

Mediation 2020

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Mediation 2020

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Mediation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Japan, Singapore and United Kingdom.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Jonathan Lux of Lux Mediation, for his continued assistance with this volume.



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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 of the Mediation Act 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:

- identify the issues in dispute;
- explore and generate options;
- communicate with one another;
- voluntarily reach an agreement.'

The State Courts of Singapore's website describes mediation as 'a process in which a neutral third party, namely a mediator, facilitates and guides the parties in negotiating a mutually acceptable settlement to their dispute.'

ADR is not formally defined in legislation but Order 108 Rule 3(9) of the Rules of Court defines, for the purposes of that rule, that the 'ADR process' is '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.'

The State Courts of Singapore's website describes conciliation (introduced in October 2018) 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?

In a speech in 2015, the Chief Justice of Singapore provided a brief history of the development of mediation in Singapore. He said a decision was made to promote alternative dispute resolution, or ADR, processes, and in particular mediation, throughout the 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:

- to provide a less costly and adversarial method of dispute resolution that could be deployed for different types of conflicts;
- to assist in case management and in particular to ease the burden of the judicial caseload; and
- to maintain the Asian way of life by promoting the harmonious settlement of disputes.

The Singapore Mediation Centre (SMC) was set up in 1997 to provide private commercial mediation services; the Singapore International Mediation Centre (SIMC) was set up in 2014 to cater to cross-border disputes. Today, both the facilitative and evaluative method is practised in Singapore.

Domestic mediation law

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

Yes, the Mediation Act 2017 applies to mediations conducted wholly or partly in Singapore, or where the agreement to mediate provides that Singapore law or the Mediation Act applies. However, section 6 of the Act sets out instances where the Act does not apply.

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 instrument on 7 August 2019 and ratified it on 25 February 2020.

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, litigants are required to read through a document known as Form 7, which sets out detailed information about their ADR (including mediation) options, and they have to either choose 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(1) (c) of the Rules of Court.

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.

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 at Order 59 Rule 5(1)(c) provide for cost sanctions if parties unreasonably refuse to participate in mediation.

Prevalence of mediation

7 | How common is commercial mediation compared with litigation?

Mediation is very common in Singapore and is an intrinsic part of the dispute resolution and judicial system. About 7,000 civil actions were filed in the High Court and 26,000 civil actions in the state courts in 2018. The State Courts Centre for Dispute Resolution heard 6,601 cases in 2018.

There are no publicly available figures for mediation in Singapore but in a January 2018 news article, it was reported that the SMC received 538 matters for mediation in 2017, an 8 per cent increase on 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.

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.

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 (MSA).

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 mediation agreements of the 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?

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, and an agreement to keep the entire process confidential.

The state courts do not use mediation agreements as the mediation is usually directed by the court registry.

Appointment

11 | How are mediators appointed?

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.

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. 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.

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.

PROCEDURE

Counsel and witnesses

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

Yes, parties are usually represented by lawyers in commercial mediation in Singapore. Fact and expert witnesses are also quite common.

Procedural rules

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

Yes, for instance, both the SMC and the SIMC have their respective mediation procedures and rules that litigants 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 directed 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?

Section 8 of the Mediation Act provides that any party to a mediation agreement, which may also be in the form of a clause, may apply to court for a stay of proceedings so far as the proceedings relate to that matter, and the court hearing the application may make an order to stay the proceedings upon such terms or conditions as the court thinks fit.

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 circumstances. This is provided for in the Mediation Act as well as in the mediation agreement that parties sign prior to commencing mediation.

As mediation communications are conducted on a without prejudice basis, they are also not admissible in legal proceedings.

A party in breach of its obligations of confidentiality may face an action for breach of confidence.

Success rate

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

The SMC has mediated more than 4,400 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. 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.

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 subject to general contractual principles and as such, the usual contractual vitiating factors apply. For instance, a settlement agreement may be challenged on the basis of fraudulent misrepresentation.

Under the mediation rules of the 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 can be enforced as such.

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.

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 for by the parties. However, it is generally the case in practice that as the courts do view mediation favourably, they will issue longer time-lines or hold proceedings in abeyance once it is known that parties are attempting mediation, in an effort to promote the use of mediation as an effective dispute resolution platform.

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 coming into force in November 2017 and Singapore's ratification of the Singapore Convention on Mediation in February 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.

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 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, in order to better understand and cater to the specific issues and nuances of for instance, the maritime, construction or intellectual property industry.

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