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COURT-ORDERED MEDIATION IN RESTRUCTURING PROCEEDINGS: THE NEXT REFORM?

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Two waves of reforms to its restructuring regime have placed Singapore at the forefront of achieving its aim of becoming Asia's international debt restructuring hub. This article explores the juridical basis of a court order for parties to attend a non-binding mediation in restructuring proceedings and suggests that reforms may be due in order to empower the courts to grant such orders.

Ashok **KUMAR**
LLB (Hons), University of London (Queen Mary College);
Advocate and Solicitor (Singapore); *Barrister at Law (Middle Temple)*;
Associate Mediator (Singapore Mediation Centre);
Director, BlackOak LLC.

KOH Wei Lun
LLB (Magna Cum Laude) (Singapore Management University);
Advocate and Solicitor (Singapore);
Senior Associate, BlackOak LLC.

I. Introduction

1 Since the Companies Act[1] was amended in 2017 to provide practitioners with more tools for debt restructuring, there has been increased interest by local and foreign companies to undertake their corporate restructuring in Singapore. When the Insolvency, Restructuring and Dissolution Act[2] comes into force, the restrictions on *ipso facto* clauses will provide further relief

1 Cap 50, 2006 Rev Ed.
2 Act 40 of 2018.

to debtor companies, especially in the light of the current economic climate.

2 As with all developing areas of law, the present restructuring regime is not without its teething problems. The protracted and well-publicised restructuring of the Hyflux group has accentuated several areas, such as the disclosure of information and the creditors' control over the restructuring, where the balance of interests between the debtor company and its creditors has to be carefully struck. Nevertheless, the authors are confident that, given time, the Singapore court will be able to strike the right balance.

3 In order to capitalise on the momentum to transform Singapore into Asia's debt restructuring hub, the authors revisit one of the ideas that was considered by the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (the "Restructuring Committee") – promoting the use of mediation in restructuring proceedings.

4 The value of mediation in restructuring proceedings was highlighted by the Restructuring Committee, which noted in its 2016 report[3] (the "Restructuring Report") at para 3.54 that mediation can be used effectively to (a) resolve individual creditor disputes with the debtor (in the context of a multi-creditor restructuring); (b) manage multiple creditor disputes of the same nature; and (c) achieve consensus in the restructuring plan between the debtor and its creditors.

5 Kannan Ramesh J, the co-chairperson of the Restructuring Committee, also remarked in *Re IM Skaugen SE* that:[4]

> Another aspect, which surprisingly has not been resorted to by debtors and creditors, is to enlist the help of an experienced and skilled insolvency mediator to develop the restructuring plan, whether it be an individual or group restructuring plan. … Frequently, the discussions on the plan are partisan, and the positions adopted are therefore reflective of that. I see tremendous

3 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee* (20 April 2016) (Co-chairpersons: Indranee Rajah & Kannan Ramesh JC).

4 *Re IM Skaugen SE* [2019] 3 SLR 979 at [94].

> utility in deploying the services of a neutral third party skilled in mediation techniques, and with the relevant domain knowledge. Such a party can play the invaluable role of building consensus between the debtor and the creditors in the development of the restructuring plan, and build trust in the process. In this way, the mediator can assist to iron out many of the wrinkles and creases that frequently erupt in a restructuring and which perhaps are not best resolved in the adversarial cauldron of the court. It is important that this be explored with vigour, as it seems to me to be self-evident that bridging differences and the trust divide is fundamental to a successful restructuring outcome. ...

6 Nevertheless, as far as the authors are aware, there has not been a restructuring in Singapore where parties have taken up the court's encouragement to undergo mediation. This article considers the potential for legislative reform to expressly empower the Singapore court with the ability to compel parties to attend a non-binding mediation in restructuring proceedings.

II. Fundamental concept of voluntariness in mediation

7 The basic premise of alternative dispute resolution ("ADR"), which includes mediation, is that ADR should be voluntary. However, what does this voluntariness entail? There is a distinction between providing parties with the autonomy to (a) enter into the ADR process voluntarily, and (b) walk away from the ADR process without compromising their substantive rights. This distinction should be borne in mind as this article briefly explores the different attitudes of Singapore, England, Hong Kong, Australia and the US towards compelling parties to attend a non-binding mediation.

A. Singapore

8 In Singapore, the principle underpinning the court's approach to mediation since former Chief Justice Yong Pung How first introduced court-based mediation in the former Subordinate

Courts in 1994 is that the court generally does not compel parties to mediate.[5]

9 At the State Courts, the Subordinate Courts Practice Directions[6] introduced the presumption of ADR in 2012. Under this presumption of ADR, the State Courts will refer civil matters, other than non-injury motor accident and personal injury claims, to ADR unless any or all parties opt out of it. If the parties opt out of ADR for unsatisfactory reasons, the judge may take the reasons into consideration when making subsequent costs orders pursuant to O 59 r 5(1)(*c*) of the Rules of Court.[7]

10 At the Supreme Court, the Supreme Court Practice Directions[8] introduced the ADR Offer process where Pt IIIA of the Supreme Court Practice Directions now provides that any party who wishes to attempt mediation or any other means of dispute resolution should file and serve an ADR Offer on all relevant parties. The party receiving the ADR Offer has 14 days to file a response to an ADR Offer stating whether he is agreeable to ADR; if he is not, he should state the reasons for his unwillingness or make counter-proposals. Similarly, the judge may take the reasons into consideration when making subsequent costs orders pursuant to O 59 r 5(1)(*c*) of the Rules of Court.

11 Nevertheless, this precept is not without its exceptions. Examples of the exceptions where the Singapore court may compel parties to mediate are as follows.

12 In 1996, the Women's Charter was amended to empower the court to direct parties to attend non-binding mediation with the consent of the parties.[9] A failure to comply with a direction or advice to mediate would not constitute a contempt of court. In 2014, Parliament adopted the recommendations of the Committee for Family Justice and introduced the judge-led approach via

5 The Honourable Justice Andrew Phang, Judge of Appeal, "4th Asian Mediation Association Conference, Mediation and the Courts – The Singapore Experience" (20 October 2016) at paras 8 and 19.
6 Amendment No 2 of 2012 (effective 28 May 2012).
7 Cap 322, R 5, 2014 Rev Ed.
8 Amendment No 6 of 2013 (effective 2 January 2014).
9 Women's Charter (Cap 353, 2009 Rev Ed) s 50.

the Family Justice Rules 2014[10] so as to strengthen the court's powers in the resolution of family disputes. Rule 22 of the Family Justice Rules 2014 now provides that, among others, the court may make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter including a direction that parties attend mediation, counselling or family support programmes.[11]

13 In 2017, the State Courts was similarly empowered via the State Courts Practice Directions[12] to, as a matter of course, refer appropriate matters to ADR where, *inter alia*, the court is of the view that doing so would facilitate the resolution of the dispute between the parties.

B. England

14 In the seminal decision of *Halsey v Milton Keynes General NHS Trust*[13] ("*Halsey*"), the English Court of Appeal held that the court does not have the power to order parties to submit their disputes to mediation if they refuse to.

15 In coming to this conclusion, Dyson LJ first relied on *Deweer v Belgium*[14] ("*Deweer*") for the conclusion that the compulsion of ADR would be an unacceptable constraint of the right of access to the court and thus, a violation of Art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Art 6").[15] Dyson LJ was further of the view that even if the English court has the power to order unwilling parties to refer their dispute to mediation, it would be difficult to conceive of circumstances in which such an order would be appropriate because:[16]

10 S 813/2014.
11 See also s 18(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) read with para 21 of the First Schedule to the Supreme Court of Judicature Act.
12 Amendment No 3 of 2017 (effective 1 September 2017).
13 [2004] 1 WLR 3002.
14 (1980) 2 EHRR 439.
15 *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 at [9].
16 *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 at [9]–[10].

> The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.

16 However, various judges have subsequently questioned the reasoning adopted in *Halsey* in their extra-judicial capacity.[17]

17 In March 2008, Lord Phillips of Worth Matravers expressed his doubts about *Halsey* in an extra-judicial speech.[18] In particular, his Honour questioned whether *Deweer* can be relied on for the proposition that compelling parties to mediate would be in breach of Art 6.

18 In *Deweer*, a Belgian butcher was facing criminal prosecution for overcharging for pork. The Belgian authorities offered him two choices: he was to close his business until the conclusion of the criminal proceedings, or he could pay a fine of 10,000 Belgian francs in a "friendly settlement". The Strasbourg Court held while a party may waive his rights to a trial by entering into a settlement, the settlement procured under a threat of business closure was not voluntary and infringed upon the butcher's right to a fair trial. Therefore, Lord Phillips noted that these facts are a long way from the imposition of a mediation order and *Deweer* demonstrates that a *coerced agreement* that involves waiving the right to trial will infringe Art 6.[19] His Honour further noted that the European Commission had published a draft Directive designed to encourage mediation in 2004, in which Art 3 provides that national legislation

17 See ch 35 of Hon Sir David Foskett, *Foskett on Compromise* (Sweet & Maxwell, 8th Ed, 2015) for a summary of the English position.

18 Lord Phillips CJ, "Alternative Dispute Resolution: An English Viewpoint" (29 March 2008) <https://webarchive.nationalarchives.gov.uk/20131203080228/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf > (accessed 30 March 2020).

19 Lord Phillips CJ, "Alternative Dispute Resolution: An English Viewpoint" (29 March 2008) at p 13 <https://webarchive.nationalarchives.gov.uk/20131203080228/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf > (accessed 30 March 2020).

may make the use of mediation compulsory provided that it does not impede the right of access to the judicial system.[20]

19 Turning then to the second objection that an order compelling parties to mediate is antithetical to mediation which should be voluntary, his Honour noted that "[s]tatistics show that settlement rates in relation to parties who have been compelled to mediate are just about as high as they are in the case of those who resort to mediation of their own volition".[21] To adopt his Honour's words, you can take a horse to water but you cannot make it drink; the horse usually does drink when it is taken to water.[22]

20 Thereafter in May 2008, Sir Anthony Clarke MR gave a speech where he similarly observed that "there may well be grounds for suggesting that *Halsey* was wrong on the Article 6 point".[23] Among other reasons, a distinction can be drawn between arbitration and mediation because mediation does not preclude parties from entering into court proceedings if the mediation is unsuccessful.

21 Sir Clarke MR went further to opine that the English court may have powers to compel parties to mediate pursuant to its case management powers under r 26.4(1) of the Civil Procedure Rules[24]

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20 Lord Phillips CJ, "Alternative Dispute Resolution: An English Viewpoint" (29 March 2008) at p 14 <https://webarchive.nationalarchives.gov.uk/20131203080228/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf > (accessed 30 March 2020).

21 Lord Phillips CJ, "Alternative Dispute Resolution: An English Viewpoint" (29 March 2008) at p 14 <https://webarchive.nationalarchives.gov.uk/20131203080228/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf > (accessed 30 March 2020).

22 Lord Phillips CJ, "Alternative Dispute Resolution: An English Viewpoint" (29 March 2008) at p 14 <https://webarchive.nationalarchives.gov.uk/20131203080228/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf > (accessed 30 March 2020).

23 Sir Clarke MR, "The Future of Civil Mediation" (8 May 2008) at paras 8–15 <https://webarchive.nationalarchives.gov.uk/20131203075728/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_may08.pdf> (accessed 30 March 2020).

24 Rule 26.4(1) of the Civil Procedure Rules (UK) states that "A party may, when filing the completed directions questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means."

as it is "but a small step from an order that the parties meet to an order that they meet in the presence of a mediator".[25]

22 More recently, Ward LJ (who was a member of the Court of Appeal in *Halsey*) suggested that the decision in *Halsey* ought to be revisited in *Wright v Wright*.[26] In 2014, Lord Dyson queried in an extra-judicial speech whether the decision in *Halsey* should be tempered after the European Court of Justice held in *Rosalba Alassini v Telecom Italia SpA*[27] that the Italian mandatory requirement to undertake ADR before being heard in court was not precluded by European Union laws.

23 Nevertheless, in spite of the extra-judicial criticisms against *Halsey*, it remains good law. The Civil Justice Council's ADR working group did not take a position on whether the court should be empowered to compel parties to mediate in their final report on ADR and Civil Justice published in November 2018 and noted at para 4.20 that "[t]here was no or very little support for anything approximating to blanket, compulsory or automatic referral to mediation".[28]

C. Hong Kong

24 The position in Hong Kong is similar to that in Singapore and England, that is, the court does not compel parties to mediate.

25 Practice Direction 31 of the Practice Directions of the Hong Kong Judiciary, which was introduced in 2010, provides that the Hong Kong court has "the duty as part of active case management to further [the objective of facilitating the settlement of disputes] by encouraging the parties to use an alternative dispute resolution procedure ("ADR") if the Court considers that appropriate and

25 Sir Clarke MR, "The Future of Civil Mediation" (8 May 2008) at paras 17–18 <https://webarchive.nationalarchives.gov.uk/20131203075728/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_may08.pdf> (accessed 30 March 2020).
26 [2013] EWCA Civ 234.
27 C-317/08 to C-320/08.
28 United Kingdom, Civil Justice Council ADR Working Group, *Final Report on ADR and Civil Justice* (November 2018) (Chairman: William Wood QC).

facilitating its use".[29] Where a party unreasonably fails to engage in mediation, the court may make an adverse costs order.[30]

26 In 2008, the Secretary for Justice's Working Group on Mediation (the "Working Group") was established to, *inter alia*, review the development of mediation and make recommendations on ways to facilitate and encourage wider use of mediation in Hong Kong. In its Report of the Working Group on Mediation published in February 2010, the Working Group stated that:[31]

> 7.207 Notwithstanding Blackburne J's remark, *it is generally accepted that the court, in the absence of specific statutory provision, does not have jurisdiction to order a reluctant party to submit his dispute to mediation.* In other words, there is no power to order mediation under common law or as part of the court's inherent jurisdiction. [emphasis added; references omitted]

27 After considering the differing approaches in various jurisdictions and noting that the debate on whether mediation should remain voluntary remains unsettled, the Working Group recommended that "[c]ompulsory referral to mediation by the court should not be introduced at this stage, but the issue should be revisited when mediation in Hong Kong is become more developed".[32]

28 For completeness, the authors would point out it is unclear whether Hong Kong maintains the same position today. The Working Group had cited para 43-05 of *The Law and Practice of Compromise* (6th Ed) at fn 227 of its report, where David Foskett QC had relied on *Halsey* in concluding that "the better view is that the court does not have the jurisdiction to order a reluctant party to

29 See Practice Direction 31 of the *Practice Directions of the Hong Kong Judiciary* at para 1.

30 See Practice Direction 31 of the *Practice Directions of the Hong Kong Judiciary* at paras 4 and 5.

31 Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (February 2010) at p 125 (Chairman: Wong Yan Lung SC).

32 Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (February 2010) at p 126 (Chairman: Wong Yan Lung, SC).

submit his dispute to ADR".[33] However, this unequivocal position is no longer maintained in *Foskett on Compromise* (8th Ed) after the various extra-judicial criticisms set out at paras 17 to 22 above.[34]

D. Australia

29 The approach in Australia is vastly different from the other Commonwealth jurisdictions discussed above. The Australian courts are empowered by statutory provisions at the federal and state levels to refer parties in court proceedings to mediation and other ADR processes. For example, s 53A of the Federal Court of Australia Act 1976[35] ("FCA") states that the court may refer proceedings to arbitration, mediation or for resolution by an ADR process.[36] Save for a referral to arbitration, these referrals may be made with or without parties' consent.

30 However, this was not always the case. When s 53A of the FCA was originally enacted in 1991, it stated that:[37]

> Subject to the Rules of Court, the Court may, *with the consent of the parties to proceedings in the Court*, by order refer the proceedings, or any part of them or any matter arising out of them, *to a mediator or an arbitrator for mediation or arbitration*, as the case may be, in accordance with the Rules of Court. [emphasis added]

31 In 1997, the Australian parliament passed the Law and Justice Legislation Amendment Act 1997[38] to amend s 53A of the FCA so that the court could refer parties to *mediation* with or without their consent.[39] During the parliamentary session, Mr Daryl Williams, the Attorney-General and Minister for Justice, acknowledged that "mediation can be seen to be a process that involves consensus in participation and consensus in outcome but there is, so long as

33 David Foskett QC, *The Law and Practice of Compromise* (Sweet & Maxwell, 6th Ed, 2005) at p 585, para 43-05.
34 Hon Sir David Foskett, *Foskett on Compromise* (Sweet & Maxwell, 8th Ed, 2015) at paras 35-05–35-08.
35 No 156, 1976.
36 See s 26 of the New South Wales Civil Procedure Act 2005 (Act 28 of 2005).
37 Courts (Mediation and Arbitration) Act 1991 (No 113 of 1991) (Aus).
38 No 34, 1997.
39 See Schedule 8 of the Law and Justice Legislation Amendment Act 1997 (No 34, 1997) (Aus) at paras 18 and 19.

there is consensus in outcome, no reason why people should not be compelled to at least sit around the table".[40] He further highlighted that the Law Council of Australia had recommended in 1994 that s 53A of the FCA be amended because "although the traditional model promotes mediation as a voluntary process, experience in jurisdictions where mediations can be compulsory suggests that satisfactory outcomes can be achieved, notwithstanding that parties have been directed to mediation".[41]

32 It must be emphasised that that s 53A of the FCA draws a distinction between arbitration and other forms of ADR such as mediation. Unlike mediation and other forms of ADR, the Australian court cannot order parties to enter arbitration without their consent. This clearly illustrates the distinction alluded to at para 7 above between providing parties with the autonomy to (a) enter into the ADR process voluntarily, and (b) walk away from the ADR process without compromising their substantive rights.

33 As arbitration will always result in a binding arbitral award that affects the parties' substantive rights, an order compelling parties to arbitrate will deprive the unwilling party *both* of its voluntariness to enter into arbitration and its voluntariness to be bound by the outcome once it is within the process. On the other hand, an order compelling parties to mediate *only* deprives the unwilling party's voluntariness to enter into mediation but leaves that party free to step away from the mediation at any point of time without any consequences to its ongoing court process and with its substantive rights intact.

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40 Commonwealth (Australia), House of Representatives, *Parliamentary Debates* (26 February 1997) at 1468, <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1997-02-26/toc_pdf/H%201997-02-26.pdf;fileType=application%2Fpdf#search=%221990s%201997%20law%20and%20justice%22> (accessed 30 March 2020) (Daryl Williams, Attorney-General and Minister for Justice).

41 Commonwealth (Australia), House of Representatives, *Parliamentary Debates* (26 February 1997) at 1468 (Daryl Williams, Attorney-General and Minister for Justice) <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1997-02-26/toc_pdf/H%201997-02-26.pdf;fileType=application%2Fpdf#search=%221990s%201997%20law%20and%20justice%22> (accessed 30 March 2020).

E. US

34 While it is well known that judges in US Chapter 11 proceedings may order parties to attend mediation in order to resolve disputes and/or formulate a restructuring plan in an appropriate case,[42] the courts in the US appear to have relied on various legal bases for this power. As the authors of "Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR" explain:[43]

> Despite the increased use of mandatory ADR in bankruptcy cases, the courts have not consistently articulated the sources of their authority to compel participation in ADR. This section reviews the sources, which include (1) the court's inherent power to manage and control its docket, (2) the statutes enabling the district courts to use ADR through local district courts rules, (3) section 105 of the Bankruptcy Code, (4) section 1123 of the Bankruptcy Code authorizing the use of examiners, (5) section 1123 of the Bankruptcy Code, (6) local bankruptcy rules, and (7) Bankruptcy Rule 7016.

35 In the context of general court proceedings, the courts in the US have held that where there is no express legislative provision empowering the courts to compel parties to mediate, the courts nonetheless have the power to do so pursuant to their inherent case management powers.[44] However, the courts will only order parties to participate in mediation if the courts are convinced that: (a) the case before the court is appropriate for mediation; and (b) there are sufficient procedural and substantive safeguards to ensure fairness to all parties involved.[45]

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42 See, *eg*, The Honourable James M Peck, "Plan Mediation as an Effective Restructuring Tool" (2020) 32 SAcLJ 23.

43 Ralph Mabey, Charles Tabb & Ira Dizengoff, "Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR" (1995) 46 *South Carolina Law Review* 1259 at 1283.

44 See, *eg*, *In re Atlantic Pipe Corp* 304 F 3d 135 at 140–148 (1st Cir, 2002); *In re African-American Slave Descendants' Litigation* 272 F Supp 2d 755 at 758–760 (ND Ill, 2003); and *Short Brothers Construction, Inc v Korte & Luitjohan Contractors, Inc* 356 Ill App 3d 958 (Ill App Ct, 2005).

45 See, *eg*, *In re Atlantic Pipe Corp* 304 F 3d 135 (1st Cir, 2002) which suggests at 146–147 that the order may incorporate safeguards such as wording that makes it clear that participation in the mediation will not be taken as a waiver

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III. Can Singapore courts be empowered to compel parties in restructuring proceedings to participate in mediation?

36 As mentioned in the previous section, there is a strong emphasis in Hong Kong, England and, to a certain extent, Singapore on the principle of voluntariness and, in particular, the parties' voluntariness to enter into mediation. Therefore, the courts in these jurisdictions generally do not compel parties to mediate. Instead, the courts may strongly encourage parties to mediate and may grant adverse costs orders if a party unreasonably refuses to do so.

37 On the other hand, Australia and the US are willing to accept that the parties may be deprived of their freedom to choose whether to mediate. However, the courts' power to compel parties to mediate is constrained by (a) limiting the power to ADR processes such as mediation where the parties' substantive rights remain unaffected even if an unwilling party is ordered to participate in mediation; and (b) requiring the applicant to demonstrate that the case is suitable for mediation and that there are appropriate safeguards to ensure fairness to all parties involved.

38 The authors believe that it is time to consider whether Singapore should move away from the emphasis on parties' voluntariness to mediate and empower the court with the ability to compel parties in *restructuring proceedings* to attend a non-binding mediation. To be clear, the question of whether the same power ought to extend to *all proceedings* in the Supreme Court is left open and should be revisited at an appropriate time in the future.

A. Is legislative reform due?

39 The principal objection to mandatory mediation is that parties are deprived of their voluntariness to mediate. However, if one can look past this unease and consider the following four reasons, some degree of restriction on the parties' freedom to

of any litigation position and limits on the duration of the mediation or the expense associated therewith.

decide whether to mediate may arguably be a small and acceptable price to pay.

40 First, it is undisputable that, in certain circumstances, mediation can be used effectively in restructuring and would provide substantial benefits to parties involved. This much has been acknowledged in the Restructuring Report and by the Singapore court (see paras 4 and 5 above). However, notwithstanding the clear benefits of mediation in restructuring proceedings, it may be difficult or impracticable to obtain the express consent individually from all of the parties involved in a restructuring. This impracticality is especially evident in restructuring proceedings which generally involve one debtor company and multiple creditors, each with their own differing (and often opposing) interests.

41 Second, while the Singapore court has the discretion to award adverse costs orders for any unreasonable refusal to engage in ADR pursuant to para 35B of the Supreme Court Practice Directions and O 59 r 5(1)(*c*) of the Rules of Court, this stick is, with respect, ineffective in and unsuitable for restructuring proceedings.

42 The Singapore courts generally do not make costs orders against the debtor company or its creditors in a restructuring proceeding. It is also difficult to prove that a party is acting unreasonably in refusing to mediate given the myriad of possible explanations that can be provided. Would a creditor's refusal be considered unreasonable if it refuses to participate in the mediation unless the debtor company bears the costs and expenses that it had incurred and will be incurring in the restructuring? Furthermore, even if the court is satisfied that a party unreasonably refused to attend the mediation, the adverse costs order may be of cold comfort to the debtor company and other creditors who are willing to engage in the mediation if the refusal led to the liquidation of the debtor company. One creditor may thus hold the other stakeholders hostage at the expense of the interests of the creditors as a whole when there is a possibility of a successful restructuring.

43 Third, the shift to the judge-led approach and empowerment of the court to direct parties to attend ADR in family law (see para 12 above) is premised on the understanding that it is

not always appropriate to adopt an adversarial approach as it may, in some cases, exacerbate conflict and prolong the time taken to adjudicate disputes.[46]

44 The Restructuring Committee has similarly suggested that the Singapore court overseeing restructuring proceedings could adopt a judge-led approach.[47] Ramesh J also opined that the correct approach in restructuring is to "facilitat[e] discussions between the debtor and creditors, secured and unsecured, and promot[e] a more cooperative, collaborative and transparent environment wherein all parties involved work towards a common objective of attaining an effective and sustainable restructuring".[48] Empowering the court with the same ability to compel parties in restructuring proceedings to mediate will go a long way towards encouraging the same shift from the traditional adversarial approach towards a more facilitative and collaborative one.

45 Lastly, the moratorium granted in aid of restructuring proceedings involves a suspension of the creditors' substantive rights. There is a need to ensure that the moratorium period is utilised fruitfully and efficiently. Where there is a roadblock in the restructuring proceedings that could be potentially resolved by way of mediation, there is a strong need for parties to at least attempt to mediate because any delay in the resolution of their differences in the dispute or restructuring plan is likely to be value destructive.

B. Safeguards and limits on the court's power

46 Should the Singapore court be empowered to compel parties in a restructuring proceeding to mediate, the authors suggest that this power ought to be subject to (a) the court's discretion; and (b) procedural and substantive safeguards.

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46 See the speech by The Honourable The Chief Justice Sundaresh Menon, "The Future of Family Justice: International and Multi-Disciplinary Pathways" *Singapore Law Gazette* (November 2016) 11–19 at paras 20–23.

47 See the Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee* (20 April 2016) at para 3.67 (Co-chairpersons: Indranee Rajah & Kannan Ramesh JC).

48 *Re IM Skaugen SE* [2019] 3 SLR 979 at [94].

(1) Exercise of the court's discretion

47 Beginning with the court's discretion whether to compel parties to mediate, the applicant (who may be the debtor company or a creditor) will need to convince the court that the exercise of the court's discretion is suitable under the facts and circumstances of that case. Drawing from cases in the US (see para 25 above) and Asst Prof Eunice Chua's article entitled "Mediation in the Singapore Family Justice Courts: Examining the Mandatory Mediation Model under the Judge-led Approach",[49] the Singapore court may wish to take this non-exhaustive list of factors into account in the exercise of its discretion: (a) the complexity of the case; (b) the balance of power between the parties; and (c) the willingness of parties to attend mediation.

48 On the first factor – complexity of the case – there will always be a risk that the mediation will fail and be a waste of parties' time and resources when not all parties are necessarily willing to participate in the mediation. Therefore, the applicant should demonstrate that the case is complex – for example, it involves multiple claims and parties, where the benefits are substantial that the potential rewards of a mediation outweigh the risks.[50]

49 On the second factor – balance of power between the parties – just as the balance of power ought to be a factor that the court considers in determining whether mediation is appropriate in the context of family law,[51] this factor equally applies in the context of insolvency mediation. Where one creditor holds an overwhelming power in the mediation, there is a risk that this creditor may abuse its power to hold out on terms that are solely in its favour. In evaluating the relative bargaining power of the parties, the court should not be limited to financial figures such as the debt owed to all creditors and the value of security held by the secured creditors. If a group of creditors holds a blocking vote in terms of value or

49 (2019) 38 *Civil Justice Quarterly* 97.
50 *In re Atlantic Pipe Corp* 304 F 3d 135 at 144–145 (1st Cir, 2002).
51 Eunice Chua, "Mediation in the Singapore Family Justice Courts: Examining the Mandatory Mediation Model under the Judge-Led Approach" (2019) 38 *Civil Justice Quarterly* 97 at 104–105.

number in any intended scheme of arrangement, this veto power ought to be taken into account.

50 Nevertheless, as Asst Prof Chua notes, "an adept mediator, can use power creatively, [to transform] a dispute into joint decision and [avoid] the negative consequences of power imbalance while offering safeguards to power abuse".[52] Therefore, the threshold for refusing to grant the order for parties to mediate due to the power imbalance should be a very high one.

51 Onto the third factor – the willingness of parties to attend mediation – if a party is unwilling to mediate, it should be heard as to the reasons for its refusal. However, mere refusal alone should not be a bar and the reasons proffered should be scrutinised by the court. After all, a party may refuse to mediate "simply out of unfamiliarity with the process or out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position".[53]

52 The possibility that parties may change their positions in a restructuring as the circumstances evolve is alive to the Singapore courts. The High Court has held on different occasions that it is premature to consider whether the lack of creditor support, or even creditor opposition, is fatal in an application for a moratorium under ss 211B and 210(10) of the Companies Act as creditors may change their position based on their commercial motivations as the plan evolves.[54] Furthermore, there is commentary which suggests that settlement rates in mediations where parties have been compelled to mediate are just about as high as they are in mediations where parties enter mediation of their own volition.[55]

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52 Eunice Chua, "Mediation in the Singapore Family Justice Courts: Examining the Mandatory Mediation Model under the Judge-Led Approach" (2019) 38 *Civil Justice Quarterly* 97 at 105.

53 *In re Atlantic Pipe Corp* 304 F 3d 135 at 144 (1st Cir, 2002).

54 *Re IM Skaugen SE* [2019] 3 SLR 979 at [65]–[68].

55 See, *eg*, Lord Phillips CJ, "Alternative Dispute Resolution: An English Viewpoint" (29 March 2008) at p 14 <https://webarchive.nationalarchives.gov.uk/20131203080228/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf > (accessed 30 March 2020); Eunice Chua, "Mediation in the Singapore Family Justice Courts: Examining the Mandatory Mediation Model under the Judge-Led Approach" (2019) 38 *Civil Justice Quarterly* 97 at 106; and Commonwealth (Australia), House of

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53 Distilling the abovementioned factors, the test could be formulated in the following manner: The applicant needs to satisfy the court, on a balance of probabilities, that there is a real prospect that the mediation will result in substantial benefits. When the applicant proves that mediation is appropriate, the court should be slow to decline the order unless the countervailing factors, such as the balance of power and unwillingness of the parties to participate in the mediation, demonstrate a real risk that the mediation is doomed to fail.

(2) Procedural and substantive safeguards

54 Having set out the factors that the Singapore court can consider in the exercise of its discretion, the next issue is the procedural and substantive safeguards that have to be put in place to ensure fairness to all parties involved.

55 The First Circuit Court of Appeal in *In re Atlantic Pipe Corp* laid out these three safeguards which are fairly uncontroversial and seek to protect the parties' substantive rights while the mediation is ongoing:[56]

> (a) the order must make it clear that participation in the mediation will not be taken as a waiver of any litigation position;
>
> (b) the order needs to set limits on the duration of the mediation or the expense associated therewith; and
>
> (c) in appropriate cases, the court may order the sharing of reasonable costs and expenses to avoid having the mediation be held hostage to the parties' ability to agree on the concomitant financial arrangement.

56 In addition, and drawing upon the existing legislations, the proposed legislative provisions should make it clear that:

Representatives, *Parliamentary Debates* (26 February 1997) (Daryl Williams, Attorney-General and Minister for Justice) <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1997-02-26/toc_pdf/H%201997-02-26.pdf;fileType=application%2Fpdf#search=%221990s%201997%20law%20and%20justice%22> (accessed 30 March 2020).

56 *In re Atlantic Pipe Corp* 304 F 3d 135 at 146–147 (1st Cir, 2002).

(a) a failure to comply with the court's order to compel parties to mediate would not constitute a contempt of court despite the provisions of the Administration of Justice (Protection) Act 2016;[57] and

(b) any order compelling parties to mediate should only apply to parties that are in Singapore or within the jurisdiction of the court so as to uphold the principle of comity among states.[58]

IV. Conclusion

57 The emphasis on parties' autonomy to decide whether they wish to mediate needs to be reconsidered and perhaps abandoned so long as parties are free to step away from the mediation at any point of time without any consequences to their substantive rights. By empowering the court with the ability to compel parties in restructuring proceedings to mediate, restructurings may be carried out much more effectively and efficiently, thereby leading to the preservation of value in the companies which may be temporarily insolvent due to the economic crisis.

58 The world may be experiencing the worst economic crisis since the Great Depression as a result of the economic shock arising from COVID-19. Singapore's legal framework for restructuring regime will be put to the test in the coming years. While the various reforms since 2017 have provided more tools for companies to undertake their restructuring in Singapore, the power to compel parties to mediate is a tool that could be added to the court's arsenal, especially in the light of the trying times ahead.

57 Act 19 of 2016. See also s 50(3) of the Women's Charter (Cap 353, 2009 Rev Ed).

58 See Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee* (20 April 2016) at para 3.14 (Co-chairpersons: Indranee Rajah & Kannan Ramesh JC); and *Re IM Skaugen SE* [2019] 3 SLR 979 at [39] and [86].