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The emergence of mediation law in Asia: A tale of two cities

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The Emergence of Mediation Law in Asia: A Tale of Two Cities

Nadja M. Alexander[1]

Introduction

Contemporary mediation systems are emerging throughout Asia. In 2019, 16 jurisdictions from Asia and the Pacific region signed the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).[2] Moreover, Asia's signatories include some of its largest economies,[3] five ASEAN countries and seven members of the RCEP.[4]

Why is this important? In a strict legal sense, the Singapore Convention is an instrument to facilitate the enforcement of international mediated settlement agreements (iMSAs); however its broader objective is to facilitate cross-border trade and investment. This is reflected in the Preamble to the Singapore Convention, which reiterates the view that "the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations [...]"[5]

The Singapore Convention promises to leave a significant impact on international dispute resolution practices and, beyond that, on trade and investment flows. According to Edna Sussman, the Singapore Convention has inspired the "changes to the ICSID rules on conciliation [which] specifically suggests that the parties sign a settlement agreement [which may be embodied in a Conciliation Report] so that parties in ICSID conciliation proceedings can benefit from the enforcement regime for mediated settlements contemplated by the Singapore Convention".[6] Matthew Erie points out that global capital flows post-2008 are

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[1] I would like to thank an anonymous reviewer for helpful comments on an earlier version of this paper. Thanks also go to Ong Kye Jing for his meticulous research and to my colleague Vakho Giorgadze for his insights on various points.

[2] UN General Assembly, Resolution 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018). These are Brunei, China, India, Kazakhstan, Laos, Malaysia, Maldives, the Philippines, Singapore, South Korea, Sri Lanka, Timor-Leste, Turkey, Fiji, Palau, and Samoa.

[3] According to the World Bank's latest figures in 2019, China is Asia's largest economy with a nominal Gross Domestic Product (GDP) of USD14.34 trillion; India is the third largest economy in Asia with a nominal GDP of USD2.87 trillion; and South Korea is the fourth largest economy in Asia with a nominal GDP of USD1.65 trillion: World Bank, "World Development Indicators," https://databank.worldbank.org/reports.aspx?source=2&series=NY.GDP.MKTP.CD&country=# (last accessed 4 March 2021).

[4] The Regional Comprehensive Economic Partnership Agreement (the RCEP) includes ten ASEAN states, specifically Indonesia, Thailand, Singapore, Malaysia, the Philippines, Vietnam, Brunei, Cambodia, Myanmar, Laos, plus China, Japan, South Korea, Australia and New Zealand.

[5] Recital 3 of the preamble of the Singapore Convention. The UN General Assembly has noted that the use of mediation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States." UN General Assembly, Resolution 57/18, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, A/Res/57/18 (Jan. 24, 2003). See also recital 6 of Council Directive 2008/52/EC, Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3, which acknowledges the benefits of mediation.

[6] Edna Sussman, "The Singapore Convention – Promoting the Enforcement and Recognition of International Mediated Settlement Agreements," *ICC Dispute Resolution Bulletin* 3 (2018): 54, citing ICSID Secretariat, "Proposals for Amendment of the ICSID Rules – Synopsis," vol. 1 (Aug. 2, 2018), para 95, https://icsid.worldbank.org/sites/default/files/amendments/volume-1/Synopsis_English.pdf. In 2018, ICSID

increasingly taking place within Asia, which means that more cross-border disputes are being resolved in the region.[7] In this regard, the naming of the Convention after an Asian city-state may be serendipitous symbolism. The Convention has the capacity to enhance the attractiveness of mediation within regional initiatives, such as the Belt and Road Initiative[8], and support economic growth in Asia, which continues despite the global downturn due to Covid-19.[9]

International commercial disputes are considered part of the cost of doing business. But how much conflict actually costs, depends on how disputes are managed and resolved. From a user perspective, the Singapore Convention offers a risk management mechanism accessible in terms of its commercial and cultural sensitivity, flexibility and affordability to cross-border business players – whether they are multi-national corporations, micro, small and medium enterprises (MSMEs), indigenous communities with resource rights, or the governments of emerging economies or industrialised states. Further, the Convention will support the regulatory robustness of cross-border online mediation initiatives, which have surged in the wake of pandemic-related travel restrictions.[10]

During this period of growth in, and digitization of, mediation practice, choices made about the design and implementation of mediation law will have a direct and significant impact on how mediation develops (or not) throughout the world. It is vital to ensure that such choices are informed by:

- insights from jurisdictions that have experience in regulating (cross-border) mediation and other relevant empirical evidence;
- available resources that may support mediation law and its implementation, for example, existing laws, infrastructure and institutions; and
- the expertise of the professional mediation community.

started working on a new set of mediation rules designed specifically for investor-state disputes. The latest draft of the proposed Mediation Rules was published in Working Paper #4: Proposals for Amendment of the ICSID Rules, in February 2020, available at https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf (last accessed 11 March 2021).

[7] Matthew Erie, "The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution," *Virginia Journal of International Law* 60, no. 2 (2020): 227.

[8] World Bank, "Belt and Road Initiative," Mar. 29, 2018, https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative. According to the World Bank, the Belt and Road Initiative (BRI) is an effort initiated by China to improve regional cooperation and connectivity between continents, endeavouring to build robust infrastructure, trade and investment ties between China and at least 65 other countries which, together, account for over 30 per cent of global GDP, 62 per cent of the world's population, and 57 per cent of known exploited energy reserves.

[9] International Monetary Fund, "World Economic Outlook, April 2019: Growth Slowdown, Precarious Recovery," Apr. 2019, https://www.imf.org/en/Publications/WEO/Issues/2019/03/28/world-economic-outlook-april-2019#Chapter%202. According to 2019 figures, Asia accounted for almost two-thirds of global growth.

[10] See, for example, the proposed APEC-wide ODR framework that is set to provide access to commercial justice for micro, small and medium enterprises (MSMEs) in cross-border B2B disputes. APEC is the Asia Pacific Economic Council. APEC, "APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes – Endorsed," 2019/SOM3/EC/022, Second Economic Committee Meeting in Puerto Varas, Chile, 26-27 August 2019. Available at http://mddb.apec.org/documents/2019/ec/ec2/19_ec2_022.pdf (last accessed 11 March 2021).

To this end, I take a deep dive into the laws applicable to cross-border commercial mediation in two Asian jurisdictions considered as leaders in dispute resolution: Hong Kong[11] and Singapore. Throughout the past decade, I have been an active member of the professional mediation community in both of these jurisdictions, first Hong Kong and then Singapore. In this capacity, I have contributed to their respective regulatory initiatives on mediation. It is from this dual "insider/outsider" perspective that this essay is situated, as it draws upon empirical studies, academic literature and legal analysis throughout.

Before introducing a framework for comparison, it is important to emphasise that law is essential but not sufficient to build mediation capacity. Equally essential are aspects of the mediation ecosystem such as infrastructure including digital technology, a cadre of professional mediators, institutions that offer international mediation services, regulatory and institutional connections between mediation and other dispute resolution systems such as arbitration and litigation, a supportive judiciary, ongoing educational initiatives, and a monitoring and review mechanism.[12] This essay targets one piece of the mediation puzzle – law.

Law forms the foundation of mediation systems and international mediation hubs. As Gloria Lim states, commercial dispute resolution users value "a sound, transparent and predictable trusted legal framework and environment." Where mediation clauses are drafted years before a dispute may arise, it is vital that "commercial parties […] be assured that with the passage of time, such clauses remain honoured […] as the parties had envisaged when they first signed their agreement."[13] In the wake of the Singapore Convention and with much institutional and regulatory activity in the investor-state mediation space,[14] designing and implementing comprehensive (cross-border) mediation law will be an important initial task in many jurisdictions.

Meaning of Mediation "Law" and "Regulation"

Not all mediation law will be found in legislation. In fact, a focus on statutory intervention alone captures only a thin slice of how cross-mediation practice is being regulated; further it represents an outdated view of regulation. In line with contemporary theories of regulation, the terms "regulation" and "law" have a broad meaning that include notions of soft and hard law, embrace pluralistic thinking and view regulation as a system comprising a range of regulatory

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[11] Hong Kong refers to The Hong Kong Special Administrative Region of the People's Republic of China.

[12] Nadja M. Alexander, "The Singapore Convention: What Happens After the Ink has Dried?" 30(2) *American Review of International Arbitration* (2019), 235–262. In relation to arbitration, Anselmo Reyes and Weixia Gu listed six reforms that are necessary for developing arbitration and transforming a country into an arbitration-friendly jurisdiction in the Asia Pacific region: acceding to the New York Convention; adopting the Model Law on Arbitration; establishing national arbitral institutions and centres and ensuring that their rules represent best practices; establishing a corps of judges familiar with arbitration practice to ensure that arbitration agreements and arbitral awards are enforced in accordance with best international practices; engaging in capacity-building activities; and constantly reviewing legislation relating to arbitration. See Anselmo Reyes & Weixia Gu (eds.), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Bloomsbury Publishing Plc, 2018), at 1–17.

[13] Gloria Lim, "International Commercial Mediation: The Singapore Model," *SAcLJ* 31 (2019): 386–387.

[14] In 2012, the International Bar Association adopted Rules for Investor-State Mediation. In 2016, the Energy Charter Secretariat published the Guide on Investment Mediation. In 2018, the ICSID started working on mediation rules designed specifically for investor-state disputes. In February 2020, the ICSID published the latest draft of the proposed mediation rules.

instruments and interactions with diverse mediation stakeholders.[15] In the context of mediation, the involvement of various regulatory actors leads to engagement with regulatory forms beyond formalistic law and extends to forms of so-called soft law, such as codes of conduct, institutional mediation rules, and standard mediation agreements and clauses.[16] In addition, regulation by private contract (specific mediation agreements and clauses adapted to client needs) and the market laws of supply and demand play an important role in shaping the regulatory landscape for mediation. Soft forms of regulation possess greater capacity to respond to changing circumstances and needs. By way of illustration, standard mediation agreements may be varied by the parties to them and only become binding on the individuals when they enter a contractual relationship. Legislation, by contrast, can apply directly to individuals and may be mandatory, in which case it will override any contractual arrangements to the contrary.

In a world of global villages with growing access to affordable telecommunications and other technologies, regulatory activities led by dispute resolution stakeholders (for example, professional mediation communities and international law firms and corporations) can expand beyond jurisdictional boundaries and occur increasingly on an international scale. Such cross-border initiatives offer opportunities for harmonization. Equally, their adaptive nature has the potential to encourage diversity. As argued in previous work, both diversity and harmonization are important values and the tensions between them are vital to achieve sustainable and responsive international mediation practice.[17] As a result, a mix of regulatory forms for mediation is desirable.[18] In this essay the terms "regulation" and "law" go beyond a focus on legislation to include soft law as described above.

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[15] See Christine Parker et al., eds., *Regulating Law* (Oxford: Oxford University Press, 2004), especially the following chapters: Hugh Collins, "Regulating Contract Law", 29, Colin Scott, "Regulating Constitutions", 227, and John Braithwaite and Christine Parker, "Conclusion", 270 *ff*; Peter Drahos, ed., *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017), especially "Section 2: Theories and Concepts of Regulation": 115–247; Klaus J. Hopt and Felix Steffek, "Chapter 1 Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues," in Klaus J. Hopt and Felix Steffek, eds., *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2013): 114.

[16] Nadja M. Alexander, "Through the Looking Glass: Exploring the Regulatory-Ethical Eco-system for Mediation" in Maria Moscati, Michael Palmer & Marian Roberts (eds.), *Comparative Dispute Resolution* (Cheltenham: Edward Elgar Publishing, 2020): 172–189.

[17] Nadja M. Alexander, "Harmonization and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform," in Hopt and Steffek, eds., *Mediation: Principles and Regulation*. In the context of international arbitration, Luke Nottage examines tensions around glocalisation and in/formalisation. He describes how international arbitration in the 1950s and 1960s was informal in nature and characterised by the norms of international practices rather than national norms. Then, in the 1970s and 1980s it became more formalised and dominated by national legal traditions, particularly from common law countries. After that, in the 1990s and 2000s, international arbitration partially shifts back towards informal and international norms. These tensions between formal and informal, and between global and local (or national) continue to shape the field. Nottage argues that the formalisation of international arbitration and domination by common law traditions were partially due to the entry of big international law firms which applied a more adversarial common law approach in arbitration cases. Nottage notes that informality and globalisation in the 1990s and 2000s were promoted by the adoption of UNCITRAL instruments such as the Model Law on International Commercial Arbitration and recommendations regarding the liberal interpretation of the writing requirements prescribed in the New York Convention. See Luke R. Nottage, "In/Formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia," in Joachim Zekoll, Moritz Bälz and Iwo Amelung (eds.), *Formalisation and Flexibilisation in Dispute Resolution* (The Netherlands: Brill, 2014): 215–217.

[18] For example, see Council Directive 2008/52/EC, Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3. The Directive identifies aspects of mediation that require regulation by EU member-states. The recitals clearly recognise different forms of regulation of mediation including self-regulation (recital

Having established that law can take different regulatory forms, the content of mediation law is now considered; specifically, what aspects of mediation law can be subject to regulation?

In terms of its functional content, mediation law may:

1. facilitate access to mediation pathways and trigger the mediation process (triggering mechanisms);
2. regulate aspects of the conduct of the mediation process itself (process and procedure);
3. support the development and recognition of the mediation profession by establishing standards for credentialing of mediators and other quality assurance measures for mediation practice (professional and ethical standards);
4. protect participants in mediation processes by clarifying their respective rights and obligations (rights and obligations).

These four categories offer a well-established structure for thinking about (cross-border) mediation law and an approach for comparing mediation law in different jurisdictions.[19]

Bringing regulatory form and content together, we can now ask the question, what aspects of mediation are regulated *and how*? Comprehensive legal regimes for mediation comprise a strategic combination of diverse regulatory forms (i.e. hard and soft law) to fulfil the four functions set out above. Further, it is also important to consider the extent to which cross-border and domestic mediation regulation are usefully harmonized in a given jurisdiction. These issues are examined below.[20]

Armed with this broad, inclusive and structured definition of mediation law, let us turn to the two case study jurisdictions, Singapore and Hong Kong.

A Tale of Two Asian cities

While cross-border mediation practice remains in its infancy, there are signs of its emergence as a standalone dispute resolution process, and as part of mixed mode procedures, in both online and offline (or face-to-face) formats.[21] Already considered to be leading international

14), specifically referring to the European Code of Conduct for Mediators and market-based solutions (recital 17). Recital 16 encourages member-states to ensure that appropriate quality control mechanisms for mediation services are in place. Article 4 of the Directive requires member-states to encourage mediators and mediation organisations to adhere to voluntary codes of conduct and other quality control mechanisms.

[19] For an application of this functional content approach to analyse mediation law, see Nadja M. Alexander, *International and Comparative Mediation: Legal Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2009), and Nadja Alexander, Sabine Walsh, and Martin Svatos, eds., *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer, 2017).

[20] See the section entitled "Congruence of Laws" below.

[21] Nadja Alexander, Vakhtang Giorgadze, and Allison Goh, "Singapore International Dispute Resolution Academy International Dispute Resolution Survey (SIDRA Survey): 2020 Final Report,": 5–6, 46–60, 71–76, https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html.

arbitration hubs[22] with strong rule of law rankings, [23] Hong Kong and Singapore are leading the way in terms of setting up legal environments that support and encourage, cross-border mediation.[24]

As former English colonies, Singapore and Hong Kong, inherited the common law system, which has become well-established as a choice of law in international business. [25] Contemporary mediation practice first emerged in western common law jurisdictions such as the United States, Canada and Australia in the 1970s and 1980s. However, it was not until the 1990s,[26] around the same time as mediation was developing as a credible commercial dispute resolution mechanism in England that the mediation phenomenon emerged in Hong Kong and Singapore -- at first domestically and then as part of the respective governments' international agenda to grow international dispute resolution hubs. In 2021, mediation in both jurisdictions

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[22] Other leading arbitration hubs are London, Paris, Geneva, Beijing and Shanghai. See SIDRA Survey, 34. The findings of the SIDRA Survey showed that Singapore was selected as the most commonly used arbitration seat, followed by Hong Kong in the third place. The Singapore International Arbitration Centre (SIAC) was selected as the most commonly used arbitration institution, followed by the Hong Kong International Arbitration Centre (HKIAC) in the fourth place. See SIDRA Survey, 34 and 39. See also White & Case LLP and Queen Mary University of London School of International Arbitration, "2018 International Arbitration Survey: The Evolution of International Arbitration," (May 9, 2018): 9 and 13 (the 2018 Queen Mary Survey), which revealed that Singapore and Hong Kong were the third and fourth most preferred international arbitration seats respectively, while SIAC and HKIAC were the third and fourth most preferred international arbitration institutions respectively. The report is available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

[23] Looking forward, there has been speculation about the future stability of the Hong Kong rankings in relation to international arbitration, and whether Hong Kong's push towards international mediation and online dispute resolution (e.g. through eBRAM: www.ebram.org) seeks to address any future shifts in its international arbitration market share. Data on rankings available at the time of writing is set out here. In the Rule of Law Index compiled by the World Justice Project, both Singapore and Hong Kong placed within the top 3 countries in Asia: "Rule of Law Index 2020," World Justice Project, https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf. In particular, the civil justice systems of both jurisdictions were scored as being "free of corruption" or "improper government influence", "effectively enforced", and having "accessible, impartial, and effective" alternative dispute resolution mechanisms: "Rule of Law Index 2020 Factors: Hong Kong SAR, China," World Justice Project, https://worldjusticeproject.org/rule-of-law-index/factors/2020/Hong%20Kong%20SAR%2C%20China/Civil%20Justice; "Rule of Law Index 2020 Factors: Singapore," World Justice Project, https://worldjusticeproject.org/rule-of-law-index/factors/2020/Singapore/Civil%20Justice. In the Global Competitiveness Report 2019, both Hong Kong and Singapore ranked within the top 3 under the "efficiency of legal framework in settling disputes" sub-factor: "Global Competitiveness Report 2019," World Economic Forum, http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf. In the IMD World Competitiveness Ranking, "effective legal environment" was one of the key attractiveness indicators for both Hong Kong and Singapore: "Competitiveness Country Profiles," IMD World Competitiveness Centre, https://www.imd.org/wcc/world-competitiveness-center-rankings/competitiveness-country-profiles/. In the Fraser Institute's Economic Freedom of the World 2020 Annual Report, Hong Kong and Singapore were ranked as the top two in Asia for "legal system and property rights", which is based on factors including judicial independence, impartial courts, protection of property rights, integrity of legal system, and enforcement of contracts: "Economic Freedom of the World: Annual Report 2020," Fraser Institute, 4 and 11–15, https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2020.pdf.

[24] On the emergence of Hong Kong and Singapore as dispute resolution hubs, see Nobumichi Teramura, Shahla Ali, and Anselmo Reyes, "On Expanding Asia-Pacific Frontiers for International Dispute Resolution: Conclusions and Recommendations," in Luke Nottage, et al., eds, *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, 2020), and Erie, "The New Legal Hubs".

[25] Bill Marsh, Alexander Oddy and Jan O'Neill, "Chapter 9: England and Wales", in Alexander, Walsh, and Svatos, eds., *EU Mediation Law Handbook*: 207.

[26] Loukas A. Mistelis, "ADR in England and Wales: A Successful Case of Public Private Partnership," in Nadja Alexander, ed., *Global Trends in Mediation* (Germany: Centrale Fur Mediation, 2003): 144.

has a firm foothold in policy, education and practice. Both Hong Kong and Singapore boast a pro-mediation judiciary and government. While local and cross-border mediation practice still has room to develop, data suggests continued positive growth in this regard.[27] For example, mediation played an important role in the resolution of B2C financial disputes emerging out of the global financial crisis of 2008;[28] in 2021, anecdotal evidence suggests a boost for B2B as well as B2C mediation linked to the global recession coming out of Covid-19.[29] Further, at government and institutional levels, both jurisdictions have embraced mediation as a policy congruent with Asian cultures, values and traditions.[30] In Hong Kong, principles of harmony

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[27] The HKIAC administered 690 mediation cases between the years 2009-2020. See the statistics at: https://www.hkiac.org/about-us/statistics (last accessed 11 March 2021). Also, Hong Kong's mediation statistics for Civil Justice Reform-related cases between the years 2011-2019 show that 10929 mediation notices were filed in the Court of First Instance and 14356 mediation notices were filed in the District Court. See the full statistics at: https://mediation.judiciary.hk/en/figures_and_statistics.html#msfcjrrc (last accessed 11 March 2021). As for Singapore, Singapore Mediation Centre (SMC) has mediated more than 4800 matters worth over $10 billion since its launch on 16 August 1997, 70% of which have been settled. Available at https://www.mediation.com.sg/about-us/about-smc/#:~:text=SMC%20has%20mediated%20more%20than,under%20Singapore's%20Mediation%20Act%2017 (last accessed 11 March 2021). Mr Edwin Tong SC, Minister for Community, Culture and Youth and Second Minister for Law, in his speech delivered at the SIMC Singapore Specialist Mediators Empanelment Ceremony on 11 December 2020, mentioned that the Singapore International Mediation Centre (SIMC) administered a record number of 43 cases in 2020. The speech is available at https://www.mlaw.gov.sg/news/speeches/2020-12-10-speech-by-second-minister-edwin-tong-at-simc-singapore-specialist-mediators-empanelment-ceremony (last accessed 12 March 2021).

[28] Mediation played an important role in the resolution of financial disputes relating to the bankruptcy of Lehman Brothers after the global 2008-2009 financial crisis. In 2008, the Hong Kong Monetary Authority announced an arbitration and mediation scheme for the resolution of these disputes under the framework of the HKIAC. The first step of this scheme was mediation, which would be followed by arbitration in case of failure by parties to arrive at a settlement. Under this scheme, as of 31 December 2009, of the 86 cases that were referred to mediation, 76 cases were settled. No case was referred to arbitration. See Shahla F. Ali, *Consumer Financial Dispute Resolution in a Comparative Context: Principles, Systems and Practice* (Cambridge University Press, 2013): 155–162. In Singapore, the Financial Industry Disputes Resolution Centre ("FIDReC") handled 2386 cases relating to the collapse of Lehman Brothers in the 2008-2009 financial crisis, which represented more than a 500% increase as compared to the previous financial year. See Financial Industry Disputes Resolution Centre Ltd, Annual Report 2014-2015, 10th Anniversary Edition: 17. Available at https://www.fidrec.com.sg/website/annualreports/FIDReC%20AR%202014-2015.pdf (last accessed 11 March 2021).

[29] On the importance of mediation as a cost- and time-effective dispute resolution mechanism during the Covid-19 Pandemic, see Tong, Speech at SIMC Empanelment Ceremony on 11 December 2020. See also Nadja Alexander, "Mediation: the new normal?" *SMU Law and COVID-19 SSRN eJournal* (2020): 245–254.

[30] See, for example, the Foreword of Department of Justice of The Government of the Hong Kong Special Administrative Region, "Report of the Working Group on Mediation," Feb. 2010, https://www.doj.gov.hk/en/legal_dispute/pdf/med20100208e.pdf; Jaime Lye, "Mediating the ASEAN Way" in Joel Lee and Marcus Lim, eds., *Contemporary Issues in Mediation Volume 1* (Singapore: World Scientific, 2016); Parliament of Singapore, "White Paper on Shared Values," Paper Cmd No. 1 of 1991: para 4; Tan Dawn Wei, "Singapore, China to set up mediators' panel for Belt and Road projects," *The Straits Times*, Jan. 25, 2019, https://www.straitstimes.com/asia/east-asia/singapore-china-to-set-up-mediators-panel-for-belt-and-road-projects, referring to a speech by the then Minister of State for Law and Health, Mr Edwin Tong; Chan Sek Keong, "Launch of the SMU - Centre for Dispute Resolution -- Speech by Chief Justice Chan Sek Keong," Apr. 16, 2019, https://www.supremecourt.gov.sg/news/speeches/launch-of-the-smu---centre-for-dispute-resolution----speech-by-chief-justice-chan-sek-keong. On mediation and Asian values, see also "Asian Culture: A Definitional Challenge" in Joel Lee and Teh Hwee Hwee, eds., *An Asian Perspective on Mediation* (Singapore: Academy Publishing, 2009): 55–57; Joan V. Bondurant, *Conquest of Violence: The Gandhian Philosophy of Conflict* (Berkeley: University of California Press, 1965): 195; Thomas Weber, "Gandhian Philosophy, Conflict Resolution Theory and Practical Approaches to Negotiation," *Journal of Peace Research* 38, no. 4 (2001): 495. See also Eunice Chua, "The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution," *Asian Journal of International Law* 9 (2019): 203–205.

feature in academic and policy presentations on mediation.[31] In multi-ethnic and multi-religious Singapore, mediation is viewed as central to sustaining the city-state's social fabric.[32] The term MediASIAN was first coined to symbolize the strong relationship that Asian cultures have with mediation, historically, traditionally and in contemporary settings.[33] On a regional level at the Asia Pacific Economic Cooperation (APEC), both Hong Kong and Singapore have opted in to the APEC Collaborative Framework for Online Dispute Resolution, which aims to provide a regulatory and institutional framework to support commercial online dispute resolution, including mediation.[34]

Neither Hong Kong nor Singapore was amongst the early adopters of generally applicable legislative frameworks for mediation. In relation to regulating cross-border commercial mediation, this has turned out to be of advantage, as both jurisdictions have found themselves in a position to cherry pick from regulatory models in diverse mediation legal regimes around the world, and have not limited themselves to following common law trends in this regard.[35] At the time of writing, one of the most striking differences in the regulatory approaches of these two jurisdictions relates to the availability of direct enforcement for pre-litigation iMSAs – that is, iMSAs of disputes in relation to which litigation proceedings have not commenced. In Hong Kong, where the Singapore Convention has not yet been ratified, there is no legislation providing for direct enforcement of pre-litigation iMSAs. In contrast, Singapore provides direct enforcement mechanisms for commercial iMSAs in both its Mediation Act and the legislation implementing Singapore's obligations under the Singapore Convention, the Singapore Convention on Mediation Act. These aspects of international mediation law are explored further below. Next, a contextual overview of Hong Kong and Singapore respectively is offered, followed by a comparative analysis of cross-border mediation law in both jurisdictions.

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[31] Jeffrey K. L. Lee, "Mediation in Mainland China and Hong Kong: Can They Learn from Each Other?" *City University of Hong Kong, CityU Institutional Repository* (2013). Please see also the following speeches on mediation in Hong Kong: The Hon Chief Justice Andrew Kwok-nang Li at the conference on "Mediation in Hong Kong: The Way Forward," Sep. 27, 2020, https://www.hkcfa.hk/filemanager/speech/en/upload/68/Speech%20by%20the%20Chief%20Justice%20at%20Mediation%20Conference(30-11-2007)en.pdf and The Hon Madam Justice Lisa Wong's speech at the "Mediate First" Pledge Mediation Forum 2019, May 24, 2019, https://mediation.judiciary.hk/en/doc/The%20Hon%20Madam%20Justice%20Lisa%20Wong%27s%20speech%20at%20the%20the%20Mediate%20First%20Pledge%20Mediation%20Forum%202019.pdf.

[32] Pravin Prakash, "The Leviathan and its Muscular Management of Social Cohesion in Singapore," in Aurel Croissant and Peter Walkenhorst, eds., *Social Cohesion in Asia: Historical Origins, Contemporary Shapes and Future Dynamics* (Routledge, 2019).

[33] George Lim SC, "Back to 'MediAsian'" (Jul. 2014) http://www.mediatewith.me/portfolio/back-to-mediasian-august-2014/. See also the literature highlighting the cultural, political, economic and legal diversity across Asia and questioning the notion of "Asian values" as the following quote indicates: "[t]he diversity and richness of languages and traditions in Asia makes the suggestion of a uniform Asian cultural identity crude and fictitious": Lee and Teh, "Asian Culture – A Definitional Challenge": 52. In relation to mediation, the use of mediation interventions within arbitration procedures varies dramatically amongst Asian jurisdictions; for example, in China, mediation interventions are part and parcel of an overall arbitration procedure, whereas in Singapore or Hong Kong, there has traditionally been a strict separation between arbitration and mediation procedures. The more recent development of mixed mode dispute resolution protocols involving mediation and arbitration is discussed below.

[34] See APEC, "APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes – Endorsed".

[35] In Singapore, the ADR Committee Report of 1997 states "[…] Singapore can take an eclectic approach. We should select the best features from these and other countries to set up a national framework for promoting ADR processes." *Report of the Committee on Alternative Dispute Resolution* (1997): 3, as reported in Lim, "The Singapore Model," 381.

Hong Kong: Background and Context

The development of Hong Kong as a centre for international dispute resolution has been described by at least one commentator as "organic".[36] Mediation as a form of Alternative Dispute Resolution first appeared in the 1980s[37] and 1990s, primarily on an *ad hoc* basis.[38] In 2007 the then Chief Executive of the HKSAR foreshadowed a transformation of the dispute resolution landscape through mediation. Hong Kong's commitment to promoting the development of mediation locally, regionally and internationally has been reaffirmed on many occasions.[39] While most of the initiatives do not focus specifically on cross-border commercial mediation but rather mediation in civil and commercial disputes, their reach certainly extends to cross-border matters as envisaged by policy- and law-makers.

Over the years, the Department of Justice has established the following initiatives, which have played a significant role in the development of (cross-border) mediation practice in Hong Kong.

- The Working Group on Mediation (2008–2010), which produced the Hong Kong Mediation Report 2010.[40] The Report's 48 recommendations included the enactment of a legislative framework for mediation, the establishment of a premier accreditation body for mediators, the introduction of the corporate mediation pledge, the development of mediation schemes in various sectors, widespread promotion of mediation to litigants and the legal profession, the integration of mediation into school and higher education curricula, and the introduction of apology legislation.
- The Mediation Taskforce (2010–2012), which considered and implemented the Report's recommendations. Its work led to the enactment of the Mediation Ordinance[41] and a mediator accreditation and standards body, HKMAAL.[42]
- The Steering Committee on Mediation (since December 2012), which continues to monitor and promote mediation practice in Hong Kong.[43]
- The Inclusive Dispute Avoidance and Resolution Office (since 2019), which was established to better co-ordinate and implement, under the leadership of the

[36] Erie, "The New Legal Hubs": 225.
[37] Family mediation was first introduced to Hong Kong in the 1980s by non-governmental organisations such as the Hong Kong Family Welfare Society and the Hong Kong Catholic Marriage Advisory Council.
[38] A notable example from the 1990s is the Hong Kong airport construction project, which used a mixed mode dispute resolution process comprising mediation, adjudication and arbitration: Mark Wilson, "Hong Kong's New Airport and the Resolution of Disputes," *Hong Kong Law Journal* 25 (1995): 363–382.
[39] See for example, Teresa Cheng, Speech by SJ at opening ceremony of "Mediate First" Pledge Event (May 24, 2019), https://www.info.gov.hk/gia/general/201905/24/P2019052400773.htm; Chun-ying Leung, "The 2014 Policy Address: Support the Needy, Let Youth Flourish, Unleash Hong Kong's Potential," Hong Kong Government: 12; Chun-ying Leung, "The 2013 Policy Address: Seek Change, Maintain Stability, Serve the People with Pragmatism," Hong Kong Government: 9.
[40] Department of Justice of Hong Kong, "Report of the Working Group on Mediation."
[41] Mediation Ordinance (Cap 620) (Hong Kong).
[42] Department of Justice of The Government of the Hong Kong Special Administrative Region, "Mediation Task Force Terms of Reference," (2011): 2–3, https://www.doj.gov.hk/en/legal_dispute/pdf/mediation20110729e.pdf. HKMAAL is the Hong Kong Mediation Accreditation Association Limited.
[43] Department of Justice of the Government of the Hong Kong Special Administrative Region, "Steering Committee on Mediation, Terms of Reference," https://www.doj.gov.hk/en/legal_dispute/mediationCommittee.html.

> Secretary for Justice, initiatives that the Department undertakes in the areas of dispute avoidance and resolution — and this includes cross-border mediation.

Hong Kong Mediation Week[44] takes place every two years and features a variety of mediation-related events hosted by dispute resolution institutions. Every other year a major international conference is convened by the Department of Justice.[45] The Hong Kong Mediation Lecture takes places on an annual basis also.[46] In terms of the legal framework relevant to cross-border mediation, the following regulatory instruments and texts are noteworthy. Practice Direction 31[47] was introduced in 2010 and requires parties to mediate unless it is unreasonable to do so. It is frequently referred to as a starting point for regulatory developments in civil and commercial mediation in Hong Kong.

As indicated previously, the Hong Kong Mediation Report envisaged the enactment of generally applicable civil mediation legislation; as a result in 2013 the Mediation Ordinance came. Next, and also responding to the recommendations of the Hong Kong Mediation Report of 2010, Hong Kong became the first Asian jurisdiction to enact apology legislation to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution, for example, through mediation. The link between mediation and apologies was visible in the design, drafting and implementation of this legislation, which came into force in 2017.[48] Also in 2017, as part of its bid to provide a legislative framework for international mediation as attractive to international players as its arbitration framework, Hong Kong passed third party funding legislation for mediation (and arbitration).[49]

In relation to investment matters, a mediation mechanism has been adopted under the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) Investment Agreement[50] to help resolve investment disputes between investors and the Mainland or Hong Kong authorities or institutions. This has been supported by dedicated training for investor-state mediators.[51] Also making the most of Hong Kong's unique relationship with China, the territory has made a major push to promote the use of mediation among the various regions of

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[44] See https://www.doj.gov.hk/mediatefirst/en/conference/2018.html.
[45] See https://www.doj.gov.hk/mediatefirst/en/conference2020/event2020.html.
[46] The inaugural lecture was held in 2019, see https://www.legalhub.gov.hk/gallery.php?rp=inaugural-hong-kong-mediation-lecture#.
[47] See Hong Kong Practice Directions, https://legalref.judiciary.hk/lrs/common/pd/Practice_Directions.jsp. PD 31 was slightly amended in August 2014 and the revised PD 31 came into effect on 1 November 2014.
[48] Apology Ordinance (Cap 631) (Hong Kong).
[49] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Ord. No. 6 of 2017) (Hong Kong). The Ordinance was gazetted on 23 June 2017 but sections lifting the prohibition on third party funding were operational only as of 1 February 2019, following the Code of Practice for Third Party Funding of Arbitration (GN 9048) issued by the Secretary of Justice and a concurrent notice published in the Gazette. At the time of writing the provisions relating to mediation are not operative.
[50] Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), Investment Agreement, Jun. 28, 2017, https://www.tid.gov.hk/english/cepa/legaltext/cepa14.html. See Teramura, Ali and Reyes, "Expanding Asia-Pacific Frontiers for International Dispute Resolution". Also, Article 8(3) of the Agreement for the Promotion and Reciprocal Protection of Investments between Hong Kong and the United Arab Emirates, signed in 2019 and entered into force in 2020, requires the submission of an investment dispute to the competent authorities of a Contracting Party for conciliation, if this is required by that Contracting Party.
[51] Carrie Lam, Speech by CE at International Dispute Resolution Conference 2019 (Apr. 17, 2019), https://www.info.gov.hk/gia/general/201904/17/P2019041700390.htm.

the Greater Bay Area.[52] Developments in online mediation have proven to be helpful for these and other cross-border matters, particularly during the global health pandemic of 2020. Online dispute resolution has been spearheaded by the technology start-up, eBRAM,[53] the institutional members of which include legal and dispute resolution service providers and professional associations.[54] In addition to offering online mediation services for cross-border commercial and investment disputes, eBRAM offers mediation under Hong Kong's COVID-19 Online Dispute Resolution ("ODR") Scheme introduced in 2020.[55]

Finally, in a bid to offer a parallel infrastructure to Singapore's Maxwell Chamber Suites, Hong Kong announced its Legal Hub in 2020[56] to provide a premier platform for dispute resolution and business expansion in Asia. Space from Central Government Offices and former the French Mission Building is being made available to dispute resolution and law-related organisations, internationally.[57]

Since the introduction of PD 31 in 2010, Hong Kong moved quickly to develop itself as a centre for cross-border mediation as part of its international legal and dispute resolution hub. Although most of the regulatory and institutional initiatives identified above cover both domestic and international mediation, there has been increased attention placed on cross-border commercial and investor-state mediation in recent years. In the words of the Secretary for Justice, Teresa Cheng SC, "Moving forward, we will step up our efforts in promoting the use of mediation and enhancing public awareness of its benefits with the aim of strengthening Hong Kong's position as an international legal and dispute resolution services centre." [58]

Singapore: Background and Context

Singapore's path, while equally ambitious, has been a different one in which design features strongly. Building on strong domestic mediation institutional and regulatory foundations that date back to the mid-1990s,[59] Singapore shifted its focus to international mediation in the early 2010s. Having already designed and implemented a domestic mediation system and an international arbitration system, the Singapore government in early 2013 set up the Working Group to Develop Singapore into a Centre for International Commercial Mediation (ICM WG) – its mandate reflected unmistakeably in its title.[60] The ICM WG issued its report in November of the same year and set out six key recommendations, namely, (1) to design and implement a

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[52] National Development and Reform Commission, "Framework Agreement on Deepening Guangdong-Hong Kong-Macao Cooperation in the Development of the Greater Bay Area," https://www.bayarea.gov.hk/filemanager/en/share/pdf/Framework_Agreement.pdf. The Guangdong-Hong Kong-Macao Greater Bay Area encompasses the Guangdong Province, and the Special Administrative Regions of Hong Kong and Macao. Since 2017, there has been a push to deepen cooperation within the region.

[53] "eBRAM" stands for Electronic Business Related Arbitration and Mediation.

[54] For example, HKIAC, the Bar Association and the Law Society of Hong Kong are members of eBRAM.

[55] eBRAM, "Covid-19 Online Dispute Resolution (ODR) Scheme," https://www.ebram.org/covid_19_odr.html.

[56] Government of the Hong Kong Special Administrative Region, "Hong Kong Legal Hub," http://www.legalhub.gov.hk.

[57] Ting Kwok Iu, "Face to Face with Hong Kong's Secretary for Justice," interview with Teresa Cheng SC, *Kluwer Mediation Blog*, Aug. 2, 2020, http://mediationblog.kluwerarbitration.com/2020/08/02/interview_with_hksj/.

[58] Speech by SJ at opening ceremony of "Mediate First" Pledge Event, 24 May 2019, available at https://www.info.gov.hk/gia/general/201905/24/P2019052400773.htm (last accessed 4 March 2021).

[59] For an insightful overview of the development of Singapore's mediation eco-system, see Lim, "The Singapore Model".

[60] "Report and Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation" (Nov. 2013) (ICM WG Report), as cited in Lim, "The Singapore Model".

legislative framework for international commercial mediation, (2) to extend existing tax exemptions and incentives for foreign arbitrators to foreign mediators, (3) to review rules and court procedures with a view to encouraging greater use of mediation, (4) to establish international mediation services including the development of innovative user-centric products, (5) to establish a professional standards and accreditation body for mediation professionals, and (6) to undertake relevant promotional activities in target markets and key industries.[61]

As a direct result of the ICM WG Report, the Singapore International Mediation Centre (SIMC), an institutional service provider dedicated to international mediation, and the Singapore International Mediation Institute (SIMI), a credentialing and standards body, were established in 2014. A few months later, the SIMC, together with SIAC,[62] launched its innovative Arb-Med-Arb Protocol as the first of a number of user-centric protocols anticipated by the recommendations.[63] Tax exemptions for non-resident mediators were implemented in 2015. Then, in 2016 the Legal Profession Act was amended to extend certain exemptions regarding foreign mediators and foreign-qualified counsel already applicable to arbitration. Legislation applicable to international commercial mediation, namely the Mediation Act (MA), was enacted in 2017.[64] Further, changes to the Rules of Court (in 2014)[65] and the Supreme Court Practice Directions (in 2016)[66] were made in pursuance of the WG's recommendations. In 2019 Singapore introduced a review of the Civil Procedure Rules (CPR)[67], to further integrate mediation into Singapore's dispute resolution ecosystem.[68]

The implementation of the ICM WG's recommendations did not signal the extent of Singapore's international mediation initiatives; rather it inspired further developments. Sustained by a long-term vision for cross-border mediation as an integrated element of the international dispute resolution system, the Singapore government set up a platform for thought leadership and applied research in international mediation and dispute resolution, the Singapore International Dispute Resolution Academy (SIDRA).[69] The construction of a new state of the art international dispute resolution facility was completed in 2019; Maxwell Chambers Suites extends and improves the existing facilities at Maxwell Chambers. Further, as Chair of the UNCITRAL Working Group II deliberations that led to the adoption of the UN Convention on International Settlement Agreements Resulting from Mediation (known as the Singapore Convention on Mediation), Singapore has been at the forefront of promoting the Convention. Singapore was the first country to sign the Convention followed by 45 other states at the opening ceremony hosted by the city-state in August 2019. Not surprisingly, Singapore was the first country to ratify the Convention and for this purpose has enacted the Singapore

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[61] ICM WG Report (2013).
[62] SIAC refers to the Singapore International Arbitration Centre. https://www.siac.org.sg/.
[63] The Arb-Med-Arb Protocol is available here: https://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf.
[64] Mediation Act 2017 (Act No. 1 of 2017) (Sing.).
[65] Cap 322, R 5, 2014 Rev Ed. (Sing.), O 59 r 5. See below for further examination.
[66] Supreme Court Practice Directions (Sing.) (updated Mar. 27, 2019), para 35B(4). See below for further examination.
[67] Civil Procedure Rules - Rules and Directions (UK) are available here: https://www.justice.gov.uk/courts/procedure-rules/civil/rules.
[68] "Public Consultation on Civil Justice Reforms: The Recommendations of the Civil Justice Review Committee and Civil Justice Commission," Supreme Court of Singapore (Oct. 26, 2018), https://www.supremecourt.gov.sg/Data/Editor/Documents/Annex%20A_Public%20consultation%20paper%20on%20civil%20justice%20reforms.pdf.
[69] In 2020, SIDRA is a centre at the Singapore Management University and continues to be funded by the Ministry of Law in Singapore.

Convention on Mediation Act 2020.[70] Singapore is collaborating with UNCITRAL to offer the UNCITRAL Academy focussing on cross-border mediation. Further, the Singapore government curates and hosts the Singapore Convention Week on an annual basis; this global event features a variety of events held by local and international bodies on mediation and international dispute resolution. The long-standing Singapore Mediation Lecture[71] convened by the Singapore Mediation Centre and the Singapore Management University now takes places within Singapore Convention Week. Already home to numerous foreign dispute resolution institutions such as the ICC,[72] Singapore's initiatives continue to attract foreign dispute resolution institutions, with the PCA establishing its first Asian office in Singapore in 2017. Finally, in the wake of Covid-19, online mediation practice has grown. In addition to the launch of the SIMC Covid-19 Protocol providing 'expedited, economical and effective' online mediation, the recently-signed JIMC-SIMC Joint Protocol is the first mediation protocol of its kind between two international dispute resolution centres, and offers online mediation services to cross-border businesses.[73]

These are significant regulatory–institutional changes for cross-border mediation that have taken place within less than a decade. They are the result of targeted policymaking and a collaborative and inclusive approach to regulatory activity involving key stakeholders to build (international) mediation as a dispute resolution process in nearly all industries and government procurement systems.[74] As Minister Edwin Tong stated, "Businesses ultimately want to know that if they invest in Singapore, their investments will be safe, and should there be a dispute, they want to know that it will be resolved impartially in a transparent manner, quickly, expeditiously, and cost effectively. Mediation offers all of this."[75]

Next, cross-border mediation laws in both jurisdictions will be examined from a comparative perspective. The analysis will follow the four aforementioned functional categories for mediation law: triggering laws, procedural laws, standards, and rights and obligations.

Triggering Laws

Regulations, policies and initiatives that activate a pathway to, or trigger, mediation processes are referred to as triggering regulations, laws or mechanisms. They encourage the use of mediation in different ways and with varying levels of influence. Generally, triggers to

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[70] Please visit the official website of the Singapore Convention on Mediation: https://www.singaporeconvention.org/convention/about-convention/. Information about the signatory states to the Singapore Convention is available here: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

[71] See https://www.smu.edu.sg/SML2019?itemid=16836.

[72] ICC refers to the International Chamber of Commerce: https://iccwbo.org/. Other foreign dispute resolution organisations with an office in Singapore include the International Centre for Dispute Resolution and World Intellectual Property Organization.

[73] Singapore International Mediation Centre, "Singapore and Japan International Mediation Centres Launch Joint Mediation Protocol to Help Cross-Border Businesses Resolve Disputes Swiftly and Inexpensively," *SIMC News* (Sep. 13, 2020), https://simc.com.sg/blog/2020/09/13/singapore-and-japan-international-mediation-centres-launch-joint-mediation-protocol-to-help-cross-border-businesses-resolve-disputes-swiftly-and-inexpensively/.

[74] Sundaresh Menon, "Building Sustainable Mediation Programs: A Singapore Perspective," *Dispute Resolution Magazine* 22 (Fall 2015): 42–45.

[75] Edwin Tong, "Speech by Mr Edwin Tong, Senior Minister of State for Law and Health, at the SIMC Singapore Specialist Mediators Appointment Ceremony," (Jan. 4, 2020), https://simc.com.sg/blog/2020/01/04/speech-by-mr-edwin-tong-senior-minister-of-state-for-law-and-health-at-the-simc-singapore-specialist-mediators-appointment-ceremony/.

mediation may include court referral mechanisms contained in practice directions and procedural rules, mediation clauses in commercial contracts, and even legislative provisions that provide pathways to mediation. A global review of mediation regulatory practice has shown that having multiple, diverse triggering mechanisms is the most effective approach to encouraging the use of mediation across a range of sectors.[76]

In Singapore and Hong Kong, laws on triggering mediation feature in court practice directions and rules. In Hong Kong, PD 31 places a duty upon civil litigants to consider and reasonably engage in mediation before trial with costs sanctions for failure to do so.[77] PD 31 applies to all civil proceedings in the Court of First Instance and the District Court begun by writ. PD 31 Appendix A expressly sets out the proceedings to which PD 31 does not apply; these proceedings are dealt with in the specialised lists which have their own arrangements as to mediation under their respective PDs.[78] PD 31 effectively establishes an opt-out mechanism for parties: parties can opt out if there is a legitimate and reasonable ground to do so.[79] Legal advisers are under a duty to advise clients of the consequences of non-compliance with this obligation.[80] Similarly, in Singapore, the Supreme Court Practice Directions state that it is the professional duty of lawyers to advise their clients on the different ways disputes may be resolved using an appropriate form of ADR,[81] and that ADR must be attempted "at the earliest possible stage to facilitate the just, expeditious and economical disposal of civil cases".[82] Further, lawyers should advise their clients of potential adverse costs orders under Order 59 rule 5(1)(c) of the Rules of Court for any unreasonable refusal to engage in ADR.[83] In the State

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[76] See Alexander, "Chapter 3: Pre-Mediation I: Selection and Referral" in *International and Comparative Mediation*; Alexander, Walsh, and Svatos, eds., *EU Mediation Law Handbook*; and generally, Hopt and Steffek, eds., *Mediation: Principles and Regulation*.

[77] Hong Kong Practice Directions, https://legalref.judiciary.hk/lrs/common/pd/Practice_Directions.jsp. See PD 31, paras 4 and 5. Note: PD 31 was slightly amended in August 2014 and the revised PD 31 came into effect on 1 November 2014.

[78] Some of the specialised PDs adopt a similar mechanism to PD 31. For example, under PD 18.2 of the Employees' Compensation List, it is to be noted that paras 21, 23 and 24 require parties to use the standard forms of Mediation Certificate, Mediation Notice and Mediation Response contained in Appendices B, C and D of PD 31 respectively. PD 18.2 allows parties to make necessary modifications to the standard forms to suit the proceedings to which PD 18.2 applies. These include proceedings on any cause or matter begun by originating summons but were ordered to be continued as if the cause or matter had been begun by writ. See O 28 r 8 of the Rules of the High Court (Cap 4A) and Rules of the District Court (Cap 336) (Hong Kong), and also PD 31, Part A, para 2.

[79] PD 31, para 18.

[80] See PD 31, para 4.

[81] Supreme Court Practice Directions (Sing.) (updated 27 March 2019), para 35B(2). Appendix I to the Supreme Court Practice Directions further sets out Guidelines for Advocates and Solicitors Advising Clients About ADR. See also Legal Profession (Professional Conduct) Rules 2015 (No. S 706/2015), rr 17(2)(e)(i) and (ii), according to which a legal practitioner has a duty to evaluate together with his client whether the expense of, or risk involved in, pursuing a matter is justified and a complementary duty to evaluate together with his client the use of ADR processes. The Rules may be accessed here: https://sso.agc.gov.sg/SL/LPA1966-S706-2015#pr5-.

[82] Supreme Court Practice Directions (Sing.) (updated 27 March 2019), para 35B(4). On ADR Offers, see para 35C.

[83] See O 59 r 5(1)(c) of the Singapore Rules of Court (Chapter 322, R 5, 2014 Rev Ed.), which provides: "The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account – [...] the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution." See also rule 5 of the Legal Profession (Professional Conduct) Rules 2015, which may be interpreted to suggest that lawyers should furnish information concerning the resort to alternative dispute resolution processes when advising their clients. See Dorcas Quek Anderson, "Supreme Court Practice Directions (Amendment No. 1 of 2016): A Significant Step in Further Incorporating ADR into the Civil Justice Process," *The Singapore Law Gazette* (Mar. 2016), http://v1.lawgazette.com.sg/2016-03/1524.htm. This is because in Singapore, it is known that the courts will impose costs sanctions when it thinks that matters before itself should have been better resolved through mediation instead of litigation (see *HSBC Institutional Trust*

Courts, to which lower value cross-border commercial disputes may be routed, there is a presumption of ADR which permits parties to opt out.[84] At the Singapore International Commercial Courts (SICC), paragraph 77(11) of the SICC Practice Directions grants judges broad discretion to recommend (but not compel) parties to proceed to mediation.[85]

Empirical evidence on court-related mediation suggests that mechanisms which nudge parties towards mediation, such as those in Hong Kong and Singapore, are more likely to be associated with efficient legal frameworks for settling disputes compared to mandatory directives.[86]

As indicated previously, mediation clauses (or mixed mode clauses with mediation components) can trigger mediation processes. Indeed, the SIDRA Survey Report 2020 found that the most common reason why users entered into a mixed mode procedure involving mediation and arbitration was the existence of a mixed mode dispute resolution clause.[87] In Singapore[88] and Hong Kong,[89] mediation and mixed mode dispute resolution clauses are prima facie recognized and enforced by the courts.[90] Case law in both jurisdictions suggest that mediation clauses must be *meticulously drafted*[91] so that they may not be rendered

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Services (Singapore Ltd) (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd [2012] 4 SLR 738, paras 68–72; and also see O 59 r 5(1)(c) of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed.)), and "[a] legal practitioner must [...] when advising [their] client, inform the client of all information known to the legal practitioner that may reasonably affect the interests of the client in the matter."

[84] State Courts Practice Directions (Sing.), para 35(9).

[85] Singapore International Commercial Court Practice Directions Amendment No. 1 of 2016. Paragraph 77(11) states "Where parties are not willing to attempt mediation or any other form of ADR, the Judge *may* direct that the issue of mediation or any other form of ADR be considered at the next Case Management Conference or at a specified stage in the proceedings." (emphasis added)

[86] Shahla F. Ali, "Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation User Experience in Twelve Regions," *Cardozo J of Conflict Resolution* 19, no. 2 (Winter 2018); Charmaine Yap Yun Ning, "What's in a Nudge? How Choice Architecture Surrounding Dispute Resolution Options Can Increase Uptake of Mediation," in Joel Lee and Marcus Lim, eds., *Contemporary Issues in Mediation Volume. 4* (World Scientific Research, 2019).

[87] SIDRA Survey, 71–72.

[88] *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130, especially, para 54.

[89] *Hyundai Engineering and Construction Co Ltd v. Vigour Ltd* [2005] HKEC 258, paras 17–33, 37–41.

[90] For Singapore, see *Zhongguo Remittance Pte Ltd v. Samlit Moneychanger Pte Ltd and others* [2020] SGDC 73; *Ling Kong Henry v. Tanglin Club* [2018] 5 SLR 871, para 25; *Heartronics Corporation v. EPI Life Pte Ltd and others* [2017] SGHCR 17; *International Research Corp PLC* [2014] 1 SLR 130; *HSBC v. Toshin* [2012] 4 SLR 738, para 43. See also Sundaresh Menon, speech by CJ on "Judicial Attitudes towards Arbitration and Mediation in Singapore" at the ALA and KLRCA Talk and Dinner (Oct. 25, 2013), para 22, https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/judicial-attitudes-to-arbitration-and-mediation-in-singapore.pdf. For Hong Kong, see *Hui Ling Ling v. Sky Field Development Limited* (unreported, Jul. 22, 2009; HCA 35/2007) [2009] HKCU 1216, paras 5–6; *Hyundai Engineering and Construction* [2005] HKEC 258; *Dragomar S.p.A. v. Geoworks Contractors* (*HK*) *Limited* (unreported, Jan. 27, 1998; 1997, NO. A5399) [1998] HKCU 63.

[91] In Singapore, the mediation clause must be worded clearly, setting out in mandatory fashion with some specificity the personnel who are required to attend the dispute resolution process and the purpose of each meeting (e.g., to attempt to resolve any conflict which had arisen between the business parties): *International Research Corp PLC* [2014] 1 SLR 130, para 54. To reproduce the clause enforced (see para 7 of the judgment), the clause reads:

> 37.2 Any dispute between the Parties [ie, the Respondent and Datamat] relating to or in connection with this Cooperation Agreement or a Statement of Works shall be referred:
>
> 37.2.1 first, to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion; and (if the matter remains unresolved);
>
> 37.2.2 second, to a committee consisting of Datamat's designee and Lufthansa Systems' [ie, the

unenforceable for uncertainty. However, legislation introduced in Hong Kong [92] and Singapore[93] subsequent to these cases acknowledge mediation clauses in different ways and may potentially relax drafting requirements in these jurisdictions in the future. The Hong Kong legislation uses the definition of an "agreement to mediate" (the equivalent of a mediation clause or mediation agreement) to establish the scope of application of the Ordinance; in other words the Ordinance only applies to mediations conducted pursuant to an agreement to mediate.[94] The Singapore legislation contains a similar provision and uses the term "mediation agreement";[95] however it goes further, by expressly providing for judicial discretion to stay court proceedings when parties, not being in compliance with a mediation clause or agreement, institute court proceedings in respect of matters covered by that mediation clause or agreement.[96]

This examination of triggering laws shows that both Singapore and Hong Kong have pro-mediation judiciaries that recognize and support mediation triggering mechanisms such as mediation clauses and that also provide practice directions or procedural rules to encourage parties to engage in mediation. While the Singapore legislation expressly provides that courts have the discretion to stay proceedings so that parties can comply with the terms of a mediation agreement, the courts of both jurisdictions would conceivably have an inherent power to stay proceedings in circumstances of non-compliance with a mediation clause.[97]

Regulation of Procedural Aspects of Mediation

Mediation is known as a flexible dispute resolution process. Its flexibility is particularly linked to its procedure. Procedural aspects of mediation cover:

- the nature of preliminary meetings and intake;
- the nature and contents of agreements to mediate;
- how the mediator expects participants to prepare;
- whether there will be a single mediator or co-mediators;
- how discussions are structured;
- how agenda items are framed;
- the extent to which private meetings are utilised;
- the constellations of private meetings, for example mediator and one party; mediator, one party and lawyer; mediator and lawyers only; mediator and both parties only;

Respondent's] Director Customer Relations; and (if the matter remains unresolved);
37.2.3 third, to a committee consisting of Datamat's designee and Lufthansa Systems' Managing Director for resolution by them, and (if the matter remains unresolved);
37.2.4 fourth, the dispute may be referred to arbitration as specified in Clause 36.3 [*sic*] hereto.

[92] Hong Kong Mediation Ordinance (Cap 620), ss 2 and 6.
[93] Singapore Mediation Act 2017 (Act 1 of 2017), s 8.
[94] Hong Kong Mediation Ordinance, s 5.
[95] Singapore Mediation Act, s 6.
[96] Singapore Mediation Act, ss 8(1)–(2).
[97] See, for example, Nadja Alexander, et al., *Singapore Mediation Handbook* (Lexis Nexis, 2019) at paras 9.157 and 9.159 arguing in the Singapore context that the court has the inherent jurisdiction to grant a stay of proceedings in situations that would fall outside s 8 of the Mediation Act 2017 and referring to *Tomolugan Holdings Ltd v Silica Investors* [2016] 1 SLR 373. In this case O 92 r 4 of the Rules of Court was invoked in a request for the court to exercise its inherent powers of case management – specifically, to stay ongoing litigation in favour of certain matters being arbitrated first.

- how outcomes are documented and who is responsible for this task; and
- the extent to which there are post mediation follow up meetings.

Procedures that are used for the appointment of mediators, payment and administrative matters also fall within this category of mediation regulation.

A global review of mediation regulatory practice has shown that most jurisdictions prefer to use non-legislative regulatory forms to regulate such procedural matters.[98] These soft forms of regulation (for example, mediation agreements and institutional rules and codes) offer greater elasticity than legislation and also can be varied by the parties and easily updated from time to time by the institutions themselves. Both Hong Kong and Singapore regulate mediation procedure primarily through soft law mechanisms.

In line with the rationale of Recommendation 37 of the Hong Kong Mediation Report, the Mediation Ordinance does not deal with process aspects of mediation, apart from issues relating to appointment of mediators and permitting non-lawyers and foreign lawyers to participate in mediation.[99] Similarly, in Singapore, the ICMWG recommended the establishment of a professional body to set standards and establish a mediator credentialing system.[100]

As indicated previously, case law in Singapore and Hong Kong recognise appropriately drafted mediation clauses and agreements. These contractual instruments may include provisions to regulate procedural aspects of mediation; alternatively, they may incorporate institutional rules to address procedural points. Certainly, mediation clauses often incorporate the provisions of institutional rules into their terms, and as such they become binding on the parties. By way of illustration, sample mediation clauses of two leading service provider organisations, the SIMC[101] and the HKIAC,[102] provide templates of clauses that incorporate institutional mediation rules.[103] In terms of institutional rules and codes, SIMI provides its Code of Professional Conduct[104] that extends to procedural matters, and in Hong Kong, the HKMAAL Mediation Code with attached Sample Agreement to Mediate[105] is the most relevant text. Both codes contain provisions relating to mediator appointment, fees, confidentiality, impartiality, and other important matters. In relation to the mediation process, the HKMAAL Code places

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[98] See Felix Steffek, "Mediation in Europa und der Welt – Rechtsvergleichende Forschung zur Umsetzung der Mediationsrichtlinie," *Zeitschrift für Konfliktmanagement* 12, no. 1 (2009): 23.
[99] See Hong Kong Mediation Ordinance, s 7.
[100] Lim, "The Singapore Model": 386.
[101] For example, see the Singapore International Mediation Centre's (SIMC) Model Clause, http://simc.com.sg/dispute-resolution/mediation/; and its Arb-Med-Arb Protocol Model Clause, www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause.
[102] For the Hong Kong International Arbitration Centre's (HKIAC) Suggested Mediation Clause, see https://www.hkiac.org/mediation/rules/hkiac-mediation-rules.
[103] For further illustrations, see the sample mediation clauses and rules of the law societies of Hong Kong and Singapore respectively. For Hong Kong's sample Mediation and Med-Arb clauses, see https://www.hklawsoc.org.hk/pub_e/mas/clauses.asp; for its Mediation Rules, see https://www.hklawsoc.org.hk/pub_e/mas/rules.asp. For Singapore's sample clauses and rules, see The Law Society of Singapore, *Mediation Scheme Handbook 2017*, https://www.lawsociety.org.sg/wp-content/uploads/2020/01/LSMS-Handbook.pdf.
[104] The Singapore International Mediation Institute's (SIMI) Code of Professional Conduct can be found here: https://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct.
[105] The Hong Kong Mediation Accreditation Association Limited's (HKMAAL) Mediation Code can be found here: http://www.hkmaal.org.hk/en/HongKongMediationCode.php.

a duty on mediators to inform parties and their advisers about the mediation process and the roles of all participants including the mediator. It then goes on to offer procedural guidance for a facilitative mediation process. For example, clause 2 of the Sample Agreement to Mediate (attached to the Code) sets out some of the basic process steps in interest-based mediation, such as isolating the issues in dispute and helping to develop and explore options for resolution. Clause 4 confirms the non-advisory and non-determinative role of mediators, which will influence how they conduct the process. Of course, parties are free to vary the standard terms of the Sample Agreement to Mediate, and do so as a matter of practice. The SIMI Code takes a different approach and requires that mediators obtain the informed consent of parties and their advisers in relation to their approach to mediation (whether facilitative, directive or otherwise) and ensure that they understand what to expect in terms of the mediation's procedural characteristics and the roles of participants and mediators.[106] This type of disclosure would typically lead to a discussion with the parties and their advisers about the preferred way to proceed with the mediation, thereby promoting party autonomy. The Code expressly states that SIMI mediators "should draw on their expertise and experience to assist the parties in developing sustainable settlements during the mediation" with the consent of all parties. However, in the same provision, mediators are warned to "guard against prescribing solutions or offering any statement, suggestion, or value judgement which may create an undue influence on any one party towards accepting a specific outcome."[107]

Specialised Mediation Protocols have been created in both jurisdictions in the wake of Covid-19. One of the first DR institutions to do so, SIMC, introduced a SIMC Covid-19 Mediation Protocol to offer parties an expedited, economical and effective route to attempt to settle their international commercial disputes during the Covid-19 pandemic period. The Protocol features streamlined procedures, reduced fees and the option of online mediation. Subsequently, in collaboration with JIMC, it established the JIMC-SIMC Joint Covid-19 Protocol, which offers a co-mediator model for commercial disputes along the Singapore-Japan corridor.[108] Hong Kong's Covid-19 Online Dispute Resolution Scheme, introduced in 2020,[109] is especially focused on micro, small and medium-sized enterprises (MSMEs) that may be adversely affected or hard hit by the pandemic, with claim amounts capped at HK$500,000.

In Hong Kong, eBRAM has been appointed as the ODR service provider to provide e-mediation services as part of an e-mixed mode procedure, beginning with e-negotiation and with the last procedural option being e-arbitration.

Mixed mode dispute resolution protocols featuring mediation as a key element also contain provisions on mediation procedure. The eBRAM ODR Protocol provides one example. In Singapore cross-institutional collaboration has led to the following mixed mode protocols:

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[106] SIMI Professional Code of Conduct, para 5. While the HKMAAL Code has a similar provision in para 3, it is to be read in context of the provisions setting out facilitative mediation principles.
[107] SIMI Professional Code of Conduct, para 5.10.
[108] JIMC Kyoto and SIMC, "JIMC-SIMC Joint Covid-19 Protocol," (Sep. 12, 2020), http://simc.com.sg/v2/wp-content/uploads/2020/09/JIMC-SIMC-Joint-Protocol_FINAL-for-web.pdf. See also Nadja Alexander, "Japan-Singapore Joint Mediation Protocol Announced," *Kluwer Mediation Blog*, Sep. 16, 2020, http://mediationblog.kluwerarbitration.com/2020/09/16/japan-singapore-joint-mediation-protocol-announced/. On the JIMC, see generally, James Claxton, Luke R. Nottage, and Nobumichi Teramura, "Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?" *Journal of Japanese Law* 47 (2019).
[109] eBRAM, "Covid-19 Online Dispute Resolution (ODR) Scheme," https://www.ebram.org/covid_19_odr.html.

SIMC has teamed up with SIAC[110] to offer the Arb-Med-Arb Protocol, and with SMC[111] to offer the Singapore Infrastructure Dispute Management Protocol.[112]

This overview of how mediation procedure is regulated in Hong Kong and Singapore shows that this aspect of mediation law is largely regulated through the actions and initiatives of mediation users, mediators and mediation and other dispute resolution institutions in a way that maximises party autonomy. An active and flourishing professional mediation community in both jurisdictions means that we can expect more innovation in terms of soft law regulation of mediation procedure.

Setting Standards

As leading centres for cross-border dispute resolution, setting standards for mediators means being able to offer users an internationally recognized pool of local and foreign mediators who are appropriately qualified and skilled. As part of the international professionalization of mediation practice, there is a discernible trend towards the credentialing of mediators (also referred to as mediator certification or accreditation). This has taken different forms, namely:

- Legislative solutions, most commonly seen in early civil law regulation; or
- Regulation by a professional community of mediators.

Both Singapore and Hong Kong have made a deliberate choice to develop non-legislative uniform mediator credentialing and ethical practice standards designed by their respective professional community of mediators. The discussion in this section will focus on standards set by HKMAAL in Hong Kong and SIMI in Singapore, the two bodies that were established as premier mediator credentialing institutions on the recommendation of Mediation Working Groups in each jurisdiction.[113] At the same time, it is recognised that institutional mediation service providers and professional associations frequently have their own standards for mediators mediating under their auspices; for example the law societies of Hong Kong and Singapore have standards applicable to members who are solicitor-mediators.[114]

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[110] The SIAC-SIMC Arb-Med-Arb (AMA) Protocol can be found here: http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf. Unlike the use of mediation windows in arbitration or Arb-Med (see s 17 of the International Arbitration Act of Singapore (Cap 143A, 2002 Rev Ed.) and s 33 of the Arbitration Ordinance of Hong Kong (Cap 609)), the AMA Protocol separates mediation from arbitration by involving separate institutions and separate dispute resolution practitioners. The focus here is strongly on mediation with the AMA Protocol aiming to streamline and add transparency to this mixed mode dispute resolution procedure. While the more traditional Arb-Med procedures have rarely been used, the AMA Protocol has been invoked 23 times within the five years of its operation and has been incorporated as a clause in a much greater number of commercial contracts, according to data from the SIMC. On the AMA Protocol generally, see Aziah Hussin, Claudia Kück and Nadja M. Alexander, "SIAC-SIMC's Arb-Med-Arb Protocol," *New York Dispute Resolution Lawyer* 11, no. 2 (2018).

[111] SMC refers to the Singapore Mediation Centre. More information on the SMC is available here: https://www.mediation.com.sg/about-us/about-smc/.

[112] The Singapore Infrastructure Dispute-Management Protocol (SIDP) was launched in 2018, and promotes the use of Dispute Boards for large construction and infrastructure projects. See: https://www.mediation.com.sg/wp-content/uploads/2019/06/Guide-to-Singapore-Infracture-Disputre-Management-Protocol-Booklet.pdf.

[113] See above n 42 (for HKMAAL) and n 60 (for SIMI).

[114] See The Law Society of Singapore, *Mediation Scheme Handbook 2017*: 24–28. Prior to HKMAAL, the Hong Kong Law Society (HKLS) had its own credentialing system; since 2013 it has set out the requirements necessary to be admitted onto the Law Society's panels under its Mediator Admission Scheme; these follow the HKMAAL

In line with the general ethos of remaining adaptable to changing circumstances and needs, Singapore and Hong Kong have tended to embrace responsive regulation through uniform institutional and industry-based mediator standards which have the buy-in of users of mediation services, the professional community, of mediators, and formal and informal referrers (such as courts and lawyers). Significantly the establishment of credentialing and standards institutions independent of mediation service providers and training institutions in both jurisdictions signals a commitment to demonstrating the importance of quality assurance through high professional standards.

While there are strong similarities between the soft law regulation of mediator credentialing in both jurisdictions, there are also differences. In this overview, I highlight the main features of each system.

The Hong Kong Mediation Accreditation Association Limited (HKMAAL) was established at a time when there were more than 30 organisations in Hong Kong offering mediator credentialing to different kinds of standards. The aim of HKMAAL was to establish a uniform accreditation system with minimum standards. To this end it commenced in 2013 with four founder members, the Law Society of Hong Kong (LSHK), the Hong Kong Bar Association (HKBA), the Hong Kong International Arbitration Centre (HKIAC) and the Hong Kong Mediation Centre (HKMC), and other organisations have joined subsequently.[115] Prior to HKMAAL these organisations had their own credentialing systems and panels. Now their mediator members (and those of all subsequent organisational members of HKMAAL[116]) follow the HKMAAL credentialing system plus any additional standards imposed by their organisation. For example, Law Society members will typically need to be solicitors in addition to meeting the HKMAAL standards. Importantly mediators do not need to be part of a member organisation to be accredited by HKMAAL and placed on the HKMAAL panel; they can apply directly. This approach seeks to ensure the quality of mediations services by setting a uniform minimum standard amongst all member organisations, which comprise the vast majority of institutional mediation service providers in Hong Kong. At the same time, it permits organisations to set even higher standards, thereby maintaining quality and encouraging tailor-made credentialing solutions where desirable.

Therefore, HKMAAL offers accreditation for local and foreign mediators who meet the eligibility requirements, comply with the training, and pass the assessment. HKMAAL also offers an experience-based path to accreditation for mediators who are credentialed elsewhere and/or highly experienced.[117] Family mediation is considered a specialisation and HKMAAL has a separate credentialling system for family mediators. In all cases, HKMAAL eligibility requirements state that candidates must have at least three years working experience and in the

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requirements with the additional requirement of being a solicitor. HKLS also follows the HKMAAL Mediation Code for ethical practice standards: see The Law Society of Hong Kong, *Mediator Admission Scheme Information Package* (Oct. 2017): 3–6 and 9–11, available at https://www.hklawsoc.org.hk/pub_e/mas/doc/MediatorAdmiisioinSchemeInfoPack_201710.pdf.

[115] HKMAAL has successfully admitted other non-legal professional bodies as its corporate members, including the Hong Kong Institute of Architects, the Hong Kong Institution of Engineers, Centre for Effective Dispute Resolution (CEDR) Asia Pacific, Hong Kong Institute of Construction Managers, Hong Kong Institute of Arbitrators, Hong Kong Institute of Surveyors and others.

[116] Information about joining HKMAAL as an institutional member is available on its website: www.hkmaal.org.hk.

[117] See "How to become a Mediator - General Mediator" in the HKMAAL website: www.hkmaal.org.hk/en/HowToBecomeAMediator_G.php.

case of family mediators, candidates must have a relevant degree or a postgraduate qualification in addition to three years working experience in a relevant field.[118] While most mediators practising in Hong Kong have HKMAAL accreditation, it is not mandatory. Justice Secretary Teresa Cheng has pointed out that this factor helps to attract foreign mediators to Hong Kong.[119]

Established one year after HKMAAL in 2014, SIMI was established in a different mediation environment. Prior to the establishment of SIMI, most mediator credentialing was done via the Singapore Mediation Centre (SMC); therefore, there was not the same need to attract buy-in from multiple credentialling organisations by establishing institutional membership as there was in Hong Kong. SIMI members are its mediators and it also works with partner organisations on various initiatives. In addition to the different structure, the SIMI system has no work experience or degree eligibility requirements that compare to the HKMAAL system. SIMI has developed a four tier accreditation and certification system, with the fourth and highest level of the SIMI system corresponding to the International Mediation Institute certification.[120] In terms of recognition by international standards, SIMI Certified Mediators are able to apply to become IMI Certified Mediators without an additional assessment process, giving them credibility to work across borders and appeal to international parties.[121] As the SIMI name suggests, the accreditation system is designed for local and foreign mediators conducting both domestic and international mediations.[122] In other words, SIMI placed its focus on both international and domestic mediators from the start, in contrast to the initial domestic focus of HKMAAL and accreditation bodies in most other jurisdictions.[123] The service provider, SIMC, which boasts an internationally diverse mediator panel, requires that its local and foreign mediators are recognized and SIMI certified (to the highest level), thereby offering a transparent, independent and international quality-standard of mediation services. Further, Singapore's Mediation Act expressly acknowledges "designated" mediation service providers (for example, SIMC), and "approved" mediators (for example, SIMI credentialed). While non-recognized foreign mediators may conduct mediations in Singapore, they and their mediations will not be covered by the provisions of the Mediation Act (which include direct enforcement options for iMSAs). Such an approach aims to encourage foreign mediators to work in Singapore through designated institutions and apply for the appropriate SIMI recognition. Tax exemptions for foreign mediators further enhance the attractiveness of Singapore as a venue from a mediator's perspective.[124]

Diversity of mediators brings with it diversity of practices, which in turn raises the question as to how diversity is managed by standards bodies. Both the HKMAAL and SIMI are grounded

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[118] For details, see "How to become a Mediator - Family Mediator" in HKMAAL website: www.hkmaal.org.hk/en/HowToBecomeAMediator_F.php.

[119] See Iu, "Face to Face with Hong Kong's Secretary for Justice":
"In respect of accreditation, we have the Hong Kong Mediation Accreditation Association Limited ("HKMAAL"), which is a single body for accreditation of mediators in Hong Kong. Nonetheless, Hong Kong welcomes mediators from other jurisdictions to practise mediation here as accreditation by HKMAAL is not a mandatory requirement."

[120] IMI is a private public-interest organization established to certify international mediators based on its competency certification scheme and standards for training and assessment.

[121] See SIMI, "About The SIMI Credentialing Scheme," https://www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme.

[122] SIMI, "About The SIMI Credentialing Scheme."

[123] 50 per cent of SIMI panel mediators are from outside Singapore: www.simi.org.sg .

[124] See Singapore Ministry of Law, "Tax Exemption for Income Derived by Non-resident Mediators for Mediation Services Rendered in Singapore," (2016) https://www.mlaw.gov.sg/files/IndustryCircular29042016.pdf/.

in a facilitative mediation approach[125] yet accept diverse approaches to mediation. Generally, both bodies seem to allow mediators to adopt more directive mediating approaches, provided the consent of all parties is obtained.

Requirements for renewal of mediator credentialing are an integral part of the HKMAAL[126] and SIMI systems.[127] Both bodies also set standards and approval requirements for mediation training courses. Overall, the HKMAAL system is more centralised than the SIMI system; for example, whereas HKMAAL conducts mediator assessments itself, SIMI approves training bodies to assess and determine mediator competency provided certain requirements are met. HKMAAL has panels comprising general mediators, family mediators, assessors and supervisors, whereas SIMI features panels of mediators at each of its four levels.

Beyond credentialing, standards for ongoing ethical mediation practice are of increasing importance with the coming into force of the Singapore Convention on Mediation in 2020 – according to which one of the grounds of refusal to enforce an international mediated settlement agreement relates to a breach of mediator standards.[128] Examples of standards (variously known as codes of ethics, practice standards and professional codes of conduct) are the HKMAAL Code of Conduct[129] and the SIMI Code of Professional Conduct.[130] In Hong Kong, specialist standards for family mediators are found in the HKMAAL Guidelines for Professional Practice of Family Mediators (Mediation Rules).

Further, channels for users to offer feedback and make complaints are central to a professional standards system. In this regard, HKMAAL and SIMI have complaints and disciplinary procedures in relation to their member mediators.[131] For disgruntled mediation parties seeking redress in the form of civil law remedies in either Hong Kong or Singapore, it is conceivable that legal proceedings could be commenced against a mediator, for example for breach of the mediator's duties.[132]

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[125] For Singapore, see the SIMI Code of Professional Conduct, para 5.10, and the meaning of mediation in s 3 of the Mediation Act 2017 (Singapore). For Hong Kong, see the HKMAAL Sample Agreement to Mediation, clause 2, and the meaning of mediation in s 4 of the Mediation Ordinance (Hong Kong).

[126] While the HKMAAL Sample Agreement to Mediate attached to the Mediation Code indicates that mediators will not give professional advice to the parties, as a matter of practice, parties can and do vary these terms by consent.

[127] See "Renewal requirements" on the SIMI website: https://www.simi.org.sg/What-We-Offer/Mediators/Renewal-Requirements.

[128] UN General Assembly, Resolution 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018). Singapore has enacted legislation to implement the Convention: Singapore Convention on Mediation Act 2020 (Act 4 of 2020).

[129] The HKMAAL Code of Conduct, which is also known as the "Hong Kong Mediation Code", is available at http://www.hkmaal.org.hk/en/HongKongMediationCode.php.

[130] For example, the Singapore International Mediation Institute (SIMI) Code of Professional Conduct, www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct.

[131] See HKMAAL Rules for the Handling of Complaints Against an Accredited Mediator, http://www.hkmaal.org.hk/en/MediationRules_RulesForTheHandling.php;
Singapore International Mediation Institute, SIMI Mediator Feedback Form, http://www.simi.org.sg/Mediator-Feedback; and SIMI Assessment of Professional Conduct for SIMI Mediators, https://www.simi.org.sg/Portals/0/Code%20of%20Conduct/SIMI%20Assessment%20Of%20Professional%20Conduct%20%5BJAN%202017%5D.pdf.

[132] See, e.g., *Chan Gek Yong v. Violet Netto (practising as L F Netto) and another and another matter* [2018] SGHC 208, where allegations that the mediators pressured the plaintiff into signing a mediated settlement

Professional indemnity insurance is not required for mediators in either jurisdiction, however SIMI provides its mediators with basic professional indemnity insurance.[133] Further, lawyers acting as mediators in either jurisdiction would typically be covered under their existing professional indemnity insurance.[134]

This regulatory overview of mediator standards shows well-developed independent institutional mediator credentialing schemes in both Singapore and Hong Kong and mediator codes of ethical practice that are supported by the primary credentialing organisations in each jurisdiction. While the Mediation Act in Singapore will only apply to mediators that have met certain credentialing or institutional standards, no such condition exists for the application of Hong Kong's Mediation Ordinance. As breach of mediator standards is recognised as a ground of refusal for enforcing international mediated settlement agreements, standards as well as feedback and complaints mechanisms in relation to mediator conduct will increasingly be scrutinised.

Rights and Obligations

The rules governing the rights and obligations of mediation participants – including mediators, parties, lawyers, experts, translators, and administrative staff – link the mediation process and its participants directly to the legal system of the jurisdiction.[135] Rights and obligations of mediation participants are not only contained in legislation; they can also be found in case law and general law principles as well as in the terms of mediation agreements (and the institutional rules they incorporate).[136] This discussion[137] will focus on legislation with some reference to case law, in relation to the issues of enforceability of mediation clauses and mediated settlement agreements, and the confidentiality and admissibility of mediation communications in arbitration or court proceedings. Mention will also be made of apology legislation and third party funding legislation.

The starting point for a discussion of rights and obligations associated with participants in international commercial mediation is the applicable legislative framework in each jurisdiction: the Mediation Ordinance (MO) in Hong Kong,[138] which came into force in 2013, and the

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agreement were dismissed. These allegations were made in the course of litigation to which the mediators were not a party, and at the time of writing, no action against the mediator has been pursued.

[133] See SIMI Professional Indemnity Insurance, https://www.simi.org.sg/Portals/0/Events/Indemnity%20Insurance/Professional%20Indemnity%20Insurance.pdf . See also the professional indemnity insurance cover of The Law Society of Singapore, and in Hong Kong, of The Law Society of Hong Kong and the Hong Kong Bar Association.

[134] See The Law Society of Singapore, Professional Insurance Cover, https://www.lawsociety.org.sg/For-Public/Professional-Indemnity-Insurance; The Law Society of Hong Kong, Solicitors (Professional Indemnity) Rules, https://www.hklawsoc.org.hk/pub_e/professionalguide/volume2/default.asp?cap=19#10; Hong Kong Bar Association, HK Bar Professional Indemnity Association, https://hkbarpiadmin.com/.

[135] Nadja Alexander and Felix Steffek, *Making Mediation Law* (World Bank Group International Finance Corporation, 2016): 36, http://documents1.worldbank.org/curated/en/899611503551941578/pdf/119067-WP-REV-11-9-2017-15-33-48-MakingMedLaw.pdf.

[136] See, for example, provisions on rights and obligations associated with confidentiality in the HKMAAL Mediation Code at para 4, and the Singapore International Mediation Centre Mediation Rules at rule 9. The latter are available at: http://simc.com.sg/mediation-rules/.

[137] For a deeper consideration of the rights and obligations of mediation participants, see Alexander, et al., *Hong Kong Mediation* for Hong Kong, and Alexander, et al., *Singapore Mediation Handbook* for Singapore.

[138] Mediation Ordinance (Cap 620) (Hong Kong).

Mediation Act (MA)[139] in Singapore, which came into force four years later in 2017. Both pieces of legislation have similarities; in fact, the Singaporean legislation took inspiration from a number of Hong Kong provisions, thereby promoting a harmonised approach in the region in relation to confidentiality and admissibility of mediation evidence.[140] At the same time, there are some notable differences with the Singaporean legislation going further and addressing enforceability and (indirectly) credentialing.

Both pieces of legislation aim to encourage and facilitate the resolution of disputes by mediation.[141] They are remarkably similar in a number of aspects; for example:

1. the similarly-worded definition of mediation in both the MO and the MA is broad and yet also reflects an interest-based approach;[142]
2. the scope of application of each legislation extends to mediations which
   a. take place pursuant to a written mediation agreement (in Hong Kong called an agreement to mediate); and
   b. where the mediation is wholly or partly conducted in Hong Kong or Singapore, as the case may be, or where the mediation agreement provides that the legislation or the law of Hong Kong or Singapore, as the case may be, applies;[143]
3. a detailed regime for confidentiality and admissibility of mediation communications in subsequent proceedings is similarly worded and structured;[144]
4. both pieces of legislation contain a provision permitting foreign lawyers to represent parties in mediations conducted in Hong Kong or Singapore, as the case may be;[145]
5. in both jurisdictions, the legislation expressly binds the government.[146]

As explained in the previous discussion on standards, mediator credentialing and standards is primarily regulated by institutionally-generated soft law in both Singapore and Hong Kong. However, the Singaporean MA establishes a system whereby the Act only applies when parties engage a designated service provider, or a mediator accredited under a designated scheme.[147] On one hand, this regulatory approach encourages diversity in mediation practice by leaving the content of standards to institutional bodies; on the other hand, it promotes high ethical standards and competency by requiring mediations covered by the Act to be conducted by

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[139] Mediation Act 2017 (Act 1 of 2017) (Sing.).

[140] In the drafting of both the HK and Singapore mediation legislation, reference was had to mediation legislation in a wide range of jurisdictions and also to the then UNCITRAL Model Law on International Commercial Conciliation (subsequently amended and renamed in 2018). While inspiration for robust provisions on the confidentiality and admissibility of mediation communications may have come from the Model Law, the provisions themselves are different from the Model Law. Overall the provisions and scope of the legislation in each jurisdiction are the result of clear goals about the purpose the legislation was to serve. The content of the legislation certainly also reflects the thinking of the international professional community of mediators at the time of drafting.

[141] See s 3 of the MO and the long title of the MA. The latter reads: "An Act to promote, encourage and facilitate the resolution of disputes by mediation and for connected purposes, and to make consequential and related amendments to certain other Acts."

[142] See MO, s 4, and MA, s 3.

[143] See MO, ss 2 and 5, and MA, ss 4 and 6.

[144] See MO, ss 8–10, and MA, ss 9–11.

[145] See MO, s 7, and MA, s 17.

[146] See MO, s 6, and MA, s 5.

[147] Section 7 of the MA allows the Minister to designate mediation service providers (e.g., SIMC and others) and accreditation schemes (e.g., SIMI and others) in the Schedule to the Act.

mediators and service providers approved by the Minister. While the topic of standards is not addressed in Hong Kong's MO, an earlier draft of the MO contained a provision identifying HKMAAL as the default body for the appointment of mediators.[148] However the draft HKMAAL provision was removed in subsequent drafts as the incorporation of HKMAAL did not take place until after the MO was enacted. It is possible that future amendments to the Mediation Ordinance may incorporate a provision identifying HKMAAL as the default appointment body for mediators, in the same way as the Arbitration Ordinance provides for the HKIAC to be the default appointment body for arbitrators.[149]

One notable difference between the MO and the MA is that the former does not address enforcement of iMSAs while the latter does. During the drafting period of the MO from 2011 to 2013, it was considered unnecessary to legislate on enforcement of iMSAs as the general law already offered a number of options for their enforcement: courts recognised and enforced MSAs generally either as contracts, deeds of settlement, or consent arbitral awards.[150] Furthermore, for matters at any stage of litigation (including mediations pursuant to PD 31), parties can agree to have their iMSA recorded as a consent order of the court.[151] The variety of options in relation to the legal form (and therefore enforcement) of mediated outcomes was viewed as positive and consistent with the flexible nature of mediation itself. In turn, the scope for challenging an MSAs/iMSA depends on the legal form adopted. Another reason for not legislating on enforcement relates to the nascent state of international commercial mediation at the time of drafting. In 2011, it was considered too early to formulate a direct enforcement mechanism for iMSAs; to be effective, a certain level of international buy-in would have been required. Since then, commencing in 2015, we have seen international buy-in through the efforts of UNCITRAL which led ultimately to the Singapore Convention on Mediation.[152]

As indicated previously, the Singaporean MA was passed in 2017. During the deliberations on the legislation, Singapore was also chairing UNCITRAL WG II on developing a legal instrument on the enforcement of iMSAs. Global interest in international commercial mediation and enforcement issues was growing. Section 12 of the MA broke new ground at the time in relation to enforcement of iMSAs by permitting parties to a commercial iMSA reached *outside of any legal proceedings* to apply to the relevant Singapore court within eight weeks of

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[148] See, e.g., the Submission from The Law Society of Hong Kong on the Draft Mediation Bill (July 2011) and the comments on the clause dealing with default appointment of mediators by HKMAAL (cl 7): The Law Society of Hong Kong, "Draft Mediation Bill – Submission of the Law Society," LC Paper No. CB(2)2415/10-11(02), https://www.legco.gov.hk/yr10-11/chinese/panels/ajls/papers/aj0721cb2-2415-2-ec.pdf. Note that in the absence of a mechanism for default appointment of mediators, there is assistance available on questions relating to the appointment of mediators from the Judiciary's Mediation Information Office, the Joint Mediation Helpline Office and other mediation service providers.

[149] See the Arbitration Ordinance (Cap 609), s 24 (Hong Kong).

[150] See Arbitration Ordinance (Hong Kong), s 66. See also International Arbitration Act (Cap 143A, 2002 Rev Ed.) (Sing.), s 18.

[151] For example, the parties may jointly apply to have their mediated settlement recorded as a consent order, pursuant to O 42 r 5A of the Rules of the High Court (Cap 4A) (Hong Kong). An identical rule is found in O 42 r 5A of the Rules of the District Court (Cap 336H) (Hong Kong), which apply to the District Court. There are also other mechanisms; see Michael Wilkinson, et al., *A Guide to Civil Procedure in Hong Kong*, 6th edn (Hong Kong: Lexis Nexis, 2017): paras 13-74 to 13-92.

[152] UN General Assembly, Resolution 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018).

the iMSA to record it as a court order.[153] In other words, even in the absence of litigation proceedings, parties may agree to make use of the authority of the courts to elevate their contract to the status of a court order.

With the passing of the Singapore Convention on Mediation Act (SCMA) in 2020,[154] Singapore implemented the terms of the Convention including its enforcement provisions, offering yet another pathway for direct enforcement of iMSAs. The SCMA provides that a party seeking relief in relation to an iMSA that falls under the Act may proceed to the High Court of Singapore,[155] submit the written settlement agreement signed by the parties with evidence that it results from a mediation, [156] and apply to have the iMSA recorded as a court order for the purposes of enforcement[157] or invocation[158] as the case may be. No time limit is imposed in relation to the seeking of relief under the SCMA. At the time of writing, there is no equivalent legislation in Hong Kong, as the People's Republic of China has yet to ratify the Convention.[159]

Apart from enforcement mechanisms in the MA and the SCMA, other legal forms for iMSAs that are recognized in Singapore include contracts, settlement deeds, arbitral consent awards[160] and consent court orders.[161]

Still on the topic of legislation, it is important to point out the role of apology and third party funding legislation in the international mediation landscape. In 2010, Recommendation 43 of the Report of the Hong Kong Working Group on Mediation[162] stated:

> The question of whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body.

Seven years later in 2017, Hong Kong's Apology Ordinance (AO) was enacted. [163] Section 3 of the Ordinance sets out its aim to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.

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[153] Mediation Act (Sing.), s 12. Note the potential applicability of reciprocal recognition and enforcement legislation to court orders recording iMSAs pursuant to this section; for example, via the Foreign Judgments Act 1991 (Cth) (Austl.) or the Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev. Ed.) (Brunei).
[154] Singapore Convention on Mediation Act 2020 (Act 4 of 2020) (Sing.).
[155] Singapore Convention on Mediation Act, s 4.
[156] Singapore Convention on Mediation Act, s 6.
[157] Singapore Convention on Mediation Act, ss 4(1)(a)(i) and 5.
[158] Singapore Convention on Mediation Act, ss 4(1)(a)(ii) and 5. Alternatively, for invocation purposes, a party may simply fulfil the requirements set out in s 6 without applying for a court order: see s 4(1)(b).
[159] See Article 153 of the Hong Kong Basic Law.
[160] International Arbitration Act (Sing.), s 18.
[161] Prior to 2017 there was a practice of recording as court consent orders iMSAs arising out of litigation matters; such court consent orders not need to rely on s 12 of the Mediation Act: see, for example, Dorcas Quek Anderson, "A Coming of Age for Mediation in Singapore? Mediation Act 2016," *SAcLJ* 29 (2017): 287; Singapore International Commercial Court Practice Directions (effective from Jul. 20, 2020), r 77(12). See *HSBC v. Toshin* [2012] 4 SLR 738; *International Research Corp PLC* [2014] 1 SLR 130. On enforcement of iMSAs generally, see Eunice Chua, "The Enforcement of International Mediated Settlement Agreements Without the Singapore Convention on Mediation," *SAcLJ* 31 (2019).
[162] Department of Justice of Hong Kong, "Report of the Working Group on Mediation."
[163] Apology Ordinance (Cap 631) (Hong Kong), s 3.

Research confirms that apologies have the potential to restore and build relationships and communities, offering insights and learning to those involved – values shared in mediation.[164]

The AO features a broad and inclusive definition of apology which includes an express or implied admission of fault. The AO supports mediation by protecting apologies made prior to mediation from being construed as admissions of liability. An early apology made without fear that it be used as evidence of liability may encourage settlement negotiations and the use of mediation. Further, while apologies made in the course of mediation will usually be protected by legislative confidentiality provisions in Hong Kong, these are subject to exceptions. Therefore, in exceptional circumstances, apologies may not be protected, and this may create doubt in the minds of parties contemplating making an apology. Finally, apologies made as pursuant to an iMSA may not be protected by the confidentiality provisions of the MO[165] but would *prima facie* be covered by the AO. Apology legislation is significant in this regard as it enhances the mediation regulatory regime by providing apologies with better protection and the apologiser a broader safe harbour. There is no equivalent legislation in Singapore.

Legislation addressing third party funding of dispute resolution proceedings was introduced in Hong Kong and Singapore in 2017.[166] The new laws have paved the path for third party funding in dispute resolution in Asia's two leading dispute resolution hubs. This development reflects a shift in international attitudes and practices in relation to third party funding and, at the same time, a desire to keep a close eye on its development through regulatory measures.[167] The Singapore legislation extends to mediation arising out of arbitral proceedings such as Med-Arb or Arb-Med-Arb but not standalone mediation. In anticipation of these amendments, the SIAC released the Investment Arbitration Rules of the SIAC on 1 January 2017, which includes a rule giving tribunals the discretionary authority to order the disclosure of the details of the such funding agreements.[168] Guided by flexibility and with party autonomy in mind, the Singapore Institute of Arbitrators[169] and the Singapore Law Society[170] have released non-binding guidance notes on third party funding.

Hot on the heels of the amended legislation in Singapore, Hong Kong passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance in June 2017.[171] As

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[164] See Jennifer K. Robbennolt, "Apologies and Legal Settlement: An Empirical Examination," *Michigan Law Review* 102, no. 3 (2003); Robyn Carroll, "Beyond Compensation: Apology as a Private Law Remedy," in Jeff Berryman and Rick Bigwood, eds., *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2010); Ian Austen and Jason Horowitz, "Pope Rejects Call for Apology to Canada's Indigenous People," *The New York Times*, Mar. 28, 2018.

[165] Where iMSAs contain a confidentiality clause, the scope and impact of the clause will depend on its wording and may be subject to interpretation by the courts.

[166] For Singapore, see ss 5A and 5B of the Civil Law Act (Cap 43, 1999 Rev Ed.) and the Civil Law (Third Party Funding) Regulations 2017 (No. S 43/2017). For Hong Kong, see the Code of Practice for Third Party Funding of Arbitration (G.N. 9048) and Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Ord. No. 6 of 2017). See also the 2018 Queen Mary Survey: 9.

[167] Although third party funding of dispute resolution proceedings, in particular, litigation and arbitration, has become part and parcel of dispute resolution practice in jurisdictions such as England, Australia and the US, it is only just emerging but quickly gaining traction: 2018 Queen Mary Report: 18.

[168] SIAC Investment Arbitration Rules, 1st edn (Jan. 1, 2017), r 24(l).

[169] Singapore Institute of Arbitrators, SIArb Guidelines for Third Party Funders (May 18, 2017).

[170] The Law Society of Singapore, "Guidance Note 10.1.1 – Third Party Funding" (effective Apr. 25, 2017).

[171] Ord. No. 6 of 2017. The Ordinance was gazetted on 23 June 2017 but sections lifting the prohibition on third party funding for arbitration were operational only as of 1 February 2019, following the Code of Practice for Third Party Funding of Arbitration (G.N. 9048) issued by the Secretary of Justice and a concurrent notice published in the Gazette. However the prohibition has not been lifted in relation to standalone mediation.

with the SIAC, the HKIAC's new Administered Arbitration Rules (HKIAC Rules) entered into force on 1 November 2018, introducing, among others, amended provisions in relation to third party funding.

The main distinction between the developments in the legislative frameworks in Singapore and Hong Kong on third party funding for the time being is their scope. The Hong Kong Ordinance permits third party funding in both international and domestic arbitrations *and mediations,* as well as in related proceedings (including ancillary court proceedings) and also mixed mode procedures such as mediation within an arbitration framework. However, the provisions relating to standalone mediation are not yet in operation. In comparison, Singapore's amended Civil Law Act permits such funding only for international arbitrations and related proceedings, which would include Arb-Med-Arb and similar mixed mode procedures. At the time the amendments to the Civil Law Act were introduced, Senior Minister of State for Law, Indranee Rajah SC (as she then was), indicated a possibility that the framework would be expanded to other categories of dispute resolution proceedings – and these could conceivably include litigation and mediation.[172]

A second distinction is with respect to the requirement of disclosure. In Singapore, pursuant to the amendments to the Legal Profession (Professional Conduct) Rules for lawyers that entered into force in March 2017, legal representatives of funded parties have obligations related to disclosure.[173] By way of contrast, and consistent with the Ordinance, Art 44 of the HKIAC Rules places a funded party itself under a continuing obligation to disclose to each party to the arbitration, the tribunal and HKIAC the fact that a funding agreement has been made and the identity of the third party funder.

While the immediate focus and impact of these new legislative provisions is on international arbitration, these amendments have opened the door to third party funding of international mediation in the two top-ranking Asian dispute resolution jurisdictions.

Finally, there is a small but developing body of case law in both Singapore and Hong Kong, which addresses the rights and obligations of mediators, mediation parties, lawyers, and others involved in mediation.[174] Cases deal variously with enforceability and invocation of iMSAs[175]

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[172] Indranee Rajah SC, "Third Party Funding – Reinforcing Singapore as a Premier International Dispute Resolution Centre," (Jan. 24, 2017). See also Marla Decker and Nicholas Lingard, "Third Party Funding in Asia: Arrived, and Set to Thrive," *Above the Law Blog* (Dec. 12, 2018).

[173] See Part 5A of the Legal Profession (Professional Conduct) Rules 2015 (No. S 706/2015) (Sing.), added by the Legal Profession (Professional Conduct) (Amendment) Rules 2017 (No. S 69/2017) (Sing.).

[174] On case law in Singapore, see Nadja Alexander and Shouyu Chong, "Mediation and Appropriate Dispute Resolution," *Singapore Academy of Law Annual Review of Singapore Cases* 21 (forthcoming, 2020; published on e-First on Jul. 9, 2020), https://journalsonline.academypublishing.org.sg/e-First/Singapore-Academy-of-Law-Annual-Review-of-Singapore-Cases/ctl/eFirstPDFPage/mid/570/ArticleId/1273; Alexander, et al., *Singapore Mediation Handbook*: 370 *ff*. On case law in Hong Kong see Alexander, et al., *Hong Kong Mediation*; Anna K. C. Koo and Shahla Ali, "Mediation in Hong Kong SAR," in Wang Guiguo and Yang Fan, eds., *Mediation in Asia Pacific: A Practical Guide to Mediation and its Impact on Legal Systems* (Hong Kong: CCH Hong Kong, 2013).

[175] For Singapore cases, see, e.g., *Navin Jatia and others v. Ram Niranjan and another and other appeals* [2020] SGCA 31; *Inngroup Pte Ltd v. M Asset Pte Ltd* [2020] SGHC 197; *Chan Gek Yong v. Violet Netto* [2018] SGHC 208; *Lock Han Chng (Jonathan Luo Hancheng) v. Goh Jessiline* [2008] 2 SLR(R) 455, para 34. For Hong Kong cases, see, e.g., *Hyundai Engineering and Construction* [2005] HKEC 258.

and mediation or mixed mode clauses,[176] the scope of confidentiality in mediation processes,[177] and the obligations of parties and lawyers in mediation settings.[178] In relation to mediation clauses, judicial precedents in Hong Kong and Singapore have established that mediation clauses should be meticulously drafted so that they may not be rendered unenforceable for uncertainty.[179] In Hong Kong, Rogers V.P. of the Court of Appeal (as he then was) opined that mediation agreements should be precisely worded to define the specific steps which must be taken in order for the mediation process to take place when the dispute resolution clause is triggered.[180] For example, it would be prudent to specify a mediation service provider or a set of formalized mediation procedures[181] in a mediation clause as the mere reference of submission to a "Third Party Mediation procedure" would be too ambiguous for the courts to enforce.[182] Further, the inclusion of a "timetable specifying when various steps [of the mediation process] must be taken" would also assist with the precision of the mediation clause.[183] It is noteworthy that these cases were decided before the introduction of the Hong Kong Mediation Ordinance, which applies to "mediation conducted under an agreement to mediate" (an agreement to mediate is defined to include a mediation clause). It remains to be seen the extent to which the express reference to, and therefore acknowledgement of, agreements to mediate in the legislation may indirectly influence the courts' approach to mediation clauses in the future.

The Singapore MA[184] applies to mediations conducted pursuant to a 'mediation agreement' (the equivalent of Hong Kong's 'agreement to mediate') and the term is defined to include mediation clauses.[185] In addition, section 8 of the MA expressly permits courts to stay proceedings pursuant to a mediation agreement, thereby removing any doubt as to the *prima facie* validity of mediation clauses and the court's power to stay proceedings to give effect to

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[176] For Singapore cases, see, e.g., *Zhongguo Remittance v. Samlit Moneychanger* [2020] SGDC 73; *Ling Kong Henry v. Tanglin Club* [2018] 5 SLR 871, para 25; *Heartronics Corporation v. EPI Life* [2017] SGHCR 17; *International Research Corp PLC* [2014] 1 SLR 130; *HSBC v. Toshin* [2012] 4 SLR 738, para 43. For Hong Kong cases, see, e.g., *Hui Ling Ling v. Sky Field Development Limited* (unreported, Jul. 22, 2009; HCA 35/2007) [2009] HKCU 1216, paras 5–6; *Hyundai Engineering and Construction* [2005] HKEC 258; *Dragomar S.p.A. v. Geoworks Contractors* (*HK*) *Limited* (Unreported, Jan. 27, 1998; 1997, NO. A5399) [1998] HKCU 63.

[177] For Singapore cases, see, e.g., *LVM Law Chambers LLC v. Wan Hoe Keet and another and another matter* [2020] SGCA 29; *Ernest Ferdinand Perez De La Sala v. Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894, para 98; *Chan Gek Yong v. Violet Netto* [2018] SGHC 208; *Krishna Kumaran s/o K Ramakrishnan v. Kuppusamy s/o Ramakrishnan* [2014] 4 SLR 232, para 15. For Hong Kong cases, see, e.g., *Chu Chung Ming & Anor v. Lam Wai Dan & Ors* [2012] 4 HKLRD 897; *S v. T* [2011] 1 HKLRD 534, paras 3–4; *Wu Wei v. Liu Yi Ping* (unreported, Jan. 30, 2009; HCA 1452/2004) [2009] HKCU 126; *Hyundai Engineering and Construction* [2005] HKEC 258, para 40.

[178] For Singapore cases, see, e.g., *Heartronics Corporation v. EPI Life* [2017] SGHCR 17; *HSBC v. Toshin* [2012] 4 SLR 738, para 43–45; *International Research Corp PLC* [2014] 1 SLR 130, paras 90–97; *Asia Pte Ltd v. EZ-Import. Com Pte Ltd* [2004] SGDC 64. For Hong Kong cases, see, e.g., *WW v. LLN* [2020] HKCA 178; *LLC v. LMWA* [2019] 2 HKLRD 529; *Chan Shun Kei v. Hong Kong Construction (Hong Kong) Ltd* (unreported, CACV192/2014, Mar. 7, 2016); *Wing Hong Investment Co Ltd v. Fung Sok Han & Others* (unreported, HCA 2075/2009, Nov. 19, 2015).

[179] It is trite under English law that contractual clauses should hold some degree of certainty, such that they may not be avoided for uncertainty: see generally, *Scandinavian Trading Tank v. Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529, at 540.

[180] *Hyundai Engineering and Construction* [2005] HKEC 258, at para 29.

[181] Rogers V.P. considered the English case of *Cable & Wireless Plc. v. IBM UK Ltd.* [2002] EWHC 2059.

[182] *Hyundai Engineering and Construction* [2005] HKEC 258, at paras 29–30.

[183] *Hyundai Engineering and Construction* [2005] HKEC 258, at para 30.

[184] Mediation Act (Sing.).

[185] By and large, the terms "mediation agreement" and "agreement to mediate" are used interchangeably in international mediation circles.

them. Similar to Hong Kong, the Singapore precedents on the enforceability of mediation clauses predate the legislation. Prior to the MA, the position taken by the Singapore Court of Appeal adopted a similar approach to the Hong Kong cases previously cited. By way of example, the Singapore Court of Appeal has indicated that mediation clauses should be worded clearly, and establish in definitive and mandatory fashion (and with sufficient specificity) the personnel who are required to attend the dispute resolution process and the purpose of each meeting at different stages of the process.[186] It remains to be seen if the Singapore courts will take a more lenient approach in relation to the interpretation and enforcement of mediation clauses, given the provisions in the MA.[187]

Overall, the court decisions coming out of both Singapore and Hong Kong suggest that both jurisdictions have a pro-mediation judiciary with judges who are familiar with the regulatory framework for mediation, the nuances of mediation practice, and the legal issues associated with it.

Congruence of Laws

Domestic and international legal frameworks for cross-border mediation are useful to legal and client users if they are congruent rather than wholly or partially separate. In disputing situations where domestic and cross-border elements are present in the same dispute or in related disputes, it would make mediation potentially difficult if different laws were applicable to domestic and cross-border aspects in the same mediation. Mediation promises users the flexibility to address related disputes together in one mediation process and to address issues which may not technically form part of the legal statement of claim. This aspect of mediation is made significantly easier if domestic and international mediation legal frameworks are identical or harmonized.

In Hong Kong there is no differentiation between the law applicable to domestic MSAs and international MSAs. Certainly lawyers must be familiar with the common law rules, court practice directions and rules concerning litigation matters that are resolved at mediation, and the Arbitration Ordinance in relation to iMSAs that have been recorded as consent arbitral awards. The PRC has signed the Singapore Convention but at the time of writing, not yet implemented it. Once this occurs and Hong Kong implements the relevant Convention provisions, there will be an enforcement option open to iMSAs that is not open to domestic MSAs. However, given the international buy-in to the Singapore Convention and the fact that Hong Kong has no other legislation on commercial iMSA enforceability, this is unlikely to cause confusion. Rather it will likely enhance Hong Kong's enforceability regime for iMSAs and its overall desirability as an international mediation hub.

In Singapore, the legal frameworks for both domestic and international mediation are comprehensive and largely integrated such that domestic and cross-border commercial mediation with a Singapore element are regulated in the same way and according to the same rules. For instance, in relation to international commercial mediation, the primary piece of

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[186] *International Research Corp PLC* [2014] 1 SLR 130, para 54. Note the historically strict approach of the Australian courts in relation to mediation clauses: see, for example, *WTE Co-generation and Visy Energy Pty Limited v RCR Energy Pty Limited & Anor* [2013] VSC 314, and *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* [1995] 36 NSWLR 709 discussed in Alexander, *International and Comparative Mediation: Legal Perspectives*at 172.

[187] See *International Research Corp PLC* [2014] 1 SLR 130.

legislation is the Mediation Act, which applies to both domestic and cross-border mediation, provided there is a Singapore element.[188] With the introduction of the SCMA, which implements the Singapore Convention, the enforcement regime for iMSAs has become slightly more complex. The SCMA deals with the recognition and enforcement of international (and not domestic) commercial mediated settlement agreements but without the prerequisites set out in the MA.[189]

Legal practitioners will need to familiarise themselves with the different options available for recognition and enforcement of iMSAs available in Singapore. Significantly both the MA and the SCMA may apply to iMSAs in relation to disputes where litigation proceedings have not commenced.[190] This broad scope offers disputants opportunities to save time and costs associated with commencing litigation, whilst pursuing early options for settlement that promise direct and perceptible enforcement relief should it be required. Of course, there are differences between the MA and the SCMA that will influence choices and strategies in relation to the recognition and enforcement of iMSAs. For example, the MA only applies where the mediation is at least partly conducted in Singapore or where Singapore law otherwise applies pursuant to the mediation agreement; further, mediation service providers and mediators must meet certain standards; finally, the parties have eight weeks within which to apply for a consent order reflecting the terms of the iMSA. These requirements do not apply to the SCMA. Moreover, under the SCMA it is envisaged that only one party needs to apply to the court to record the iMSA as an order of the court – this is because the party applying will be seeking relief in relation to a dispute with the other party about the iMSA. In any case, in the event that parties succeed in obtaining enforcement of their iMSA as a court order under the MA, they will be precluded from doing so under the SCMA.

As in Hong Kong, domestic and international MSAs continue to be enforceable as contracts under the common law in Singapore. Further, where litigation proceedings have commenced before a Singapore court, then enforcement procedures for court-referred mediation may be available. Finally, when mediation takes place as part of mixed mode procedures such as the Arb-Med-Arb protocol, then iMSAs may also be enforceable as consent arbitral awards. As a result, parties have numerous options for enforcement in Singapore and legal practitioners must familiarise themselves with the variegated enforcement regime for iMSAs.

Conclusion

The analysis of the law applicable to iMSAs in Hong Kong and Singapore has demonstrated that both jurisdictions have shown leadership in the regulation of cross-border mediation, although their regulatory developments have varied in some ways.

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[42] Under s 6(1), the Mediation Act applies to any mediation wholly or partly conducted in Singapore or under a mediation agreement which provides that the MA or Singapore law is to apply to the mediation.

[189] See sections 4 and 5 of SCMA, which state that an iMSA can be enforced and invoked in the same manner as a judgment. See also section 6, which prescribes the items that to be submitted to the competent authority for the enforcement and recognition of an iMSA: namely, the iMSA signed by the parties and evidence that the iMSA resulted from mediation.

[190] The SCMA does not apply to iMSAs that have been approved by a court or concluded in the course of proceedings before a court: see section 3(2)(a) of the SCMA, read with Article 1(3)(a)(i) of the Singapore Convention on Mediation.

Both jurisdictions feature hard and soft law approaches to mediation regulation. For example, mediation clauses and court practice directions and rules are the primary mechanisms to trigger mediation processes in both Singapore and Hong Kong, whereas internal aspects of the mediation process are largely left to the parties and the mediators to determine, as an expression of the principle of party autonomy and mediation's procedural flexibility. Institutions in Hong Kong and Singapore play a leading role in credentialing and setting ethical and practice standards, and notably the Singaporean MA only applies to mediations conducted by designated mediators or service provider institutions. In terms of legislation, both the MO (Hong Kong) and the MA and the SCMA (Singapore) primarily address rights and obligations of mediators and participants in mediation.

It is noteworthy that the general legislation applicable to both cross-border and domestic commercial mediation in both jurisdictions contain many similar provisions, suggesting a harmonized approach by the two leading dispute resolution jurisdictions in Asia, especially in relation to confidentiality and admissibility of mediation communications. The differences in the regulatory approaches are most noticeable in relation to direct enforcement provisions for pre-litigation iMSAs. While there is currently no legislation that provides for direct enforcement of such iMSAs in Hong Kong, Singapore provides direct enforcement mechanisms for commercial iMSAs in both the MA and the SCMA regardless of whether the iMSA resolves a dispute before a Singapore court. At the time of writing, neither jurisdiction has operative legislative provisions on third party funding that apply to standalone mediation, although this is likely to change in the future. Unique in Asia is Hong Kong's apology legislation, which is designed to encourage the use of mediation (including cross-border commercial mediation) by protecting apologies.

Mediation-related case law in both jurisdictions indicates a judiciary well-versed in the nuances of mediation, especially in relation to the enforcement of iMSAs, mediation agreements and confidentiality issues, and supportive of its development. Further the overall tenor of the mediation case law, by and large, is consistent across jurisdictions, differences being one of degree rather than principle. In relation to mediation agreements, courts in Hong Kong and Singapore have taken a rather strict approach to requirements of "certainty" and "completeness". It remains to be seen whether this approach will gradually become more liberal in relation to international mediation agreements, similar to the respective courts' approaches to the construction of international arbitration agreements.[191]

The tale of two cities, Hong Kong and Singapore, bodes well for the future development of cross-border mediation law, regionally and internationally. Jurisdictions seeking to introduce new cross-border commercial mediation laws or review and amend existing law, stand to learn much from the regulatory initiatives and experiences of Singapore and Hong Kong,

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[191] By way of example, Article II(2) of the New York Convention imposes the obligation on Contracting States to recognise an arbitration agreement made "in writing". Some courts have interpreted this requirement in a restrictive manner, as Article II(2) of the New York Convention limits the scope of this requirement to arbitration agreements or clauses signed by the parties or contained in an exchange of letters or telegrams. See for instance, the case of *Sen Mar, Inc. v Tiger Petroleum Corp,* 774 F. Supp. 879 (S.D.N.Y. 1991), where the court interpreted that an arbitration clause would be valid only if it is either in a signed writing agreement or an exchange of letters. In 2006, UNCITRAL adopted a recommendation regarding a liberal interpretation of the "in writing" requirement. Since then, courts have interpreted this requirement in a less stringent way. See UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 edition, at 51, available at https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf (last accessed 5 March 2021).

respectively. Finally, the presence of an active professional mediation community and associated stakeholders in both jurisdictions combined with supportive judiciary and governments, suggests that we can expect ongoing mediation leadership and further regulatory innovation into the future.

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