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# High Court Orders Specific Performance to Compel Parties to Comply With Their Obligation to Attend Mediation

*Maxx Engineering v PQ  
Builders Pte Ltd [2023] SGHC  
71*

**10 April 2023**

# LEGAL UPDATE

# In this Update

In the decision of *Maxx Engineering v PQ Builders Pte Ltd* [2023] SGHC 71, the Singapore High Court held that it was just and equitable to order specific performance to compel the counterparty to perform its contractual obligation to refer the dispute to mediation. Given the popularity of tiered dispute resolution clauses and the lack of case law on this issue, the High Court's decision merits careful study.

Our update discusses this decision.

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## INTRODUCTION

In the decision of *Maxx Engineering v PQ Builders Pte Ltd* [2023] SGHC 71, the Singapore High Court was faced with the issue of whether the remedy of specific performance was available to an applicant where the counterparty had failed to comply with its obligation under the sub-contract to refer the dispute to mediation.

On the facts of the case, the Court held that it was just and equitable to order specific performance to compel the counterparty to perform its contractual obligation to refer the dispute to mediation. Given the popularity of tiered dispute resolution clauses and the lack of case law on this issue, the High Court's decision merits careful study.

## BACKGROUND

Maxx Engineering Works Pte Ltd ("**Applicant**") entered into a sub-contract with PQ Builders Pte Ltd ("**Respondent**").

Clause 54 and 55 were the salient clauses of the sub-contract. First, Clause 54 of the sub-contract required that "if negotiations fail, the parties shall refer the dispute for mediation at the Singapore Mediation Centre in accordance with the Mediation Rules for the time being in force" ("**Mediation Clause**"). Secondly, Clause 55 of the sub-contract stated that in the event of a dispute between the parties, "and such dispute is not resolved by the parties in accordance with Clause 54, the parties shall refer the dispute for arbitration" ("**Arbitration Clause**").

Following a dispute between the parties, the Respondent referred the dispute to arbitration in accordance with the Arbitration Clause. However, the Applicant responded by commencing Originating Application 621 for an order of specific performance to compel the Respondent to refer the dispute to mediation on the basis that parties were obligated to do so in accordance with the Mediation Clause.

Accordingly, the High Court had to consider two issues:

- (a) first, whether there was a legal obligation to refer to mediation; and
- (b) secondly, whether it was just and equitable to order specific performance.

## A LEGAL OBLIGATION AROSE TO REFER THE DISPUTE TO MEDIATION

To recap, the Mediation Clause stated that "if negotiations fail, the parties **shall refer** the dispute for mediation at the Singapore Mediation Centre in

accordance with the Mediation Rules for the time being in force”. For comparison, the Arbitration Clause stated that in the event of a dispute between the parties, “and such dispute is not resolved by the parties in accordance with Clause 54 [the Mediation Clause], the parties **shall refer** the dispute for arbitration”. Notably, the Respondent did not dispute that the words “shall refer” in the Arbitration Clause imposed an obligation on the parties to refer the dispute to arbitration.

The Court held that as “a matter of consistency, and on the plain language of Clause 54 [the mediation clause], the phrase “shall refer” must have also imposed an obligation on the parties to refer the dispute to mediation”. The Court held that the Mediation Clause should, like the Arbitration Clause, be found to impose a legal obligation on the parties to refer their dispute to mediation.

## **IT WAS JUST AND EQUITABLE TO ORDER SPECIFIC PERFORMANCE**

On the second issue of whether an order of specific performance was justified, the Court reiterated the principles and considerations in relation to specific performance as set out by the Court of Appeal in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537. In summary, the relevant considerations as to whether the order was just and equitable were:

- (a) whether damages would be an adequate remedy if the order for specific performance was not made;
- (b) whether the Respondent would suffer substantial hardship from the order of specific performance;
- (c) whether the order of specific performance would be futile;
- (d) whether the order of specific performance would be impractical; and
- (e) whether there were other factors that would render granting the order of specific performance just and equitable in the circumstances of the case.

First, the Court considered that damages were an inadequate remedy. On this issue, the Applicant submitted that it would be denied the benefits of the Respondent’s participation and that the time and costs which could have been saved through mediation would have been difficult to quantify. The Respondent agreed at the hearing that it would not submit on this issue. On balance, the Court held that damages were an inadequate and unsuitable substitute for the obligation to refer the dispute to mediation.

Secondly, the Court considered that there was no evidence that the Respondent would suffer substantial hardship. The Respondent confirmed at the hearing that it was not submitting that an order of specific

performance would cause it undue hardship, legal costs, or delay. The Court therefore held that there was no evidence that the Respondent would suffer undue hardship as a result of an order of specific performance.

Thirdly, the Court considered that mediation would not necessarily be futile. Although the Applicant had failed to tender a proposal for the mediation at the time of the hearing, the Court held that this did not mean that the Applicant was insincere. The Court also noted that the Respondent did not indicate that it was “unamenable to mediation or that mediation would be rendered futile by its unwillingness to mediate”. In the absence of such evidence, the Court held that there was no basis to conclude that an order of specific performance referring the parties to mediation would be futile.

Fourthly, the Court considered that the order for specific performance was not impractical. The Respondent sought to argue that an order for specific performance was not impractical because the Court would not be able to supervise the acts to be carried out by the Respondent pursuant to the mediation process. However, the Court noted that the order sought would require the Respondent to take specific steps to refer the dispute to mediation. This included actions such as referring the dispute to the SMC to confirm the Respondent’s assent to mediation, providing dates for the mediation, and providing its case summary to the mediator. Accordingly, the Court held that it would have no serious difficulty in determining if the Respondent complied with the order of specific performance and that the grant of the order of specific performance would not be impractical.

Finally, the Court considered that other circumstances arose that made the granting of an order of specific performance “just and equitable”. As a start, the mediation process would provide both parties the opportunity to resolve their dispute without incurring further legal costs or substantial delay. Additionally, the Court recognised that the party’s choice to refer their dispute to mediation as reflected in the Mediation Clause should be respected. As a concluding consideration, the Court held that the trend in recent cases has been towards the promotion of amicable dispute resolution in accordance with Order 5 Rule 1(1) of the Rules of Court and that an order of specific performance would be consistent with the trend and preference for amicable dispute resolution.

Taking into consideration these factors, the Court held that it was just and equitable in the circumstances to order specific performance to compel the Respondent to refer the dispute to mediation.

## **COMMENTARY**

Given the popularity of tiered dispute resolution clauses, the High Court’s judgment provides important guidance for all contracting parties who already have or will have dispute resolution clauses requiring parties to submit any dispute to mediation before commencing arbitration or court proceedings.



## KEYPOINT

*This decision provides clear guidance that parties who seek to circumvent such a contractually agreed framework are unlikely to have their conduct countenanced by the Singapore Courts.*

However, this decision does not necessarily mean that the Court will automatically grant an order of specific performance in all cases where a dispute resolution clause obliges parties to refer their dispute to mediation. It bears emphasis that in this case, the Respondent did not adduce evidence that it would suffer substantial hardship or delay as a result of the order for specific performance. It appears possible that a respondent in a future case might adduce evidence that tilts the balance in favour of the Court not granting an order of specific performance, for instance in a situation where a party requires urgent injunctive relief and it is not feasible to go through the mediation process before obtaining such relief from a Court or tribunal.

In the final analysis, it is not surprising that the Court made an order of specific performance in this situation given that the Court is expressly empowered by Order 5 Rule 3 of the Rules of Court 2021 to “order parties to attempt to resolve the dispute by amicable resolution” even in situations where parties are not contractually obliged to mediate their disputes. It also bears emphasis that in considering whether to exercise this power, the Court must have regard to the Ideals of the Rules of Court in Order 3 Rule 1(2) which include expeditious proceedings, cost-effective and proportionate work, and efficient use of court resources. These Ideals, coupled with the Court’s express power to order parties to attempt to resolve their dispute by amicable resolution, mean that it is very likely that there will be many more cases where we will see similar orders to the one made in *Maxx Engineering*.

*With thanks to practice trainee Aaron Tan for his assistance in the preparation of this update.*

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