

A New Dawn for Mediation? The Launch of the Singapore International Mediation Centre (SIMC) and Introduction of the SIAC-SIMC Arb-Med-Arb Protocol

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The Singapore International Mediation Centre (“SIMC”) was officially launched on 5 November 2014. Set up following the recommendations of a Working Group chaired by Edwin Glasgow CBE QC and George Lim SC, the SIMC will supplement the array of international dispute resolution options available in Singapore.

Of particular note is the establishment of a new ‘Arb-Med-Arb’ protocol (“AMA Protocol”), to be administered by the SIMC in conjunction with the Singapore International Arbitration Centre (“SIAC”), with the aim of promoting the use of mediation within the framework of international arbitration.

The AMA Protocol in a nutshell

The AMA Protocol allows a party to commence arbitration under the auspices of the SIAC, and then proceed to mediation under the SIMC. In practice, parties will, as they would in a regular arbitration, commence proceedings under the AMA Protocol by filing with the Registrar of the SIAC a Notice of Arbitration, who will proceed to notify SIMC of the filing. After the filing of the Response to the Notice of Arbitration and the constitution of the Tribunal, the Tribunal will stay the arbitration for mediation at SIMC. The SIMC will then fix a date for the commencement of mediation at SIMC (“Mediation Commencement Date”), which will be conducted under the SIMC Mediation Rules. Unless the Registrar of SIAC, in consultation with the SIMC, extends the time, the mediation shall be completed within eight weeks of the Mediation Commencement Date.

Jurisdiction

Parties can avail themselves of the AMA Protocol in Singapore by incorporating the model Arb-Med-Arb clause (“Model Clause”) into their contracts referring disputes to the SIAC and SIMC for arbitration and mediation. The Model Clause reads:

All disputes, controversies or differences (“Dispute”) arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall

be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC”) for the time being in force.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre (“SIMC”), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

It is worth noting that the Model Clause contains a very bare reference to arbitration. In the absence of express agreement by the parties, the SIAC Arbitration Rules (which the Model Clause incorporates by reference) deal with key matters such as the number of arbitrators, the seat of the arbitration and the language of the proceedings. However, the parties should consider whether they need to amend the Model Clause with bespoke drafting in order to vary the default provisions in the SIAC Arbitration Rules to suit the particular transaction.

Alternatively, parties who have already commenced arbitration at the SIAC may, at any stage of the arbitration, refer their dispute to the SIMC for mediation. Similar to the procedure outlined above, the arbitration will be stayed by the Tribunal pending completion of the mediation process. Indeed, and notwithstanding the absence of a clause providing for this expressly, it is also open to parties to elect to refer their dispute to SIMC mediation first, and if mediation does not result in settlement, proceed to arbitration.

Key features of the AMA Protocol

The concept of Arb-Med-Arb is not a new one. Various prominent jurisdictions and institutions including the International Centre for Dispute Resolution (ICDR), the International Chamber of Commerce (ICC) and the Hong Kong International Arbitration Centre (HKIAC) both recognize and support the use of mediation as a precursor to arbitration (Med-Arb) or during the arbitral process (Arb-Med-Arb). Indeed, the International Arbitration Act (Cap. 143A) (“IAA”) itself already contemplates the use of conciliators/mediators during the arbitral process. Sections 16 and 17 of the IAA in particular provide that an arbitrator may also act as a conciliator during mediation proceedings provided that parties consent to the same.

Two key factors nevertheless set the SIAC-SIMC AMA Protocol apart – the clarity and certainty of the process, and the assurance of institutional support.

Parties to the AMA Protocol will have their mediations and arbitrations administered by and under the respective rules of SIMC and SIAC, with the option of appointing an internationally recognised mediator/arbitrator from the SIMC and SIAC’s respective panels. Perhaps uniquely in the context of the traditional understanding in Asia of the arb-med process (where arbitration and mediation proceedings are generally understood to be conducted by the same person), the default position under the AMA Protocol provides for the arbitration(s) and the mediator(s) to be separately and independently appointed by the SIAC and SIMC respectively. This is likely to lead to increased confidence in the process insofar as parties can be assured that their respective cases in the arbitration will not be affected by the outcome of the mediation.

If the mediation is successful, parties also have the option of formalising the terms of any settlement by requesting for the same to be recorded in the form of a consent award. A consent award is generally accepted as an arbitral award and, subject to any local legislation and/or requirements, is

enforceable in the approximately 150 New York Convention member states. The non-justiciable elements of any mediated settlement (for example, settled disputes that fall outside the scope of the arbitration agreement and hence the tribunal's jurisdiction) would need to be recorded in a separate settlement agreement (which would not be enforceable under the New York Convention). Parties who cannot settle their disputes through mediation may continue with the arbitration proceedings.

These factors arguably go one step further than the existing Med-Arb/Arb-Med-Arb processes that generally leave it to the parties to determine their own procedure, and serve to promote mediation as an ADR option for parties to consider.

Moving ahead - encouraging the use of Mediation in the arbitral process

The Arb-Med-Arb Protocol is the latest in the movement to encourage the use of ADR in Singapore. A good illustration of this policy is the recent decision in *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and anor* [2013] SGCA 55. There, the Singapore Court of Appeal upheld a multi-tiered dispute resolution clause requiring parties to escalate any dispute for negotiation as a precondition to arbitration and stressed that that "[w]here the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled". Insofar as the use of the Model Clause represents a clear intention by parties to engage in mediation as a precursor to arbitration, it is likely to be upheld by the Singapore courts.

Indeed, further measures can be taken to ensure the viability and popularity of the Arb-Med-Arb Protocol in Singapore. For one, the input of counsel is generally recognized as a decisive factor in determining whether parties consider mediation as an option. The Singapore International Mediation Institute (SIMI), also launched in November 2014 primarily as a professional standards body for mediators and to increase awareness of ADR, will play an important role in making practitioners aware of the benefits of, and providing training on, mediation. Another avenue would be to direct the minds of the parties and the arbitral tribunal to the possibility of mediation during the arbitration process. For example, the Rules of Arbitration of the ICC expressly provide (at Appendix IV) that the tribunal may, at an early stage of proceedings during a 'Case Management Conference', encourage parties to consider mediation as an option. Including a similar provision within the SIAC Rules for example will compel parties to consider the possibility and benefits of ADR, thereby increasing the possibility that parties will attempt to resolve their disputes via mediation.

Comment

The AMA Protocol represents another boost for ADR in Asia, and an example of dispute resolution institutions formally recognising what is already a familiar practice in Asia. It is also further evidence of Singapore's commitment to staying ahead of the curve as a leading one-stop dispute resolution venue. Having said that, whether the AMA Protocol will mature into a dispute resolution option of choice will significantly depend on the awareness of parties of the benefits of mediation and, once mediation is entered into, the quality of the mediations conducted by the SIMC. Developments on this front will be keenly watched.