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Combinations of mediation and arbitration: The Singapore perspective

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Combinations of Mediation and Arbitration

The Singapore Perspective

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8.1 Introduction

In recent years, Singapore has been actively rethinking and reworking 'access to justice', with a strong focus on creating new options for dispute resolution and promoting the awareness of these options. The creation of the Singapore International Commercial Court in 2015 and the launch of the SIAC Investment Arbitration Rules in 2017 are testaments to Singapore's innovation through hybridisation of conventional dispute resolution mechanisms. Singapore's promotion of consensual resolution mechanisms saw the establishment of the Singapore International Mediation Centre (SIMC) and the Singapore International Mediation Institute (SIMI) in 2014, as well as its active support for the 2019 United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention on Mediation') which was signed in Singapore in August 2019.

Against this background, this chapter examines the judicial, regulatory and institutional support in Singapore for the twinning of mediation and arbitration as a form of multi-tier dispute resolution mechanism for commercial disputes. It is a hybrid approach that draws upon 'the strengths of both adversarial and consensual dispute resolution'.[1] In particular, this chapter critically analyses the SIMC-SIAC Arb-MedArb Protocol (the 'AMA Protocol'). Section 8.2 considers the enforcement of multi-tier dispute resolution clauses. Section 8.3 examines the statutory support for the arbitration-mediation dispute resolution approach and potential issues that require further attention. Section 8.4

[1] Vijaya Kumar Rajah, 'W(h)ither Adversarial Commercial Dispute Resolution?' (2017) 33 Arbitration International 17, 33.

critically analyses the AMA Protocol, which is Singapore's contribution towards improving the arb-med-arb mechanism.

8.2 Enforcement

The Queen Mary University of London and White & Case LLP 2018 International Arbitration Survey ('QMUL Survey 2018') findings reveal that 'there has been a significant increase in the combination of arbitration with ADR'.[2] Nearly half of the participants[3] to the 2018 survey preferred the hybrid approach, as compared to just 35 per cent in the 2015 survey findings.[4] This is unsurprising in view of the benefits of using mediation as a prerequisite to starting arbitration.[5] The mediation step allows for a 'cooling-off' period for parties, thereby avoiding the escalation of disputes for adversarial resolution as an immediate recourse.[6] It also has a filtering effect: only the 'truly' contentious issues in dispute proceed for resolution by arbitration.[7] Overall, thus, the mediation prerequisite increases the prospects of preserving the parties' commercial relationship. Indeed, the QMUL Survey 2018 findings support the general dispute-avoidance mentality of business parties. Within the in-house counsel sub-group, it is reported that there is 'a clear preference' for the twinning of international arbitration and alternative dispute resolution (ADR) (60 per cent) over international arbitration as a stand-alone mechanism.[8]

The enforceability of multi-tier dispute resolution clauses is thus a crucial consideration for business parties in deciding the precise dispute resolution mechanism. In the past, there was some uncertainty as to the enforceability of multi-tier dispute resolution clauses under Singapore law, by reason of the common perception that clauses requiring parties to

[2] Queen Mary University of London and White & Case LLP, 2018 International Arbitration Survey: The Evolution of International Arbitration <www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey–The-Evolution-of-International -Arbitration-(2).PDF> accessed 2 February 2020, 5.

[3] Of the respondents to the survey, 25 per cent were from the Asia Pacific region: ibid 41.

[4] Queen Mary University of London and White & Case LLP (n 2) 5.

[5] Constance Castres Saint-Martin, 'Arb-med-arb Service in Singapore International Mediation Centre: A Hotfix to the Pitfalls of Multi-tiered Clauses' [2015] Asian Journal of Mediation 35, 37.

[6] Craig Tevendale, Hannah Ambrose and Vanessa Naish, 'Multi-tier Dispute Resolution Clauses and Arbitration' (2015) 1 Turkish Commercial Law Review 31, 33.

[7] ibid.

[8] Queen Mary University of London and White & Case LLP (n 2) 5.

negotiate in good faith were not enforceable.[9] For some time, the concerns of uncertainty and repugnancy towards the nature of adversarial dispute resolution – which were raised in respect of agreements to negotiate in good faith – had been extended to agreements to mediate as mediation was viewed as a form of assisted negotiation.[10] However, efforts to distinguish an agreement to mediate from an agreement to negotiate in good faith prevailed. In Cable & Wireless plc v IBM United Kingdom Ltd,[11] the English High Court held that an agreement to mediate was enforceable. More significantly, in HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd, the Singapore Court of Appeal refined the law by holding that a clause to negotiate in good faith, which is sufficiently certain, is valid and enforceable.[12] The Court stressed that the law should uphold commercial parties' choice of a particular form of dispute resolution[13] and rejected drawing a distinction between a 'negotiate in good faith' agreement and a mediation agreement.[14] It affirmed that such clauses 'promote consensus and conciliation in lieu of adversarial dispute resolution, values which the Singapore legal system should promote'.[15]

More recent developments clearly indicate that multi-tier dispute resolution clauses of different designs are generally enforceable under Singapore law.[16] Such a development is in line with the prioritisation of party autonomy in dispute resolution under Singapore law, as well as the active promotion of ADR in Singapore in recent years. The landmark decision was International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd.[17] The case concerned a multi-tier mediation-arbitration

[9] Walford v Miles [1992] 2 AC 128, which was followed in Singapore: United Artists Singapore Theatre Pte Ltd v Parkway Properties Pte Ltd [2003] 1 SLR(R) 202; Grossner Jens v Raffles Holdings Ltd [2004] 1 SLR(R) 202; Sundercan Ltd v Salzman Anthony David [2010] SGHC 92.

[10] Joel Lee, 'Agreements to Negotiate in Good Faith' [2013] Singapore Journal of Legal Studies 212.

11 [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041.

12 [2012] 4 SLR 738 (the case concerned a multi-tier rent review mechanism contained in a lease agreement).

13 ibid [45].

14 ibid [43].

15 ibid [45].

16 See George M Vlavianos and Vasilis FL Pappas, 'Multi-tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration' in J William Rowley, Doak Bishop and Gordon Kaiser (eds), The Guide to Energy Arbitrations (2nd edn, Law Business Research 2017).

17 [2014] 1 SLR 130 ('Lufthansa').

dispute resolution mechanism. The pre-arbitral mediation mechanism involved a number of steps that progressively escalate the dispute for mediation by the more senior ranks of the respondent's management and the designated personnel of the counterparty. Disputes which could not be settled by mediation[18] were to be resolved by arbitration.

The Lufthansa decision clarified two crucial aspects of enforceability of multi-tier dispute resolution clauses. First, are such clauses generally enforceable from the perspective of certainty? On this question, the Court of Appeal agreed with the lower court's ruling that the preconditions for arbitration were certain and enforceable, noting the clear and mandatory language and the specificity as to the personnel involved in each pre-arbitral step.[19] The lack of specification as to the time frame or rules for each pre-arbitral step did not render the clause uncertain.[1]Clearly, the Court of Appeal took a commercially sensible, as opposed to technical, approach in assessing certainty of dispute resolution clauses.[2]

The second issue is this: are the pre-arbitral steps conditions precedent to the commencement of arbitration? If the pre-arbitral steps constitute conditions precedent, the arbitral tribunal constituted without fully complying with these steps and any resultant ruling would be subject to a jurisdictional challenge. In Lufthansa, the Court of Appeal was of the view that the pre-arbitral steps, in the form that they were drafted, were conditions precedent to the submission of disputes for arbitration.[22] The arbitration clause clearly specified that only 'disputes which cannot be settled by mediation pursuant to Clause 37.2, shall be finally settled by arbitration ...'.[23] The Court further affirmed that, in the absence of waiver, specific procedures prescribed as conditions precedent to arbitration or litigation must be fully complied with.[24] Disagreeing with the lower court, it held that the pre-arbitral steps had not been satisfied by the mere convening of 'some meetings between some people in their respective organisations discussing some variety of matters'.[25] The decision would thus assure the commercial parties that Singapore courts would hold parties to their agreement.

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[18] The pre-arbitral steps were described as 'mediation' by the parties in their agreement.
[19] Lufthansa (n 17) [54].
[20] The specification of deadlines and time limits would, however, increase the chances of enforcement: see Lawrence Teh, 'Singapore' in Frederick A Acomb and others (eds), Multi-tiered Dispute Resolution Clauses (IBA Litigation Committee 2015) 172.
[21] Seng Onn Loong and Deborah Koh, 'Enforceability of Dispute Resolution Clauses in Singapore' [2016] Asian Journal of Mediation 51, 59.
22 Lufthansa (n 17) [54].
23 ibid [7], [54].
24 ibid [62].
25 ibid.

Lufthansa was followed in the subsequent case of PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd,[26] which contains the following dispute resolution clause:

> Save for the matters set out in [the following] paragraph [concerning disputes over the quality of materials or workmanship], all disputes arising in connection with this contract including but not limited to the validity, the interpretation or the execution of this contract shall be settled amicably by negotiation. In case no settlement can be reached the parties hereto agree to submit all such disputes to the Governing Jurisdiction of the Courts Batam in Batam [sic].

In PT Selecta, the defendant argued that the Singapore proceedings ought to be stayed as the parties' contract contained an exclusive jurisdiction clause in favour of Batam courts and the plaintiff failed to prove that the breach may be justified by exceptional circumstances amounting to 'strong cause'.[27] It was held that the obligation to negotiate is a condition precedent to the commencement of litigation in a Batam court.[28] As parties had yet to attempt negotiation in the case, the obligation to pursue litigation in a Batam court was not engaged and the 'strong cause' test was thus irrelevant at that stage.[29]

Further, Singapore courts view a multi-tier dispute resolution clause as a unitary dispute resolution mechanism, as opposed to comprising severable and distinct dispute resolution mechanisms. For clauses which incorporate arbitration as one of the dispute resolution steps, the judicial characterisation bears practical significance for a party's ability to invoke section 6 of the Arbitration Act[30] or section 6 of the International Arbitration Act[31] (as the case may be)[32] to ask for a stay of court proceedings commenced by the other party

[26] [2015] SGHCR 16 ('PT Selecta') [53].

[27] As to the 'strong cause' test, see Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd [2018] 2 SLR 1271.

[28] PT Selecta (n 26) [51]–[52].

[29] ibid [55]. The defendant did not argue whether the plaintiff's commencement of court proceedings in Singapore amounted to a breach of the obligation to negotiate, thereby entitling the defendant to enforce the exclusive jurisdiction agreement (see ibid [56]).

[30] Arbitration Act 2001 (Cap 10).

[31] International Arbitration Act 2002 (Cap 143A).

[32] The Arbitration Act governs arbitrations where the place of arbitration is in Singapore and where Part II of the International Arbitration Act does not apply (see Arbitration Act, s 3). The International Arbitration Act governs international arbitrations and non-international arbitrations where parties have agreed in writing that Part II of the International Arbitration Act or the UNCITRAL Model Law on International Commercial Arbitration 1985 shall apply to their arbitration (see International Arbitration Act, s 5).

in breach of the clause. On a unitary dispute resolution mechanism characterisation, the entire multi-tier dispute resolution clause will be treated as an arbitration agreement for the purposes of section 6 of the Arbitration Act[33] and section 6 of the International Arbitration Act.[34] As such, the innocent party may ask for a stay of court proceedings that were commenced without first attempting the pre-arbitral steps such that the arbitration agreement is not engaged. This is an eminently sensible approach as the relevant legislative provisions aid in the enforcement, albeit in an indirect way, of the multi-tier dispute resolution clause. Putting enforcement considerations aside, the unitary dispute resolution mechanism view is also consistent with the reality of combined processes. As will be discussed in Sections 8.3 and 8.4, the combination of two processes inevitably means that the features of the separate processes are adapted and sometimes lost. In other words, the combined process is a different mechanism, and not the sum of the separate processes.

Relevantly, the Mediation Act 2017 further bolsters the enforcement of an agreement to mediate disputes by providing that the courts have a power to stay court proceedings commenced in breach of a mediation agreement.[35] This statutory power applies in respect of a dispute falling within the scope of a 'mediation agreement' which is defined by the legislation as simply 'an agreement by 2 or more persons to refer the whole or part of a dispute which has arisen, or which may arise, between them for mediation'.[36] Accordingly, this power may be invoked in a case where mediation is the pre-arbitral step in a multi-tier dispute resolution clause and one party has commenced court proceedings in breach of the agreed dispute resolution procedures.[37]

8.3 Regulatory and Institutional Support

The pro-enforcement attitude of the courts goes hand-in-hand with the strong regulatory and institutional support of multi-tier dispute resolution, to which

[33] Ling Kong Henry v Tanglin Club [2018] SGHC 153.
[34] Heartonics Corporation v EPI Life Pte Ltd [2017] SGHCR 17 [80].
[35] Mediation Act 2017, s 8.
[36] ibid, s 4.
[37] Mediation Act 2017 applies only to 'a mediation that is wholly or partly conducted in Singapore' or where the agreement stipulates that the Mediation Act 2017 or Singapore law applies to the mediation (see s 6).

we now turn. We commence our analysis by tracing the rise of ADR[3] in Singapore, for this forms the foundation for the support of multi-tier dispute resolution mechanisms.

8.3.1 The Rise of ADR

The Singapore judicial system embraces the vision of 'a multi-door courthouse'[39] through the incorporation of various forms of ADR since 1994. Numerous seminal developments on mediation in Singapore legal practice are worth highlighting:[40]

- Court-based mediation was first implemented in the Subordinate Courts (which have now been renamed the State Courts) in 1994.
- In 1997, the Singapore Mediation Centre, which focused on private commercial mediation, was established.
- In 1998, the Community Mediation Centres were set up by the Ministry of Law to provide mediation for disputes arising between relatives, friends and neighbours.
- In 2011, the option of neutral evaluation – a process of assessing parties' legal rights by a neutral third party – was made available for all civil cases.[41]
- In 2013, mediation and counselling had been made mandatory for divorce cases involving parents with children under fourteen years of age.
- In 2014, the SIMC and the SIMI were established. The SIMC was set up to provide world-class mediation services for transnational commercial disputes, particularly those arising from business operations in Asia. The SIMI, on the other hand, is a professional standards body which offers a mediator credentialling scheme.
- From 2015, parties involved in matters falling under the Protection from Harassment Act and the Community Disputes Resolution Act 2015 may be referred for mediation, with or without their consent.

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[38] In this chapter, 'ADR' shall refer to any means of non-litigation dispute resolution process, including mediation, neutral evaluation, conciliation and arbitration.

[39] Frank EA Sander, 'Varieties of Dispute Resolution' (1976) 70 FRD 111; Leo A Levin and Russell R Wheeler, The Pound Conference: Perspectives on Justice in the Future (West Publishing 1979).

[40] See also George Lim and Eunice Chua, 'Development of Mediation in Singapore' in Danny McFadden and George Lim (eds), Mediation in Singapore: A Practical Guide (2nd edn, Sweet & Maxwell 2017), ch 1; Andrew Phang, 'Mediation and the Courts – The Singapore Experience' [2017] Asian Journal of Mediation 14.

[41] Dorcas Quek Anderson and Chi Ling Seah, 'Finding the Appropriate Mode of Dispute Resolution: Introducing Neutral Evaluation in Subordinate Courts' (2011) Law Gazette 21.

- The Mediation Act 2017, a legislative framework for commercial mediation, came into force on 1 November 2017.[42] It contains four salient provisions: power of court to stay court proceedings pending the completion of mediation;[43] enforceability of mediated settlement agreements;[44] confidentiality and admissibility of mediation communications;[45] and applicability of exceptions under the Legal Profession Act (applicable to arbitration) to mediation.[46]

From this summary of seminal developments, it is clear that Singapore law promotes the use of mediation for resolving both commercial and non-commercial disputes.[47] In respect of commercial disputes, which forms the focus of this chapter, it would be unrealistic to expect that all disputes will be resolved amicably through ADR. Moreover, the enforceability of mediated settlement agreements, although enhanced to some degree by the Mediation Act 2017,[48] is still much more limited as compared with the degree of enforceability of arbitral awards under the New York Convention.[49] Save for mediated settlements that are reached in a mediation following the commencement of arbitration (and can be recorded in a consent award), mediated settlements are generally enforced as an agreement. The enforcement of such agreements overseas can be costly and time-consuming. Whilst the Singapore Convention on Mediation[50] mitigates some of these difficulties, it should not be missed that the Convention only applies to international commercial disputes. It also excludes settlement agreements that have been approved by a court or have been concluded in court proceedings, and are enforceable as a judgment in the state of the issuing court, as well as mediation agreements that have been recorded

42 See Dorcas Quek Anderson, 'Comment: A Coming of Age for Mediation in Singapore?: Mediation Act 2016' (2017) 29 Singapore Academy of Law Journal 275.

43 Mediation Act 2017, s 8.

44 ibid, s 12 (recording of mediated settlement agreement as order of court).

45 ibid, s 9 (restrictions on disclosure) and s 10 (admissibility of mediation communication in evidence).

46 ibid, s 17.

47 See, generally, Siyuan Chen and Eunice Chua, 'Singapore Civil Procedure' in Piet Taleman (ed), International Encyclopedia of Laws (3rd edn, Kluwer Law and Business International 2018).

48 On conditions for the conversion of a mediated settlement into a court order under s 12 of the Mediation Act 2017, see Anderson (n 42) 287–88.

49 In full, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. More than 150 countries are signed up to the New York Convention.

50 At the time of writing, there are fifty-two signatories to the Convention.

and are enforceable as an arbitral award.[51] Moreover, there are uncertainties as to enforcement under the Convention.[52] With Qatar ratifying the Convention on 25 February 2020, following Singapore and Fiji, the Convention has come into force on 12 September 2020. It remains to be seen how popular this instrument will be going forward and whether the uncertainties can be satisfactorily resolved in the near future. Accordingly, it may still be prudent and sensible to combine mediation with arbitration in the dispute resolution clause, as opposed to relying on mediation alone, for some time to come. Relying on adversarial forms of dispute resolution alone (such as arbitration and litigation), on the other hand, ensures that an outcome would be reached in every case, but it does not facilitate the preservation of the parties' commercial relationship.[53]

In former Attorney-General VK Rajah, SC's words, thus, 'the future belongs to hybrid dispute resolution mechanisms which marry both adversarial and consensual forums'.[54] Accordingly, Singapore's promotion of ADR for the resolution of commercial disputes is carried out in conjunction with the promotion of multi-tier dispute resolution mechanisms. In Section 8.3.2, we turn to consider regulatory support for the hybrid dispute resolution mechanism that combines mediation and arbitration under Singapore law.

8.3.2 Regulatory Support

Both the Arbitration Act and the International Arbitration Act envisage that disputes may be resolved through the twinning of mediation and arbitration and provide support for the implementation of the procedures. Express legislative provision for mediation[55] appears 'unusual'

51 Singapore Convention on Mediation, art 1(3).

52 See Norton Rose Fulbright, 'The Singapore Mediation Convention: An Update on Developments in Enforcing Mediated Settlement Agreements' < http://www.nortonrosefulbright.com/en/knowledge/publications/b5906716/the-singapore-mediation-convention> accessed 14 August 2020.

53 Bobette Wolski, 'ARB-MED-ARB (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of Its Parts' (2013) 6(2) Contemporary Asia Arbitration Journal 249, 258.

54 Rajah (n 1) 32.

55 The International Arbitration Act uses the terminology of 'conciliator' and 'conciliation', which are defined under s 16(5) to include reference to a mediator and mediation proceedings, respectively. The Arbitration Act uses the language of 'mediator' and 'mediation proceedings', which are defined under s 16(4) to include reference to a 'conciliator' and 'conciliation proceedings', respectively.

because mediation and like processes are considered 'purely voluntary' in other jurisdictions and are generally left up to the parties' own agreement or arrangements.[56] However, these legislative provisions are helpful in practice as they operate as 'gap-fillers' and/or clarification on the effect of such a hybrid mechanism. We now examine these provisions in detail.

First, both legislations provide for a mechanism to appoint a mediator in the event that the appointing party designated by the agreement 'refuses to make the appointment or does not make it within the time specified in the agreement or, if no time is so specified, within a reasonable time of being requested by any party to the agreement to make the appointment'.[57] Under the International Arbitration Act, the President of the Court of Arbitration of the Singapore International Arbitration Centre (SIAC) is given the power to appoint the mediator, on the application of any party to the said agreement. Similarly, under the Arbitration Act, the Chairman of the Singapore Mediation Centre may make the appointment in such circumstances.

Second, both the Arbitration Act and the International Arbitration Act, in identical language, prescribe default timelines for the conduct of the mediation.[58] These provisions ensure that the mediation agreement can be implemented in practice and help to overcome any issue of uncertainty with provisions that fail to provide for specific timelines.

Third, section 37 of the Arbitration Act and section 18 of the International Arbitration Act (referring to Article 30 of the UNCITRAL Model Law on International Commercial Arbitration 1985) provide that if the parties settle their dispute during the arbitral proceedings, the settlement agreement shall be recorded as a consent award by the arbitral tribunal, if so requested by the parties and not objected to by the arbitral tribunal.[59] For parties who choose SIAC arbitration, Article 32.10 of the SIAC Rules 2016 also makes clear that the arbitral tribunal 'may make a consent award recording the settlement' of the parties, if the parties so request.

Fourth, both legislations expressly allow for the appointment of the same person to act as both the mediator and the arbitrator.[60] Parties may agree to the same person acting as both mediator and arbitrator where

56 Robert Merkin and Johanna Hjalmarsson, Singapore Arbitration Legislation Annotated (2nd edn, Informa Law 2016) 81.

57 Arbitration Act, s 62(1); International Arbitration Act, s 16(1).

58 Arbitration Act, s 62(4); International Arbitration Act, s 16(4).

59 The provisions, on a literal reading, would not apply to a med-arb procedure as any settlement reached in the mediation phase is not reached in the course of an arbitration.

60 Arbitration Act, s 62(4); International Arbitration Act, s 16(3).

mediation fails to help parties reach a settlement (the 'Same Person Model') on considerations of savings of time and costs because the mediator would not need to spend further time familiarising himself/ herself with the facts and issues when acting as arbitrator.[61] It is said that this model is particularly advantageous if parties are not confident that the pre-arbitral mediation will be successful.[62] However, the Same Person Model suffers from a number of shortcomings. As an arbitrator is better paid than a mediator, the third party who is to assume both roles sequentially is placed under a conflict of personal interest (of receiving more remuneration) and duty.[63] He/she might come under attack for not working as hard to bring both parties to a consensual settlement of their dispute out of the self-interest of wanting to receive more remuneration for his/her subsequent role as the arbitrator. Further, the conduct of the mediator (who later turned arbitrator) in the pre-arbitral mediation proceedings might give rise to allegations of procedural irregularities or other grounds (for example, apparent bias) to challenge the arbitral award or its enforcement.[64] Such complications/challenges do not arise in a model where different persons take on the roles of mediator and arbitrator.

Even if the mediator's conduct in the mediation proceedings is beyond reproach, there is a real risk that a mediator who has to then take on the function of an arbitrator may adjudicate the dispute under bias, having already formed his/her views as to the merits of the case based on the communications exchanged during the mediation proceedings or the parties' reasonableness in conduct.[65] Most crucially, parties may have divulged confidential information or made concessions in the course of the mediation proceedings on a 'without prejudice' basis – for example, during private meetings (caucus sessions)[66] – in hope of reaching an amicable settlement which did not ultimately materialise.[67] The information disclosed or the concessions made may operate to the disadvantage of the relevant party in the arbitral proceedings or increase the risk of bias

[61] Castres Saint-Martin (n 5) 39.

[62] ibid.

[63] ibid.

[64] See Gao Haiyan v Keeneye Holdings Ltd [2011] 3 HKC 157. The Hong Kong Court of First Instance found the conduct of the mediation proceedings by the mediator turned arbitrator to be irregular and concluded that the arbitral tribunal operated under apparent bias. The arbitral award was accordingly refused enforcement on the ground of public policy. This holding was reversed on appeal: [2012] 1 HKLRD 627.

[65] Castres Saint-Martin (n 5) 40.

[66] See Arbitration Act (n 30), s 63(2)(a); International Arbitration Act (n 31), s 17(2)(a).

[67] Merkin and Hjalmarsson (n 56) 82.

from the mediator-arbitrator. It cannot be assumed that the mediator-arbitrator can put aside the information that has been received in the mediation process when he/she is to take on the function of an arbitrator. In fact, cognitive psychology instructs that the contrary tends to happen.[68] Conversely, for fear of compromising their positions in the event of arbitration, parties may be unwilling to confide in the mediator who is to take on the function of the arbitrator subsequently, thereby diminishing the effectiveness of the mediation process.[69]

Such risks are more pronounced under Singapore law. Although the mediation communications are generally regarded as confidential,[70] both the Arbitration Act and the International Arbitration Act oblige the arbitrator, on the resumption of the arbitral proceedings, to divulge as much of the confidential information he or she received during the mediation proceedings to all parties to the arbitral proceedings as he or she considers material to the arbitration. In nearly identical language, section 63(3) of the Arbitration Act and section 17(3) of the International Arbitration Act provide:

> (3) Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings during [mediation/conciliation] proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall before resuming the arbitral proceedings disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings.

Clearly, the Singapore legislative model opts for transparency as a means of safeguarding against the risk of bias on the part of the arbitrator. It resurrects the norms of arbitrations: most notably, to ensure that information provided by one party will be communicated to the other party,[71] and that all parties to an arbitration have a right to be heard. Section 63(3) therefore ensures that all parties have a chance to respond to communications made in the mediation process that may potentially influence the arbitrator's decision-making process in the arbitration. Yet, this may diminish the utility of the

68 Ellen E Deason, 'Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review' (2013) 5 Yearbook on Arbitration and Mediation 219, 220.

69 Castres Saint-Martin (n 5) 40.

70 Arbitration Act (n 30), s 63(2)(b); International Arbitration Act (n 31), s 17(2)(b).

71 Arbitration Act (n 30), s 63(3) essentially overrides the effect of private sessions that took place during mediation. See IBA Rules of Ethics for International Arbitrators, r 5.3.

mediation step for defensive parties. It may also be that parties in mediation, being aware of the full disclosure to follow in the arbitral process, feel compelled to settle. As such, parties, in opting for a multi-tiered clause that combines mediation and arbitration, need to balance the risks against the benefits of adopting the Same Person Model. Parties should also carefully consider their selection of a professional to act as both the mediator and the arbitrator. The two roles require very different skill sets and not everyone is able to discharge both functions with competence.[72] More broadly, the foregoing analysis reveals that the combination of both mediation and arbitration does not always lead to the best of both worlds with no downsides. Hence, tactically, given the inherent limitations of the pre-arbitral mediation phase, some parties may use the mediation process to improve their chances of success in arbitration, by using the process to 'shape the views of the person who will become the ultimate fact finder'[73] or flush out the counterparty's position.

Of course, parties may choose to agree on the appointment of different persons to take on the functions of mediator and arbitrator. Such a model would be more costly and time-consuming but may better preserve, though not in entirety, the key advantageous features of both processes. In Section 8.4, we turn to look at the AMA Protocol, which generally appoints different persons for the two processes. Through a close scrutiny of this initiative, we explore in greater depth the difficulties that may arise with multi-tier dispute resolution mechanisms.

8.4 The AMA Protocol

On 5 November 2014, the SIAC and the SIMC jointly launched the AMA Protocol,[74] a three-stage mechanism that seeks to overcome or avoid the problems that commonly arise in the combined process of mediation and arbitration, including the ones discussed in Section 8.3.2. To summarise, at the first stage, the parties' dispute is submitted for arbitration before the SIAC. An arbitral tribunal is constituted. At the second stage, the arbitral tribunal orders a stay of the arbitration and the case is referred to mediation at the SIMC (within a prescribed eight-week mediation

72 Deason (n 68) 224, 228–29.

73 ibid 224.

74 Singapore International Mediation Centre, 'SIAC-SIMC Arb-Med-Arb Protocol' < http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf> accessed 2 February 2020.

window)[75] pursuant to the SIMC Mediation Rules. At the final stage, as a general description, arbitration is resumed and the arbitral tribunal makes an award. But what precisely happens at this final stage depends on the outcome of the mediation at the second stage. If the mediation successfully led to a settlement, then the parties may ask the arbitral tribunal to record their settlement in a consent award at the final stage. If the mediation was unsuccessful, the parties settle the dispute through arbitration at the final stage.

8.4.1 Core Features of the AMA Protocol

The parties may agree to the application of the AMA Protocol at any time: in their contract, after the dispute has arisen or after arbitration has commenced. There are a number of key advantages of the AMA Protocol. First, the AMA Protocol lays down more specific procedures than the pre-existing med-arb or arb-med-arb processes which generally leave parties to determine for themselves the applicable timelines and procedures.[76]

Second, the arb-med-arb three-stage process ensures that the settlement agreement at the conclusion of a successful mediation can be recorded as a consent award and is enforceable under the New York Convention. The alternative multi-tier mechanism that begins with mediation and continues with arbitration poses two problems for the enforceability of the settlement agreement as a consent award.[77] Where the dispute has been settled by mediation, technically, there is no dispute between the parties to be submitted to arbitration.[78] In other words, the tribunal lacks jurisdiction to act. The lack of a dispute raises a separate question as to whether an award made on the basis of a mediated settlement agreement concluded before the commencement

75 This period may be extended by the Registrar of the SIAC in consultation with the SIMC: see ibid, para 6.

76 Alastair Henderson and Emmanuel Chua, 'Singapore International Mediation Centre Is Launched, Offering Parties an "Arb-med-arb" Process in Partnership with SIAC' (Herbert Smith Freehills, 11 December 2014) accessed 25 October 2018.

77 See generally Yarik Kryvoi, 'Enforcement of Settlement Agreements Reached in Arbitration and Mediation' (Kluwer Arbitration Blog, 25 November 2015) accessed 25 October 2018.

78 Arbitration agreements typically stipulate that there must be a dispute between the parties in order that an arbitration may be commenced pursuant to the arbitration agreement.

of arbitration is enforceable under the New York Convention.[79] Article I(1) of the New York Convention provides that it applies to the recognition and enforcement of arbitral awards 'arising out of differences between persons, whether physical or legal'. If the dispute has been settled by mediation, there is no 'difference' of any kind between the parties. Where the arbitration is initiated before the commencement of mediation and stayed to enable the mediation to proceed as under the AMA Protocol, the aforesaid problems or uncertainties do not arise.[80]

Third, as the arbitral tribunal and mediator under the AMA Protocol are separately and independently appointed by the SIAC and the SIMC,[81] they are usually different persons, unless the parties agreed otherwise. As discussed in Section 8.3.2, this ensures greater impartiality on the part of the arbitral tribunal when the arbitration is resumed after an unsuccessful mediation as well as great effectiveness of the mediation process. It is also less likely that the arbitral award may be challenged in a setting-aside application or refused enforcement. Indeed, the mediation will be conducted in accordance with the SIMC rules on mediation,[82] thereby ensuring that the proceedings will abide by certain standards and be overseen by the SIMC. Of course, costs are likely to be higher for using different persons in the dispute resolution process.

8.4.2 Problems and Uncertainties

Notwithstanding the improved dispute resolution process under the AMA Protocol, uncertainties and problems remain. First, commentators have highlighted the silence of the AMA Protocol on the issue of jurisdictional objections.[83] This gives rise to uncertainty as to whether

79 See Christopher Boog, 'The New SIAC/SIMC AMA-Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs' (Singapore International Mediation Centre, 14 April 2015) accessed 25 October 2018.

80 There is a question to be investigated, as a matter of principle, which is whether the technical differences between the two forms of multi-tier dispute resolution mechanisms should lead to differences in enforceability. See Wolski (n 53) 269. But we may prescind from this question now.

81 'SIAC-SIMC Arb-Med-Arb Protocol' (n 74), cls 4–5.

82 See Singapore International Mediation Centre, 'Mediation Rules' accessed 25 October 2018.

83 Paul Tan and Kevin Tan, 'Kinks in the SIAC-SIMC Arb-Med-Arb Protocol' (Law Gazette, January 2018) accessed 14 August 2020.

the objections should be raised pre-mediation or post-mediation. It has been pointed out that the AMA Protocol seems to assume that the arbitral tribunal has jurisdiction and requires a mandatory stay of arbitration after the filing of the Notice of Arbitration with the SIAC.[84] This reading is supported by clause 5 of the AMA Protocol:

> The Tribunal shall, after the exchange of the Notice of Arbitration and Response to the Notice of Arbitration, stay the arbitration and inform the Registrar of SIAC that the case can be submitted for mediation at SIMC. The Registrar of SIAC will send the case file with all documents lodged by the parties to SIMC for mediation at SIMC. Upon SIMC's receipt of the case file, SIMC will inform the Registrar of SIAC of the commencement of mediation at SIMC (the 'Mediation Commencement Date') pursuant to the SIMC Mediation Rules. All subsequent steps in the arbitration shall be stayed pending the outcome of mediation at SIMC.

Commentators thus suggest that the AMA Protocol, on balance, envisages that any jurisdictional objections will be raised post-mediation. This is, however, far from satisfactory. Parties may be less committed to reaching an amicable settlement during the mediation proceedings[85] if they are concurrently concerned with the jurisdiction of the tribunal and the possibility that their settlement agreement, even if reached, may not be recorded in a consent award.[86] In an article published on the SIMC website, but addressing a different issue, it is suggested that although the AMA Protocol 'does not expressly stipulate the extent to which parties are free to deviate from the standard process', '[i]t can ... be expected that party autonomy will be given precedence'.[87] The general force of the suggestion lends support to the argument that parties are given some flexibility to deviate from the standard process. However, the article is not a legally binding authority. It also does not discuss the issue of the extent to which party autonomy – and therefore deviation from the AMA Protocol – will be 'given precedence'.

Second, the AMA Protocol does not expressly provide for application for interim relief, for example, an order to preserve evidence or a freezing order. Relevantly, it is unclear whether parties may apply for such relief post-stay of arbitration, pending the conclusion of mediation. Where urgent relief is required, one 'less than ideal' solution is to terminate the mediation

84 Ibid.

85 Parties may refuse to participate in the mediation and even attempt to derail any mediation proceedings on the basis of jurisdictional objections.

86 86 Tan and Tan (n 83).

87 Boog (n 79).

proceedings pursuant to clause 7 of the AMA Protocol to allow for the resumption of the arbitration.[88] An alternative solution,[89] which is less drastic but rather uncertain, is to apply to the court for interim relief pursuant to section 12A(6) of the International Arbitration Act. By way of background, section 12A of the International Arbitration Act extends to the Singapore High Court 'the powers that are conferred on an arbitral tribunal' to make the interim measures set out in sections 12(1)(c) to 12(1)(i) in connection with arbitral proceedings,[90] whether the arbitration is held in Singapore or abroad.[91] Exercise of the aforesaid powers is subject to sections 12A(3)–(6):

> (3) The High Court or a Judge thereof may refuse to make an order under subsection (2) if, in the opinion of the High Court or Judge, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined makes it appropriate to make such order.
>
> (4) If the case is one of urgency, the High Court or Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets.
>
> (5) If the case is not one of urgency, the High Court or Judge thereof shall make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) made with the permission of the arbitral tribunal or the agreement in writing of the other parties.
>
> (6) In every case, the High Court or a Judge thereof shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively. (emphasis added)

If the application for interim measures from the Singapore High Court is 'not one of urgency' as falling under section 12A(5), the High Court may make such orders sought only where notice has been given to the other parties and the arbitral tribunal and where the arbitral tribunal's permission and the other parties' agreement in writing have been obtained. Importantly, whether the case is one of urgency or not, section

88 Boog (n 79); Tan and Tan (n 83).
89 Tan and Tan (n 83).
90 Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd [2013] 2 SLR 449 [33].
91 International Arbitration Act (n 31), s 12A(1)(b).

12A(6) imposes a threshold jurisdictional requirement on the order of interim measures by the Singapore High Court. For the purpose of our discussion, thus, the question is: can it be said in a stage 2 situation of the AMA Protocol that the arbitral tribunal 'has no power or is unable for the time being to act effectively' simply by reason of the stay of arbitration to allow a 'mediation window'? Commentators have observed that the provision for the appointment of an emergency arbitrator under the SIAC Rules[92] is likely to 'cut out pre-arbitration applications in most cases'.[93] By parity of reasoning, can it be said that the availability of clause 7 in the AMA Protocol to enable the premature termination of the mediation proceedings so that arbitration may resume would similarly cut out the necessity of section 12A applications? The clause 7 solution is more drastic and is therefore an inexact parallel to the appointment of an emergency arbitrator under the SIAC Rules. The idea is, however, very similar – it is possible for the arbitral tribunal to act in the circumstances. The more important point is that the lack of clarity on application for interim relief under the AMA Protocol is unsatisfactory. However, it has been pointed out that this aspect of uncertainty is unlikely to be a great cause for concern in practice because 'most mediations under the Protocol are completed within 1–2 days' and parties are thus unlikely to make applications for interim relief within 'that narrow window'.[94]

Third, arb-med-arb mechanisms – one of which being the AMA Protocol – have been criticised for not preserving the core features of both mediation and arbitration.95 In particular, the features of party autonomy and the concomitant procedural flexibility inherent in arbitration do not appear to be explicitly taken into consideration in the AMA Protocol. One particular issue is the timing of the mediation process. If it takes place straight after the constitution of the arbitral tribunal, it is said that the parties enter mediation with their own, and often wildly different, perceptions of the justice of the case. They are less likely to reach settlement than if they have carefully thought through the merits of the case, for example, after they have completed written briefs.[96] This is the case for the AMA Protocol. However, it may be

[92] See Singapore International Arbitration Centre, 'SIAC Rules 2016' <https://siac.org.sg /our-rules/rules/siac-rules-2016> accessed 16 August 2020, sch 1, para 3.
[93] Merkin and Hjalmarsson (n 56) 71.
[94] Aziah Hussin, Claudia Kück and Nadja Alexander, 'SIAC-SIMC's Arb-Med-Arb Protocol' (2018) 11 New York Dispute Resolution Lawyer 85.
[95] Wolski (n 53) 267.
[96] ibid 266.

that the concerns are somewhat exaggerated. In commercial disputes, parties are likely to have sought the preliminary opinion of their lawyers before even commencing arbitration. In fact, many large multinational companies have able in-house counsel who would have advised the board of directors even before the engagement of external legal counsel. If the merits of the case were overwhelmingly in favour of one side, most parties would resolve the matter privately rather than initiate formal legal processes. It should also not be missed that commercial parties do often try to negotiate a private resolution between themselves at an early stage of a potential dispute, before lawyers are involved. As such, they are not completely unaware of the other side's basic position. The concerns may be exaggerated but they can be real, at least in some instances.

The follow-on question is can the parties deviate from the AMA Protocol (which provides for very specific steps and timelines) and design a process that better suits their own needs? It has been suggested that party autonomy is given precedence under the AMA Protocol and that parties 'may agree to insert a mediation phase after the first or even the second round of full written briefs, or even after the arbitration hearing, instead of after the response to the notice of arbitration'.[97] If the AMA Protocol indeed champions party autonomy, the way forward is for explicit provision of possible deviations from the standard process. This is not just for certainty. That a dispute resolution mechanism is described as a 'protocol' means that it lays down a set of formal rules to govern the process. To allow parties to deviate from the set of rules as they wish, so long as there is agreement between them, would transform the AMA Protocol into a mere model dispute resolution template. Further, the AMA Protocol is a collaborative initiative between the SIAC and the SIMC. It represents a standardised and co-ordinated dispute resolution process that both institutions are able to administer efficiently. Deviations will have an impact on the efficiency of the process, as both institutions would need to readjust the co-ordination and the processes they are in charge of. Significant deviations may mean that the process is no longer an application of the AMA Protocol but the application of a multi-tier dispute resolution process in which both the SIAC and the SIMC are involved. In any event, parties who are considering a deviation from the standard process should bear in mind that a later mediation phase in the arbitral process would mean that significant legal costs have been run up in the pre-mediation arbitral stage.

[97] Boog (n 79).

Since the SIMC's launch in November 2014, approximately one-fifth of more than fifty mediations that it has administered used the AMA Protocol.[98] Going forward, it will be interesting to carry out a study on the utilisation rate of the AMA Protocol, addressing questions concerning the popularity of including the AMA Protocol as a dispute resolution mechanism in parties' contracts as compared with post-dispute utilisation; the types of disputes for which the AMA Protocol is most frequently used; and the settlement rate for mediations conducted under the AMA Protocol. One interesting query, in particular, is the impact which the Singapore Convention on Mediation will have on the utilisation rate of the AMA Protocol. The Singapore Convention on Mediation is a UN treaty that is aimed at making it easier to enforce mediated settlement agreements across jurisdictions. The Singapore Convention on Mediation does not prescribe a specific mode of enforcement but sets out conditions for enforcement by a state. If a key advantage of the AMA Protocol (or generally the arb-med-arb process) is that it facilitates enforcement of the mediated settlement agreement through the mechanism of converting it into an arbitral award, the question is whether the popularity of the AMA Protocol may decline over time when there is a more direct means of enforcement. Of course, parties may choose the application of the AMA Protocol for its other advantages discussed in this chapter.

8.5 Conclusion

This chapter has discussed Singapore's support of multi-tier dispute resolution mechanisms for commercial disputes through three means: judicial enforcement of multi-tier dispute resolution clauses, regulatory support of such mechanisms; and institutional innovation to improve the combination of mediation and arbitration for the resolution of commercial disputes (the AMA Protocol). This chapter has also highlighted the inherent weaknesses or limitations of the combined processes, whether adopting a Same Person Model or the AMA Protocol which generally appoints different persons to take on the functions of mediator and arbitrator. The point is this: the combined process does not fully bear out the salient features of the separate processes. Something is lost in the combination, in exchange for other gains. Our expectations of what the combined process can do and how it should develop should accordingly be different from our expectations of the separate processes. Readjustment of expectations will bring to the fore important research and law reform questions, such as:

[98] Hussin, Kück and Alexander (n 94).

1. Why should med-arb differ from arb-med or arb-med-arb in terms of enforceability of the consent award?
2. What are the real advantages of combined processes and for which kinds of disputes is each combined process most suitable?
3. What are the ethical or procedural issues arising from such combined processes that may need to be addressed through regulation or codes of conduct?
4. How would the combined dispute resolution process change our understanding and practice of mediation and arbitration as separate processes?
5. Should there be accreditation schemes for mediator-arbitrators (in other words, individuals who are to take on dual functions in the combined dispute resolution process), to the extent that the law continues to sanction the Same Person Model?