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Mediation

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Ch. 03 Mediation

SECTION 1 INTRODUCTION TO MEDIATION

3.1.1 The mediation movement in Singapore was actively revived in the 1990s. Currently, mediation is not only used for private disputes but forms an integral part of the Singapore legal system. It is widely used as a mechanism of dispute resolution in courts, government departments, businesses and other specific industries.

SECTION 2 DEFINITION AND BENEFITS OF MEDIATION

3.2.1 In order to grasp the impact of the mediation movement in Singapore, it is necessary to understand the key concept and benefits of mediation.

A. Concept of mediation

(1) A neutral third party, the mediator, assists the parties in dispute to find a practical solution

3.2.2 Mediation is best described as a voluntary and confidential process in which the parties seek to find a practical solution to their dispute. The parties are guided in their decision-making process by a neutral third party, the mediator, who assists the parties in finding an agreeable solution.

(2) Mediation can be used for many purposes

3.2.3 Mediation can be used for many purposes, including settlement of disputes, management of conflicts, negotiation of contracts, policy-making and conflict prevention.

(3) Techniques of mediation range from evaluative to facilitative approaches

3.2.4 Depending on the parties and the matter to be decided, the mediator can adopt different mediation techniques. They range from an active involvement in the substantive outcome of the dispute using evaluative or directive approaches to a more facilitative model where the focus of the mediation process is to assist parties achieve a settlement by managing the process of negotiations between them.

B. Benefits of mediation compared to adjudicatory dispute resolution mechanisms

3.2.5 This definition reveals some of the benefits of mediation as compared to adjudicatory dispute resolution mechanisms such as litigation and arbitration.

(1) Neither parties would lose out as settlement agreements are reached voluntarily

3.2.6 First, as settlement agreements are reached voluntarily, unlike arbitration or litigation, parties do not run the risk of having a judge or an arbitrator deciding against them and losing their case.

3.2.7 Settlement agreements are also binding by virtue of the law of contract.

(2) Mediation saves time and costs

3.2.8 Second, as an informal and flexible process, mediation saves time and costs, being much faster than adjudicatory processes.

(3) Mediation encourages improvement of party relations

3.2.9 Third, unlike adversarial proceedings, it can lead to an improvement of party relations by overcoming or reducing communication problems.

(4) Mediation preserves privacy and is thus highly beneficial for businesses

3.2.10 Fourth, mediation is a process for parties who value their privacy. SMC, SIMC, its mediators and the parties are prohibited by contract from disclosing any information relating to the mediation.

3.2.11 Mediation is thus highly beneficial for businesses as the mediation process is confidential and as such is more likely to preserve the commercial goodwill of the parties and avoid long-term damage that often results from proceedings in court.

SECTION 3 MEDIATION IN SINGAPORE

A. Brief history of mediation in Singapore

3.3.1 Mediation is not a new concept to Singapore. Many Asian cultures practised mediation in one form or another in their communities, often by using respected elders as mediators. However, urbanisation and industrialisation and a focus on legal rights has led to an emphasis on litigation and dwindling of mediation and other informal dispute resolution mechanisms.

3.3.2 Mediation and other alternative dispute resolution practices were re-introduced into Singapore in the 1990s as the 1970s Western mediation movement spilled over to Singapore. It is these practices that determine Singapore's mediation culture today.^[1]

B. The mediation movement in Singapore is largely institutionalised

3.3.3 There are two main categories of mediation practice in Singapore; court-based mediation and private mediation.

(1) Court-based mediation

3.3.4 Court-based mediation is mediation that takes place in the courts after parties have commenced legal proceedings. This type of mediation is mainly carried out by the State Courts (for civil disputes; community, harassment and employment disputes; and minor criminal offences) and the Family Justice Courts. The former type of mediation is conducted by the State Courts Centre for Dispute Resolution (SCCDR). Family Justice Courts' mediation is currently conducted by the Family Resolution Chambers (FRC), the Maintenance Mediation Chambers (MMC) and the Child Focused Resolution Centre (CFRC).

(2) Private mediation

3.3.5 Private mediation in Singapore is spearheaded and mainly carried out by the Singapore Mediation Centre (SMC), and the Singapore International Mediation Centre (SIMC).

(3) Other forms of mediation

3.3.6 A third prong of mediation practice, takes place in government agencies and industry-based bodies such as the Community Mediation Centres, Tribunal for the Maintenance of Parents, Consumers' Association of Singapore and the Tripartite Alliance for Dispute Resolution.

C. Mediation has received much support from Singapore's judiciary

(1) The judiciary initiated the usage of pre-trial conferences which were subsequently formalised in 1996

3.3.7 The resurrection of mediation in Singapore depended to a large extent on the support of Singapore's judiciary, in particular, the Honourable Chief Justice Yong Pung How.

3.3.8 The judiciary initiated Pre-Trial Conferences (PTCs) for civil cases in the Supreme and State Courts as early as January 1992. These PTCs, led by a registrar, served to evaluate the case for an optimal and efficient handling and encouraged the parties to settle their dispute via negotiation on a 'without prejudice' basis.

3.3.9 The use of PTCs was formalised in 1996 in the High Court and State Courts through O34A of the Rules of Court of Singapore. This order empowers the court to order the parties to attend confidential PTCs or to make other orders or directions as it regards appropriate for the just, expeditious and economical disposal of the dispute at any time after the beginning of proceedings.

(2) The judiciary introduced mediation in the courts with the launch of court-based mediation in 1994

3.3.10 The judiciary led the way in institutionalising mediation through the introduction of mediation in the State Courts in 1994.

3.3.11 The main objective was to reintroduce into Singapore culture a process to which it was not a stranger and to preserve family and societal harmony and cohesion. Other reasons included increasing productivity by reducing the costs of conflict and making more efficient use of public resources for conflict resolution.

3.3.12 In 2010, the State Courts encouraged the use of mediation by introducing the ADR Form at the Summons for Directions stage for civil disputes. Both lawyers and clients had to certify in this form that they had discussed ADR options, and had to indicate in the form their decision concerning the use of ADR. In 2012, a "presumption of ADR" was introduced, in which all civil cases were automatically referred to mediation or other forms of ADR unless one or more party opted out. Refusal to use ADR for reasons deemed unsatisfactory by the registrar would result in cost sanctions under Order 59 rule 5 of the Rules of Court. Similar steps have been taken by the Supreme Court in 2013, when the Practice Directions were

amended in 2013 to allow a party wishing to attempt mediation to serve an “ADR offer”. The Supreme Court highlighted that it would take into account the ADR offer and the response to the offer in deciding on appropriate costs orders under O 59 r 5 of the Rules of Court. Mediation also plays an integral role in the Family Justice Courts, where divorcing couples with children below 21 years old have to undergo mediation and counselling. Court-based mediation is discussed below in Section 5.

D. The Singapore government has been actively promoting mediation

3.3.13 The Singapore government has also adopted an active role in promoting mediation in Singapore and in encouraging parties to try mediation before resorting to litigation.

(1) A study was carried out in 1996 to see how the scope of mediation in Singapore may be expanded

3.3.14 In May 1996, a cross-profession Committee in ADR was formed to study how mediation could further be promoted in Singapore and to implement mediation beyond the courts. The Committee made two main recommendations, dividing the private mediation movement into commercial and community mediation.

(2) The recommendations made through the study were readily implemented

a. Creation of a commercial mediation centre in 1997

3.3.15 First, the committee recommended the creation of a commercial mediation centre under the Singapore Academy of Law. This centre, SMC, was launched on 16 August 1997.

b. Establishment of Community Mediation Centres in 1998

3.3.16 Second, it recommended the establishment of a network of easily accessible Community Mediation Centres to foster social cohesion. In order to achieve this, community leaders and volunteers were to be trained to be mediators. This was to teach communities how to resolve their own disputes.

3.3.17 This recommendation was implemented by the Ministry of Law. A Resource Panel on ADR was formed to oversee the development of a national ADR infrastructure. The Community Mediation Centres Act (Cap 49A) came into force in January 1998 and, shortly after, Singapore’s first Community Mediation Centre was officially opened in November 1998. The Ministry of Law supervises the CMCs and remains an active promoter of mediation and ADR.

(3) Other initiatives put in place to promote mediation

3.3.18 Other initiatives to promote mediation as the primary tool of dispute resolution include the recommendation by the Attorney General’s Chambers that all government departments should use mediation as their first option for dispute resolution and to include a mediation clause for referrals of disputes to SMC in government contracts.

(4) Developing Singapore as an international mediation centre

3.3.19 In 2013, the CJ and the Ministry of Law appointed a Working Group to look into developing Singapore as the centre of international commercial mediation. The key recommendations were: (1) the formation of the Singapore International Mediation Centre; (2) the formation of the Singapore International Mediation Institute; (3) the enactment of a Mediation Act; (4) extension of tax exemptions and incentives to mediation; (5) enhancing rules and court processes; and (6) reaching out to target markets and key industries.^[2] Recommendations (1) to (3), which were implemented between 2014 and 2017, will be discussed below.

SECTION 4 SINGAPORE MEDIATION CENTRE, SINGAPORE INTERNATIONAL MEDIATION CENTRE AND SINGAPORE INTERNATIONAL MEDIATION INSTITUTE

A. Singapore Mediation Centre (SMC)

(1) Brief History

3.4.1 SMC was incorporated on 8 August 1997, and officially launched by the Honourable Chief Justice Yong Pung How on 16 August 1997. SMC is a non-profit organisation guaranteed by the Singapore Academy of Law. It is linked institutionally with many professional and trade associations and receives the support of the judiciary and the Singapore Academy of Law.

(2) Roles and functions of SMC

3.4.2 SMC has successfully spearheaded the mediation movement in Singapore and is dedicated to the promotion of amicable and efficient settlement of disputes.

(3) Statistics on mediation cases referred to SMC

3.4.3 As at 30 November 2018, more than 4,000 disputes were referred to SMC. About 70% of the cases that are mediated at SMC are successfully settled. Of those successfully resolved, more than 90% were settled within one working day. Very often, parties save substantial legal, court and hearing fees when agreements are reached by mediation.

3.4.4 Almost all types of civil cases are mediated at SMC. SMC has handled cases where the disputed amount is in excess of S\$1.06 billion. To-date, the total quantum of disputes handled at SMC is close to S\$9 billion. About 40% of SMC cases are referred by the courts.

(4) Mediators in SMC

SMC maintains a panel of Principal Mediators that have undergone formal mediation training

3.4.5 SMC maintains its own panel of trained and experienced Principal Mediators and Associate Mediators comprised of distinguished members of different professions and fields. They include, among others, Members of Parliament, former High Court Judges, Senior Counsel and other lawyers, architects, doctors, engineers, IT specialists, maritime professionals, project managers, psychologists and university professors.

3.4.6 All SMC Mediators have undergone formal mediation training and a strict evaluation before being appointed to the panel.

3.4.7. If disputes require technical expert knowledge, SMC usually appoints two mediators to the case to co-mediate the dispute. One of these mediators will be a professional of the industry concerned who is familiar with the subject matter of the dispute. The other mediator is generally a lawyer who will be familiar with the legal issues.

3.4.8 SMC also maintains an international panel consisting of internationally renowned neutrals.

Mediators are able to handle cases in languages other than English, such as Tamil, Malay, Mandarin and other Chinese dialects

3.4.8 SMC will also try to match the language abilities of the mediators to the disputants to facilitate the free flow of conversation between the parties and to avoid the mediation of cases through translators who may hinder the building of rapport between mediator(s) and parties. So far, besides English, cases have been successfully mediated in Mandarin and other Chinese dialects as well as Tamil and Malay.

Mediators are bound by SMC's Code of Conduct

3.4.9 Mediations under SMC's auspices are governed by the provisions in the SMC Mediation Procedure. Clause 4 of this Procedure states that a mediator has to subscribe to SMC's Code of Conduct. These provisions are binding upon all mediators appointed by SMC to mediate. They direct and guide the mediator through the mediation process with regard to issues such as confidentiality, neutrality and impartiality.

(5) Mediation processes at SMC

The mediation process may be initiated by a reference by the courts or upon request of one or more parties

3.4.10 The mediation process at SMC may be initiated in two ways; either the case may be referred to SMC by the courts or one or more of the parties may contact SMC directly with a request for mediation. If only one party makes a request, SMC will contact all the other parties and seek to convince them to attempt mediation.

3.4.11 After SMC has assessed the suitability of the case for mediation and if all parties agree to mediate, SMC may brief the parties on what mediation at SMC entails. This is to ensure that the parties make an informed decision and are committed towards finding a suitable solution to their dispute via mediation.

SMC's Agreement to Mediate must be signed by the parties

3.4.12 The first step for mediation at SMC is the signing of SMC's Agreement to Mediate. By this Agreement, the parties are bound by the terms of SMC's Mediation Procedure which requires them to give effect to the terms of any settlement reached.

SMC will set a date and time for mediation

3.4.13 Then, SMC will designate a date and time for the mediation process (generally two week after initiation, or, on an urgent basis, within 24 hours). Mediation sessions are held at SMC's premises to ensure neutrality.

SMC will appoint suitable mediators

3.4.14 Also, SMC will appoint suitable mediators from its Panel of Principal and Associate Mediators. A party may reject the proposed mediator if it has valid reasons, such as conflict of interests. Meanwhile, the parties exchange concise summaries of their case and, if necessary, of important documents referred to in the summary.

A brief description of the mediation process

3.4.15 On the day of the mediation, the mediator will lead and guide the parties through a problem-solving process. The lawyers of the parties play an important role in assisting the mediator and advising the parties during the settlement process. If the matter is settled, the parties will reduce in writing the terms of their settlement with the assistance of their lawyers and this settlement agreement will be signed by or on behalf of the parties.^[3]

B. Singapore International Mediation Centre (SIMC)

3.4.16 In 2013, a Working Group exploring ways to develop Singapore as the centre of international commercial mediation recommended the formation of an international mediation centre. This centre would be led by an international board of directors and have a panel of international mediators.

3.4.17 The Singapore International Mediation Centre was launched on 5 November 2014. In December 2018, SIMC's panel of mediators comprised 78 mediators from 14 countries. It also has a panel of more than 70 experts to assist the mediator in disputes involving highly technical issues. Working together with the Singapore International Arbitration Centre (SIAC), the SIMC offers an arbitration-mediation-arbitration protocol that provides a seamless process for the resolution and enforcement of international commercial disputes. An arbitration may be commenced in the SIAC, and be stayed for mediation at SIMC after the arbitral tribunal has been appointed. If the dispute is settled at mediation, the parties may request the arbitral tribunal to record a consent award which is enforceable under the New York Convention. This protocol has been described as "granting the efficiency of mediation and the certainty and enforceability of an arbitral award".^[4]

3.4.18 As at 2017, the SIMC has administered mediations of claims ranging from S\$0.5 million to S\$600 million, involving parties from 20 jurisdictions.^[5] The centre has also been involved in the conclusion of international dispute resolution regimes, including the Singapore Infrastructure Dispute-Management Protocol to assist parties involved in major infrastructure projects to manage disputes.^[6]

C. Singapore International Mediation Institute (SIMI)

3.4.19 Apart from recommending the provision of international mediation services, the Working Group on International Commercial Mediation also recommended the establishment of a national mediation standards body. By increasing user confidence in the quality of Singapore's mediators, this body would support the overall goal of bringing international commercial mediation work into Singapore. The Singapore International Mediation Institute (SIMI) was thus established in 2014 as a subsidiary of the National University of Singapore.

3.4.20 Working closely with the International Mediation Institute, SIMI introduced a robust four-tiered mediation credentialing system. The scheme has been designed to differentiate between different levels of mediation experience based on user feedback on the mediator. It also provides a pathway for mediators to make steady progress. As at March 2017, SIMI had 44 level 1 accredited mediators, 1 Level 2 accredited mediator, 4 level 3 accredited mediators and 85 certified mediators. In addition, SIMI has set standards for mediation training organisations and mediation service providers. SIMI has also created a SIMI Code of Professional Conduct which all its mediators should adhere to. Finally, SIMI has been actively increasing the awareness of mediation by providing a website portal with information on mediation, and organising an annual essay competition for tertiary students and publishing top entries in an annual publication.^[7]

SECTION 5 COURT-BASED MEDIATION IN THE STATE COURTS AND FAMILY JUSTICE COURTS

A. History of Court-based Mediation

3.5.1 Court-based mediation was first introduced as a pilot project in 1994, when specially selected District Judges mediated a range of civil disputes. The Court Mediation Centre was established in 1995 following the pilot project. It was renamed the Primary Dispute Resolution Centre in May 1998.

3.5.2 Court-based mediation was gradually extended to other disputes within the Courts, including Magistrate's complaints involving minor criminal offences,^[8] and consumer claims filed in the [Small Claims Tribunals](#). Between 2014 and 2015, court-based mediation was extended to community disputes and harassment claims. In March 2015, the Primary Dispute Resolution Centre was reconstituted as the State Courts' Centre for Dispute Resolution to consolidate the different mediation services and to provide an integrated and holistic approach to resolving disputes.^[9] Apart from offering court-based mediation, this centre provides neutral evaluation for civil claims.

3.5.3 Mediation has similarly played a prominent role in family justice. Court-based mediation and counselling were introduced to the Family Justice Courts in 1996, when these courts were empowered under s 50(1) of the Women's Charter to refer parties to mediation with their consent. Mediation is conducted by judges, volunteer mediators and professional mediators. The Family Justice Courts adopt a therapeutic approach by offering counselling and psychological services to holistically address family disputes.

3.5.4 The Family Resolution Chambers were established in 2006 to consolidate the Family Justice Courts' mediation programmes. This centre was complemented by the Maintenance Mediation Chambers, which was established in 2007 to deal with disputes over spousal and child maintenance. In addition, the Child Focused Resolution Centre was set up in 2011 to carry out the legislative mandate of requiring divorcing parties with at least one minor child to undergo counselling and mediation.^[10]

B. Features of court-based mediation

3.5.5 Court-based mediation refers to mediation which is held in court once legal proceedings have commenced. With the introduction of the presumption of Alternative Dispute Resolution for civil claims in 2012, the vast majority of cases in the State Courts undergo court-based mediation or another form of alternative dispute resolution.

3.5.6 The State Courts' model of mediation in the State Courts has been described as containing the following elements: (a) a facilitative approach in assisting the parties' negotiations; (b) an emphasis on joint problem-solving between mediator, parties and lawyers; (c) the mediation usually involves discussion on legal merit of the case. The last feature is especially prominent, since court-based mediation takes place in the context of pending legal proceedings, and mediation is conducted in the shadow of the law. This usually takes place during the more advanced stage of mediation, and in private sessions when the mediator can conduct reality-testing together with the lawyer and client.^[11]

3.5.7 By comparison, the Family Justice Courts have adopted a multi-disciplinary and therapeutic approach to mediation. The parents and their lawyers are usually asked to attend a family dispute resolution conference before a judge-mediator and court family specialist where they are invited to resolve their divorce and ancillary issues amicably in the best interests of the child by taking a non-adversarial approach. Issues in dispute are jointly explored with the parents. Immediately after this conference, a court family specialist will conduct an intake and assessment session with the parents to identify key psychosocial and practical issues concerning care of their children, and to assess possible risk factors such as family violence and mental health concerns. Further counselling sessions may be arranged following this intake session. After the counselling sessions are concluded, the parents will attend a mediation before a judge-mediator who will continue to facilitate negotiations between parties to try and resolve all outstanding divorce and ancillary issues.^[12]

C. Statistics on mediation cases in the courts

3.5.8 Court-based mediation has had an enormous impact on the Singapore judicial system. Between 2012 and 2017, around 6,700 matters were handled by the State Courts' Centre for Dispute Resolution, with a settlement rate above 85%. In surveys conducted by the State Courts in 2015, 98% agreed that the dispute resolution services provided by the State Courts met their expectations in providing satisfactory resolution of disputes.^[13] Within the Family Justice Courts, the Child Focused Resolution Centre managed 1530 families with children under 21 years in 2014 and 1380 families with children under 21 years in 2015. For

cases that have to undergo mandatory mediation, 75% achieved a full resolution of all contested issues in 2014 while 80% achieved full or partial resolution of contested issues. In 2015, the figures were 77% and 82% respectively. Disputes concerning maintenance of spouses and children were also settled with high settlement rates of 85% and 87% in 2016 and 2017 respectively.^[14]

D. Mediators in Court-based Mediation

(1) Judges were appointed as mediators due to high regard for persons in positions of authority

3.5.9 Former Chief Justice Yong Pung How suggested in 1997 that the Singapore court mediation model was an adaptation of the western style of mediation to the Asian and Singaporean context, where there is a tendency to have high regard for persons in positions of authority. In this connection, retired Chief Justice Chan Sek Keong in *Jonathan Lock v Jesseline Goh [2008] 2 SLR(R) 455* observed how “[f]eedback from litigants shows an overwhelming preference for district judges to act as mediators because of the public confidence and respect that they command... as well as the convenience to the parties of being able to directly enforce a court-mediated settlement by means of a court order”. The Honourable Chief Justice Chan highlighted how our model of court mediation is “sui generis, and is particularly suited to a jurisdiction where litigants respect the impartiality of judges in giving objective views on the merits of the claim and defence respectively”.

3.5.10 Judges have played a central role as mediators since court-based mediation was introduced in the 1990s. It has been commented, in this regard, that “[w]hile judicial mediation is less formal compared to a trial, the resultant ceremony of coming to court, attending before a judge and having an opportunity to present one’s case and views to the judge, are an important part of the process of case resolution at the courts”.^[15] Parties potentially feel “heard” by the judge who represents the judicial system, and judges are also able to facilitate negotiations through assisting in reality testing. Currently, court mediation is provided by a larger and diverse base of mediators including professional staff and court volunteers.^[16]

(2) Mediators are required to adhere to guidelines provided by the Courts and comply with the Courts’ Code of Ethics

3.5.11 The State Courts’ Mediators are guided by the Code of Ethics and Basic Principles for Court Mediators, the State Courts’ Justice Statement and the Courts’ Guide on Best Practice for Mediation. These documents articulate the shared values that shape how mediations are conducted, and deal with fairness, accessibility, independence, impartiality, integrity and responsiveness. The State Courts also have an internal Guide on Best Practices for Court Mediation, which sets out recommended practices for each stage of mediation. All court mediators (Judges, staff and volunteers) are required to comply with these guidelines.

(3) Mediations take place on a ‘without prejudice’ basis

3.5.12 The mediations in both the State Courts and Family Justice Courts take place on a 'without prejudice' basis and no matters disclosed during the sessions are admissible in subsequent court proceedings. A similar provision exists for Muslim parties or parties married under Muslim Law who seek mediation or counselling for their family dispute.

SECTION 6 LEGAL ISSUES IN MEDIATION

A. The Mediation Act

3.6.1 The Mediation Act, which came into operation on 1 November 2017, has clarified and codified many legal aspects of the mediation process. The Act applies to mediations that are partially or wholly conducted in Singapore, and mediations in which parties agree that Singapore law applies. The Act currently does not apply to mediations that are conducted under written law (including community mediation) and mediated conducted by or under the court's direction. Section 6(3) allows the Minister to make a future order in the Gazette extending the application of the Act to other types of mediations in the future.^[17]

This section will briefly review the common law position on these legal issues and highlight how the Mediation Act has clarified them.^[18]

B. Status of settlement agreements arising from mediation

3.6.2 The legal status of settlement agreements will depend on the intention of the parties, the context of the mediation and the existence and nature of relevant statutory requirements.

(1) Private mediations

3.6.3 In most private mediations, parties would usually reduce the terms of the agreement in writing and sign on the document. It would be a legally binding agreement. As such, the enforceability of such settlement agreements is subject to normal contractual principles. The Court of Appeal decisions of *Gay Choon Ing v Loh Se Ti Terence Peter* [2009] 2 SLR 332 and *Ng Chee Weng v Lim Jit Ming Bryan* [2015] 3 SLR 92 are examples of how contractual formation principles were utilised to find the existence of valid compromise agreements. In addition, the court in *Chan Gek Yong v Violet Netto* [2018] SGHC 208 considered whether allegations of duress and incapacity invalidated a mediated settlement.

(2) Where there are pending court proceedings

3.6.4 Where there are pending court proceedings, the settlement agreement may provide for its terms to be recorded as a consent judgment or court order. The Court of Appeal in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 highlighted that such a consent order is contractual in nature, and supersedes the original cause of action as well as puts an end to the proceedings. It also held that the courts did not retain a residual discretion to set aside a consent order arising from a settlement.

3.6.5 It is also possible for parties to agree to have the terms of the settlement subsequently recorded as a consent arbitral award.

(3) Recording a private mediated settlement agreement as a consent order

3.6.6 Section 12 of the Mediation Act has provided a novel mechanism for a privately mediated settlement agreement to be converted into a court order. This unique mechanism is meant to attract parties to use the mediation process with the assurance of finality and enforceability of their mediated settlements.

3.6.7 The expedited enforcement mechanism is currently available only to Designated Mediation Service Providers. These are mediations administered by the Singapore Mediation Centre, Singapore International Mediation Centre, WIPO Mediation and Arbitration Center and the Tripartite Alliance for Dispute Resolution, or mediations conducted by a SIMI certified mediator. To obtain the court order, all the parties must agree to the application, and the mediated settlement agreement must be in writing as well as signed by the disputing parties. The application must also be made within 8 weeks after arriving at the settlement, unless the court grants an extension of time.

3.6.8 Section 12(4) of the Act sets out four situations in which the court would not record the settlement as a court order, including when the agreement has been invalidated to the presence of vitiating factors such as duress.

3.6.9 Most recently, the United Nations Commission for International Trade Law agreed to create the United Nations Convention on International Settlement Agreements Resulting from Mediation, and to amend the Model Law on International Commercial Conciliation to facilitate the cross-border enforcement of international commercial disputes. The former convention is scheduled to be signed in Singapore in August 2019 and named “the Singapore Convention”. A contracting state to this Convention will be obliged to enforce a mediated settlement agreement according to its domestic procedural rules. If ratified by many states, the Convention will provide a harmonised framework to enforce international mediated settlement agreements, putting the mediation process on equal standing as arbitration in terms of competitive advantages. Singapore’s Mediation Act is also likely to be amended once Singapore ratifies the Convention.

C. The role of confidentiality in mediation

3.6.10 Mediation is often said to be a private and confidential process. As a matter of law, practice and policy, confidentiality in mediation is not a straightforward matter. In order to determine the scope of confidentiality, the law in relation to common law privileges, contractual principles, equitable doctrines and statutory regulations have to be examined.

(1) The two levels of confidentiality in mediation

3.6.11 The first is in relation to the process itself and the second is in relation to private meetings between the mediator and one of the parties during the process. The former is confidential in the sense that, apart from the mediator and the parties, no third party is to be privy to the proceedings. The latter refers to confidentiality in that no matter raised in private sessions should be disclosed to the other party by the mediator.

(2) Confidentiality and admissibility of mediation communications at common law

a. Statements made on a 'without prejudice' basis are inadmissible

3.6.12 Generally, at common law, statements made on a 'without prejudice' basis during negotiations towards settlement of a dispute are inadmissible in subsequent court proceedings relating to the same subject matter. As such, the 'without prejudice' privilege is usually applicable in most mediations. However, the privilege is not absolute and in certain cases, 'without prejudice' communications may be admissible where the court needs to determine whether an agreement has been reached and understand its terms, or where circumstances exist giving rise to the waiver of the privilege: s 23 of the Evidence Act, *Quek Kheng Leong Nicky v Teo Beng Ngoh* [2009] 4 SLR(R) 181 and *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457.

b. A situation where there is a dispute between parties and mediator

3.6.13 At present, it would seem that the 'without prejudice' privilege only applies to the parties in mediation and not the mediator or the process: *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2009] All ER (D) 228 (Jun). This poses a potential problem where there is a dispute between parties and mediator. In order to avoid these potential problems, most agreements to mediate contain a confidentiality clause which provides that the parties and the mediator are not to disclose to persons outside the mediation any information or document used in the mediation. These provisions have not yet been tested in the Singapore courts. Whilst such provisions afford a broader scope of confidentiality over the process and the parties, it is likely that some of the limitations on privileges under the law would also be imposed on such confidentiality clauses.

(3) Confidentiality in equity

3.6.14 In equity, persons who receive information in circumstances of confidence cannot make unauthorised use of the information. A court may grant relief if there has been actual abuse or threatened abuse of confidential information.

a. In Singapore, there are three elements which must be fulfilled for there to be a breach of confidence

3.6.15 In *X Pte Ltd & Anor v. CDE* [1992] 2 SLR(R) 575 996, the court cited with approval *Coco v. AN Clarke (Engineers) Ltd* [1969] RPC 41 giving the elements of breach of confidential information as follows: (1) the information to be protected must have the necessary quality of confidence about it; (2) that information must have been imparted in circumstances importing an obligation of confidence; and (3) there must be an unauthorised use of the information to the detriment of the party who originally communicated it.

b. Mediators may be in breach of confidence if there has been unauthorised use of information without authorisation

3.6.16 Breach of confidentiality may apply in mediation where there has been disclosure of information which had been disclosed to mediators only for the purpose of the mediators performing their function as such. Mediators may be in breach of confidence where there has been unauthorised use of the information

or disclosure to third parties without authorisation. In some situations confidential information disclosed in mediation may be commercially sensitive and mediators who use such information for their own benefit may be ordered to make restitution to the injured parties.

(d) Confidentiality and admissibility under the Mediation Act

3.6.17 The Mediation Act has defined mediation communications to include anything said or done, documents prepared or information provided for the purpose of mediation. Section 9 declares that all such communications are confidential, subject to the ten stipulated exceptions. These situations include well-accepted exceptions such as party consent, disclosure to protect a person from injury and disclosure relating to a potential offence. In all other situations, a person who wishes to breach mediation confidentiality must obtain the leave of the court or the arbitral tribunal. Section 11(2) sets out three factors to be considered by the court in deciding whether to grant leave:

- a. Whether the communication has already been disclosed;
- b. Whether it is in the public interest or interest of the administration of justice to allow the disclosure; and
- c. Any other circumstances that the court or arbitral tribunal considers relevant.

3.6.18 With regard to admissibility of mediation communications, s 10 of the Act requires the court's or arbitral tribunals' leave before admitting any mediation communication as evidence. The above three factors also apply to the court's consideration of whether to grant leave. In addition, s 9(3) specifies three situations when mediation communications would be admissible:

- a. Communications needed to enforce or dispute a settlement agreement;
- b. Disciplinary proceedings for mediator or solicitor conduct;
- c. Disclosure and admissibility of communications for the purpose of discovery.

3.6.19 While these statutory provisions have substantially clarified the common law, they will not apply to statutory mediation schemes (such as small claims tribunal mediation) and court-based mediation. There are other statutory provisions that extend coverage to these mediations. Some examples of such protection would be sections 19 and 20 of the Community Mediation Centres Act (Cap 49A).

D. Mediation clauses

(1) Mediation clauses may be incorporated in contracts

3.6.20 Mediation clauses have been incorporated in some contracts. Such clauses are drafted to trigger the mediation process in the event that there is a breach of the contract or to require the parties to resolve potential differences through mediation before resorting to litigation.

3.6.21 A typical clause which is recommended by SMC would be worded as such:

“Any dispute arising out of or in connection with this agreement must be submitted for mediation at the Singapore Mediation Centre (SMC) in accordance with SMC’s Mediation Procedure in force for the time being. Either/any party may submit a request to mediate to SMC upon which the other party will be bound to participate in the mediation within [45 days] thereof. Every party to the mediation must be represented by [senior executive personnel, of at least the seniority of a Head of Department] or its equivalent, with authority to negotiate and settle the dispute. Unless otherwise agreed by the parties, the Mediator(s) will be appointed by SMC. The mediation will take place in Singapore in the [English] language and the parties agree to be bound by any settlement agreement reached.”

(2) Enforceability of mediation clauses

3.6.22 The Court of Appeal’s robust enforcement of an ‘in good faith endeavour to agree’ clause in *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738; [2012] SGCA 48 signalled the court’s readiness to accept mediation as a key ADR process. VK Rajah JA held that such an agreement to negotiate in good faith was valid because such clauses were in the public interest as they promoted the consensual disposition of any potential disputes, consistent with cultural values of promoting consensus whenever possible.

3.6.23 This decision was then followed in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 where the Court of Appeal decided that a multi-tiered dispute resolution mechanism contained in a cooperation agreement was enforceable.

E. Things to take note of while drafting mediation clauses

3.6.24 In Singapore, the Attorney General’s Chambers recommends that government contracts should carry a clause referring disputes to mediation, where appropriate.

3.6.25 Drafters of mediation clauses should be attentive to the following factors: (1) mediation clauses should be clear and certain; (2) they should be complete and comprehensive; (3) they should specify procedures to be followed by the parties in setting up and undertaking the mediation with some reference to the identity of the mediator and procedure to be followed or incorporated by reference to the mediation agreement or mediation rules of an agency providing mediation services; and (4) they should uphold the non-ouster principle by stipulating that the parties should first submit their dispute to mediation before they institute court proceedings.

F. Remedies for breach of mediation clauses

3.6.26 Where there is a breach of a mediation clause, parties are possibly entitled to the following 3 remedies: (1) stay of proceedings; (2) specific performance; and /or (3) damages.

(1) Stay of proceedings

3.6.27 In respect of a stay of proceedings, the Singapore High Court has a statutory power to stay proceedings pending arbitration. The Singapore Court of Appeal in *Star Trans Far East Pte Ltd v. Norske-*

Tech Ltd & Ors [1996] 2 SLR(R) 196 has affirmed that the Singapore courts retain a residual inherent jurisdiction to order a stay of court proceedings in favour of arbitration where such cases are not covered by statutory provisions. Section 8 of the Mediation Act also allows the court to order a stay of proceedings pending the completion of a mediation.

(2) Specific performance

3.6.28 Specific performance is a remedy for breach of contract in which the court orders a contracting party to carry out obligations under the contract. Such a remedy is equitable and ordered at the discretion of the court. Although the possibility of granting specific performance has not yet been considered by the courts in Singapore, it remains a possible remedy given the difficulties in awarding damages for breach of such clauses. However, several problems may arise; for example, it would be difficult for the court to supervise the performance thereof.

(3) Damages

3.6.29 Damages are designed to put plaintiffs in a position they would have been if the defendants had carried out their contractual obligations. As for damages as a possible remedy for breach of a mediation clause, a major difficulty would be to assess the quantum of damages suffered. In mediation, it would not be possible to determine the terms or the outcome of the mediation had the mediation clause been complied with.

SECTION 7 FUTURE DEVELOPMENTS AND CHALLENGES

3.7.30 The Mediation movement in Singapore has come a long way since the early 1990s. The government managed to revive mediation as an autonomous dispute resolution mechanism and, today, Singapore is one of the leading nations in the effective use of ADR in early stages of the judicial process with a high settlement rate. Also, the private mediation movement has expanded largely since its inception in the mid-nineties, extending now to the international dispute resolution landscape. Mediation bodies such as SMC and SIMC remain at the forefront of the mediation movement in Singapore and Asia.

3.7.31 However, much remains to be done. Mediation needs to be further promoted and ingrained within Singapore society to become the primary tool of dispute resolution.

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