

新加坡工程仲裁應注意事項及案例 分享

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Overview

- Negotiating the Contract
 - Sample clauses
 - Nature of the disputes covered
 - Things to consider
- When a Dispute Arises
- Commencing an Arbitration



Negotiating the Contract: Sample Clauses

SIAC Model Clause

Any 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 administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be Singapore.

The Tribunal shall consist of a sole arbitrator.

The language of the arbitration shall be in English.



Negotiating the Contract: Sample Clauses

ICC Sample Clause

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.



Negotiating the Contract: Sample Clauses

Multi-tiered arbitration clause

"All Disputes arising out of or in connection with this Agreement shall firstly be subject to the Parties conducting consultation meetings, by the senior executives of each Party, in good faith whereby each Party will use best efforts and without prejudice to resolve the dispute in a reasonable time frame, not to exceed 30 (thirty) days. In the event that the consultation meetings are not successful within the said time frame, the dispute(s) shall be finally settled in arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC), by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Geneva (Switzerland). The language of the arbitration shall be English."



Negotiating the Contract: Sample Clauses

Multi-tiered arbitration clause – FIDIC Red Book 2017

21.4 - Obtaining Dispute Adjudication Board's Decision

If a Dispute arises between the Parties, then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [Avoidance of Disputes]) [...].

21.5 - Amicable Settlement

Where a NOD has been given under Sub-Clause 21.4 [Obtaining DAAB's Decision], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.

21.6 - Arbitration

Unless settled amicably, and subject to Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], Sub-Clause 21.4.4 [Dissatisfaction with DAAB's decision], Sub-Clause 21.7 [Failure to Comply with DAAB's Decision] and Sub-Clause 21.8 [No DAAB in Place], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. [...]"



Negotiating the Contract: Nature of the disputes covered

- What is covered by the arbitration agreement?
 - Delays
 - Regulatory issues
 - Cost overruns and claims for additional payments
 - Performance issues with new technologies
 - Raw material price and supply disputes
 - Differences regarding the scope of works and disputes over responsibility for design and performance of the work



Negotiating the Contract: Nature of the disputes covered

- What is not covered by the arbitration agreement?
 - Disputes with parties that are not parties to the contract, e.g. employer and the subcontractor
 - Performance bond issues
 - Disputes with authorities



Negotiating the Contract: Things to consider

- Where are you likely to have to enforce the award/judgment?
- Where should the arbitration be seated (仲裁地) ?
- Where should the arbitration be held (開庭地) ?
- What should be the governing law (準據法) ?



Negotiating the Contract: Things to consider

- Choosing the right institution
 - Procedure and cost considerations
- Arbitrator
 - Number of arbitrators
 - Selection of arbitrators
 - Special qualifications
- Language of arbitration



Negotiating the Contract: Things to Consider

- Multi-tiered dispute resolution clause (多層次的爭議解決程序)
 - Whether the steps are mandatory
 - Time periods
 - The events determining failure of the pre-arbitration steps and allowing them to be skipped.
- Consider the need for an umbrella dispute resolution clause that applies to all the agreements in cases where there are multiple parties and multiple contracts relating to the same project.



When a Dispute Arises

- How do you know when your dispute arises?
 - Payment issues
 - Slippage in timelines
 - Deviation from contractual terms



When a Dispute Arises (Cont'd)

- How do you want to resolve the issue?
 - Negotiation or start legal proceedings.
 - Possibility for settlement.
- If you are the claiming party, what do you want to achieve?
 - Extension of time
 - Payment
 - Variation



When a Dispute Arises (Cont'd)

- Identify whether you should engage lawyers.
 - Yes if you've received
 - Any letters from lawyers;
 - Notice of breach;
 - Notice of termination; and
 - Notice of claim.



Commencing an Arbitration

- Observe any claim notice procedures specifically designated in the contract.
 - Construction contracts often include detailed provisions on how to assert claims, including strict time limits or requiring that the other party have an opportunity to cure the default.
 - Maintain written records of any meetings at which claims are discussed and decisions are made, e.g. any amendment to contractual terms, agreement to pay certain costs, waiver or release of certain claims.
 - You may potentially be precluded from pursuing your claim further or from obtaining any remedy if you did not comply with the claim notice procedures set out in the agreement.



Commencing an Arbitration (Cont'd)

- Importance of documents to a construction arbitration
 - Documents are critical to meeting the burden of proof for claims and defences
 - Documents may be required in connection with document exchange in arbitration
 - If a party has not maintained any documents in a reliable format or has no documents, then the party seeking the documents may ask the Tribunal to draw adverse inferences from lack of documentation.



Commencing an Arbitration (Cont'd)

- Importance of documents to a construction arbitration (cont'd)
 - Maintain and preserve contemporaneous documentary evidence throughout the duration of the project
 - Bid documents and pre-contract assumptions, e.g. records of key decisions made in meetings, information exchanged between the parties, e.g. site conditions, applicable regulations and environmental conditions.
 - Records of key decisions made in in any meetings, including internal meetings
 - Maintain detailed daily logs and reports, drawings logs, field reports, claim notices, project schedules, variation orders/change orders



Commencing an Arbitration (Cont'd)

- Identify the steps that are required to initiate the arbitration (仲裁前置程序)
 - Multi-tiered dispute resolution clauses
 - Negotiations between project personnel
 - Negotiations between senior executives
 - Mediation
 - Early neutral evaluation/expert determination
 - Dispute Adjudication Boards (“**DAB**”) and Dispute Avoidance and Adjudication Board (“**DAAB**”)
 - Singapore Court’s approach – *BTN and another v BTP and another* [2020] SGCA 105



Commencing an Arbitration (Cont'd)

- Where do we arbitrate?
 - Singapore Court's approach to "pathological" clauses
 - *BNA v BNB and another* [2019] SGCA 84
 - Disputes shall be submitted to "*the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules*"
 - Where is the seat of arbitration?
 - *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] SGHC 58
 - Disputes shall be submitted to the "*China International Arbitration Center*"
 - Which arbitral institution is selected?



Commencing an Arbitration (Cont'd)

- Consider whether any interim reliefs (臨時救濟/緊急臨時救濟) are required.
 - Interim reliefs are temporary measures that are granted prior to the final arbitration award.
 - Consider whether there is a need for immediate relief:
 - Preserving evidence
 - Enjoining the adversary from disclosing confidential information
 - preserving assets out of which an award might be satisfied



Commencing an Arbitration (Cont'd)

- Examples of interim reliefs that you may wish to apply in construction arbitrations:
 - Keeping the status quo to ensure parties to continue to perform their obligation:
 - Examples: contractor may want interim payment application to be processed without delay so that it has cash flow to continue its works pending a final award or an employer may wish to prevent suspension of works so as not to cause further delays to completion of the work.
 - Preserving evidence or property
 - Where a contractor has been terminated and information detained or removed from site, the parties may want to apply for an order to preserve evidence and to provide access to that information or prevent its equipment from being used by others.
 - Stopping parties making bond calls or to order parties to deposit proceeds of bond calls to a specified account
 - Freezing assets



Commencing an Arbitration (Cont'd)

- Emergency Arbitration (“**EA**”) (緊急仲裁人) is one which an arbitrator is appointed to deal with requests for urgent interim relief before the main tribunal is constituted.
 - SIAC Rules, Schedule I
 - Appointment of Emergency Arbitration by the SIAC: within 1 day.
 - Decision time: within 14 days from appointment of EA.
 - ICC Rules 2021, Article 29 and Appendix V
 - Appointment of Emergency Arbitration by the SIAC: within 2 days.
 - Decision time: within 15 days from appointment of EA.
- Singapore Courts have power to grant interim reliefs in support of the arbitration, e.g. compel disclosure of documents and attendance of witnesses in Singapore.



Commencing an Arbitration (Cont'd)

- Expert Witnesses (專家證人)
 - Identify whether experts are required and when to engage experts
 - How to select expert witnesses
- Factual Witness (證人)
 - Identify the relevant factual witnesses



Commencing an Arbitration (Cont'd)

- Consider who are the parties involved and whether it is necessary for them to be part of the proceedings.
 - Multi-party and multi-contract arbitration disputes are prevalent in construction arbitration.
 - Multi-Contracts (多份合約)
 - Provides a streamlined process of disputes involving multiple contracts.
 - SIAC Rules 2016, Rule 6
 - The Claimant may now file a single Notice of Arbitration in respect of all arbitration agreements. This ensure that the parties' rights are preserved vis-à-vis any limitation periods should an application for consolidation be rejected.
 - ICC Rules 2021, Article 9
 - Claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one nor more than one arbitration agreement under the Rules.



Commencing an Arbitration (Cont'd)

- Consolidation (合并仲裁)
 - Provides a streamlined process for separate disputes that arise from the same arbitration agreement.
 - SIAC Rules 2016, Rule 8
 - A party may apply for consolidation before or after the Tribunal's constitution. The grounds on which the Tribunal itself can consolidate are more restricted after the Tribunal's constitutions.
 - ICC Rules 2021, Article 10
 - A party may apply for consolidation where all the claims in the arbitration where:
 - All parties agree;
 - The parties in the arbitrations are not the same but have all signed the same arbitration agreement or arbitration agreements;
 - The parties in the arbitrations are the same, the disputes in the arbitrations arise from the same legal relationship and the ICC Court finds the multiple arbitration agreements under which the claims are made to be compatible.



Commencing an Arbitration (Cont'd)

- Joinder (當事人的追加)
 - Enables parties apply to join a third-party, or the third-party to apply to be joined to an arbitration that is pending under the relevant rules.
- SIAC Rules 2016, Rule 7
 - Application may be made before or after the constitution of the Tribunal.
 - Successful joinder application requires:
 - The additional party is prima facie bound by the arbitration agreement, or
 - All parties, including the additional party, have consented to the joinder.
- ICC Rules 2021, Article 7
 - Any request for joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party having accepted the constitution of the arbitral tribunal.

