IN THE SINGAPORE INTERNATIONAL COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 16

Originating Application No 4 of 2023

Between

(1) CZQ

(2) CZR

… *Applicants*

And

CZS

… *Respondent*

GROUNDS OF DECISION

[Arbitration — Agreement — Condition precedent to arbitration]

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CZQ and another
v
CZS

[2023] SGHC(I) 16

Singapore International Commercial Court — Originating Application No 4 of 2023
Andre Maniam J, Sir Henry Bernard Eder IJ and Zhang Yongjian IJ
30 August 2023

27 October 2023

Andre Maniam J (delivering the judgment of the court):

Introduction

1 The respondents to an arbitration applied to court under s 10 of the International Arbitration Act 1994 for a determination that the arbitral tribunal had no jurisdiction. The parties in the arbitration were as follows:

(a) the first respondent was the Contractor under a construction contract ("the Contract");

(b) the second respondent was the Contractor's parent company which had guaranteed the Contractor's performance of the Contract; and

(c) the claimant was the Employer under the Contract.

2 The respondents contended that the tribunal had no jurisdiction because a procedure for amicable settlement prescribed in Sub-Clause 20.5 of the Contract had not been complied with. The tribunal ruled, as a preliminary question, that it had jurisdiction (the "Ruling"). The respondents applied to court for a determination to the contrary, but we agreed with the tribunal that it had jurisdiction. These are our grounds of decision.

Issues

3 The tribunal decided:

(a) that the amicable settlement procedure in Sub-Clause 20.5 of the Contract was not a condition precedent to the commencement of arbitration under Sub-Clause 20.6 (Ruling at [430]–[484]; and

(b) that the Sub-Clause 20.5 procedure had factually not been complied with, but this had been caused by the respondents, and so they could not rely on it to challenge the tribunal's jurisdiction (Ruling at [536]–[554]).

4 We agreed with the tribunal that the amicable settlement procedure under Sub-Clause 20.5 was not a condition precedent to the commencement of arbitration under Sub-Clause 20.6. Our decision on this issue was sufficient for us to dismiss the respondents' application.

Background

5 On 3 February 2020, the claimant commenced two arbitrations, one against each respondent. The two arbitrations were then consolidated into one, to form the subject arbitration.

6 A three-member tribunal was constituted, comprising Professor Douglas Jones AO (presiding), Mr David Brynmor Thomas KC, and Mr Christopher Lau SC.

7 As between the claimant and the first respondent, Clause 20 of the Contract addressed the resolution of disputes between them as the Parties to the Contract.

8 As between the claimant and the second respondent (who was not a party to the Contract, but had guaranteed the first respondent's performance of it), it was common ground that the guarantee incorporated Clause 3 of the Contract regarding Engineer determinations, and in relation to such determinations, Clause 20 as well.[1] In the arbitration, and before us, the parties proceeded on the basis that the same arguments relating to Clause 20 would apply both to the claimant's claim against the first respondent, and to the claimant's claim against the second respondent.

9 As General Conditions, the Contract incorporated the FIDIC Conditions of Contract for Plant and Design Build (First Edition, 1999) (the "FIDIC Conditions"), as amended by the Conditions of Particular Application (the "Particular Conditions").

10 Clause 20 of the Contract (set out below) was based on Clause 20 of the FIDIC Conditions, as amended by the Particular Conditions:

> **CLAUSE 20 CLAIMS, DISPUTE AND ARBITRATION**
>
> **20.1 – Contractor's Claims**
>
> [*Various stipulations concerning the Contractor's Claims*]

[1] Second Respondent's Response to the Notice of Arbitration at para 13.

20.2 – Appointment of Dispute Adjudication Board

[*FIDIC Sub-Clause 20.2 was deleted and replaced with the following*]

All references to the Dispute Adjudication Board will not apply and all disputes will be dealt with under Sub-Clause 20.5.

20.5 – Amicable Settlement

[*FIDIC Sub-Clause 20.5 was deleted and replaced with the following*]

(a) If any dispute arises out of or in connection with the Contract, or the execution of Works, including any dispute as to certification, determination, instruction, opinion or valuation of the Engineer, then either Party shall notify the other Party that a formal dispute exists. Representatives of the Parties shall, in good faith, meet within 7 days of the date of the notice to attempt to amicably resolve the dispute,

(b) If the representatives of the Parties cannot resolve a dispute within 7 days from the first meeting, 1 or more senior officer(s) from each Party shall meet in person within 14 days from the first meeting of the representatives in an effort to resolve the dispute. If the senior officers of the Parties are unable to resolve the dispute within 7 days from their first meeting, then either Party shall notify the other Party that the dispute will be submitted to arbitration in accordance with Sub-Clause 20.6.

20.6 – Arbitration

[*FIDIC Sub-Clause 20.6 was amended to the following*]

Unless settled amicably, any dispute shall be finally settled by international arbitration.

Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the Singapore International Arbitration Centre,

(b) unless the parties otherwise agree, the dispute shall be settled by one arbitrator appointed in accordance with these Rules,

> (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].
>
> (d) The seat of arbitration will be Singapore, and
>
> (e) The arbitration will be confidential.
>
> The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.
>
> Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.
>
> Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.
>
> **20.9 – Continuity**
>
> Despite the existence of a Dispute, the parties must continue to perform their obligations under the Contract.
>
> **20.10 – Injunctive or Urgent Relief**
>
> Nothing in Clause 20 prejudices either Party's right to institute proceedings to seek injunctive relief or urgent declaratory relief in a competent Brunei court in respect of a Dispute under Clause 20 or any other matter arising under the Contract.

Findings

Overview

11 The respondents contended that, as a matter of contractual interpretation, compliance with Sub-Clause 20.5 was a *condition precedent* to the commencement of arbitration under Sub-Clause 20.6.

12 We concluded (and so had the tribunal), that compliance with Sub-Clause 20.5 was not a condition precedent to the commencement of arbitration under Sub-Clause 20.6. We deal with the respondents' submissions on Sub-Clauses 20.6, 20.5 and 20.2 in turn, but emphasise that our decision was arrived at on a construction of Clause 20 as a whole, rather than by looking at individual Sub-Clauses in isolation.

Clear expression of conditions precedent

13 As a general principle, clear words are necessary to create a condition precedent to the commencement of arbitration. The authorities the tribunal reviewed are consistent on this (Ruling at [460]–[474]).

14 In this regard, counsel for the respondents acknowledged that:

(a) a condition precedent would normally be expressed in clear words;

(b) counsel had not seen any authority where the courts had found a condition precedent without clear words; and

(c) there were no clear words in Sub-Clause 20.5 or Sub-Clause 20.6 making compliance with Sub-Clause 20.5 a condition precedent to the commencement of arbitration under Sub-Clause 20.6.

15 Those concessions by counsel reflected the state of the relevant authorities, and the language of Sub-Clauses 20.5 and 20.6.

16 The following authorities are instructive in this regard:

(a) *Halifax Financial Services Limited v Intuitive Systems Limited* [1999] 1 All ER (Comm) 303 at 307 where McKinnon J stated, "There is no express provision making compliance with cl 33 a condition precedent to legal proceedings" (Ruling at [461]);

(b) *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973 ("*Lufthansa (HC)*") at [100] where the High Court endorsed the parties' common premise that Clause 37.2 was a condition precedent to the commencement of arbitration under Clause 37.3, noting that Clause 37.2 provided for the reference of disputes to mediation, and Clause 37.3 then referred to Clause 37.2 in providing for the arbitration of disputes "which cannot be settled by mediation pursuant to Clause 37.2" (Ruling at [461]);

(c) *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 ("*Lufthansa (CA)*") at [54] where the Court of Appeal agreed that the steps set out in Clause 37.2 were conditions precedent to any reference to arbitration pursuant to Clause 37.3, stating that it was significant that the arbitration clause itself in Clause 37.3 referred only to "disputes…which cannot be settled by mediation pursuant to Clause 37.2" (Ruling at [461]);

(d) *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 ("*Emirates*") where cl 11.1 provided that if any dispute or claim should arise, "the Parties shall *first* seek to resolve the dispute or claim by friendly discussion…*If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause* and refer the disputes to arbitration" [emphasis added] (Ruling at [467]– [469]);

(e) *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC) ("*Ohpen*") where Clause 11.1 provided that "The Parties will *first* use their respective reasonable efforts to resolve any Dispute that may arise out of or relate to this Agreement or any breach thereof, in accordance with this Clause"; that was followed by Clause 11.2 which provided that "If a Dispute is not resolved in accordance with the Dispute Procedure [defined as the procedure for resolving Disputes contained in Clause 11], then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts" (Ruling at [470]–[472]).

17 It promotes the efficacy of the agreement to arbitrate, for any condition precedent to the commencement of arbitration to be expressed clearly. It would not be desirable for parties to be embroiled in a dispute over whether something was or was not a condition precedent to the commencement of arbitration, on top of having to resolve the disputes they submitted to arbitration. The parties would have sought to avoid that by making their intentions clear regarding any condition precedent to arbitration.

18 With that, we turn to consider the language of Clause 20.

Sub-Clause 20.6

19 The respondents contended that the opening words of Sub-Clause 20.6 – "[u]nless settled amicably" – were a reference to the amicable settlement procedure in Sub-Clause 20.5. They argued that arbitration could only be commenced under Sub-Clause 20.6 if the parties had first gone through the Sub-Clause 20.5 procedure, and the dispute was still not settled amicably.

20 Sub-Clause 20.6, however, contains no reference to Sub-Clause 20.5 or the amicable settlement procedure in Sub-Clause 20.5. As the tribunal observed (Ruling at [446]), that tended against a finding that compliance with the Sub-Clause 20.5 procedure was a condition precedent to the commencement of arbitration under Sub-Clause 20.6.

21 The opening words of Sub-Clause 20.6 are, simply, "[u]nless settled amicably". Any dispute that had been "settled amicably" could not be submitted to arbitration, but any dispute that had not been "settled amicably" could. As the tribunal stated (Ruling at [448]), the term "settled amicably" was not a specifically defined term in the Contract, and ordinarily meant disputes being fixed, resolved, or concluded by agreement between parties usually out of court, characterised by friendly goodwill.

22 We agreed with the tribunal that a dispute could be "settled amicably" in a variety of ways, one of which was the procedure in Sub-Clause 20.5 (Ruling at [449]). If the Parties did not use the Sub-Clause 20.5 procedure, but nevertheless a dispute was "settled amicably", that dispute could not then be submitted to arbitration under Sub-Clause 20.6. As a corollary, if a dispute had not been "settled amicably", whether because the Parties had not gone through the Sub-Clause 20.5 procedure or for any other reason, the dispute could be submitted to arbitration under Sub-Clause 20.6

23 The respondents sought to use the heading of Sub-Clause 20.5, "Amicable Settlement" to argue that the only disputes that could be submitted arbitration under Sub-Clause 20.6 were those which had gone through the Sub-Clause 20.5 procedure *and* were not settled amicably.[2] This use of Sub-Clause

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2 Applicants' Written Submissions at para 26.

headings was however impermissible, for (as the tribunal noted in its Ruling at [451]), Sub-Clause 1.2 of the General Conditions provides that "The marginal words and other headings shall not be taken into consideration in the interpretation of these Conditions." In any event, we did not consider that the heading assisted the respondents in their main argument that compliance with Sub-Clause 20.5 was a condition precedent to the commencement of arbitration.

24 There were no clear words in Sub-Clause 20.6 establishing a condition precedent to the commencement of arbitration. Moreover, the interpretation advanced by the respondents was one which the language of Sub-Clause 20.6 could not bear.

25 On the terms of Sub-Clause 20.6, the only restriction on the commencement of arbitration is, "[u]nless settled amicably", *ie*, the dispute submitted to arbitration must not have been settled amicably. The respondents sought to read into that a second restriction, *ie*, "[u]nless settled amicably" *and* "unless Sub-Clause 20.5 has been complied with", but that is not what "[u]nless settled amicably" in Sub-Clause 20.6 could mean.

26 Sub-Clause 20.6 was quite unlike Clause 37.3 in the *Lufthansa* decisions, which referred to "disputes…which cannot be settled by mediation pursuant to Clause 37.2". With that language, if a dispute had not been "settled amicably" but *could* yet be settled by "mediation pursuant to Clause 37.2", arbitration could not be commenced under Clause 37.3. In the present case, however, Sub-Clause 20.6 did not refer to Sub-Clause 20.5 or the procedure in Sub-Clause 20.5.

Sub-Clause 20.5

27 Turning then to Sub-Clause 20.5, that did not contain language like the clauses in *Emirates* or *Ohpen* which stipulated that the parties should "first" seek to resolve disputes in accordance with a stated procedure, before resorting to arbitration (see [16(d)], [16(e)] above). Nor did Sub-Clause 20.5 contain language addressing the right to commence arbitration or litigation, like the clauses in *Emirates* and *Ohpen*:

(a) "[i]f no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause" (*Emirates* at [3]); and

(b) "[i]f a Dispute is not resolved in accordance with the Dispute Procedure, then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts." (*Ohpen* at [18]).

28 Sub-Clause 20.5 simply provided that:

(a) if a dispute should arise, "either Party shall notify the other Party that a formal dispute exists";

(b) representatives of the Parties shall then, in good faith, meet within 7 days of the date of the notice to attempt to amicably resolve the dispute;

(c) if the representatives cannot resolve a dispute within 7 days from the first meeting, 1 or more senior officer(s) from each Party shall meet in person within 14 days from the first meeting, in an effort to resolve the dispute; and

(d) "If the senior officers of the Parties are unable to resolve the dispute within 7 days from their first meeting, then either Party shall notify the other Party that the dispute will be submitted to arbitration in accordance with Sub-Clause 20.6."

29 We agreed with the tribunal (Ruling at [454]), that:

(a) the Contract allowed the Parties to attempt other methods of amicable settlement, if they chose to do so – they were not constrained to settle disputes amicably only by going through the Sub-Clause 20.5 procedure; and

(b) it was not commercially unrealistic for the Parties not to have made the amicable settlement procedure in Sub-Clause 20.5 *exclusive*; it was reasonable for the Parties to have left themselves room to attempt other methods of settlement.

30 Sub-Clause 20.5 did not purport to prevent the Parties from attempting other methods of amicable settlement. The first step of giving notice of formal dispute referred to "either Party" doing so, and so did the last step of one Party notifying the other that the dispute will be submitted to arbitration. In Sub-Clause 20.5, "either Party shall notify" meant either Party *may* notify, and if so then that notification *shall* be as stipulated in Sub-Clause 20.5. It follows that if no Party gave notice, neither could complain that the other was in breach of the Contract; indeed, it would be within the complaining Party's own power to give notice itself. Thus, it would not be a breach of the Contract if, instead of initiating the sub-Clause 20.5 process, the Parties attempted another method of settlement, such a mediation, or direct negotiations that did not strictly follow the Sub-Clause 20.5 procedure. In any event, it was open to the Parties to vary

or waive any restriction they might have placed on themselves to settle disputes amicably only by the Sub-Clause 20.5 procedure.

31 We also agreed with the tribunal's decision (Ruling at [455]–[475]) that the last sentence of Sub-Clause 20.5 does not make compliance with Sub-Clause 20.5 a condition precedent to arbitration under Sub-Clause 20.6. That sentence reads: "If the senior officers of the Parties are unable to resolve the dispute within 7 days from their first meeting, then either Party shall notify the other Party that the dispute will be submitted to arbitration in accordance with Sub-Clause 20.6."

32 That simply meant that *if* "either Party" initiates the Sub-Clause 20.5 procedure, at the end of the procedure the dispute is not settled, and *if* "either Party" wishes to submit the dispute to arbitration it *shall* notify the other Party that the dispute will be submitted to arbitration. As the tribunal put it (Ruling at [457]), "The notification contemplated here [that the dispute will be submitted to arbitration] is the logical conclusion of the Sub-Clause 20.5 process, if that is the process adopted by the Parties."

33 Sub-Clause 20.5 did not oblige the Parties to initiate the amicable settlement procedure if neither of them wished to do so; nor did it oblige the Parties to commence arbitration if neither of them wished to do so. They could, for instance, have continued to seek an amicable settlement even after the conclusion of the Sub-Clause 20.5 procedure. If, however, the dispute was still not settled, and either of the Parties wished it to be finally settled, that was to be done through arbitration pursuant to Sub-Clause 20.6 (rather than by going to court).

34 We are reinforced in our interpretation of Sub-Clause 20.5 by the fact that the notification at the end of the Sub-Clause 20.5 process (that the dispute *will be submitted* to arbitration) appears to be a separate matter from the notice of arbitration that *submits* a dispute to arbitration. Sub-Clause 20.5 says nothing about the Parties' right to give notice of arbitration.

35 There is nothing unworkable about applying Sub-Clause 20.5 in a situation where arbitration had already been commenced pursuant to Sub-Clause 20.6 when the Sub-Clause 20.5 procedure had yet to be completed. At the end of the Sub-Clause 20.5 procedure when "either Party shall notify the other Party that the dispute will be submitted to arbitration", the Parties could simply regard it as unnecessary for either of them to provide such notification, if the dispute had already been submitted to arbitration.

Sub-Clause 20.2

36 Besides Sub-Clauses 20.5 and 20.6, before us the respondents also relied on Sub-Clause 20.2. They had not done so before the tribunal, and the Ruling did not specifically analyse the terms of Sub-Clause 20.2 on the issue of whether Sub-Clause 20.5 was a condition precedent to arbitration under Sub-Clause 20.6.

37 Sub-Clause 20.2 provided as follows:

> **20.2 – Appointment of Dispute Adjudication Board**
>
> All references to the Dispute Adjudication Board will not apply and all disputes will be dealt with under Sub-Clause 20.5.

38 The High Court in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR(R) 23 stated at [22]: "a party is entitled to raise an objection to jurisdiction before the judge that it had not raised and argued before the

arbitrator. However, "a failure to raise a specific point before the arbitrator is likely to be relevant as to weight (*Jurisdiction and Arbitration Agreements* at para 13.35)."

39 Aside from the weight to accord to this belated argument, the fact that the respondents did not rely on Sub-Clause 20.2 before the tribunal indicates that they did not see Sub-Clause 20.2 as a clear expression that Sub-Clause 20.5 was a condition precedent to the commencement of arbitration. This reinforces our view that there were no clear words in Clause 20 establishing such a condition precedent.

40 In any event, the respondents' argument on Sub-Clause 20.2 added nothing material to their arguments on Sub-Clauses 20.5 and 20.6. Their argument on Sub-Clause 20.2 was that because it stipulated that "all disputes will be dealt with under sub-Clause 20.5", all disputes *first* had to go through the Sub-Clause 20.5 procedure, and only after that could disputes that had not been settled amicably be submitted to arbitration.

41 The reference in Sub-Clause 20.2 that "*all disputes* will be dealt with under sub-Clause 20.5" [emphasis added] adds nothing to the opening words of Sub-Clause 20.5, which already state, "If *any dispute* arises out of or in connection with the Contract, or the execution of Works…, then either Party shall notify the other Party that a formal dispute exists" [emphasis added]. Sub-Clause 20.2 refers to Sub-Clause 20.5, but the question remains whether on the terms of Sub-Clause 20.5 (or Sub-Clause 20.6) compliance with the Sub-Clause 20.5 procedure is a condition precedent to the commencement of arbitration. We have already explained why this is not so.

42 Sub-Clause 20.2 expressed the Parties' agreement not to adopt the Dispute Adjudication Board ("DAB") procedure found in Clause 20 of the FIDIC Conditions.

43 The following features of the FIDIC DAB procedure are noteworthy:

(a) FIDIC Sub-Clause 20.2 provides that disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4.

(b) FIDIC Sub-Clause 20.4 provides that either Party may refer the dispute in writing to the DAB for its decision, and the DAB's decision "shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below" – if either Party is dissatisfied with the DAB's decision, it has to give notice of dissatisfaction within 28 days, otherwise the decision "shall become final and binding upon both Parties".

(c) FIDIC Sub-Clause 20.4 further provides that: "Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause."

(d) FIDIC Sub-Clause 20.5 provides that "Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, 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 fifty-sixth day

after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made."

(e) FIDIC Sub-Clause 20.6 provides that "Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration."

44 The FIDIC Conditions restrict the commencement of arbitration in various ways:

(a) As stated in FIDIC Sub-Clause 20.6, arbitration may not be commenced for any dispute in respect of which the DAB's decision had become final and binding (see [43(e)] above).

(b) As stated in FIDIC Sub-Clause 20.4, arbitration may not be commenced unless notice of dissatisfaction has been given (in respect of a decision by the DAB), unless the exceptions in Sub-Clauses 20.7 or 20.8 apply (see [43(c)] above).

(c) As stated in FIDIC Sub-Clause 20.5, arbitration may only be commenced after a "waiting period", *ie,* on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, unless the Parties agree otherwise (see [43(d)] above). It is further stated that both Parties shall attempt to settle the dispute amicably before the commencement of arbitration, but after the "waiting period" arbitration may be commenced even if no attempt at amicable settlement has been made. Attempting amicable settlement was thus not a condition precedent to the commencement of arbitration: the parties simply had to

wait out the fifty-six day "waiting period" before commencing arbitration.

(d) As stated in FIDIC Sub-Clause 20.6, arbitration may not be commenced for any dispute that had been "settled amicably" (see [43(e)] above).

45 This last restriction was the only one the Parties retained in Clause 20 of the Contract: that arbitration may not be commenced for any dispute that had been "settled amicably".

46 The respondents did not contend that the claimant had submitted to arbitration a dispute that had already been settled amicably. Rather, the respondents' contention was that the amicable settlement procedure in Sub-Clause 20.5 had not been complied with, and that this was a condition precedent to the commencement of arbitration. That contention failed on the language of the Contract.

Conclusion

47 For the above reasons, we dismissed the respondents' application. The Contract, and in particular Clause 20, did not make compliance with the amicable settlement procedure in Sub-Clause 20.5 a condition precedent to the commencement of arbitration under Clause 20.6. It was thus unnecessary for us to deal with the respondents' other submissions. We reserved the question of costs to the tribunal.

48 We add two parting observations:

(a) First, not only did the tribunal find that the respondents were responsible for Sub-Clause 20.5 not being complied with (Ruling at [539]–[554]), but the tribunal also noted that by the time of the hearing on jurisdiction neither Party was interested in pursuing negotiations or settlement discussions along the lines contemplated by Sub-Clause 20.5. Counsel for the respondents said that as matters stood there was "almost no enthusiasm" for a meeting under Sub-Clause 20.5. It is ironic that despite the respondents' admitted lack of enthusiasm for Sub-Clause 20.5 as a settlement procedure, they nevertheless relied on it to challenge the tribunal's jurisdiction.

(b) Second, the arbitration process has – with the respondents' jurisdictional challenge – been time-consuming and costly thus far. The claimant commenced arbitration on 3 February 2020, but it took almost two years before the tribunal was constituted in December 2021. That month, the respondents applied for preliminary issues to be determined, including whether Sub-Clause 20.5 was a condition precedent to arbitration. The hearing on jurisdiction took place on 12 August 2022, and the tribunal issued the Ruling on 19 January 2023. By then, it was almost three years since the commencement of arbitration. For the respondents' failed jurisdictional challenge, the claimant claimed costs

of over $1m, of which the tribunal found the claimant entitled to recover $762,689.12 from the respondents. The resolution of the substantive disputes between the parties lies ahead.

Andre Maniam
Judge of the High Court

Sir Henry Bernard Eder
International Judge

Zhang Yongjian
International Judge

Poon Kin Mun Kelvin SC, Koh En Da Matthew, David Isidore Tan and Timothy James Chong Wen An (Rajah & Tann Singapore LLP) for the applicants;
Thio Shen Yi SC, Thara Rubini Gopalan and Nikita Garg (TSMP Law Corporation) for the respondent.