Mediation 2021

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Getting The Deal Through

Singapore

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LAW AND POLICY

Definitions

1 | Is there any legal definition in your jurisdiction of the terms 'ADR', 'conciliation' and 'mediation'?

'Mediation' is defined at section 3(1) of the Mediation Act 2017 (No. 1 of 2017) as:

> *a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute: (a) identify the issues in dispute; (b) explore and generate options; (c) communicate with one another; (d) voluntarily reach an agreement.*

In addition, the State Courts of Singapore's website describes 'mediation' as:

> *a flexible process in which a neutral mediator facilitates the parties' settlement negotiations, to help them reach their own solution. The focus of mediation is on finding solutions that will meet the parties' concerns. The mediator will not make a decision concerning who is at fault in the dispute.*

The term 'ADR' is not formally defined in legislation, but Order 108 Rule 3(9) of the Rules of Court (Cap 322) defines, for the purposes of that rule (which concerns the simplified process for proceedings in the Magistrate's Court and District Court), the 'ADR process' as 'an alternative dispute resolution process, that is, a method of resolving disputes that does not use the normal trial process, such as mediation, neutral evaluation or arbitration.'

There is also no formal legal definition of the term 'conciliation', but the state courts of Singapore's website describes 'conciliation' as:

> *a court dispute resolution process for you and the other party in your case to resolve your dispute without going for a trial in court. It allows you and the other party to seek guidance from the Judge during the conciliation session and tap on his experience and knowledge to come up with an optimal settlement for all of you.*

Mediation models

2 | What is the history of commercial mediation in your jurisdiction? And which mediation models are practised?

A conscious decision was made to promote alternative dispute resolution processes, in particular mediation, throughout the Singapore legal system. This was prompted in part by concerns over a trend of Singaporeans becoming excessively litigious, as well as by the desire to achieve a number of specific goals: (1) to provide a less costly and adversarial method of dispute resolution that could be deployed for different types of conflicts; (2) to assist in case management and, in particular, to ease the burden of the judicial caseload; and (3) to maintain the Asian way of life by promoting the harmonious settlement of disputes.

The history of the development of mediation in Singapore is briefly outlined below:

- In 1994, the state courts of Singapore introduced alternative dispute resolution to promote a non-adversarial approach towards the resolution of court proceedings.
- In 1997, the Singapore Mediation Centre (SMC) was set up to provide private commercial mediation services and to act as a training and accreditation body for mediators.
- In 2010, the state courts of Singapore encouraged the use of mediation by introducing a document known as Form 7 at the Summons for Directions stage for civil disputes. The form requires the client to certify that his or her solicitor had explained to him or her the ADR options available and for him or her to indicate in the form his or her decision concerning the use of ADR.
- In 2012, the state courts introduced a 'presumption of ADR', in which all civil cases were automatically referred to mediation or other forms of ADR unless one or more party opted out. There may, however, be subsequent cost implications, where a party has opted out of ADR based on unsatisfactory reasons under Order 59 Rule 5 of the Rules of Court.
- In 2013, the Supreme Court of Singapore amended the Supreme Court Practice Directions to allow a party wishing to attempt mediation or other means of dispute resolution to serve an 'ADR offer'. The Supreme Court highlighted that in exercising its discretion as to costs, it would take into account the ADR offer and the response to the offer in deciding on appropriate costs orders under Order 59 Rule 5 of the Rules of Court.
- In 2014, the Singapore International Mediation Centre (SIMC) was set up to provide mediation services to parties who wish to resolve their cross-border disputes amicably.
- From 1 November 2014, as part of the Simplified Process for Proceedings in a Magistrate's Court or District Court, all claims of $60,000 Singapore Dollars or less would be strongly encouraged by the court to be sent for mediation.
- On 4 March 2015, the state courts' Court Dispute Resolution Cluster (CDRC) was established. The CDRC employs a judge-led courtdispute resolution process to ensure that cases in the state courts are managed robustly. One of the dispute resolution modalities employed by CDRC is judicial mediation.
- On 1 November 2017, the Mediation Act 2017, which codifies various legal aspects of the mediation process in Singapore, came into force.
- On 12 September 2020, the Singapore Convention on Mediation and the Singapore Convention on Mediation Act 2020 entered into force.

Today, both the facilitative and evaluative methods are practised in Singapore.

Domestic mediation law

3 | Are there any domestic laws specifically governing mediation and its practice?

Yes, the Mediation Act 2017, which codifies various legal aspects of the mediation process, applies to mediations conducted wholly or partly in Singapore, or where the agreement to mediate provides that Singapore law or the Mediation Act applies. There are, however, certain exceptions provided for under section 6 of the Act. For instance, the Act currently does not apply to mediations that are conducted under or provided by any other written law or those conducted by or under the court's direction.

Singapore Convention

4 | Is your state expected to sign and ratify the UN Convention on International Settlement Agreements Resulting from Mediation when it comes into force?

Singapore signed the UN Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention on Mediation) on 7 August 2019 and ratified it on 25 February 2020. The Singapore Convention on Mediation Act 2020, which implements the Singapore Convention on Mediation, was passed into law on 4 February 2020 and came into effect on 12 September 2020. With the Singapore Convention on Mediation entering into force, commercial parties involved in cross-border disputes can apply directly to the courts of countries that have signed and ratified the treaty to enforce a mediated settlement agreement.

Incentives to mediate

5 | To what extent, and how, is mediation encouraged in your jurisdiction?

Mediation is strongly encouraged as a dispute resolution and cost-saving process in Singapore and is regarded as the 'first stop to the court process'.

In the state courts of Singapore, litigants are required to read through Form 7, which sets out detailed information about their ADR (including mediation) options, and they have to either choose an option or opt out of the ADR process. The form specifically highlights that any unreasonable refusal on the litigant's part to resolve this matter via mediation or other means of ADR may expose them to adverse costs orders pursuant to Order 59 Rule 5 of the Rules of Court.

The introduction of the 'presumption of ADR', in which all civil cases in the state courts are automatically referred to mediation or other forms of ARD unless opted out by one or more party, is indicative of the courts' attempts to exhort parties to consider conciliatory ways of resolving their disputes, before resorting to litigation, which should be a last resort.

In the Supreme Court, judges and registrars frequently encourage and refer appropriate cases for mediation, and solicitors must advise their clients on the benefits of ADR, including mediation. The Supreme Court Practice Directions allow a party who wishes to attempt mediation or other means of dispute resolution to serve an 'ADR offer'. The Supreme Court highlighted that in exercising its discretion as to costs, it would take into account the ADR offer and the other party's response to the offer in deciding on appropriate costs orders under Order 59 Rule 5 of the Rules of Court. The party that was not willing to participate in mediation must be prepared to explain to the Court why mediation was not suitable, particularly when the Court exercises its discretion as to costs.

Sanctions for failure to mediate

6 | Are there any sanctions if a party to a dispute proposes mediation and the other ignores the proposal, refuses to mediate or frustrates the mediation process?

Yes. The Rules of Court Order 59 Rule 5 specifically provides that in exercising the court's discretion as to costs, a court will take into account various circumstances, including the parties' conduct in relation to any attempt at resolving the matter by mediation or any other means of dispute resolution. This means that there can be cost sanctions if parties unreasonably refuse to participate in mediation.

Prevalence of mediation

7 | How common is commercial mediation compared with litigation?

There are no publicly available figures in Singapore regarding the growth and use of commercial mediation, including how common commercial mediation is compared with litigation and what proportion of mediation is voluntary and directed by the court. However, the following public data are available:

- In a January 2018 news article in the *Singapore Straits Times*, it was reported that the SMC received 538 matters for mediation in 2017 (an 8 per cent increase from 2016) and handled S$2.7 billion in disputed sums in 2017, a record high since it was set up more than 20 years ago.
- The SMC website states that to date, the SMC has mediated more than 4,900 matters worth over S$10 billion since its launch on 16 August 1997.
- In a 2018 speech given by The Honourable Justice Belinda Ang, judge of the Supreme Court of Singapore, it was revealed that between 2012 and 2017, 6,700 cases were mediated at the state courts annually.

MEDIATORS

Accreditation

8 | Is there a professional body for mediators, and is it necessary to be accredited to describe oneself as a 'mediator'? What are the key requirements to gain accreditation? Is continuing professional development compulsory, and what requirements are laid down?

Yes. The Singapore International Mediation Institute (SIMI) is the independent professional standards body for mediation in Singapore. SIMI was incorporated on 15 July 2014 as a non-profit organisation, with support from both the Ministry of Law as well as the National University of Singapore. SIMI works closely with the International Mediation Institute (IMI), a non-profit public interest initiative to drive transparency and high competency standards into mediation practice across all fields, worldwide.

It is not necessary to be accredited to hold oneself out as a mediator, but to be listed as a SIMI mediator, accreditation by SIMI is necessary. SIMI introduced a robust four-tiered mediation credentialing system to differentiate mediators based on their mediation experience as well as user feedback. Each tier has its own accreditation requirements such as completing and passing a SIMI Registered Training Program and acquiring the stipulated amount of mediation experience.

Similarly, to be formally recognised as a Singapore Mediation Centre Accredited Mediator, a candidate has to take and pass the SMC's Mediation Skills Assessment.

There is no legal requirement for continuing education for mediators.

Liability

9 What immunities or potential liabilities does a mediator have? Is professional liability insurance available or required?

The relationship between the parties and the mediator is governed by the mediation agreement. Mediation agreements may contain provisions that seek to waive the mediator from personal liability, but whether such an exclusion is enforceable will depend on the particular circumstances. For instance, certain liabilities such as for fraud, wilful or professional misconduct cannot be waived.

The mediation agreements of the Singapore Mediation Centre (SMC) and the Singapore International Mediation Centre (SIMC) provide that the mediator shall not be liable for any acts or omissions in connection with the mediation unless there is fraudulent, wilful or professional misconduct.

Similarly, mediators in the state courts are immune from suit provided the act done by the mediator was done in good faith and did not involve fraud or wilful misconduct on his part.

There is no requirement for mediators to have professional indemnity insurance in Singapore.

Mediation agreements

10 Is it required, or customary, for a written mediation agreement to be entered into by the parties and the mediator? What would be the main terms?

There is no legal requirement for a written mediation agreement to be entered into by the parties and the mediator. However, in practice, many mediation providers require parties to sign their standard template mediation agreement before the commencement of mediation.

The SMC and SIMC require parties to enter into a mediation agreement prior to the commencement of mediation. Common terms include those relating to each centre's conduct of the mediation, the appointment of the mediator and fees payable, the conduct and termination of the mediation process, an agreement to keep the entire process confidential and that discussions during mediation are without prejudice.

The state courts do not use mediation agreements as the mediation is usually directed by the state court and conducted by the state courts Centre for Dispute Resolution.

Appointment

11 How are mediators appointed?

Often, mediators are appointed by agreement between the parties. In the event that parties cannot reach an agreement, they may ask the mediation service provider to appoint a mediator for them. For example, for mediations at the SMC or SIMC, parties may choose their own mediators or ask that the mediation centre appoints one in the event that parties do not agree. Mediators are appointed based on their attributes including but not limited to language, skills, qualifications, areas of expertise, experience and availability.

Parties are not able to choose their mediator for disputes mediated at the State Courts Centre for Dispute Resolution.

Conflicts of interest

12 Must mediators disclose possible conflicts of interest? What would be considered a conflict of interest? What are the consequences of failure to disclose a conflict?

Yes, mediators must disclose possible conflicts of interest.

Possible conflicts of interest include:

- where the mediator has acted in any capacity for any of the parties;
- where the mediator has a financial interest (direct or indirect) in any of the parties or the outcome of the mediation; or
- where the mediator has any confidential information about the parties or the dispute under mediation derived from sources outside the mediation.

If a mediator fails to disclose a conflict of interest which is later discovered, the mediator's appointment will be set aside. Mediators are generally not liable for wasted costs unless their acts or omissions were fraudulent or constitute professional misconduct.

Fees

13 Are mediators' fees regulated, or are they negotiable? What is the usual range of fees?

Mediators' fees are not regulated and are negotiable; the fees can range widely depending on the type of matter being mediated and the seniority or experience of the mediator. Mediators' fees generally include their time in reviewing the matter prior to the mediation and the actual conduct of the mediation expressed as a lump sum, although hourly rates may apply for mediations that go on after office hours.

The SMC also provides a schedule of fees (which covers the mediator's fee) if parties use the mediator selected by SMC. The fee schedule does not apply if parties choose their own mediators, in which case SMC will provide a fee quote based on the mediator's commercial rates.

PROCEDURE

Counsel and witnesses

14 Are the parties typically represented by lawyers in commercial mediation? Are fact- and expert witnesses commonly used?

Depending on the nature of the dispute in question, parties may be represented by lawyers and have other experts present at the mediation. In practice, parties are usually represented by lawyers in commercial mediation in Singapore. Fact and expert witnesses are also commonly used especially if the case is complex and involves technical issues.

Procedural rules

15 Are there rules governing the mediation procedure? If not, what is the typical procedure before and during the hearing?

As mediation is generally a flexible and consensual process, there are no particular rules that govern the mediation procedure.

However, many mediation providers such as the Singapore Mediation Centre (SMC) and Singapore International Mediation Centre (SIMC) have their respective mediation procedures and rules that participants are required to agree to prior to the commencement of the mediation. Typical procedures include parties being required to provide to each other and the mediator a concise summary of their case and copies of all documents referred to in the summary that each party wishes to rely on in the mediation before the mediation; procedures governing communications before and during the mediation; and procedures dealing with how the mediator may conduct joint or separate meetings with the parties.

Tolling effect on limitation periods

16 Does commencement of mediation interrupt the limitation period for a court or arbitration claim?

Unless otherwise agreed to by the parties or ordered by the court, mediation does not generally postpone the underlying limitation period of actions in Singapore.

Enforceability of mediation clauses

17 | Is a dispute resolution clause providing for mediation enforceable? What is the legal basis for enforceability?

Yes, a dispute resolution clause providing for mediation can be enforceable as long as it satisfies the normal requirements of contract law such as being sufficiently certain (eg, the process and reference to mediation is clear and defined) and the obligation to mediate is expressed in unqualified and mandatory terms. Where parties have agreed to a clause that provides a sufficiently clear commitment to go for mediation, the Singapore Court has found such an agreement to mediate binding (*International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55).

Further, section 8 read with section 4 of the Mediation Act 2017 provides that where any party to a mediation agreement (which may be in the form of a clause in a contract or in the form of a separate agreement) institutes any proceedings before a court against any other party to that agreement in respect of any matter that is the subject of that agreement, any party to that agreement may apply to that court to stay the proceedings so far as the proceedings relate to that matter.

Confidentiality of proceedings

18 | Are mediation proceedings strictly private and confidential?

Yes, mediation proceedings are confidential, and a person must not disclose any mediation communication relating to a mediation to any third party unless in certain specific circumstances. This is normally provided for in the mediation agreement that parties sign prior to commencing mediation, as well as under section 9 of the Mediation Act, which states that mediation communications are confidential and must not be disclosed to any third party, subject to the 10 stipulated exceptions. These situations include well-accepted exceptions such as party consent, the mediation communication has already made available to the public at the time of disclosure and disclosure to protect a person from injury.

In all other situations, a person who wishes to disclose mediation communications must obtain the leave of the court or the arbitral tribunal. Under section 11(2) of the Mediation Act, the court or arbitral tribunal will take into account the following factors in deciding whether to grant leave:

- whether the mediation communication has already been disclosed;
- whether it is in the public interest or interest of the administration of justice to allow the disclosure; and
- any other circumstances that the court or arbitral tribunal considers relevant. As mediation communications are conducted on a without prejudice basis, they are also not admissible in legal proceedings except with the leave of court or arbitral tribunal pursuant to section 11 of the Mediation Act.

Remedies for breach of a confidentiality clause will be in accordance with the normal principles of contract law. A party in breach of its obligations of confidentiality may also face an action for breach of confidence.

Success rate

19 | What is the likelihood of a commercial mediation being successful?

According to the SMC website, the SMC has mediated more than 4,900 matters worth over S$10 billion since its launch on 16 August 1997. About 70 per cent of its cases are settled with 90 per cent of them resolved within one day.

SETTLEMENT AGREEMENTS

Formalities

20 | Must a settlement agreement be in writing to be enforceable? Are there other formalities?

No, a settlement agreement does not need to be in writing to be enforceable, nor are specific formalities required as long as it satisfies the requirements of contract formation. This is because a mediation settlement agreement is subject to general contractual principles, and since contracts under Singapore law do not necessarily need to be in writing to be enforceable, neither do mediation settlement agreements. That being said, it is generally advisable that parties record a settlement agreement in writing.

If, however, parties wish to apply to a court to record the settlement agreement as an order of court, then the Mediation Act requires that the settlement agreement must be in writing.

Challenging settlements

21 | In what circumstances can the mediation settlement agreement be challenged in court? Can the mediator be called to give evidence regarding the mediation or the alleged settlement?

Under Singapore law, mediation settlement agreements are essentially contracts and hence are subject to general contractual principles. As such, mediation settlement agreements can be challenged like any other contracts by the usual contractual vitiating factors. For instance, a settlement agreement may be challenged on the basis of fraudulent misrepresentation, mistake or frustration.

Under the mediation rules of the Singapore Mediation Centre (SMC), parties undertake not to call the mediator as a witness in relation to the dispute. Additionally, where the Mediation Act applies, section 10 of the Mediation Act provides that mediation communications (defined at section 2) are not to be admitted in evidence in any court, arbitral or disciplinary proceedings except with the leave of court or arbitral tribunal under section 11.

Enforceability of settlements

22 | Are there rules regarding enforcement of mediation settlement agreements? And on what basis is the mediation settlement agreement enforceable?

The settlement agreement is treated as a contract between the parties and is enforceable in the same way as any other contracts on the usual principles of contract law. Under Singapore law, a settlement agreement does not need to be in writing to be enforceable as long as it satisfies the requirements of contract formation. However, in practice, the mediation agreement usually stipulates that the settlement must be recorded in writing and signed by the parties to be enforceable.

Where the Mediation Act applies, the settlement agreement may also be recorded as an order of court pursuant to section 12 of the Mediation Act, in which case it may be enforced in the same manner as a judgment or order by the court.

In the state courts, a mediation settlement agreement may be enforced as a court order by registering the settlement agreement with the court. A settlement agreement that is not registered with the court can still be a legally binding contract as long as it satisfies the requirements of contract formation. However, if a party breaches the terms of the settlement agreement, the settlement agreement must first be sued upon and a court order obtained before enforcement action can be taken against the defaulting party.

STAYS IN FAVOUR OF MEDIATION

Duty to stay proceedings

23 | Must courts stay their proceedings in favour of mediation?

Courts are not obliged per se, to stay proceedings, unless requested by the parties. However, as the courts do view mediation favourably and promote the use of mediation as an effective dispute resolution platform, it is generally the case in practice that they will issue longer timelines or hold proceedings in abeyance once it is known that parties are attempting mediation, but this is subject to the overall requirement that the court proceedings are managed in a just, fair and expeditious manner.

Arbitrators similarly have no such duty to stay arbitration proceedings unless requested by and mutually agreed to by parties.

MISCELLANEOUS

Other distinctive features

24 | Are there any distinctive features of commercial mediation in your jurisdiction not covered above?

With the Mediation Act that came into force in November 2017 and the Singapore Convention on Mediation that entered into force on 12 September 2020, Singapore has made significant steps to strengthen its international commercial dispute resolution framework, providing greater certainty and clarity for parties who opt to conduct their mediation in Singapore, and making Singapore an attractive mediation centre.

The Singapore Convention on Mediation provides a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation. Commercial parties involved in cross-border disputes can apply directly to the courts of countries that have signed and ratified the treaty to enforce a mediated settlement agreement. At present, 53 countries have signed up for the convention and six of these countries have ratified it. Singapore continues to encourage more countries to sign and ratify the convention as part of its efforts to encourage the use of mediation to resolve cross-border disputes.

Mediation is now an undeniable and integral part of the Singapore judicial system and should not be thought of as an 'alternative' dispute resolution mechanism, but rather an 'appropriate' dispute resolution mechanism. It is the first port of call at the state courts and for matters at the magistrates' courts, mediation is the primary method of dispute resolution.

The arbitration-mediation-arbitration protocol is available in Singapore and offered in collaboration with the Singapore International Arbitration Centre.

The family courts in Singapore have been conducting mediations online since 2018 and lawyers, mediators and judges are no strangers to adapting quickly to these new platforms. In March 2020, in response to the developing covid-19 pandemic, the Chief Justice directed that all mediations in the state courts will be conducted using video conferencing unless there are special reasons.

UPDATE AND TRENDS

Opportunities and challenges

25 | What are the key opportunities, challenges and developments which you anticipate relating to mediation in your jurisdiction?

The significant growth in domestic and international mediation in Singapore as the country sets itself to be an international mediation centre will require lawyers to learn new skills, such as approaching disputes with a problem-solving mindset rather than the adversarial mindset – commonly associated with trial and arbitration where issues are decided on a win-lose basis; and learning mediation advocacy, to advance one's client's interests in a mediation in a non-adversarial manner. It would not be unthinkable that a lawyer could, in the near future, specialise in dispute resolution and have an exclusive career in mediation – all without ever stepping into a traditional courtroom.

Given also the spread of specialised industry-focused mediation platforms, it is clear that mediators will need to similarly specialise in the industry, to better understand and cater to the specific issues and nuances of, for instance, the maritime, construction or intellectual property industry.

Mediation has also grown in importance as a means to resolve commercial disputes during the covid-19 pandemic. Businesses looking for efficient, cost-effective options while preserving their business relationships will look to mediation as a viable option. The rise of mediation as a result of the pandemic will cement mediation's position as a mainstay of dispute resolution in Singapore.

Coronavirus

26 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

On 18 May 2020, the SIMC launched the SIMC COVID-19 Protocol, which provides an expedited and inexpensive route to resolve commercial disputes during the pandemic. The Protocol shall be in force until 30 June 2021.

Some key features of the Protocol are as follows:

- mediation will be organised within 10 working days;
- parties may enjoy reduced fees based on the amount in dispute. SIMC will exercise flexibility in appropriate cases;
- cases will be matched with experienced mediators to facilitate settlement; and
- mediation is conducted online.

The Protocol is designed to complement legislation dealing with covid-19 as parties who enjoy relief under the COVID-19 (Temporary Measures) Act 2020 can mediate at any time. As the COVID-19 (Temporary Measures) Act places a moratorium on court proceedings, the Protocol provides mediation as an alternative mechanism for parties to resolve their disputes.

Mediation, with its ability to cultivate and maintain long-term commercial relationships while resolving disputes efficiently in a non-adversarial manner, is an important mechanism in resolving commercial disputes arising from the pandemic as they are often not attributable to the fault of either party. In such uncertain and unstable times, the expedited mediation introduced by the Protocol should not be overlooked as it allows businesses to preserve their resources to deal with other challenges, instead of spending them on lengthy and expensive legal proceedings.

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ISBN 978-1-83862-688-4