

CASE UPDATE



The Ministry of Law's Responses to Feedback Received from Public Consultation on the Draft Mediation Bill

17 November 2016

Introduction

1. In this article, we highlight aspects of Singapore's mediation framework – the Mediation Bill (and the Ministry of Law's Responses on 25 October 2016 to Feedback from public consultation on the draft Mediation Bill), mediation's interaction with arbitration and litigation, as well as mediation institutions and certification.
2. Parties increasingly turn to mediation as a mode by which to resolve their disputes. In mediation, parties are assisted in resolving a dispute by a neutral third-party mediator. The process is voluntary, and parties can choose to enter into a settlement at the end of the mediation.
3. In Singapore, mediation is rapidly developing as a dispute resolution mechanism of choice for the following key reasons (among others):
 - a. The voluntary and (generally) confidential nature of mediations;
 - b. Mediation's ability to co-exist and even run concurrently with other arguably more well-known dispute resolution processes (for example, arbitration or litigation). This interaction has been strengthened by statutory and institutional developments.
 - c. The growth of mediation institutions and certification schemes in Singapore that have the capacity to conduct mediations of complex, international disputes;
 - d. The growing certainty of enforcement possibilities pursuant to mediated settlements, whether by way of Court Order by consent, or by way of an arbitral award by consent, because of statutory developments.
4. The overarching practical takeaway is that mediation can be an effective, efficient and legitimate choice of dispute resolution, with enforceable outcomes, and is not necessarily *alternative* to Court litigation or arbitration.

Mediation Bill and the Ministry of Law's Responses to Feedback

5. The Mediation Bill proposes new consolidated legislation which can give welcome statutory support to the mediation process and its outcomes. Significantly, many of the provisions proposed are similar to or mirror the statutory support currently available for arbitrations, under the International Arbitration Act and/or the Arbitration Act.

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6. The draft Mediation Bill was first released for public consultation from March to April 2016. On or about 25 October 2016, the Ministry of Law published its responses to key feedback received over the public consultation process from various sources, including mediation practitioners, service providers, and other stakeholders in the mediation industry, lawyers and the general public. Some points covered in the feedback and responses have been incorporated under the highlights of the Mediation Bill that we summarise below.

a. Stay of Court Proceedings (Section 8)

Section 8 of the Mediation Bill provides a statutory basis for parties to a mediation agreement (note that this differs from a *settlement* agreement) to apply to Court to stay ongoing Court proceedings, and for the Court to make such orders. In addition, the Court may also make interim or supplementary orders as it thinks fit for the purposes of preserving the rights of the parties pending the outcome of the mediation.

b. Confidentiality (Sections 9 to 11)

Section 9 of the Mediation Bill codifies the general obligation of confidentiality that applies to mediations.

Section 10 of the Mediation Bill sets out the circumstances in which disclosure of mediation communications can take place.

Section 11 of the Mediation Bill deals with the circumstances in which evidence given in the course of mediation proceedings can be admitted with the leave of the Court/Tribunal.

It should be noted that the concept of confidentiality of mediation communications is closely tied to the subsequent admissibility in Court of evidence that was given in the course of mediation proceedings. The Ministry of Law has stated in its response to the feedback received during the public consultation that “overlap is necessary, to make clear that an application to admit mediation evidence into court will not be a breach of confidentiality.”

c. Recording of Mediated Settlement Agreement as Order of Court (Section 12)

Section 12 of the Mediation Bill provides statutory basis for parties to apply to court to embody their mediated settlement agreements as a court order **provided that parties consent to so doing**, even where Court proceedings were not already ongoing.

However, the Court may refuse to record the mediated settlement agreement as a court order where certain invalidating factors exist (for example, the agreement is void/voidable on a ground that would invalidate a contract, any term of the agreement is not capable of enforcement as an Order of Court, or in cases where the subject matter of the agreement relates to the welfare/custody of a child, one or more terms are not in the best interests of the child).

The statutory basis for the Court to record a mediated settlement agreement as a court order may, among other things, facilitate the ease of enforceability of agreements reached through mediation. This is similar to the statutory basis for parties to an arbitration to record their settlement terms in a consent award (that can then be enforced as a judgment with the leave of Court).

It is also worth noting that the Ministry of Law has clarified that the recording mechanism set out in Section 12 of the Mediation Bill is at the moment limited to mediations which have complied with the following formal requirements – the Singapore International Mediation Centre (SIMC) or the Singapore Mediation Centre (SMC) as the designated mediation service provider, and the approved certification scheme for the mediator being the Singapore International Mediation Institute (SIMI) Scheme (SIMI Certified Mediator). The scope of Section 12's applicability is expected to expand in due course.

At the same time, we note that the (present) limited applicability of the recording mechanism under Section 12 likely does not detract from the Court's general power to record settlement terms in court orders on a consent basis, pursuant to mediated settlement agreements that do not necessarily comply with the above-stated formal requirements.

d. Legal Profession Act Exceptions

The proposed amendment to the Legal Profession Act makes clear that participation by foreign mediators and foreign-qualified counsel in mediations which involve Singapore law will not amount to the unauthorised practice of Singapore law. This proposed amendment expands on the exception in the Legal Profession Act that is presently applicable to the conduct of arbitrations involving Singapore law.

e. Other Clarifications by the Ministry of Law in their Responses to Feedback Obtained during the Public Consultation

According to the Ministry of Law's Response to Feedback, the Mediation Bill will exclude mediations which are conducted under other written laws, such as mediations under the Community Mediation Centre Act. This is to prevent inconsistency with various domestic mediation schemes that already exist in other legislation and have their own processes and rules.

The Ministry of Law has considered proposals to codify the severability of the mediation clause from a substantive agreement (drawing a parallel from the severability of arbitration clauses from the substantive agreements in which they are found). However, the Ministry has largely reserved its position on this and stated that questions as to the existence and validity of mediation clauses in substantive agreements should be determined by common law principles. The Ministry did comment that it is uncertain if the concept of severability should apply in the same way to mediation clauses.

The Ministry of Law has also declined to seek to codify mediator immunity, on the bases (among others) that immunity may be provided for through contractual provisions or professional indemnity and that mediator immunity is generally not provided for in other jurisdictions, save for court or volunteer mediations.

7. The Mediation Bill (as amended after public consultation) was read for the first time in Parliament on 7 November 2016, and we anticipate that the Mediation Bill will be enacted relatively shortly.

Mediation's Interaction with Litigation and Arbitration

8. The possibility of mediation is built into various stages of the Court litigation process through a suite of hard and soft measures.

9. At a fairly early stage of High Court litigation, parties are required to state in a standard form whether they are willing to attempt alternative dispute resolution, and if not, the reasons why. The Supreme Court Practice Directions also direct solicitors to advise their clients on the benefits of alternative dispute resolution. Similar requirements exist at State Court level.
10. Under Order 59, Rule 5(c) of the Singapore Rules of Court, the Court has the explicit discretion to take into account parties' unreasonable refusal to engage in alternative dispute resolution, in making an order as to costs. Solicitors are again exhorted (in the Supreme Court Practice Directions) to highlight these possible costs consequences to their clients.
11. Mandatory mediation/counselling is being rolled out in stages to (eventually) cover all parties with at least one child below 21 years of age, pursuant to Section 50 of the Women's Charter. At present, divorcing couples with at least one child below 14 years of age are required to attend court-ordered mandatory mediation/counselling. The Child Focused Resolution Centre was set up to support this.
12. As has been discussed earlier, Section 8 of the Mediation Bill explicitly provides a statutory basis for parties to a mediation agreement to apply to Court to stay ongoing Court proceedings, and for the Court to make such orders, pending the outcome of mediation.
13. An interesting example of how mediation can interact with arbitration lies under the SIAC (Singapore International Arbitration Centre)-SIMC's **Arb-Med-Arb Protocol**. Under this Protocol, parties typically commence the initial stages of arbitration (for example, the filing of the Notice of Arbitration and the Response to the Notice of Arbitration, and the constitution of the Tribunal). The Tribunal then orders a stay of the arbitration, so that parties may go for mediation. Where the mediation results in agreement/partial agreement, this agreement can be embodied in a consent arbitral award; where the mediation does not result in agreement, the stay will be lifted and parties can proceed with the arbitration. Similarities can again be drawn to Section 8 of the Mediation Bill, where the Court's power to stay Court proceedings pending mediation is clearly stated.

Mediation Institutions and Certification

14. The Singapore mediation landscape is well-equipped to support mediation needs at all levels, from complex international commercial mediations involving multiple parties, to smaller community mediations between individuals. This is supported by established mediation bodies such as the Singapore Mediation Centre (SMC), the Singapore International Mediation Centre (SIMC) and the Singapore International Mediation Institute (SIMI). With the roll-out of the SIMC and the SIMI in 2014, it is evident that mediation is receiving increasing support.
15. The Singapore Mediation Centre, established in 1997, has a comprehensive mediation scheme which provides for the mediation of various disputes (large and small commercial disputes, industry-specific disputes, family disputes, domain name disputes etc.) under the Rules of the Singapore Mediation Centre. The SMC's expert panel of Principal and Associate Mediators consists of experienced mediators from various industry sectors.
16. The Singapore International Mediation Centre, established in 2014, is oriented towards the needs of parties in cross-border commercial disputes, in particular those doing business in Asia. SIMC's panel of mediators comprises over 65 experienced and respected mediators from Africa, Asia, Australasia, Europe as well as North and South America.

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17. The Singapore International Mediation Institute, established in 2014, is an independent professional standards body for mediation in Singapore and the region. Its Credentialing Scheme has been developed to recognize and monitor the experience of professional mediators, and provide a yardstick for international comparison and development for mediators.

Lee & Lee is named on the Mediation Advocacy Power List 2015 published by the Singapore Mediation Centre. This list recognises the law firms that have most advanced the use of mediation as a dispute resolution tool and are providers of a more complete suite of services. For more information on the Mediation Advocacy Power List 2015, visit: <http://www.mediation.com.sg/news-and-views/listing/>

*For more information on the Singapore Mediation Centre, visit:
<http://www.mediation.com.sg/>*

*For more information on the Singapore International Mediation Centre, visit:
<http://simc.com.sg/>*

*For more information on the Singapore International Mediation Institute, visit:
<http://www.simi.org.sg/>*

*For more information on the Mediation Bill, visit:
<https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-mediation-bill.html>*

*For more information on the Ministry of Law's "Summary of Key Feedback from Public Consultation on the draft Mediation Bill", visit:
<https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/responses-to-feedback-received-from-public-consultation-on-the-d.html>*

*For more information on the Arb-Med-Arb Protocol, visit:
<http://simc.com.sg/arb-med-arb/>*

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