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## Inquisitorial Processes, Or: Can Singapore Courts or Arbitral Tribunals Engage in the Amicable Settlement of Disputes?

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There is a debate about whether courts and arbitral tribunals should be involved in the amicable resolution of disputes. Different jurisdictions deal with this issue in different ways. This post considers the approaches taken by courts and tribunals in Germany, England and Wales, and Singapore to examine whether courts or tribunals in these jurisdictions, on their own initiative, can actively seek an amicable resolution of a dispute by the parties.

### Powers of Courts and Tribunals to Encourage Settlement: Approaches in Germany and England and Wales

In Germany and England and Wales the courts have the power, and sometimes the duty, to encourage settlement.

In Germany, [Section 278\(1\), \(2\) and \(3\) of the Code of Civil Procedure](#) (Zivilprozessordnung, ZPO), reads:

(1) At every stage of the proceedings, the court is to seek an amicable settlement of the dispute [...].

(2) The oral hearing shall be preceded by a conciliation hearing [...] unless an attempt at settlement has already been made before an out-of-court conciliation body or the conciliation hearing appears to be manifestly futile. In the conciliation hearing, the court shall discuss the facts of the matter and state of the dispute with the parties, freely considering all circumstances, and, if necessary, ask questions. The parties appeared shall be heard in person. Section 128?a(1) and (3) *[pertaining to a hearing by live video or live television link]* apply with the necessary modifications.

(3) The court shall order the personal appearance of the parties for the conciliation hearing and for further conciliation attempts. Section 141(1) second sentence, (2) and (3) *[pertaining to orders of personal appearance]* apply with the necessary modifications.

Conciliation hearings are a widely accepted concept in civil procedure although the original 1877 version of the Code of Civil Procedure did not contain such a provision. It was not until World War I and the Weimar Republic that legislation was enacted to relieve the case burden on the courts, which led to the inclusion in the law of official instructions for the judge to assume a conciliatory role in addition to deciding disputes. In 1924, a compulsory conciliation procedure was introduced, but it was not successful. In 1950, the legislator abolished this procedure and instead created a provision that corresponds to current Section 278(1). Since then, all German court cases governed by the Code of Civil Procedure go through a conciliation hearing, unless the parties clearly indicate that they do not want one.

Article 26 of the [DIS Arbitration Rules 2018](#) is similar to Section 278(1) ZPO. It reads:

Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.

In England and Wales, [Rule 1.1 of the Civil Procedure Rules 1998](#) (CPR) states that the overriding objective is to enable the court to deal with cases fairly and at a reasonable cost. [Rule 1.4\(1\) and \(2\)\(f\) CPR](#) reads:

- (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes [...]
- (f) helping the parties to settle the whole or part of the case.

This wording, which implements the reform proposals of the 1996 Woolf Report, is nothing less than the court's duty to actively encourage settlement between disputing parties.

In comparison, the [LCIA Arbitration Rules](#) do not contain similar provisions.

## **Powers of Courts and Tribunals in Singapore**

In Singapore, different procedural rules may apply depending on the nature and scope of the litigation, e.g. before the various State Courts or before the Supreme Court. In all cases, the role of the courts is to encourage the parties' settlement. This may even include court-led mediation, but then before a different judge than the one called upon. The courts' facilitative role does not extend to permitting or even requiring a court to become actively involved in settlement efforts.

There are two statutory regimes for arbitrations seated in Singapore, the [Arbitration Act 2001](#) (AA) for domestic arbitrations and the [International Arbitration Act 1994](#) (IAA) for international arbitrations. The distinction is not strict, as parties may choose to treat a domestic arbitration as an international arbitration and vice versa.

Both Acts allow arbitrators to act as a mediator or conciliator if all parties agree in writing and no

party withdraws its consent. Both Acts set out the powers of a mediator or conciliator who is or will be an arbitrator. A mediator or conciliator so appointed may communicate with the parties jointly or separately and must, in principle, treat any information obtained from a party as confidential.

However, the AA does not provide for arbitrators to encourage settlement on their own initiative, i.e. before being appointed as a mediator or conciliator. Although the AA allows the tribunal to conduct the proceedings in any manner it considers appropriate absent an agreement of the parties, this only applies to arbitral proceedings within the meaning of the AA. Conversely, an arbitrator is not empowered to go beyond the limits of what constitutes an arbitration.

This is where the IAA is fundamentally different.

The difference appears in [Section 12\(3\) IAA](#), which has no equivalent in the AA. It reads:

Unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, an arbitral tribunal has power to adopt, if the arbitral tribunal thinks fit, inquisitorial processes.

This means that (i) the parties may deny the tribunal the power to adopt inquisitorial processes (whatever they may be) and (ii) if the parties do not do so, any inquisitorial process adopted by the tribunal is an element of the arbitration. This would include any inquisitorial process promoting settlement.

The term ‘inquisitorial’ refers to the way civil proceedings are conducted in civil law jurisdictions. It would be more accurate (and less pejorative) to speak of investigative, activist or interventionist processes, but since the term has entered the law, it should be used.

### **Encouraging Settlement in Practice Using Inquisitorial Processes**

To illustrate what an inquisitorial process can be in the context of an amicable settlement of a dispute, it is useful to look again at [Section 278\(2\) and \(3\) ZPO](#), which prescribes what a German court must do to seek such a settlement.

First, the provision speaks of a conciliation hearing. This implies the simultaneous presence of all parties, the importance of which is emphasized twice: by clarifying that physical presence is not required where a party participates by video or live television link, and by requiring that the parties be summoned, with all the possible consequences of unexcused absence.

Simultaneous presence means there can be no caucus. Thus, a conciliation hearing under Section 278 of the ZPO differs significantly from the actions of an arbitrator appointed by the parties as a conciliator.

Section 278(2) ZPO then clarifies that during the conciliation hearing, the court should discuss the facts of the case and the state of the dispute with the parties and freely consider all circumstances. This is to be understood in a restrained way because the court should ask questions only if

necessary. It is not for the court but for the parties to come to an amicable settlement.

Apart from Section 278(2) ZPO, the law does not prescribe other details of a conciliation hearing. According to the commentaries, it is advisable for the court to begin with a brief introduction to the facts and the dispute and then to hear the parties in person (but not separately). If necessary, the court must ask questions to elucidate the relevant facts, while respecting its duty of neutrality and the principle that it is solely for the parties to present all the relevant facts of the case.

A fair conciliation hearing requires the court to weigh these facts and inform the parties of its preliminary view of the factual and legal situation, in particular the risk factors at the time. A meaningful conciliation hearing must not aim to leave any party in the dark and must not push any party to compromise. Instead, the court can seek proposals for an amicable settlement, in a dialogue that takes into account all interests and is based on a fair explanation of the relevant issues.

A conciliation hearing under Section 278(2) ZPO is an example of an inquisitorial process designed to facilitate settlement. It is important to recognize that these processes exist and that the IAA permits them.

Singapore is home to at least four reputable arbitral organizations with their own arbitration rules: the [Singapore International Arbitration Centre \(SIAC\)](#), the [Singapore Chamber of Maritime Arbitration \(SCMA\)](#), the [Law Society \(LawSoc\)](#) and the [Singapore Institute of Arbitrators \(SIArb\)](#). Apart from the SIArb Arbitration Rules, which may be modified by the parties for their own proceedings, the arbitration rules of these organizations follow Singapore's law of international arbitration. This means that they allow for inquisitorial processes, including those designed to facilitate settlement.

## Conclusion

'Adversarial' systems such as Singapore's preserve due process and procedural fairness. However, there is no need for the high barrier of an opt-in where an arbitrator is not acting as a full conciliator or mediator, but where the tribunal is merely conducting a conciliation hearing. An opt-out will do because it will often be efficient to adopt inquisitorial processes facilitating settlement. Their adoption is consistent with the (original) preference in most Eastern societies, including Singapore, for conciliatory mechanisms to deal with conflict.

**The above is an abbreviated version of an article published in the [SchiedsVZ](#) | German Arbitration Journal, Vol. 21, No. 5 (2023), which is also included on Kluwer Arbitration. See [here](#) for more information on and other contributions to the Journal.**


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