# Singapore High Court Orders Specific Performance to Compel Compliance With Obligation to Mediate Disputes

Can a party be compelled to mediate? Mediation, a form of alternative dispute resolution, is a process in which a neutral third party attempts to help the parties reach a mutually satisfactory solution to their problem without the element of compulsion.[1]

Consensus or mutuality is an essential element of mediation. Indeed, the mediation process has been described as having the greatest potential as an alternative dispute resolution process due to its "emphasis on consensual settlement".[2] In layman's terms, mediation is possible only where parties voluntarily participate in a discussion to settle and/or compromise disputes, and are imbued with proper authority to do so.

Recently, the General Division of the Singapore High Court (**High Court**) had the opportunity to consider the novel question whether the remedy of specific performance is available to a party where the other party failed to comply with its contractual obligation to refer their dispute to mediation: *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2023] SGHC 71 (***Maxx Engineering***).

This update takes a look at the High Court's decision.

## Background

The applicant, Maxx Engineering Works Pte Ltd (**Maxx**), sought an order compelling the respondent, PQ Builders Pte Ltd (**PQ**), to refer their dispute to mediation under the Singapore Mediation Centre Mediation Procedure Rules pursuant to a contract between them (**Sub-Contract**).

Clauses 54 and 55 of the Sub-Contract provided as follows:

> 54. If a dispute arises between the parties under or out of or in connection with this Sub Contract [sic] or under or out of or in connection with the Sub-Contract Works, the parties shall endeavor to resolve the dispute through negotiations. *If negotiations fail, the parties shall refer the dispute for mediation at the Singapore Mediation Centre in accordance with the Mediation Rules for the time being in force*. For the avoidance of doubt, prior reference of the dispute to mediation under this clause shall not be a condition 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.
>
> 55. In the event of any dispute between the parties in connection with or arising out of this Sub-Contract or the Sub-Contract Works, including any dispute as to the existence, validity or termination of this Sub-Contract, 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 agreed upon by the parties within 14 days of either party giving written notice requiring arbitration to the other, … . The place of the arbitration shall be Singapore and the arbitration shall be governed by the Arbitration Act (Chapter 10) as may be amended from time to time.

1 Danny McFadden *et al*, *Mediation in Singapore: A Practical Guide* (3rd Ed) at p 35.

2 *Id*, at p 32.

When a dispute arose between the parties, PQ sought to refer the dispute to arbitration pursuant to clause 55 of the Sub-Contract *without* first referring the dispute to mediation. Maxx resisted this – while it accepted that clause 54 did not oblige the parties to mediate before commencing arbitration, it took the view that the parties had to, at the minimum, refer their dispute to mediation even if arbitration proceedings were commenced.

The High Court was thus faced with two issues:

(a) First, whether the parties were under a legal obligation to refer their dispute to mediation; and

(b) Second, *if* there was such a legal obligation, whether Maxx should be granted an order for specific performance to compel PQ to perform its obligation, i.e., refer the dispute to mediation.

## The High Court's Decision

Finding in favour of Maxx, the High Court ruled on the two issues as follows.

**Issue 1: Whether there was a legal obligation to refer to mediation?**

On the first issue, the High Court held (at [13] to [15]) that the phrase "*shall refer*" in clause 54 obliged the parties to "*refer*" the dispute to mediation and not merely to consider such referral.

**Issue 2: Whether it was just and equitable to order specific performance?**

As to the second issue, the High Court granted Maxx an order for specific performance to compel PQ to comply with its obligation to refer the parties' disputes to mediation. In making the order, the High Court considered the following factors:

(a) **Adequacy of damages**: Damages for PQ's breach of this obligation would have been an inadequate and unsuitable substitute for this obligation (at [20]);

(b) **Substantial hardship**: There was no evidence, and PQ was not contending, that PQ would suffer substantial hardship by being compelled to take steps to refer the dispute to mediation (at [21]);

(c) **Futility**: There was no evidence to show that mediation of the dispute would be futile – in particular, the lack of any proposal from Maxx for the resolution of the dispute as at the date of hearing did not necessarily mean that mediation of the dispute would be futile (at [23]);

(d) **Practicability**: There would be no serious difficulty in determining whether PQ had complied with the order to take concrete steps to refer the dispute to mediation (at [25]); and

(e) **Other circumstances relating to the "*just and equitable*" requirement**:

  (i) The mediation process would give parties the opportunity to resolve their dispute without incurring further legal costs or substantial delay (at [27]);

  (ii) An order for specific performance would uphold and respect the choices made by contracting parties (and, in particular, commercial entities) on how they wanted to resolve potential differences between them (at [28]); and

(iii) An order for specific performance would be consistent with the promotion of amicable dispute resolution (at [29] to [30]).

## Implications for Standard Form Construction Contracts

The decision of *Maxx Engineering* casts light on the manner in which dispute resolution clauses in contracts are interpreted. We consider below the decision's impact on standard form contracts commonly used in the domestic construction market.

## Public Sector Standard Conditions of Contract (PSSCOC)

The finding in *Maxx Engineering* clarifies that parties under the PSSCOC are not obliged to refer their disputes to mediation. In a recent edition of the PSSCOC, clause 35.6(1) of the PSSCOC for Construction Works 2020 (8th Ed, July 2020) and clause 31.7 of the Standard Conditions of Nominated Sub-Contract 2008 (5th Ed, December 2008) provide for parties to only "*consider resolving the dispute or difference through formal mediation*" (emphasis added). The phrase, similar to those in the decision of *Cheung Teck Cheong Richard and others v LVND Investments Pte Ltd* [2021] 2 SLR 890, and discussed in *Maxx Engineering*, was held by the Court of Appeal to import an obligation to only "*consider*" mediation and "*did not rise to the level of an obligation to mediate*" (at [31]). Furthermore, both standard form contracts provide that the provisions "*shall not amount to any legal obligation on the part of either party to attempt mediation*". It is therefore relatively clear that under the PSSCOC, parties are not obliged to refer their disputes to mediation.

## Singapore Institute of Architects (SIA) Conditions of Contract

The same view (as that in PSSCOC) applies in the context of the oft-used SIA Conditions of Contract. Clause 38(1) of the SIA Conditions of Building Contract (Lump Sum Contract, 9th Ed) and clause 16(1) of the SIA Conditions of Sub-Contract (4th Ed) provide that parties "*may refer their dispute … for mediation*" (emphasis added). The language importing an obligation to mediate the dispute as in the Sub-Contract in *Maxx Engineering* is not present. It is also important to note that in both standard form contracts, the arbitration clause uses the word "*shall*", further buttressing the interpretation that parties are not obliged to mediate their disputes.

## Real Estate Developers' Association of Singapore (REDAS) Conditions of Contract

The REDAS standard form contracts, however, employ language similar to that found in the Sub-Contract in *Maxx Engineering*. Clause 33.1.1. of the REDAS Design and Build Conditions of Contract (2nd Ed) and Clause 25.1 of the REDAS Design and Build Conditions of Sub-Contract (1st Ed) both provide that "*… Parties shall refer the dispute to the Singapore Mediation Centre for mediation …*" (emphasis added), and that "*prior reference of the dispute to mediation … shall not be a condition precedent for its reference to arbitration by either Party*". Our view is that parties who adopt the REDAS standard form contracts may be potentially exposed to an order that compels one or the other to mediate if a dispute or difference arises, in the event that the dispute is not referred to mediation.

## Bespoke contracts

Parties who have entered or will be entering into bespoke construction contracts should bear in mind this decision. Depending on whether the parties intend for mediation to be mandatory, the parties should

consider clear drafting (e.g., use of “shall” instead of “may” and “refer” rather than “consider”) to give effect to their intentions, understanding that the relief of specific performance is available in the event of a breach. Conversely, if mediation is intended to be optional, wording to such effect should be incorporated.

## Concluding Observations

At first glance, the idea of compelling a party to mediate (through specific performance) seems at odds with the consensual nature of mediation as a means of dispute resolution. There may also be practical difficulties with this approach, as mediation may not yield any result or achieve any meaningful outcome, if a party who is reluctant or unwilling to participate in the first place is compelled to do so as a matter of procedure. Such a party will more likely than not be reluctant to seriously consider settlement options and take steps to narrow the gap between the parties’ respective positions.

Nevertheless, the decision of *Maxx Engineering* is to be applauded for its bold stance on what many in the construction industry may consider a step in the right direction. It is clear from a perusal of the different standard form contracts that parties *can*, if they so choose, adopt language that does not import an obligation to mediate. If parties choose to use phrases that signify their intention to be bound by a certain course of action, then they can fairly be said to have consented to be bound subsequently by that course of action.

Furthermore, the decision of *Maxx Engineering* may not come as a surprise – it is yet another instance of reinforcing judicial commitment to the cause i.e., encouraging parties to save costs that would otherwise be incurred in protracted litigation proceedings. Indeed, the decision is in line with the recent reform to Singapore’s Rules of Court, following which litigants are now required pursuant to Order 5 Rule 1 to consider an amicable resolution of their dispute before commencing court action. Holding parties to their agreed choice of dispute resolution will arguably aid in achieving swifter and more efficacious settlement of disputes.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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