

# The consequence of skipping a mandatory pre-arbitral step

December 05 2016 | Contributed by [LALIVE](#)

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### **Introduction**

In mid-2014 the Federal Supreme Court ruled that the requirement in the International Federation of Consulting Engineers (FIDIC) Conditions to submit a dispute to a dispute adjudication board (DAB) was a mandatory precondition for arbitration (for further details please see "[Supreme Court – DAB proceedings precondition for arbitration under FIDIC Conditions](#)"). However, the court was able to avoid the longstanding question of what the consequence for failing to comply with a mandatory pre-arbitral condition should be – should the arbitral tribunal:

- dismiss the case outright for lack of jurisdiction or inadmissibility;
- suspend the proceedings; or
- award damages for the breach and proceed with the arbitration in spite of the failure?

In a recent case (4A\_628/2015) the Supreme Court finally addressed the question, ruling that an arbitral tribunal should suspend arbitration to allow the parties to comply with the pre-arbitral condition. The decision is particularly important for international construction contracts, which often contain multi-tier dispute resolution clauses requiring parties to resort to mediation, conciliation, dispute boards or DABs before initiating arbitration.

### **Decision**

The case arose from a contract that required the parties to attempt conciliation under the International Chamber of Commerce (ICC) alternative dispute resolution (ADR) Rules before initiating arbitration. The rules provide that conciliation can be terminated by either party, but only after an initial procedural meeting is held. Although the claimant first initiated conciliation proceedings, it filed for arbitration before an initial procedural meeting was held. The conciliator therefore interpreted the claimant's action as a withdrawal of the conciliation request.

In the arbitration, the respondent objected to jurisdiction on the basis that the pre-arbitral conciliation requirement had not been complied with. The arbitral tribunal disagreed and rejected the objection in a partial interim award. The respondent then challenged the award before the Supreme Court.

### **Options and solution**

Based on the wording of the ICC ADR Rules, the Supreme Court first concluded that the arbitral tribunal had erred in finding that the parties had complied with the conciliation requirement. It then turned to the question of what the consequence of the non-compliance should be – a question which it had until then managed to avoid addressing.

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The court considered several options. It first looked into whether it was enough for an arbitral tribunal to award damages for breach of contract, without any impact on the arbitral proceedings. According to the court, such a solution would, however, deprive the pre-arbitral condition of any meaning, and therefore considered that a procedural consequence was necessary. Indeed, the purpose of a mandatory pre-arbitral condition is usually to provide an opportunity to avoid the expense and disruption of an arbitration, which is especially relevant for construction projects, which often give rise to numerous highly complex disputes. That purpose would not be served if the payment of damages was the only consequence for failing to comply with the pre-arbitral condition.

The court went on to assess whether an arbitral tribunal should dismiss the case outright for lack of temporal jurisdiction. However, the court found this solution to be problematic for two reasons. First, if the pre-arbitral step does not result in a settlement of the dispute, the parties would have to incur significant costs to initiate arbitration a second time. Second, the dismissal of the case could cause problems if the claims at issue are close to becoming time barred, as pre-arbitral ADR proceedings will not usually interrupt a limitation period.

The court therefore found that the preferable solution would be for an arbitral tribunal to suspend the arbitration to allow the parties to comply with the pre-arbitral condition. According to the court, it is for the arbitral tribunal to define the conditions and duration of the suspension in order to ensure in particular that a party cannot take advantage of it to unduly stall the arbitration.

### **A question of jurisdiction?**

The court characterised the question of the consequence of non-compliance with a mandatory pre-arbitral condition as an issue of jurisdiction, which allowed it to review the matter in full in accordance with the Private International Law Act. However, the court was forthright about not being entirely convinced by its approach, conceding that it adopted it for lack of a better alternative. Indeed, the judges considered that there should be a consequence for failure to comply with a pre-arbitral requirement and acknowledged that addressing the issue as one of jurisdiction was the only way in which it could review the matter.

### **Comment**

The decision provides welcome guidance on a question that often arises in construction disputes but that has long remained open. For arbitral tribunals, the decision imposes a practical solution over which tribunals can exercise some control in order to ensure that mandatory pre-arbitral conditions are not used by respondents to unduly delay arbitral proceedings. For would-be claimants, the decision emphasises the importance of complying with mandatory pre-arbitral conditions, but also makes clear that initiating arbitration prematurely (eg, in order to prevent claims from becoming time barred) will not entail drastic consequences.

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