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The development of mediation for civil disputes

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Chapter 11

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1. INTRODUCTION

[11.001] The mediation landscape for civil disputes in Singapore has undergone several waves of change, and is, even now, in the midst of being shaped. The historical development of this area reflects very interesting features of the mediation scene, and also underscores the different roles played by key players in Singapore. This chapter surveys the major developments in civil mediation, analyses the key trends underlying these developments and offers practical suggestions on navigating the mediation scene.

2. MILESTONES IN THE HISTORICAL DEVELOPMENT OF CIVIL MEDIATION

2.1 Court-provided mediation[1]

[11.002] One major factor leading to the growth of civil mediation is the central role played by the Singapore judiciary. Former Chief Justice Yong Pung How was a key proponent of mediation, emphasising on several occasions that mediation was a "non-confrontational and less costly process of settling problems in terms of time, money and more importantly, relationships". He also highlighted how mediation was embedded in the Asian culture, in which disputes were usually dealt with by respected elders or third parties, but this tradition had been gradually eroded by the growth of a "fault-based" culture and litigation had become the usual mode of dispute resolution in the society. The judiciary was thus promoting mediation as a means to reintroduce conciliatory approaches to the community. Mediation was portrayed as a better and more natural way of resolving disputes in comparison to litigation. It was at this juncture that mediation emerged as a counterpoint to litigation, as

[1] Chapter 8 of this publication elaborates further on court mediation.

well as a much-needed process to preserve relationships.[2]

[11.003] The State Courts (formerly known as the Subordinate Courts till March 2014), under the leadership of CJ Yong, piloted a mediation programme in 1994 in which selected judges mediated a range of civil disputes. Upon the successful conclusion of the pilot programme, the State Courts established the Court Mediation Centre in 1995, which was subsequently re-named the Primary Dispute Resolution Centre in 1998 and the State Courts Centre for Dispute Resolution (SCCDR) in 2015.[3] The courts' Alternative Dispute Resolution (ADR) services were formalised and became known as Court Dispute Resolution sessions.[4] The ADR services were convened under the court's general powers under Order 34A of the Rules of Court to convene pre-trial conferences and to make the necessary orders for the "just, expeditious and economical disposal of the cause or matter". If a case is settled, the terms of settlement are recorded before an SCCDR judge and are enforceable in the court in the event of any default. Otherwise, the case proceeds for trial before a different judge. The court's ADR services have become part and parcel of the State Courts' suite of dispute resolution options.

[11.004] The Singapore courts have expanded its mediation services to other types of disputes. Mediation may now be used to resolve minor criminal complaints, employment disputes, community-related

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2 Former Chief Justice Yong Pung, "Speech at the Official Opening of the Singapore Mediation Centre" (August 16, 1997), in Hoo Sheau Peng et al (eds), *Speeches and Judgments of Chief Justice Yong Pung How* (Singapore: FT Law and Tax Asia Pacific, 1996). See also former Chief Justice Yong Pung, "Speech at the Opening of the Legal Year 1996" in Hoo Sheau Peng et al (eds), *Speeches and Judgments of Chief Justice Yong Pung How* (Singapore: FT Law and Tax Asia Pacific, 1996), pp 212–213, where CJ Yong stated that the backlog problem in the courts had been eliminated, but there was still a keen awareness that alternative means of dispute resolution may be more desirable than litigation for the litigant, "especially in the context of an Asian society which stresses harmony and cohesiveness".

3 See Chief Justice Sundaresh Menon, "Address at the Joint Launch of the State Courts Centre for Dispute Resolution and '*Mediation in Singapore: A Practical Guide*' A Thomson Reuters Publication, 4 March 2015", available online: <https://stg.statecourts.gov.sg/cws/Lawyer/Documents/State%20Courts%20-%20Launch%20of%20State%20Courts%20Centre%20for%20Dispute%20Resolution%20Speech%20on%204%20March%202015.pdf> (accessed October 5, 2020).

4 Lim Lan Yuan and Liew Thiam Leng, *Court Mediation in Singapore* (Singapore: FT Law and Tax Asia Pacific, 1997), pp 50–51; Laurence Boulle and Teh Hwee Hwee, *Mediation – Principles, Process, Practice* (Singapore: Butterworths Asia, 2000), pp 201–202.

disputes and any civil or family case filed in court.[5] The SCCDR provides a range of dispute resolution services – mediation and neutral evaluation – for all court cases except serious criminal offences and family cases (which are managed by the Family Justice Courts). Mediation sessions are conducted by judges who are trained in mediation and generally serve exclusively within SCCDR without presiding over trials or having other adjudicatory responsibilities. Court volunteers also assist the State Courts in mediating certain disputes. For instance, trained staff mediators handle claims under the jurisdiction of the Small Claims Tribunals that do not involve lawyers. In addition, volunteer mediators assist the SCCDR in mediating disputes arising from minor criminal offences.

[11.005] The Supreme Court actively encourages lawyers and their clients to use mediation but does not provide court mediation services. As part of the court's active case management, cases are called for regular pre-trial conferences when ADR options would be discussed. Where the parties consent to use ADR, the Supreme Court would refer the case to the Singapore Mediation Centre (SMC) or other private mediation services.

[11.006] Given the high volume of civil claims that the courts refer for mediation, the courts' ADR policies have significantly influenced the overall development of mediation of civil disputes in Singapore. Some of these policies are discussed below.

Encouraging the use of ADR instead of litigation as a first resort

[11.007] Over the last decade, SCCDR has introduced several mechanisms to encourage lawyers to change their mindsets concerning the use of ADR, and in turn, to influence their clients to use ADR as a first resort.

[11.008] First, pre-action protocols were put in place for motor accident claims and personal injury claims in 2000 and 2011, respectively. Under these protocols, the parties have to exchange

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5 Lim and Liew, *ibid*, pp 50–52; State Courts, *Resolving an ECT Dispute Online.* Available online: <https://www.statecourts.gov.sg/cws/ECT/Pages/Resolving-an-ECT-Dispute-Online.aspx>.

certain information prior to legal proceedings in order to attempt pre-writ negotiation. Furthermore, once formal court proceedings have commenced, the cases would be called for neutral evaluation in SCCDR as a matter of course.

[11.009] Secondly, SCCDR took a major step in 2012 to strongly encourage parties to use ADR by introducing the "presumption of ADR". The word "presumption" was intentionally used to convey the message that all cases coming before the court during summonses for directions or at pre-trial conferences would be referred to ADR by default, unless the parties opted out of ADR.

[11.010] To support the presumption of ADR, the courts created an "ADR Form". The parties must certify in this form that they have discussed with their lawyers the possibility of using ADR, indicate their decision on whether to use an ADR process and provide reasons for opting out of using ADR.[6] The form also highlights the possibility of adverse costs consequences being awarded after a trial under Order 59 rule 5(1)(c) of the Rules of Court, in the event that a party has opted out of ADR for reasons deemed unsatisfactory by the court.[7] The State Courts call lawyers for pre-trial conferences four months after the writ is filed to discuss ADR options. The ADR Form has to be filed by all the parties prior to this conference. Similarly, the form has to be submitted to the court before any summons for directions hearing.

[11.011] In 2014, the "presumption of ADR" was further strengthened through the introduction of a simplified process for Magistrate's Court claims that are generally below the quantum of S$60,000.

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6 State Courts Practice Directions Amendment No 2 of 2010, <http://www.statecourts.gov.sg>, under "Legislation and Directions". See also Joyce Low and Dorcas Quek, "The ADR Form in the Subordinate Courts – Finding an Appropriate Mode of Dispute Resolution", *Law Gazette (*April 2010), p 18, available online: <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4323&context=sol_research> (accessed October 5, 2020).

7 State Courts Practice Directions Amendment No 2 of 2012, <http://www.statecourts.gov.sg>, under "Legislation and Directions". See also Joyce Low and Dorcas Quek, "Introducing a 'Presumption of ADR' for Civil Matters in the Subordinate Courts", *Law Gazette (*May 2012), p 22, available online: <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4324&context=sol_research> (accessed October 5, 2020).

Under Order 108 of the Rules of Court, the court, during case management conferences convened for such cases, is empowered to order the parties to use ADR if it is of the view that ADR will facilitate the resolution of the dispute.[8] The presumption of ADR has focused particularly on claims of lower value, probably because the costs of litigation are likely to be disproportionate to the amount claimed.

[11.012] Since the introduction of the presumption of ADR in 2012, SCCDR has been handling more than 6,000 cases annually through neutral evaluation and mediation. More than 85% of these cases have been resolved through the use of ADR.[9] Evidently, the court's active encouragement of the use of ADR has significantly increased court users' exposure to the mediation process.

[11.013] The Supreme Court also adopts a very pro-active stance in encouraging the use of mediation. The Practice Directions highlight that solicitors have a professional duty to advise their client on using ADR, and that ADR should be considered at the earliest possible stage.[10] Taking a leaf from Hong Kong's practice, the Supreme Court introduced the "ADR Offer" and "Response to ADR Offer" in 2013. A party interested in attempting mediation may file the former form, and the opposing party must respond with the latter form within 14 days. The failure to respond may be construed by the court as unwillingness to attempt ADR without providing any reasons.[11] In this connection, both forms highlight the possible adverse costs orders that may be made in the event that the judge deems the refusal to attempt ADR to be unreasonable.[12]

Increasing the awareness of mediation

[11.014] The Singapore courts have also been focusing on spreading the awareness of mediation amongst court users, lawyers and the public. Together with other ADR organisations, the Supreme Court

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8 State Courts Practice Directions, para 35.

9 These figures are based on statistics provided by the State Courts in the earlier edition of the chapter in 2015. Refer to chapter 8 of this publication on the latest developments in court mediation.

10 Supreme Court Practice Directions, para 35B.

11 *Ibid*., para 35C.

12 *Ibid*., Appendix A Forms 28 and 29.

and the State Courts co-organised an international ADR conference held in Singapore in 2012, and the Global Pound Conference Singapore in 2016.[13] When the Chief Justice formally launched the SCCDR in 2015 to broaden its scope of services, his Honour noted that the centre would partner with others in ADR outreach and training, and in supporting ADR developments outside the courts so that the idea of consensual dispute resolution would be considered as early as possible in the life cycle of a dispute.[14] In the same vein, the Chief Justice announced in 2017 that SCCDR would have a specialised team providing training locally and internationally on court-annexed ADR in partnership with entities such as Singapore Judicial College and SMC.[15]

[11.015] SCDDR has also made efforts to increase awareness and raising standards of mediation advocacy amongst lawyers. Clear standards have been set out in the State Courts Practice Directions on best practices in preparing for mediation and for general mediation advocacy.[16] In 2009, SCCDR partnered with SMC to offer lawyers the opportunity to be trained and jointly accredited by both institutions as "Associate Mediators" who could then volunteer as mediators in

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13 Global Pound Conference website, globalpoundconference.org (accessed April 28, 2017); "Global Pound Conference Series Singapore 2016 (17-18 March 2016): Shaping the Future of Dispute Resolution and Improving Access to Justice", available online: <http://www.simi.org.sg/News-Events/List-Of-News-Events/GPC-Singapore-2016> (accessed October 5, 2020).

14 Chief Justice Sundaresh Menon, "State Courts Workplan 2014, Keynote Address" (March 7, 2014), available online: <http://www.statecourts.gov.sg>, under "Resources\Annual Workplans\Annual Workplan 2014" (accessed October 5, 2020), para 17.

15 Chief Justice Sundaresh Menon, "State Courts Workplan 2017, Keynote Address: Advancing Justice, Expanding the Possibilities" (March 17, 2017), available online: <https://www.statecourts.gov.sg/cws/Resources/Documents/State%20Courts%20Workplan%202017%20Keynote%20Address%20by%20Chief%20Justice(FINAL).pdf> (accessed October 5, 2020), paras 22–23.

16 State Courts Practice Directions, Part IIIA on Alternative Dispute Resolution, http://www.statecourts.gov.sg, under "Legislation and Directions". Paragraphs 25F and 25G set out the basic requirements for lawyers and court users to note when using mediation and neutral evaluation, and provide sample opening statements. SCCDR has also published an article on Mediation Advocacy; see Seah Chi-Ling and Dorcas Quek, "Mediation Advocacy for Civil Disputes in the Subordinate Courts – Perspectives from the Bench", *Singapore Law Gazette* (September 2012), p 14, available online at: https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4325&context=sol_research (accessed October 5, 2020).

the courts. This scheme was created principally to raise the awareness of the mediation process amongst lawyers, and to create a core group of lawyers who were and able to spread awareness of this dispute resolution option to their clients and other lawyers. This has been a largely successful programme that resulted in a sizeable group of volunteers who are actively involved in mediation activities within and outside the courts.

Shaping mediation standards

[11.016] Finally, SCCDR's policies have had an impact on the development of mediation standards. It created an internal guide on Best Practices on Court Mediation, setting out recommended practices for each stage of mediation. All judges, staff and court volunteers have to adhere to this Guide, as well as a Code of Ethics and Basic Principles on Court Mediation.[17] The Code of Ethics clearly states the importance of various ethical standards, including impartiality and neutrality, confidentiality, and respecting and empowering the parties. Furthermore, co-mediation is also used as a way for mediators to learn from one another.

[11.017] In summary, the Singapore courts' strong support of mediation and the State Courts' provision of court mediation services have played a substantial part in increasing the usage of the mediation process and in shaping the overall development of the mediation scene.

2.2 The introduction of private mediation through the establishment of SMC[18]

[11.018] The second key development that precipitated the growth of civil mediation is the establishment of the SMC in 1997. Its origin can be traced to the call in 1996 by then Attorney-General, Chan Sek

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17 State Courts, "Code of Ethics and Basic Principles of Court Mediation", available online: <https://www.statecourts.gov.sg/cws/Mediation_ADR/Documents/code%20of%20ethics.pdf>. The documents can generally be found in http://www.statecourts.gov.sg, under "Court Mediation/ADR" (accessed October 5, 2020).

18 Chapter 9 discusses developments in the SMC.

Keong, for greater use of mediation in civil disputes.[19] In late December 1996, the Supreme Court and the Academy of Law commenced a pilot project, the Commercial Mediation Service, to provide paid commercial mediation services. The Supreme Court, at pre-trial conferences, spread the awareness of mediation amongst lawyers and encouraged them to consider mediation options together with their clients. In less than 1 year, 84 cases were referred for mediation and a high settlement rate of 75% was achieved.[20]

[11.019] The SMC, a company limited by guarantee under the Singapore Academy of Law, was eventually established in August 1997 to formally take over the Commercial Mediation Service. This represented a major step to institutionalise private, non-court-based mediation. The SMC aimed to be a flagship mediation centre that would take the lead in promoting private mediation and in serving businesses and the public sector. It would provide mediation services, as well as train and accredit mediators, and "eventually, provide consultancy services in dispute avoidance, dispute management and ADR mechanisms, both locally and abroad".[21]

[11.020] SMC is now a well-known source of private, paid mediation services for civil conflicts. It has also worked together with various sectors to offer many industry-specific mediation schemes such as the medical mediation scheme set up in partnership with the Ministry of Health in 2012 and the family mediation scheme. SMC's mediators include not only legally trained persons, but also mediators from all walks of life such as architects, engineers, academics and doctors.[22] This diversity allows SMC to match the mediator to the particular nature of each dispute. The Supreme Court regularly refers civil claims to SMC, resulting in a steadily increasing stream of court cases being mediated by SMC's mediators. SMC mediated 499 cases in 2016, a 72% increase from 2015 and the highest number reached in 20 years. Most of these disputes were construction and company disputes.[23]

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19 Boulle and Teh, note 4 above, p 207.

20 Boulle and Teh, note 4 above, p 211.

21 Former Chief Justice Yong Pung, "Speech at the Official Opening of the Singapore Mediation Centre", note 2 above.

22 Singapore Mediation Centre website, http://www.mediation.com.sg (accessed April 28, 2017).

23 Tan Tam Mei, "Singapore Mediation Centre handles record number of cases in

[11.021] In addition, **S**MC has developed a reputation of being the main provider of mediation training in Singapore. It delivers basic and advanced mediation training courses for professionals. These courses are certified by the Singapore International Mediation Institute (SIMI) for the purpose of applying for professional mediation accreditation.[24] With the publication of the *An Asian Perspective on Mediation* together with editors Associate Professor Joel Lee and Ms Teh Hwee Hwee, SMC has developed its own course entitled "An Asian Perspective on Mediation – Face, Guanxi".[25] Other courses that have recently developed include mediation advocacy and collaborative family practice. Most recently, the Singapore International Dispute Resolution Academy (SIDRA) was set up initially as a subsidiary of the Singapore Academy of Law and the SMC to provide thought leadership in the region on research in negotiation as well as dispute resolution.[26]

[11.022] As more individuals have been exposed to SMC's training, the number of SMC mediators has been steadily rising. The steady provision of mediation training has not only provided a pool of mediators for cases but also helped spread the message of mediation amongst different sectors.

[11.023] In short, SMC has been at the forefront of the private mediation sector in driving and shaping many aspects of commercial mediation. Many other industries naturally look to SMC when seeking to establish dispute resolution programmes, given SMC's historical presence in Singapore.

2.3 Going international and professionalising the mediation industry

[11.024] In the last 3 years, the growth of institutionalised mediation

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2016-72% more than 2015", *The Straits Times*, January 27, 2017.

24 Singapore International Mediation Institute, "SIMI Registered Training Program", available online: <http://www.simi.org.sg/What-We-Offer/Service-Providers/SIMI-Registered-Training-Program> (accessed October 5, 2020).

25 Singapore Mediation Centre, "Training", available online: <http://www.mediation.com.sg> (accessed October 5, 2020).

26 Singapore International Dispute Resolution Academy website, available online: <http://www.sidra.academy/about-us/> (accessed October 5, 2020). Since 2020, SIDRA has been a research centre under Singapore Management University School of Law.

has accelerated exponentially due to the staunch support of the Ministry of Justice and the Judiciary. In 2013, a Working Group was appointed by Chief Justice Menon and the Ministry of Law to propose ways to develop international commercial mediation space in Singapore. One recommendation was to establish an international mediation service provider.[27] The Singapore International Mediation Centre (SIMC) was thus established in 2014 with an international panel of renowned mediators. The awareness of cross-border mediation probably increased substantially when the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation) was signed on August 7, 2019 and took effect on September 12, 2020. This convention, which has been signed by 53 countries as at October 2020, provides a harmonised legal framework to enforce international mediated settlement agreements.[28]

[11.025] These steps have increased the profile of the mediation process, placing it on par with the other international dispute resolution services offered in Singapore. Notwithstanding this positive development, it is important to recognise the very intimate connection between domestic and international mediation. Building a vibrant domestic mediation scene is a priority for Singapore since a healthy ADR community, coupled with greater public awareness of mediation, will provide a firm foundation for the Singapore mediation industry to mature. A sophisticated domestic mediation

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27 Ministry of Law, "Commercial Dispute Resolution Services in Singapore Set To Grow" (December 3, 2013), available online: <https://www.mlaw.gov.sg/news/press-releases/icmwg-recommendations.html> (accessed October 5, 2020).

28 See UNCITRAL, UN Convention on the International Settlement Agreements Resulting from Mediation, available online: <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> (accessed October 5, 2020); Singapore Academy of Law Journal, Special Issue on International Commercial Mediation, available online: <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/SALArticlesListing/mid/513/IssueId=161> (accessed October 5, 2020); Dorcas Quek Anderson, "The Singapore Convention on Mediation: Supplying the Missing Piece of the Puzzle for Dispute Resolution" (July 2020) Journal of the Malaysian Judiciary 194, available online: <http://www.jac.gov.my/spk/images/stories/4_penerbitan/journal_malaysian_judiciary/julai2020.pdf> (accessed October 5, 2020).

scene will bolster the confidence of international parties in Singapore, and in the quality of the local mediators. The international dimension of mediation ultimately hinges on how mediation grows domestically. And a change in the domestic culture of mediation will require concerted effort and partnership between key government institutions and ADR interest groups, as well as a combination of different measures to change mindsets towards mediation.

[11.026] Another recommendation by the Working Group was to establish a body to set professional standards and provide accreditation for mediators. This culminated in the setting up of the SIMI. This move signals the efforts to professionalise the mediation industry. Given how mediation has developed within discrete sectors in the past 2 decades, the time was probably ripe to increase public confidence in the mediation profession by setting common standards. The Mediation Act[29] complements the drive to professionalisation by clarifying the law concerning mediation confidentiality and enforcement of agreements. Taking effect on November 1, 2017, this is the very first statute that applies to all private mediations, and which systematically sets out the legal principles supporting the use of mediation.

3.
THE INCREASING DIVERSITY WITHIN THE CIVIL MEDIATION SCENE

[11.027] While SMC and SCCDR have been prominent in leading the expansion of private and court-provided mediation in the last two decades, the overall civil mediation landscape today has become increasingly diverse.

[11.028] Many other institutions have chosen to set up mediation panels and ADR programmes to handle specific type of disputes. The Consumers Association of Singapore (CASE) is a case in point. Mediation services were offered as early as 1975 for consumer-related complaints lodged with CASE.[30] It currently has a panel of 56 accredited mediators.[31] Likewise, the Singapore Institute of Surveyors

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29 Mediation Act 2017 (No. 1 of 2017).

30 Boulle and Teh, note 4 above, p 239.

31 Consumer Association of Singapore, "Accredited Mediators", available online:

and Valuers has its own dispute resolution centre, set up in 1997, to offer mediation and arbitration services for real estate and construction disputes.[32] Both bodies conduct their own training for their mediators. Another illustration is the Financial Industry Dispute Resolution Centre (FIDReC), which was initiated by the financial industries in 2005 to provide a transparent way for consumers and different financial institutions to deal with their disputes through mediation and adjudication.[33]

[11.029] The trend of having in-house mediation schemes has been growing steadily. Many tribunals and agencies, including the Ministry of Manpower, Tribunal for the Maintenance of Parents, Strata Titles Boards, Insolvency and Public Trustee Office, the Law Society, Renovation and Decoration Advisory Centre, Real Estate Developers' Association and the Intellectual Property Office of Singapore now have their individual ADR programmes.[34]

[11.030] A more recent trend is the emergence of private mediation practices. In the past few years, mediation firms – such as Sage

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<https://www.case.org.sg/complaint_accredited.aspx> (accessed October 5, 2020).

32 Singapore Institute of Surveyors and Valuers, "SISV Dispute Resolution Centre", available online: <http://www.sisv.org.sg/drc> (accessed October 5, 2020).

33 Financial Industry Dispute Resolution Centre website, available online: <http://www.fidrec.com.sg> (accessed 5 October, 2020).

34 Tripartite Alliance for Dispute Management, https://www.tal.sg/tadm/about; Tribunal for Maintenance of Parents, "Mediation", available online: <https://www.msf.gov.sg/maintenanceofparents/Pages/Mediation.aspx>; Strata Titles Boards, "General Information on Application for Collective Sale of Property", <http://www.mnd.gov.sg/stb/generalInformation.html>; Insolvency and Public Trustee's Office, "Application for a Mediation in Bankruptcy", <http://www.ipto.gov.sg/bankruptcy-and-debt-repayment-scheme/bankruptcy/forms.html>; Law Society of Singapore, "Cost Dispute Resolve", <http://www.lawsociety.org.sg/forMembers/ResourceCentre/MembershipBenefits/Members%E2%80%99SupportSchemes/CostDisputeResolve.aspx>; Law Society of Singapore, "SCMediate", <http://www.lawsociety.org.sg/forMembers/ResourceCentre/MembershipBenefits/Members%E2%80%99SupportSchemes/SCMediate.aspx>; Renovation and Decoration Advisory Centre, "Renovation Conciliation and Arbitration Procedure Programme", <http://www.radac.org.sg/index.php?p=1_27_RECAP-Program>; Real Estate Developers' Association of Singapore, "Conciliation Panel", <http://www.redas.com>; Intellectual Property Office of Singapore, "Mediation Options for Trademark Proceedings", <http://www.ipos.gov.sg/Services/HearingsandMediation/ResolvingDisputes/MediationOptionforTradeMarks.aspx> (accessed October 5, 2020).

Mediation,[35] Resolvers Pte Ltd,[36] Peacemakers Consulting Services[37] and MeD8[38] – have been formally created to offer their own brand of mediation services. In 2017, the Law Society launched its own mediation scheme with a panel of qualified mediators.[39] While these mediation practices are relatively new and their impact on the overall scene has yet to be fully apparent, they reflect the burgeoning passion amongst mediators and the desire to offer diverse sources of mediation services that are not linked to well-established institutions. This is a promising development for Singapore's civil mediation landscape as it could bring about a more mature private mediation scene offering greater diversity and choice for users.

4. MOVING TOWARDS GREATER CONVERGENCE

[11.031] While mediation of civil disputes initially developed within discrete sectors – court mediation, private commercial mediation and mediation of other disputes such as consumer matters – there has been greater convergence of standards and practices in the last few years.

4.1 Convergence of standards

[11.032] Much of this convergence has been precipitated by the establishment of SIMI to set standards and to provide for nation-wide accreditation of mediators. This development has provided a good opportunity to set uniform criteria for the recognition of the quality of mediation services. While individual mediators may belong to different ADR entities with varying ethical standards, they have to

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35 Sage Mediation website, available online: <https://sagemediation.sg> (accessed October 5, 2020).

36 Resolvers Pte Ltd website, available online: <http://www.resolvers.com.sg> (accessed October 5, 2020).

37 Peacemakers Consulting Services website, available online: <http://peacemakers.sg>; Peacemakers Conference, <http://peacemakers.sg/conferences/pmc_conference/index.html> (accessed October 5, 2020).

38 MeD8 Mediation Excellence Centre website, available online: <http://www.med8.com.sg> (accessed October 5, 2020).

39 Law Society Mediation Scheme, available online: <https://www.lawsociety.org.sg/for-lawyers/dispute-resolution-schemes/law-society-mediation-scheme/> (accessed October 5, 2020).

subscribe to the SIMI's Code of Professional Conduct once they are accredited by SIMI.[40] The different mediation training providers also have to comply with SIMI requirements in order to have their courses recognised by SIMI as a basis for accreditation. Furthermore, SIMI's requirements for the creation of a summary of feedback under the mediator's online profile encourages transparency in mediation practices and continual improvement of the quality of mediation across all sectors.

[11.033] SIMI's online listing of its mediators' profiles, coupled with the opportunity to obtain accreditation with the International Mediation Institute, has collectively offered incentives for mediators to apply for SIMI accreditation as the preferred mediation qualification. It is noteworthy that SIMI accreditation has been linked to the 2017 Mediation Act. This new statute has created an expedited enforcement mechanism allowing mediated settlement agreements to be converted into court orders. The mechanism is currently available for mediations conducted by SIMI-accredited mediators, or mediations conducted under the auspices of SMC and the SIMC.[41] This has created yet another incentive for Singapore mediators to obtain SIMI accreditation, paving the way for increasing standardisation of mediation standards.

4.2 The limited convergence of legal infrastructure

[11.034] However, there has been limited convergence of the legal principles supporting the use of mediation. This author has observed elsewhere that the latest Mediation Act does not apply to mediation conducted in courts and mediation proceedings conducted under other written law such as community mediation. This limitation effectively means that the provisions concerning confidentiality and limited admissibility of mediation communications only apply to private mediations. Such a limited scope appears to run counter to the policy of SIMI setting standards for all mediators in Singapore. It is hoped that there will be greater convergence of the legal standards underpinning the practice of all types of mediation.[42]

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40 Singapore International Mediation Institute website, available online: <http://www.simi.org.sg> (accessed October 5, 2020).

41 Mediation Act, note 31 above, s 12.

42 Dorcas Quek Anderson, "Legislative Comment: A Coming of Age for Mediation in

4.3 Achieving a fine balance in regulating the mediation industry

[11.035] The creation of SIMI as a professional mediation regulatory body represents a milestone that is starting to change the complexion of civil mediation. However, future regulation has to be carefully crafted and managed so that much of the growth, creativity and collaboration in this field that has spontaneously developed thus far would not be stifled. In this connection, Professor Nadja Alexander has noted that many jurisdictions with mediation experience have a mixture of market regulation, self-regulation, formal framework (such as a national model law) and formal legislative approach. She also noted that the voluntary nature of less formal frameworks has ensured that there is still scope for mediation in the "marketplace" to grow.[43] It is clear that a multi-faceted and nuanced approach is required for the regulation of mediation. A nuanced approach is crucial to balance the need to set standards and the equally important need to provide sufficient scope for the mediation scene to flourish.

5. MEDIATION AND CIVIL JUSTICE

5.1 Mediation's role in the access to justice movement

[11.036] Civil disputes present an interesting conundrum for the mediation community in Singapore, for it is an area in which mediation has developed within a legal context and closely connected with the concept of "justice". Parties are often introduced to the mediation process only after they have filed their claim in the courts, when either the Supreme Court or State Courts encourage them to attempt mediation. The rise of the modern mediation movement is, after all, traceable to the Pound Conference in USA, when there was much reflection on the "causes of popular dissatisfaction with the administration of justice".[44] Mediation for civil disputes has arisen as

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Singapore? The Mediation Act 2016" (2017) SAcLJ 275 at paras 4–6.

43 Nadja Alexander, "Mediation and the Art of Regulation" in *Queensland University of Law & Justice*, p 1 at pp 4–11. As an illustration of voluntary standards that are only recommendations, mediators in Australia who meet the National Mediator Practice Standards may be able to operate under the National Mediator Accreditation System. Those who cannot meet these standards may still call themselves mediators but do not operate under the quality assurance of the national accreditation system.

44 A Levin and R Wheeler, *The Pound Conference: Perspectives on Justice in the Future* (West

a major solution to the drawbacks of litigation and has become increasingly associated with efforts to increase access to justice.

[11.037] In this connection, the Chief Justice earlier reiterated that "[c]onsensual outcomes are amongst the best ways of achieving affordable access to justice", and that while the courts' judicial function can never be fully replaced by ADR, "a system of adjudication that is supported by ADR processes will be better equipped to effectively increase access to justice".[45] More recently, Chief Justice Menon also commented that the notion of Rule of Law need not be exclusively rooted in an adjudicative setting in the modern system for resolution of disputes. Instead, the Rule of Law is more intimately connected with access to justice.[46] The Chief Justice further suggested that peacebuilding is an integral part of the justice system, because "the preservation of ties furthers the pursuit of peace, which is the object of justice".[47]

[11.038] This is not necessarily a negative development for mediation for civil disputes. As a counterpoint to litigation, mediation could still flourish as the society becomes increasingly aware of how mediation may be a better option than litigation in certain cases. Nevertheless, some commentators have cautioned against possible pitfalls arising from the mediation movement being too closely connected with the adversarial court system.

Group, 1979).

45 Chief Justice Sundaresh Menon, note 14, available online: <http://www.statecourts.gov.sg>, under "Resources\Annual Workplans\Annual Workplan 2014" (accessed October 5, 2020), para 14.

46 Chief Justice Sundaresh Menon, "Mediation and the Rule of Law" (March 10, 2017), available online: <http://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20(Final%20edition%20after%20delivery%20-%20090317).pdf> (accessed October 5, 2020) at paras 12–16.

47 Chief Justice Sundaresh Menon, "Technology and the Changing Face of Justice" (November 14, 2019), available online: <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/ncmg---keynote-lecture.pdf> at para 58.

5.2
Potential pitfalls arising from mediation's close connection with the court system

[11.039] A prominent ADR scholar, Carrie Menkel-Meadow has observed that a "field that was developed, in part, to release us from some – if not all – of the limitations and rigidities of law and formal legal institutions has now developed a law of its own." She pointed out how the increasing institutionalisation of ADR has now been "colonialised" by advocates. Some lawyers appear in ADR still "wearing their adversarial suits" and tainting the ADR process with their conventional adversarial stance. She also noted an instance of how one court's ostensible "mediation programme" was in fact a hybrid between arbitration and case evaluation, instead of mediation. The use of ADR within the court system has "raised new issues in which the two cultures [ADR and litigation] begin to blur". There is a grave danger that good settlement practice is being "marred by over-zealous advocacy or over-zealous desire to close cases".[48] Another writer, in a similar vein, comments that the ADR movement has been assimilated into the court system, such that court-connected mediation seems to be influenced by the adversarial culture. This has occurred due to the large presence of lawyers representing their clients in mediation, and of lawyers who have become mediators.[49]

[11.040] The pertinent issue for Singapore's mediation industry to consider is how to prevent mediation from "developing a law of its own", or being influenced by the adversarial system such that it loses many of its defining qualities. Some of these defining qualities include its informality (relative to a trial), its emphasis on party autonomy and flexibility in process to suit the unique circumstances of each dispute.

[11.041] It is necessary that the courts continue to encourage the use of mediation once a claim is filed in courts, as mediation is part of a range of dispute resolution options that have to be made available to

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48 Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR'" in *Florida State University Law Review*, Vol 19 (1991), p 1 at pp 33–36.

49 Nancy Welsh, "The Thinning Vision of Self-Determination in Court-connected Mediation: The Inevitable Price of Institutionalization?" in *Harvard Negotiation Law Review*, Vol 6 (2001), p 1 at pp 26–27.

litigants. As early as 1997, former Chief Justice Yong expressed his view that ADR mechanisms like mediation have to be integrated into dispute resolution, and that "mediation must complement litigation".[50]

[11.042] However, as mediation is increasingly linked to access to justice and the courts, great care must be taken to ensure that it does not lose its distinctiveness from the adjudication process by being increasingly influenced by it. Judge Jeremy Fogel from the California courts sounded this warning when he wrote about how the hegemony of the rights paradigm has to be broken in order for ADR, particularly mediation, to be conducted successfully. In the light of how civil litigators have been trained to practise in an environment in which "the rights paradigm is not only firmly embedded but exalted … mediators tend to focus narrowly on pragmatic compromises between rights and positions rather than a process in which parties are fully heard and interests are fully developed".[51]

5.3
Preserving a clear distinction between mediation and other dispute resolution processes

[11.043] Moving forward, it is essential for the thoughtful articulation of mediation standards and refinement of existing mediation models, in order to clearly delineate how mediation differs from adjudication. This is all the more crucial as mediation continues to develop in Singapore against the backdrop of the legal profession and in association with access to justice in the courts. There should be guidelines as to how mediation styles that are closer to the adjudication process, such as the evaluative mediation model, are to be used in line with ethical principles and best practices. Furthermore, mediators have to be transparent with the disputing parties as to what the mediation process will entail or what style will be used. A lack of clarity about the distinctiveness of the mediation process potentially causes confusion among users and will eventually diminish the allure of mediation as a process that is radically different

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50 Former Chief Justice Yong Pung, "Speech at the Official Opening of the Singapore Mediation Centre", note 2 above (August 16, 1997).

51 Jeremy Fogel, "How to Take Control of the Runaway Litigation Train" (2005) 5 Pepp Disp Resol LJ 377 at 380.

from adjudicative processes.

[11.044] In addition, the ambit of civil mediation has to extend beyond the courts, and must begin much earlier than when a case is pursued within the courts. Mediation can then be properly seen as an early solution for disputes, and not only as an alternative to litigation when a case has been filed in court. Developments in this direction have already been taking place, with the growth in industry-specific mediation and dispute resolution schemes. Mediation has been incorporated into many industries' complaint or remedy processes. For instance, complaints regarding financial services are usually referred to mediation by the FIDReC. Nonetheless, these developments have been sporadic. It is also unclear as to how much the public is more aware of mediation as a result of these schemes. It is hoped that the newly established SIMI will make a positive impact in increasing the general awareness of mediation as a tool to settle civil disputes without involving the courts.

5.4 Preserving the tenets of mediation amidst diverse styles

[11.045] The preceding section underscored the importance of maintaining a distinction between mediation and other dispute resolution processes. In this regard, there had been some discussion within Singapore concerning the diversity of mediation styles. SMC has been known to provide training for interest-based, facilitative mediation.[52] Interest-based mediation has arisen from Roger Fisher's seminal book *Getting to Yes: Negotiating Agreement Without Giving In*, a most influential book from the Harvard Programme of Negotiation advocating a negotiation approach based on the parties' underlying interests or concerns instead of their stated positions.[53] Facilitative mediation has been known to represent many things, including refraining from giving a view of the strengths of the case, supporting each party's autonomy in terms of allowing them to find their own solutions and helping parties look beyond their positions to achieve

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52 See, for instance, George Lim Teong Jin, "The Role of Lawyers in Mediation – A Singapore Perspective", available online: <https://v1.lawgazette.com.sg/2000-9/Sep00-feature2.htm> (accessed October 5, 2020).

53 Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1991).

mutual understanding of their underlying concerns.

[11.046] By contrast, there has been literature appearing to describe the State Courts' mediation style as evaluative and rights-based, involving the mediator helping the parties by previewing the probable outcomes of the case should it proceed to trial. The mediation is described to be operating "with the applicable principles of law as its focal point, and parties have a full perception of the time, costs and other implications of a litigated outcome".[54] A Singapore mediation practitioner and academic has observed, in this connection, that this description of the courts' mediation model is at odds with the Courts' Code of Ethics and Basic Principles on Court Mediation, which appears to adhere strictly to the purely facilitative model.[55] In this regard, Chapter 8 clarifies the State Courts' mediation modality, observing that the current mediation model has a facilitative approach which also involves discussion on the legal merits of a case.

[11.047] This author has argued elsewhere that the evaluative style according to the original Riskin facilitative-evaluative grid may mean several things:

(1) Being directive in leading parties to certain solutions or outcomes;

(2) Giving a view on the strength of the case. Much of the debate on styles has centered on whether a mediator should give his views on the merits of the parties' case; or

(3) Focusing narrowly on legal rights without going deeper into underlying interests.

[11.048] Notably, all these aspects are more closely connected with an adjudicative framework that focuses on merits of a case and addressing only the legal aspects of the dispute. It is pertinent for mediators and policy-makers to recognise that the use of these

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54 Marvin Bay, Shobha G Nair and Asanthi Mendis, "The Integration of Alternative Dispute Resolution in the Subordinate Courts Adjudication Process" in *Singapore Academy of Law Journal*, Vol 16 (2004) at p 512.

55 Lum Kit Wye, "The Singapore Mediation Model – Are We Facilitative or Evaluative, and How Should We Choose" in *Asian Journal of Mediation* (2012), p 19 at p 22.

strategies within mediation will cause the process to increasingly resemble the adjudicative process. The distinction may potentially be blurred beyond recognition, resulting in the diminution of the hallmarks of mediation – party autonomy and addressing underlying interests.[56]

[11.049] Riskin himself thought that directive behaviour posed the greatest threat to self-determination. Mediators use a range of directive techniques, some being more controversial than others. Even when giving an opinion about the strengths and weaknesses of a case, a mediator can do so in a more directive or less directive manner; he could plainly state his view about the merits of the case, or he could choose to ask questions and have a joint discussion with the party and his lawyer about the case. This author has suggested that directive behaviour is objectionable when it borders upon direct impingement on the parties' autonomy in deciding how to settle. This usually occurs when the mediator applies pressure on the party to accept a certain outcome.[57]

[11.050] A mediator's lack of care in respecting parties' autonomy may potentially cause confusion in laypersons' understanding of mediation. And such confusion easily occurs when the public currently has not fully grasped the concept of mediation. This point was underscored when the Community Mediation Centre's Senior Master Mediator, Dr Lim Lan Yuan stated that mediators "are not judges or arbitrators who make decisions for [the parties]", but the mediators "work with them on alternative arrangements that they can consider, but it is up to them to agree on the outcome".[58]

[11.051] Hence, regardless of the labels attached to differing mediation styles for resolving civil disputes, it is crucial to give users clarity of the stark distinction between consensual and adjudicative dispute resolution processes. It should also be made plain when hybrid processes are being used. As stated in Section 5.3, it is very

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[56] See Dorcas Quek Anderson, "The Evolving Concept of Access to Justice in Singapore's Mediation Movement", in *International Journal of Law in Context*, Vol 16(2) (2020), pp 128–145.

[57] Dorcas Quek, "Facilitative Versus Evaluative Mediation – Is There Necessarily a Dichotomy?" in *Asian Journal on Mediation* (2013), pp 70–72.

[58] Janice Tai, "Mediators Are Not Judges Who Make Decisions for The Parties", *The Straits Times* (July 30, 2012).

useful in this regard for the mediation community to discuss and formulate common standards.

6. PRACTICAL TIPS ON NAVIGATING THE CIVIL MEDIATION LANDSCAPE

[11.052] It is evident from above that the landscape for mediation of civil disputes has been rapidly evolving. This section provides suggestions about how an individual, particularly a legal advisor, can best navigate the mediation landscape.

6.1 Advising clients on mediation and other ADR options

[11.053] First, the legal advisor has to be keenly aware of the need to advise clients on the suitability of using ADR, apart from litigation. The Supreme Court Practice Directions expressly state that it is the "professional duty of advocates and solicitors to advise their clients about the different ways their disputes may be resolved using an appropriate form of ADR".[59] In the same vein, the State Courts have effectively imposed such a duty on the lawyer by requiring the client to indicate in the ADR Form that he has discussed ADR options.[60] Both courts' Practice Directions have directed the lawyers' attention to the potential of adverse costs being awarded under Order 59 rule 5(c) of the Rules of Court. In the light of these provisions, it is prudent for a legal advisor to discuss ADR options with a client even prior to commencing legal proceedings in court.

[11.054] In view of the increasing diversity of ADR options within Singapore, a legal advisor has to be aware of the different dispute resolution processes and their respective advantages. The Supreme

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59 Supreme Court Practice Directions, para 35B(2); and Supreme Court Practice Directions (Amendment No 1 of 2016).

60 Incidentally, there are currently proposed amendments to professional conduct rules for lawyers handling family disputes to inform their clients about the available ADR options and to advise them to resolve their dispute amicably. KC Vijayan, "New Rules Proposed to Help Family Lawyers Manage Conflict", *The Straits Times* (February 21, 2017). Available online: <http://www.straitstimes.com/singapore/courts-crime/new-rules-proposed-to-help-family-lawyers-manage-conflict> (accessed October 5, 2020).

Court Practice Directions have provided very useful guidelines in Appendix I on how to choose the most appropriate dispute resolution process. It is apposite to highlight that not all disputes are suitable for mediation. The Practice Directions highlight certain factors to consider, such as whether the client wishes to establish a judicial precedent and whether the client desires publicity. Furthermore, many disputes may be readily resolved through negotiation without the assistance of a third party, if the lawyers and clients are reasonably confident of communicating with one another productively.

6.2 Using the most suitable mediation service

[11.055] If mediation is deemed to be a suitable process to use before commencing formal legal proceedings, the advisor could consider the following mediation options:

(1) Primary Justice Project administered by the Community Justice Centre

This is a programme that can be utilised by laypersons who have yet to get legal representation in potential claims that do not exceed S$60,000. A lawyer on this panel will represent the person with the view of negotiating a resolution to the dispute and using the mediation process. The fees are regulated at S$300 per hour, up to 6 hours.[61]

(2) SMC

The SMC's mediation services have fees starting from S$963 per party per day. The parties may choose their own mediator by paying a higher fee. SMC's website lists the names of their Principal Mediators according to their area of specialisation. For claims below S$60,000, SMC has a Small Case Commercial Mediation Scheme offering a fee starting from S$214 per party for the first 4 hours of mediation and subsequent hours at fees

[61] Primary Justice Project, available online: <https://cjc.org.sg/services/legal-services/primary-justice-project/> (accessed October 5, 2020).

starting from S$53.50 per party.[62]

(3) SIMC

This is a useful option if there is a cross-border commercial dispute. The centre has a panel of international mediators who are accredited by SIMI.[63]

(4) Law Society Mediation Scheme

This is a recent scheme launched by the Law Society. It has a panel of senior mediators and associate mediators who are practising solicitors, and its own fee schedule.[64] There is no limit to the quantum of dispute that may be mediated under this scheme.

(5) Private mediators or mediation practices

As highlighted earlier, there is an increasing number of private mediation practices emerging. Many mediators have obtained SIMI accreditation and have their profiles listed on SIMI's website, together with a summary of feedback given on their mediation skills. This development offers lawyers and their clients an opportunity to learn more about potential mediators and to choose the most suitable one.

[11.056] Once legal proceedings have started, the parties may also utilise any of the above mediation options. In addition, the parties could request for mediation or neutral evaluation in the SCCDR. A fee of S$250 per party has to be paid if the dispute is a District Court claim between S$60,000 and S$250,000.[65] A mediation session in this centre is scheduled for half a day (around 3 to 4 hours), with subsequent sessions being scheduled if necessary. By contrast, most

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62 Singapore Mediation Centre website, available online: <http://mediation.com.sg> (accessed October 5, 2020).

63 Singapore International Mediation Centre website, available online: <http://simc.com.sg> (accessed October 5, 2020).

64 Law Society Mediation Scheme, available online: <https://www.lawsociety.org.sg/for-lawyers/dispute-resolution-schemes/law-society-mediation-scheme/> (accessed October 5, 2020).

65 Rules of Court, Order 90A rule 5A.

private mediation providers will allocate an entire day for the mediation. A Magistrate's Court claim is usually allocated to a trained volunteer mediator, while District Court claims are often mediated by District Judges.[66] Users may refer to Chapter 8 concerning court mediation in order to assess whether SCCDR mediation rather than private mediation is more suitable for their particular dispute.

6.3 Choosing to mediate at the right time

[11.057] Apart from choosing the dispute resolution process, it is also crucial to be strategic about the timing of mediation. In this regard, Roselle Wissler, a US scholar, has done empirical studies suggesting that disputes are likely to settle if mediation is done sooner than later. One other finding indicates that settlement is less likely when mediation takes place while a summary judgment or other interlocutory application is pending.[67] Most recently, a Singapore empirical study examining civil disputes in the Supreme Court and State Courts found that settlement at mediation is more likely when mediation is attempted at the close of pleadings stage, without any contested interlocutory application filed. A civil dispute was 22% less likely to resolve at mediation with every additional contested application filed. The probability of resolution decreases by 41% when referral for mediation takes place at the interlocutory stage instead of the close of pleadings. In addition, a longer time taken to refer a case for mediation is more likely to negatively affect the parties' satisfaction rate at mediation.[68]

[11.058] In general, it is prudent to attempt mediation as early as possible, so as to prevent further costs from being incurred and parties being more entrenched in their respective positions. It may not

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66 See Chief Justice Sundaresh Menon, "State Courts Workplan 2017, Keynote Address: Advancing Justice, Expanding the Possibilities" (March 17, 2017), available online: <https://www.statecourts.gov.sg/cws/Resources/Documents/State%20Courts%20Workplan%202017%20Keynote%20Address%20by%20Chief%20Justice(FINAL).pdf> (accessed October 5, 2020), para 50.

67 Roselle L Wissler, "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research" in *Ohio State Journal of Dispute Resolution*, Vol 17 (2002), pp 641–703.

68 Dorcas Quek Anderson, Eunice Chua and Ngo Tra My, "How should the Courts Know Whether a Dispute is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Courts' Referral of Civil Disputes to Mediation", in *Harvard Negotiation Law Review*, Vol 23(2) (2018), p265, pp 304–305, pp 308–311.

be the best strategy to attempt mediating when there is a pending summary judgment application, because the parties may be uncertain about their chances of success and would consequently prefer taking chances on their application rather than settling at the mediation. Lawyers should also consider whether the issues in dispute have sufficiently crystallised before the case proceeds for mediation. It is probably for this reason that the State Courts call the parties for pre-trial conferences to consider ADR options only when 4 months have elapsed after the filing of the writ, which is likely to be after pleadings have closed.

[11.059] If lawyers are concerned that suggesting mediation may be perceived as a sign of weakness by the opposing party, they should make the best use of the courts' existing mechanisms to obtain the courts' assistance. The Supreme Court Practice Directions allow a party interested in mediation to file an ADR Offer. The opposing party has to file a Response to ADR Offer within 14 days of service. The failure to do so may be construed by the court as unwillingness to attempt ADR without providing any reasons.[69] Similarly, the State Courts have created opportunities to discuss the use of mediation at the case management conference for Magistrate Court's claims, and in the pre-trial conference called 4 months after the filing of writ for District Court claims. Lawyers should use these opportunities to raise the lack of response or the negative response by the opposing party to the relevant judge or assistant registrar, in order to stimulate a court-led discussion on the appropriateness of using mediation.[70]

6.4 Being equipped for and preparing for mediation

[11.060] It is most evident from the recent developments that mediation has been institutionalised within the courts and is also being incrementally incorporated into many other industries in Singapore. The "new lawyer" in many mature jurisdictions is now one who is adept in both litigation and conflict resolution skills, as he

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69 Supreme Court Practice Directions, para 35C.

70 See also Dorcas Quek Anderson, "Supreme Court Practice Directions (Amendment No 1 of 2016): A Significant Step in Further Incorporating ADR into the Civil Justice Process" in *Law Gazette* (March 2016), available online: <https://v1.lawgazette.com.sg/2016-03/1524.htm> (accessed October 5, 2020).

now needs to help clients in holistic problem-solving.[71]

[11.061] In light of the palpable paradigm shift, an effective legal advisor has to be equipped with mediation and other conflict resolution skills, learn to be effective mediation advocates and be familiar with ongoing developments in the mediation scene. There are many courses as well as literature that lawyers may avail themselves with in order to be equipped with mediation skills. In representing clients, it is also necessary for lawyers to understand how many mediators will focus on "facilitating" the parties' negotiations. The lawyer's role is then not to focus on finding fault based on past events, but to assist the client in generating solutions for the future; not to deal only with legal issues in the dispute but to ensure that the clients' underlying concerns are also met through a settlement; and not to emphasise on persuading the mediator about the strength of his case but work with all parties and the mediator to achieve a settlement that will meet the client's needs. Mediation requires a vastly different set of skills in comparison to trial advocacy, and these skills should be honed to ensure that clients are able to benefit from the ADR services that have been made widely available for them.

6.5 Enforcement of mediated settlement agreements

[11.062] Finally, it is good practice to consider how a mediated settlement may be enforced in the event of a default. While studies strongly suggest that a mediated settlement that is arrived at consensually is likely to be complied with, a lawyer usually has to plan for the "worst-case scenario". Where mediation has been conducted without a pending claim in court, the parties may make use of the expedited enforcement mechanism provided in s 12 of the Mediation Act if their mediator was accredited by SIMI, or the mediation was done under SMC, SIMC, WIPO Mediation and Arbitration Centre or the Tripartite Alliance for Dispute Resolution's auspices.[72] All the disputing parties must consent to use such a mechanism and apply to court within 4 weeks after reaching a resolution: s 12 of the Mediation Act. Moreover, the settlement terms

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71 See Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Law and Society, 2008).

72 Singapore Gazette Notification No. 3760 (November 3, 2017) Mediation Act 2017 (Act 1 of 2017): Designated Mediation Service Providers and Approved Certification Scheme.

must be in written form, signed by all the parties except the mediator and contain the following information:

(1) names of all parties;

(2) name of mediator;

(3) name of mediation service provider (if any) administering the mediation;

(4) name of SIMI certification scheme under which mediator is certified (if applicable); and

(5) date on which the mediated settlement agreement is made.[73]

The settlement terms can then be converted into a court order. The legal advisor should also consider whether to apply for the sealing of the court order, as some clients may wish to have their settlement terms kept confidential and not accessible from a search of court documents.

[11.063] Since 12 September 2020, another enforcement mechanism has been made available under the Singapore Convention on Mediation Act 2020 for settlements arrived at as a result of "international" mediations defined by art 1 of the Singapore Convention. An application to enforce the agreement must be made to the High Court, and fulfil these formality requirements:

(1) provide a signed settlement agreement or a certified copy of the agreement; and

(2) provide evidence that the agreement resulted from mediation. Such evidence could include a signature of the mediator on the agreement, a document signed by the mediator indicating that the mediation was carried out, or an attestation by the mediation institution that administered the mediation.[74]

[11.064] Where there is a pending court case, the lawyers may simply apply to record the terms of settlement before the court, with the express agreement for a court order to be extracted upon default by any party. The usual practice in SCCDR is to agree for the Notice of Discontinuance to be filed by a certain time after the settlement terms

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[73] Mediation Rules 2017 (S 624/2017).

[74] Singapore Convention on Mediation Act 2020 (No. 4 of 2020) ss 3, 4-6.

would have been complied with. This ensures that the court case remains pending and that a court order may still be extracted if a default were to occur. This method is usually chosen when all the parties wish to keep their settlement terms confidential. If confidentiality is not a major concern, the parties may agree to extract a consent order or judgment reflecting the settlement terms.[75]

7. CONCLUSION

[11.065] The mediation landscape for civil disputes has matured considerably since the first seeds of mediation were planted in Singapore. The current challenge confronting the mediation community is to harness the rich diversity within this field to bring about greater professionalisation of mediation across different sectors. Much also has to be done for the culture of mediation to be increasingly nurtured within the society, and for mediation to be known not only as a counterpoint to litigation but also as a common and accessible way to resolve disputes.

[11.066] Former Chief Justice Chan Sek Keong has observed how the ADR movement has taken on new complexions over the years – from "alternative" dispute resolution, to "appropriate", "primary" and "amicable" dispute resolution.[76] It remains to be seen how mediation will continue to take root and adopt even newer dimensions for civil disputes within and beyond Singapore. And the prospect of bringing mediation to greater maturity certainly looks promising.

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[75] See also how enforcement interacts with mediation confidentiality in Dorcas Quek Anderson, "Piercing the Veil of Confidentiality in Mediation to Ensure Good Faith Participation: An Untenable Position?", in *Singapore Academy of Law Journal*, Vol 31 (2019), p 713.

[76] Former Chief Justice Chan Sek Keong, "Keynote Address at the ADR Conference" (October 4, 2012), available online: <https://www.statecourts.gov.sg/cws/NewsAndEvents/Documents/MediaRelease2012Oct2_ADRConference2012.pdf>, para 20 (accessed October 5, 2020).