

MEDIATION IN SINGAPORE: THE LAW & PRACTICE

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Introduction

One oft-quoted advantage of mediation as a dispute resolution mechanism, is its flexibility. Unfortunately, its definition can be equally 'flexible' and difficult to pin down, thus sometimes leading to confusion. I would therefore like to begin by defining the word "mediation" as used in this paper. In this paper, "mediation", is defined as follows: -

"The voluntary process by which the parties to a dispute engage the assistance of a neutral person (called the mediator), to facilitate the negotiations between them with a view to resolving their dispute privately in an amicable manner¹."

The key distinction between mediation and adjudicatory dispute resolution mechanisms, such as litigation and arbitration, is that parties in mediation retain the autonomy to decide how the dispute should be resolved. The mediator is essentially a process manager who supervises the process of negotiation between the parties. The role of a mediator is facilitative; he, *inter alia*, creates a conducive environment for communication between the parties such that parties can arrive at mutually agreeable terms which are the best possible in the circumstances². Hence, the other moniker for mediation - "facilitated-negotiations".

History

The amicable resolution of disputes has long been a part of Asian culture. In Singapore, historically, community leaders such as leaders of Chinese clan associations, the headman of Malay villages and the panchayat or community council in an Indian community, resolved disputes using a mechanism similar to our present day mediation³. However, the expedited economic growth and urbanisation since the 1960s has had a significant impact on the growth of litigation as a popular means of dispute resolution.

In the 1990s, formal or institutionalised mediation was established. In 1994, the Court Mediation Centre was set up to introduce mediation in the Subordinate Courts. Institutional mediation received another boost in 1997. On 16 August 1997, the Chief Justice of Singapore launched the Singapore Mediation Centre ("SMC"). The SMC was established, primarily, to handle commercial disputes. In 1998, the Community Mediation Centres ("CMC") Act came into force. The CMC Act established Community Mediation Centres to manage neighbourhood, family and relational disputes.

¹ Adapted from the training material of Singapore Mediation Centre.

² See further Richard Hill, Non-Adversarial Mediation, [1996] Journal of International Arbitration 135-143.

³ Speech of the Honourable Chief Justice Yong Pung How at the launch of "DisputeManager.com" on 31 July 2002.

The Law

Unlike arbitration, there is at present, save for the CMC Act, no legislation that deals specifically with mediation. We therefore have to look to the common law for guidance on legal principles which govern mediation. Many of these areas remain uncertain in Singapore, as there is yet to be judicial pronouncement on these issues and my aim is to raise awareness as to some of these uncertainties rather than to provide categorical answers.

Mediation clauses

Mediation clauses are clauses which provide for mediation as the means of dispute resolution should a dispute arise from the agreement. They are found in Government Contracts such as the Public Sector Standard Conditions of Contract for Construction Works and they are slowly finding their way into more and more contracts with the increasing familiarity and acceptance of mediation. Mediation clauses are useful in avoiding disagreements as to what type of dispute resolution process should be employed in the case of a dispute arising from an agreement. Mediation clauses also provide a way out for a party to suggest mediation without the fear of being perceived as having a weak case.

The first question that arises pertains to the validity of the mediation clause. Clauses that are viewed as uncertain may be unenforceable by the courts. For example, an agreement to agree to mediate is likely to be viewed as uncertain. Another principle is that the mediation clause should not oust the jurisdiction of the courts. For instance, prior to there being legislation, for arbitration, the courts required that arbitration clauses had to be in the Scott v Avery⁴ form to be enforceable. Essentially the Scott v Avery clause provides for arbitration as a pre-condition to the commencement of legal proceedings. It is arguable, that mediation clauses should also provide for mediation as a pre-condition to litigation before they are enforceable.

The next question that one may need to deal with is whether there is indeed a breach of a mediation clause. This will depend on how the mediation clause is worded. Take for example, one common mediation clause which says that parties are “to participate in mediation in good faith”. As to exactly what amounts to good faith is uncertain. To take an extreme example, would turning up at the mediation session and just making one offer amount to mediating in good faith? Does the nature or the quantum of the offer make a difference?

Remedies for breach of mediation clauses

There are also difficulties with respect to the available types of remedies to the injured party should there be a breach of a mediation clause. Some of the potential remedies include a stay of proceedings, damages and specific performance.

⁴ (1856) 5 HL Cas 81

The Singapore Courts have a statutory power to stay proceedings pending arbitration. The residual inherent jurisdiction of the Singapore Court of Appeal to order a stay of court proceedings in favour of arbitration⁵ should arguably, be applicable in the case where there is a mediation clause as well. As to whether the parties have to prove anything else apart from the existence of a mediation clause is yet to be decided. For instance there are cases which impose on the party applying for a stay of proceedings, the requirement to prove that the litigation proceedings are frivolous, vexatious, oppressive or an abuse of the process of court⁶.

Awarding damages in the case of a party not abiding by the terms of a mediation clause is fraught with difficulty. After all damages are meant to put parties in the position that they would have been in had the contractual terms been carried out. Obviously, it would probably be near impossible for a party to predict exactly what would be the outcome if parties had proceeded with mediation.

One of the remedies within the courts' powers is that of specific performance i.e. where the courts compel the performance of what a party had agreed to do. Since a settlement is dependent on the free will of the parties, one of the questions often posed is whether there would be any point in compelling an unwilling party to mediate pursuant to a mediation clause. As one principle that governs the issue of an order of specific performance is that the courts should not issue futile orders, there is uncertainty as to whether the courts would issue orders for specific performance of mediation clauses.

Enforcement of settlement agreements

There is a misconception that the results of mediations are not binding. In fact, settlement agreements are binding by virtue of the law of contract. Normal contractual principles would thus apply to settlement agreements. To enforce a settlement agreement, it is necessary to commence legal proceedings to prove the contract. It has thus been suggested that a statutory provision for the enforceability of settlement agreements may be useful as per that found for arbitral awards⁷.

Confidentiality

One of the benefits of mediation is that it is meant to be a confidential process. Confidentiality is said to promote frank and open discussion thus facilitating settlement of the dispute. Mediation agreements often provide that what transpires during mediation should be kept confidential. The law has been said to be "complex, unclear in parts and yet to be fully developed"⁸. For a matter in court, in determining whether confidentiality ought to be preserved, courts have to balance between protecting an attribute that would promote mediation as opposed to bringing to light information that could assist in reaching a fair

⁵ *Star Trans Far East Pte Ltd v Norske-Tech Ltd & Ors* [1996] 2 SLR 409, 421

⁶ Boule and Teh, *Mediation: Principles Process Practice*, Butterworths, 2000

⁷ In some cases, settlements can also be recorded as consent judgements or arbitral awards. There would thus be additional 'teeth' to the enforcement of settlement agreements.

⁸ Boule and Teh, *Mediation: Principles Process Practice*, Butterworths, 2000

decision. Although it is often said that mediation is a confidential process, the truth of the matter is that mediation is only confidential as far as the law allows.

Mediators' immunity

Currently, legal immunity for mediators at ADR institutions such as the SMC is provided by contract⁹. It is argued that mediators who play a purely facilitative role and do not provide any advice or opinion run little risk of legal liability. There is however, uncertainty as to what extent the courts would recognise such immunity. For example, if mediators go beyond facilitation and say, provide views or opinions (legal or otherwise) which are erroneous, and based on which parties arrive at settlements, it is uncertain whether they would be accorded the immunity found in the contract.

The Practice of Mediation

Notwithstanding some of the uncertainties that plague mediation, it is nonetheless growing steadily. I will now like to give a quick sketch of the Singapore mediation landscape. Today's mediation practice in Singapore can be divided into three broad categories: -

- a) court-connected mediation;
- b) private mediation; and
- c) mediation in tribunals, government departments and agencies.

Court-connected mediation

In 1994, The Subordinate Courts of Singapore introduced mediation through the establishment of the Court Mediation Centre (now known as the Primary Dispute Resolution Centre). Mediation in the courts was established to assist with the efficient management of cases through the early resolution of disputes. Mediation at the Subordinate Courts is now used for civil cases, family matters, small claims matters, juvenile matters and Magistrate's complaints.

Mediation for the resolution of civil matters in the Subordinate Courts is now firmly entrenched. For dispute resolution of civil matters, generally, a Settlement Judge will serve as a mediator. Very often, the Settlement Judge will assist the parties to evaluate the merits of their cases. The Settlement Judge would conduct the mediation on a "without prejudice" basis and the communications during the session would be treated as confidential. Should the matter not be

⁹ Section 13 of the Mediation Procedure of the SMC provides that:

13.1 The Mediator will not be liable to the parties for any act or omission in connection with the services provided by him in or in relation to the mediation, unless the act or omission is fraudulent or involves wilful misconduct.

13.2 The Centre will not be liable to the parties for any act or omission in connection with the services provided by it or in relation to the mediation.

13.3 The parties will not make any claim against the Mediator and/or the Centre, its officers and employees for any matter in connection with or in relation to -

- a. the mediation;
- b. the services provided by the Mediator and/or the Centre; and/or
- c. the dispute between the parties.

settled, a Judge other than the Settlement Judge would hear the matter. From January to August of 2003, a total of 4,988 cases have gone through Court Dispute Resolution with an impressive settlement rate of above 96%. Access to this form of mediation, however, is restricted to actions pending in the courts.

Private mediation

In this paper, private mediation refers to mediation services offered by freelance mediators, the Singapore Mediation Centre (SMC), and other professional and trade bodies engaged in alternative dispute resolution.

The SMC is a non-profit organisation that began as a pilot project called the Commercial Mediation Service under the Singapore Academy of Law (SAL). In late 1996, lawyers of suitable cases were contacted to consider having their matters mediated. The first case under this service was successfully mediated on 16 January 1997. On 16 August 1997, the SMC was launched by the Honourable Chief Justice Yong Pung How. With the support of the Singapore Judiciary, the SAL, the Ministry of Law (MinLaw) and various professional and trade associations, the SMC has successfully spearheaded the mediation movement in Singapore. The SMC's main function is the provision of mediation services. As at the end of August 2003, more than 1,138 matters have been referred to the SMC with more than 76% of the cases mediated resulting in a settlement of the disputes. The SMC has handled multi-million dollar disputes and disputes of significant technical complexity of all kinds. The Singapore Judiciary supports the SMC by referring appropriate cases for mediation. In addition the courts also assist with the provision of interpreters and where applicable, a waiver or refund of part of court hearing fees for the users of SMC mediation services¹⁰.

As mediation becomes increasingly popular as a means of dispute resolution, more and more professional organisations and trade bodies are also providing mediation services. Often these services are meant for disputes between the public and their members. For instance the Insurance Disputes Resolution Organisation (IDRO) was created by the life and general insurance industry to resolve insurance disputes between the insured and the insurer. Other examples would be the Association of Banks in Singapore (ABS) which has a Consumer Mediation Unit which handles disputes between clients of banks and their bank members; the Institute of Estate Agents (IEA) which has a Mediation Board to handle disputes between members of the public and estate agents; and the National Association of Travel Agents in Singapore (NATAS) which has a Consumer Affairs Department which uses mediation to facilitate dispute resolution related to travel industry disputes involving consumers and/or travel agents¹¹.

¹⁰ See Supreme Court Registrar's Circular No. 4 of 1997 and Subordinate Courts Registrar's Circular No. 1 of 1997. These circulars provide that the amount of hearing fees to be waived or refunded shall not exceed the total amount of hearing fees payable or paid (as the case may be) or the equivalent of 50% of the mediation fees paid to the Singapore Mediation Centre, whichever is lower.

¹¹ Some other examples: Consumers Association of Singapore (CASE) has a CASE Mediation Centre to settle disputes between consumers and retailers; Real Estate Developers' Association of Singapore (REDAS) which has a REDAS Conciliation Panel to handle disputes over building defects between private home purchasers and REDAS member developers; Renovation and

Mediation provided by government agencies and tribunals

Mediation provided by Government Agencies and Tribunals include: Bankruptcy mediation at the Insolvency and Public Trustee's Office; Community mediation at the Community Mediation Centres; Conciliation at the Ministry of Manpower; mediation at the Industrial Arbitration Court; family mediation at the Syariah Court; mediation of maintenance matters at the Tribunal for the Maintenance of Parents; mediation at the Government Procurement Adjudication Tribunal and mediation at the Strata Titles Board.

I would like to highlight, in particular the Community Mediation Centres (CMC) as it is a service that is available to all Singaporeans. The CMC provides informal mediation services to help members of the community resolve social disputes. Such disputes include those involving neighbours, family members or friends. The CMC was established when the Community Mediation Centres Act came into force on 9 January 1998, under the purview of the Ministry of Law. The CMC has handled a total of more than 1000 disputes, achieving a settlement rate of 75%. Through the years, there has been a steady rise in the number of disputes mediated, from 120 cases in 1998 to 280 cases in 2002. There is increasing acceptance of community mediation as a means of alternative dispute resolution. Based on a recent survey conducted by the CMCs, out of over 300 participants who were surveyed, 88% indicated that they would like to try mediation to resolve a dispute before going to the police or the courts.

Closing Note

Mediation is now a prominent feature in the Singapore legal, commercial and social landscape. Beginning initially with informal ad hoc mediation for community and relational disputes, and thereafter court-connected mediation, mediation nowadays is institutionalised, formalised and widely recognised as a useful tool for managing even complex commercial disputes. In conclusion, I would say that mediation has become an integral aspect of the dispute resolution landscape in Singapore.

Decoration Advisory Centre (RADAC) which has the Renovation and Conciliation and Arbitration Procedure Programme (RECAP) which can handle disputes between consumers and contractors; and Eagles Mediation and Counselling Centre; and Singapore Institute of Surveyors and Valuers (SISV) which established the SISV Mediation Centre to handle disputes arising from the construction industry.