

22. MEDIATION AND APPROPRIATE DISPUTE RESOLUTION

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I. Introduction

22.1 2019 was a significant year for mediation. On 7 August 2019, 46 states – an unprecedented number – came together in Singapore to sign the United Nations Convention on International Mediated Settlement Agreements Resulting from Mediation² (“Singapore Convention”). The Convention, which comes into force on 12 September 2020,³ provides a legal framework for the recognition and enforcement of mediated settlement agreements across borders and thereby addresses one of the major criticisms of international mediation, namely, the lack of an internationally recognised expedited enforcement mechanism.⁴ The Singapore Convention aims to be for mediation what the Convention

1 The authors would like to thank Will Mak for his research assistance in the preparation of this chapter. The second author would like to pay a tribute to his colleagues working tirelessly in the UK National Health Service in London, as well as Douglas, Gulrays and Rashmi for their deep moral support.

2 GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) (hereinafter “Singapore Convention”).

3 Singapore has ratified the Singapore Convention by passing the Singapore Convention on Mediation Act 2020 (Act 4 of 2020). In addition, the Singapore Mediation Act 2017 (Act 1 of 2017) offers a comprehensive statute to regulate the practice of domestic, and (together with the Singapore Convention on Mediation Act) international mediation.

4 Nadja Alexander & Shouyu Chong, “UN Treaty on Mediation signed in Singapore” (2019) 23(2–3) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 71 at 73.

on the Recognition and Enforcement of Foreign Arbitral Awards⁵ is for arbitration.⁶ The Singapore Convention casts an even brighter spotlight on Singapore as a mediation and dispute resolution hub; with this attention comes increased interest in Singapore's jurisprudence on mediation and other forms of appropriate dispute resolution ("ADR").⁷

22.2 It is therefore timely to introduce a chapter on mediation and ADR to the Ann Rev. In terms of scope, this chapter will not deal with arbitration unless it forms part of a mixed mode dispute resolution process, which has mediation as an element.⁸ Further, the authors note that the body of jurisprudence on mediation and ADR-related subject matter is evolving. Thus, the categories of cases in this chapter will develop accordingly. In this inaugural chapter, the authors offer a review of cases in three categories. First, cases on the recognition and enforcement of negotiated and/or mediated settlement agreements are examined.⁹ Next, cases which address issues in mediation and ADR practice and ethics are reviewed.¹⁰ Finally, the authors consider cases dealing with civil procedure aspects of mediation, including disclosure of mediation evidence and the apportionment of costs.¹¹

5 330 UNTS 3 (10 June 1958; entry into force 7 June 1959), also known as the "New York Convention".

6 Joel Lee Tye Beng & Nadja Alexander, "Introduction" (2019) 31 SAclJ 373 at 373–374, para 3; Gloria Lim, "International Commercial Mediation – The Singapore Model" (2019) 31 SAclJ 377 at 391, para 31; Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAclJ 448 at 448–449, para 1; Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" (2019) 31 SAclJ 487 at 488–489, para 3; and Eunice Chua, "Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation" (2019) 31 SAclJ 572 at 576, para 6. See also Khory McCormick & Sharon Ong, "Through the Looking Glass: An Insider's Perspective into the Making of the Singapore Convention on Mediation (2019) 31 SAclJ 520 at 522, para 3.

7 See Sundares Menon, Chief Justice at the Supreme Court of Singapore, "Mediation and the Rule of Law", keynote address at the Law Society Mediation Forum (10 March 2017) at para 26.

8 See, for example, the SIAC–SIMC Arb-Med-Arb protocol at <http://simc.com.sg/dispute-resolution/arb-med-arb/> and the Singapore Infrastructure Dispute Management Protocol at Ministry of Law, "New Singapore Dispute Protocol Launched to Minimise Time and Cost Overruns in Infrastructure Projects", press release (23 October 2018) <<https://www.mlaw.gov.sg/news/press-releases/launch-of-sidp-reduces-time-and-cost-overruns-in-infrastructure-projects>> (accessed April 2020).

9 See paras 22.4–22.49 below.

10 See paras 22.50–22.76 below.

11 See paras 22.77–22.86 below.

22.3 A number of these cases may also be examined in other chapters of this Ann Rev, as the cases deal with legal issues beyond mediation. In this chapter, case reviews focus on mediation-related issues only.

Category	Focus of review comments	Case
Recognition and enforcement of (mediated) settlement agreements	Recognising (mediated) settlement agreements	<i>Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd</i> ¹²
		<i>Jumaiah bte Amir v Salim bin Abdul Rashid</i> ¹³
	Enforcing (mediated) settlement agreements	<i>Yashwant Bajaj v Toru Ueda</i> ¹⁴
		<i>Ram Niranjana v Navin Jatia</i> ¹⁵
		<i>Law Chau Loon v Alphere Group Pte Ltd</i> ¹⁶
Mediation/ ADR practice and ethics	Expert determination	<i>Teo Lay Gek v Hoang Trong Binh</i> ¹⁷
	Neutral evaluation	<i>Yashwant Bajaj v Toru Ueda</i>
	Ethical considerations: conflict of interests	<i>Wan Hoe Keet v LVM Law Chambers LLC</i> ¹⁸
Mediation and civil procedure	Costs	<i>Seraya Energy Pte Ltd v Denka Advantech Pte Ltd</i> ¹⁹
		<i>Yashwant Bajaj v Toru Ueda</i>
	Confidential and without prejudice nature of mediation	<i>Jumaiah bte Amir v Salim bin Abdul Rashid</i>

II. Recognition and enforcement of (mediated) settlement agreements

22.4 The ability of parties to obtain recognition and enforcement relief from courts in respect of a validly concluded (mediated) settlement

12 [2019] 2 SLR 131.

13 [2019] SGHC 63.

14 [2020] 1 SLR 36.

15 [2020] 3 SLR 982.

16 [2019] SGHC 275.

17 [2019] SGHC 84.

18 [2020] 3 SLR 568.

19 [2019] SGHC 100.

agreement is a crucial consideration in dispute risk management. By way of example, parties may litigate in relation to non-compliance issues, seek judicial clarification as to a (mediated) settlement agreement's ambit, or apply for it to be set aside. Decisions emanating from Singapore courts have been favourable to the recognition and enforcement of (mediated) settlement agreements, thereby galvanising the attractiveness of mediation as a reliable and effective forum for mediation in Singapore. As the review below shows, the courts have also considered defences in relation to (mediated) settlement agreements.

22.5 In this part, decisions dealing with settlement agreements resulting from mediation as well as those resulting from negotiation are examined as the jurisprudence on negotiated settlement agreements will be relevant to mediated settlement agreements. This is the reason for the references to (mediated) settlement agreements throughout this chapter.

A. *Recognising (mediated) settlement agreements*

22.6 The following two cases confirm that in Singapore, (mediated) settlement agreements may be invoked as a complete defence against proceedings at arbitration or in court, as regards discrete issues already resolved through settlement.

(1) *Settlement agreements as defence to arbitration proceedings*

22.7 The case of *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*²⁰ is instructive of the Singapore position on the recognition of settlement agreements in determinative forums such as arbitration and litigation.

22.8 In this case, Rakna Arakshaka Lanka Ltd ("RALL"), a company associated with the Sri Lankan government and specialising in security and risk management services, became embroiled in a dispute with one of its contractors, Avant Garde Maritime Services (Pte) Ltd ("AGMS"), over a private-public sector partnership arrangement related to combating piracy in Sri Lankan waters. AGMS commenced arbitration proceedings against RALL at the Singapore International Arbitration Centre ("SIAC") for breaches of contract, filing a notice of arbitration on 8 April 2015. RALL counter-sued AGMS in separate judicial proceedings, sending the latter a letter of demand on 23 August 2015 claiming for compensation as a result of the loss of reputation flowing from the institution of arbitration proceedings. On 20 October 2015, the parties

20 See para 22.3 above.

concluded a signed settlement agreement, recorded in a memorandum of understanding (“MOU”). The MOU had obliged AGMS to pay sums of money to RALL, in return for the latter to waive a part of one of its claims against the former. Additionally, the MOU expressly obliged both parties to discontinue and withdraw the arbitration and legal proceedings which they had each commenced against the other.

22.9 On 12 November 2015, RALL’s attorney wrote to the SIAC, communicating to the arbitral tribunal that AGMS had agreed to withdraw the matter. However, on 15 November 2015, AGMS objected and wrote to the tribunal claiming that it was “not in a position to withdraw” the arbitration. AGMS subsequently proceeded with the arbitration at the SIAC and successfully obtained an arbitral award in its favour one year later in November 2016. RALL did not substantially participate in the SIAC arbitration. On 27 February 2017, RALL commenced proceedings in Singapore to set aside the arbitral award, submitting among several arguments that the arbitral tribunal lacked the requisite jurisdiction to hear the dispute. The High Court refused to set aside the award, and RALL lodged a successful appeal to the Court of Appeal.

22.10 Giving weight to the MOU, the Court of Appeal ruled that a settlement agreement may be invoked to supersede a cause of action ordinarily available to parties in the event of a breach of a contractual relationship.²¹ Delivering the judgment of the Court of Appeal, Judith Prakash JA ruled that a valid and binding settlement agreement would put an end to judicial and arbitral proceedings in respect to the discrete issues which it resolved (that is, which were recorded in the contents of that settlement agreement). The moment a settlement agreement is concluded and takes a binding effect on the disputing parties, the proceedings will be spent and exhausted. Effectively, the settlement agreement operates to preclude parties from taking any further steps or making any more submissions on the resolved issues at any determinative forum (that is, litigation and arbitration), *unless* that there is a provision for parties to apply to court or an arbitral tribunal to revive the settled dispute.²²

22.11 The Court of Appeal also observed that if parties were to breach the settlement agreement, a separate claim against the breaching party would arise. Yet the breach will not ordinarily provide parties with

21 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [95]. See *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [152]; and consider *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd* [1992] 3 SLR(R) 841 at [13]–[20].

22 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [95]; *The Dilmun Fulmar* [2004] 1 SLR(R) 140 at [7]. Also see *Korea Foreign Insurance Co v Omne Re Sa* [1999] 1 Lloyd’s Rep IR 509.

the opportunity to revive the settled dispute, *unless* it was specifically provided for in the settlement agreement.

22.12 As such, the Court of Appeal allowed RALL's appeal to set aside the impugned arbitral award. First, it found that the MOU was valid and binding between the parties – it was operative immediately upon its conclusion, because there was no express or implied indication otherwise. There was an express contractual declaration in the MOU that bound both parties to the agreement that they had concluded by signature. Secondly, the Court of Appeal ruled that the arbitral tribunal lacked the jurisdiction to render the award, because of the fact that no dispute or cause of action lay before it. The settlement agreement, encapsulated by the MOU, had already resolved the parties' dispute. This is an important decision by the Court of Appeal as it is the first apex court judgment in Singapore which turns on the successful invocation of a settlement agreement as a complete defence against arbitration proceedings.

(2) *Recognition of mediated settlement agreement as potential defence in litigation proceedings – Interpretation of terms*

22.13 In *Jumaiah bte Amir v Salim bin Abdul Rashid*,²³ the High Court was asked to recognise a mediated settlement agreement. In this case, the plaintiffs, Jumaiah and Ezzad, and the defendant, Salim, were in dispute over a real estate deal that fell through in 2016. They were directed to mediation after filing a suit in the High Court and were able to reach a mediated settlement agreement in July 2017. This case before the High Court involved a claim by the plaintiffs to enforce allegedly implied terms under the mediated settlement agreement to pay rent for an extended period of time, as well as a counterclaim by the defendant for loss of surplus sums and sums incurred for renovating the property in dispute. In relation to the defendant's counterclaim for renovation expenses, the plaintiffs argued that the issue had been resolved at mediation and formed a part of the mediated settlement agreement.²⁴ Essentially, the plaintiffs argued that the defendant's claim for renovation expenses should be struck out, as that discrete issue had been resolved at mediation, and the court should recognise the relevant terms of the mediated settlement agreement.

22.14 Choo Han Teck J disagreed with the plaintiffs' arguments. His Honour found that "although the issue of renovation expenses was discussed at mediation, it did not form part of the Settlement Agreement as the Settlement Agreement made no reference to any renovation

23 See para 22.3 above.

24 *Jumaiah bte Amir and Another v Salim bin Abdul Rashid* [2019] SGHC 63 at [16].

expenses”.²⁵ In other words, parties may invoke the terms of a mediated settlement agreement as a defence in litigation proceedings involving claims on issues resolved at that mediation; however, on the facts of this case, the discrete issue in question (renovation expenses) while discussed at mediation was found not to form part of the mediated settlement agreement.

22.15 In reaching his decision, his Honour highlighted the confidential and without prejudice nature of mediation as follows:²⁶

Correspondence between parties in mediation are confidential and made without prejudice. To retain that confidentiality and to encourage such mediations, the court should therefore not delve into correspondence exchanged in the mediation process unless it is necessary, for example, to determine whether an agreement has been reached or if parties had agreed to disclose such communications (see *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [94]–[97]).

22.16 Accordingly, the defendant’s counterclaim was *not* dismissed on the basis of the mediated settlement agreement. It was, however, ultimately dismissed as the court found that the defendant was unable to fulfil the burden of proof to prove his counterclaim in relation to the renovation expenses.

B. Enforcing (mediated) settlement agreements

22.17 The following cases are illustrative of the Singapore courts’ approach to enforcing (mediated) settlement agreements.

(1) Mediated settlement agreement – Non-compliance with assessor’s directions per terms of mediated settlement agreement

22.18 In *Yashwant Bajaj v Toru Ueda*,²⁷ the High Court upheld a statutory demand which was issued to enforce an alleged debt owed by the plaintiff, Bajaj, to the defendant, Ueda, under a mediated settlement agreement. Bajaj appealed, and the Court of Appeal in *Yashwant Bajaj v Toru Ueda*²⁸ allowed his application to have that statutory demand set aside. The alleged debt was founded on a settlement amount which was to be assessed through neutral evaluation by an independent accountant (“the assessor”) per the Singapore Mediation Centre’s Neutral Evaluation Rules. It transpired that Bajaj’s obstructive conduct subsequent to the

25 *Jumaiah bte Amir v Salim bin Abdul Rashid* [2019] SGHC 63 at [17].

26 *Jumaiah bte Amir v Salim bin Abdul Rashid* [2019] SGHC 63 at [17].

27 *Yashwant Bajaj v Toru Ueda* [2018] SGHC 229.

28 See para 22.3 above.

conclusion of the mediated settlement agreement on 19 August 2014 led to a three-year long delay in the assessor's report (issued in November 2017). Consequently, the assessor was only able to report qualified values in his report as he only had access to documents submitted by Ueda, and the assessor caveated expressly that these values were subject to adjustments.

22.19 Chao Hick Tin SJ, delivering the judgment of the Court of Appeal, ruled that debt flowing from the *qualified* settlement amount derived by the assessor was not definite and certain,²⁹ and found that the valuations of the assessor were not determinations falling in accordance with the terms of the mediated settlement agreement.³⁰ Consequently, as the debt owed to Ueda was not clearly established, he could not seek to enforce the mediated settlement agreement against Bajaj in court.

22.20 The Court of Appeal also noted the plaintiff's obstructive behaviour during the neutral evaluation procedure. Although Chao SJ opined that Bajaj was evidently in breach of a duty under the settlement agreement to cooperate, "such a breach of contract could not render valid an otherwise uncertain debt so as to enable the alleged creditor to issue a statutory demand in respect thereof".³¹ Instead, the court pointed out that:³²

... a party's refusal to cooperate could entitle the other party to sue the defaulting party for breach of contract or to seek an order of court compelling the defaulting party to comply with the expert's directions, or it could amount to a repudiation of the agreement.

22.21 This case is also discussed below.³³

(2) *Enforcement of mediated settlement agreement and settlement agreement – Factors relevant to setting aside*

22.22 In *Ram Niranjana v Navin Jatia*,³⁴ the parties were locked in a drawn-out and complicated domestic dispute which spilled over into the running of a family business. During the course of the parties' acrimonious

29 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [71].

30 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [72].

31 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [78].

32 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [78].

33 See paras 22.63–22.70 below.

34 See para 22.3 above. At the time of writing, this case was on appeal. The appeal was allowed in a judgment delivered by the Singapore Court of Appeal on 6 April 2020: *Navin Jatia v Ram Niranjana* [2020] 1 SLR 1098. The Court of Appeal reversed the High Court's finding in respect to the validity of the 2015 Settlement Deed. The appeal judgment will be discussed in this chapter next year.

relationship, which unfolded over more than ten years, there were two settlement agreements concluded between the parties: a mediated settlement agreement encapsulated in a memorandum of understanding (“MOU”) dated 9 December 2006 signed by Mr Ram, Mrs Ram and Mr Navin (noting that Mrs Navin was also a named party to the MOU but she did not sign it); and a settlement agreement encapsulated in a settlement deed concluded on 6 August 2015 (“the 2015 Deed”) signed by the same four parties. The MOU provided arrangements for the family business (including the restructuring of shareholding and organisation of key appointment holders in the company, Evergreen Global Pte Ltd) as well as some domestic provisions (including the purchase of a house for Mrs Ram, which would serve as a lifelong residence for Mr and Mrs Ram under a contractual licence). Further personal and business disputes had surfaced after the signing of the MOU. The parties came together to conclude another settlement agreement, recording it under the 2015 Deed: this instrument purported to be a “full and final settlement of all or any Issues (including any claim(s) thereto) arising between them”³⁵ and to revoke and supersede:³⁶

... all previous agreements, arrangements and/or understandings made between them (including those made individually between certain parties to [the 2015 Deed], without the involvement of all four parties herein).

22.23 Unfortunately, more disputes which included physical and verbal abuse between the parties transpired, and Mr and Mrs Ram were eventually expelled from the property they were promised under the MOU. This resulted in Mr Ram filing this suit in the High Court, to address a long list of grievances. For the purposes of this review, we will only address the issues relevant to the court ordering the enforcement of the MOU, as well as the setting aside of the 2015 Deed.

22.24 As the terms of the 2015 Deed purported to supersede the MOU, the High Court first considered if the 2015 Deed was a valid and binding settlement agreement. Mr Ram, hoping to enforce the terms of the MOU, argued that the 2015 Deed should be set aside on the basis of various arguments, namely, that it was void for uncertainty, or alternatively, that it was voidable for misrepresentation, duress, undue influence, unconscionability, and/or material nondisclosure. As a nominal defendant who aligned her case with her husband’s, Mrs Ram argued for the same; additionally, she argued that the 2015 Deed should be set aside for *non est factum*.

35 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [31(a)].

36 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [31(c)].

22.25 The High Court ruled that the 2015 Deed was not void for uncertainty. Chua Lee Ming J first reiterated the law:³⁷

A contract is valid and enforceable if its terms are certain. A term is uncertain if there is no objective or reasonable method of ascertaining how the term is to be carried out: *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 at [32]. At the same time, courts do strive to uphold contracts where possible rather than striking them down: *Climax Manufacturing Co Ltd v Colles Paragon Converters (S) Pte Ltd* [1998] 3 SLR(R) 540 at [22] and [26].

22.26 In respect of the 2015 Deed purporting to be a full and final settlement of all “Issues”, Mr and Mrs Ram argued that the definition of “Issues” was uncertain. The court disagreed, as there was actually a definition provided of the term “Issues” in the Deed.³⁸

... disagreements over matters concerning personal business styles, work aptitudes, monies and other personal matters/concerns ... which have created certain disharmony within the family or amongst the individual members.

22.27 The court also clarified that a provision in a settlement agreement which purports to revoke and supersede all past agreements and understandings is not an ambiguous or uncertain clause.

22.28 Next, the High Court ruled that the 2015 Deed could not be set aside for misrepresentation. Chua J reiterated the law as follows:³⁹

An actionable misrepresentation consists in a false statement of *existing or past fact* made by one party before or at the time of making the contract, which is addressed to the party misled, and which induces that party to enter into the contract: *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [20], citing *Anson’s Law of Contract* (28th Ed, 2002) at p 237. In other words, an actionable misrepresentation does not operate on statements of intention.

22.29 The case for misrepresentation was unfounded in this case as Mr and Mrs Ram simply did not show any statements of existing facts which could have led to a misrepresentation.

22.30 The High Court ruled that the 2015 Deed may not be voidable for duress, undue influence or unconscionability. As to duress, Chua J reiterated the law:⁴⁰

37 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [46].

38 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [48].

39 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [51].

40 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [55].

There are two elements in duress. First, there had to be pressure amounting to compulsion of the victim's will. Second, the pressure exerted had to be illegitimate: *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another* [2011] 2 SLR 232 at [48].

22.31 The court found that there was no duress as there was no evidence of a compulsion of will upon Mr and Mrs Ram when they signed the 2015 Deed. By all indications, they entered into the settlement agreement voluntarily.⁴¹

22.32 As to undue influence, the court found no indication of actual or presumed undue influence. There was no actual undue influence as it was already shown when the court dismissed the arguments for duress that Mr and Mrs Ram entered into the settlement agreement voluntarily, without any compulsion of will. The presumption of undue influence was also unfounded: the very fact that Mr and Mrs Ram were locked in a highly acrimonious decade-long dispute with Mr Navin, who was their son, at the time the 2015 Deed was concluded completely debunked any doubt that there was a shred of a relationship of trust and confidence reposed by them in Mr Navin, which may have given rise to the presumption of undue influence.

22.33 As to unconscionability, the court reiterated the law:⁴²

First, there must be weakness on one side, which could arise from poverty, ignorance or other circumstances, like acute grief. Second, there must be exploitation of that weakness and a transaction at an undervalue would be a necessary component of this requirement. Third, upon the satisfaction of these two elements, it will be for the defendant to demonstrate that the transaction was fair, just and reasonable. [See *Bok v BOL and another* [2017] SGHC 316 at [120]–[122]].

22.34 Chua J opined that Mr and Mrs Ram simply did not prove to the court that they were labouring under any form of weakness, which would invoke the doctrine of unconscionability.

22.35 The High Court also ruled that the 2015 Deed could not be set aside for *non est factum* against Mrs Ram. The court first reiterated the law:⁴³

The doctrine of *non est factum* operates as an exception to the general rule that a person is bound by his signature on a contractual document even if he did not fully understand its terms. Two elements need to be established for

41 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [59].

42 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [67].

43 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [71].

this doctrine to be invoked. First, there must be a radical difference between what was signed and what was thought to have been signed. Second, the party seeking to rely on the doctrine must prove that he took care in signing the document, that is, he must not have been negligent. See *Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62 at [119].

22.36 Mrs Ram claimed that no one explained the contents of the deed to her. She also admitted that a lawyer was present, but she claimed to have not been able to understand the lawyer as he spoke poor Hindi. Judging by the contextual circumstances of the conclusion of the 2015 Deed, Chua J found Mrs Ram's claims not believable as she herself was deeply involved in the acrimonious relationship with her son and daughter-in-law and could not have had no idea about what she was signing. As her husband, Mr Ram, knew that the 2015 Deed was a settlement deed, the court found it highly likely that he would have informed her about it when she signed it. In any case, Chua J impressed that Mrs Ram was clearly negligent in signing the 2015 Deed, as she took no steps to enquire as to the nature of the instrument she was to sign.⁴⁴ Hence the doctrine of *non est factum* was not available to her under these circumstances.

22.37 However, the court held that the 2015 Deed could be set aside for a material non-disclosure of fact. Characterising the 2015 Deed as fundamentally a family arrangement,⁴⁵ in spite of the fact that business matters were also resolved therein, Chua J reiterated the law:⁴⁶

A family arrangement is an agreement between members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace or security of the family by avoiding litigation or by saving its honour: *Rajabali Jumabhoy and others v Ameerli R Jumabhoy and others* [1997] 2 SLR(R) 296 ... at [204]. In any family arrangement there must be honest disclosure by each party to the other of all such material facts known to him, relative to the rights and title of either, as are calculated to influence the other's judgment in the adoption of the arrangement, and any advantage taken by either of the parties of the other's known ignorance of such facts will render the agreement liable to be set aside: *Halsbury's Laws of England* vol 18 (Butterworths, 4th Ed, 1977), at para 315.

22.38 The court found that amidst the negotiations leading to the conclusion of the 2015 Deed, Mr Navin under-disclosed to Mr Ram his share of sale proceeds of some liquidated bonds. The court was unimpressed that whilst it thought Mr Ram was entitled to US\$3,442,378.29 of the sale proceeds, Mr Navin led Mr Ram to believe

44 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [74].

45 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [77].

46 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [76].

that his share was less than US\$1.5m in the talks leading up to the 2015 Deed. The court emphasised:⁴⁷

Obviously, Ram's share of the sale proceeds was material since the 2015 Deed purported to settle all the existing disputes for a sum of US\$2m to be paid to Ram. Navin had therefore failed to disclose a material fact.

22.39 Accordingly, Chua J allowed the application by Mr and Mrs Ram to set aside the 2015 Deed.

22.40 The High Court proceeded next to decide if the mediated settlement agreement encapsulated in the MOU was binding and enforceable on all parties. Mr and Mrs Navin argued that the MOU should be set aside, abandoning their initial position to rely on the 2015 Deed, which the court had already found to be unenforceable for material non-disclosure of fact. Unsurprisingly, Mr and Mrs Ram argued that the MOU was valid, binding and enforceable. The court engaged in a marginal inquiry as to whether the MOU was an instrument flowing from a social and domestic arrangement.⁴⁸ Highlighting that “the facts, context and circumstances in each case must be carefully considered”,⁴⁹ Chua J ruled that the parties had intended the MOU to have a legally binding effect. This was because judging from the circumstances leading to the mediation and conclusion of the MOU in 2006, the court thought that it represented the result of a serious attempt to resolve a complicated and acrimonious father-son dispute over business and domestic affairs which shaded into one another. For instance, the court thought that a hand-written provision (written by Mr Navin) which provided Mr and Mrs Ram with a right to stay at a domestic residence in the MOU led to a strong inference that the parties were in serious contemplation of achieving compromise and amicably resolving their disputes through the conclusion of that MOU in 2006, and the inference thereafter was that the parties intended it to be a legally binding instrument when it was signed.⁵⁰

22.41 Accordingly, the court ruled that the mediated settlement agreement in the form of the MOU was a valid and binding instrument, and granted the necessary declaratory orders to enforce its provisions. It should also be noted that whilst Mr and Mrs Ram were successful in enforcing the MOU against Mr and Mrs Navin, the court found that Mr Ram had breached some implied terms under the MOU: it was implied that he was not to misbehave in such a manner that would make

47 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [79].

48 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [87].

49 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [84].

50 *Ram Niranjana v Navin Jatia* [2020] 3 SLR 982 at [86].

it unreasonable for him to insist on staying at the property.⁵¹ As the court found that Mr. Ram had a “propensity towards violent behaviour and verbal abuse whilst living at the [property]”,⁵² this entitled Mr and Mrs Navin to evict him from the property, in spite of the contractual licence entitling him to reside there for life under the terms of the MOU.⁵³

(3) *Settlement agreement – Declaration of valid and binding nature*

22.42 A party may seek a declaration of the valid and binding nature of a settlement agreement as was the case in *Law Chau Loon v Alphire Group Pte Ltd*.⁵⁴ Here the applicant, Law, concluded a settlement agreement – recorded on a WhatsApp text message – with investors from Alphire Group Pte Ltd (“Alphire”) over the satisfaction of a court judgment debt, which indebted the former to the latter. Because of the unfulfilled judgment debt, there were plans by Alphire to file a bankruptcy petition against Law. Consequently, Law applied to the High Court hoping to stave off the petition by enforcing the terms of the concluded settlement agreement through a declaration of its validity and binding nature. Alphire categorically denied having concluded the settlement agreement.

22.43 The following summary of the facts of the case leading to the conclusion of the settlement agreement are relevant for the purposes of review. Some time at the end of January 2019, Law met with one of the Alphire investors, who initiated a compromise over the S\$1m judgment debt Law owed to Alphire. Subsequently, on 2 February 2019, Law and the investors conferred at a local hotel lobby. Law attended the meeting with S\$1m in cash at hand. The parties engaged in negotiations, which resulted in a full and final settlement of the judgment debt. The terms of the settlement involved payment of sums of money in addition to the S\$1m cash Law had at hand, a share transfer and disclosure of relevant information.⁵⁵

22.44 One of the investors recorded the terms of the settlement agreement in a WhatsApp text message, which was transmitted to Law. The message read as follows:⁵⁶

We agree that if [Law] pays us S\$1m (received on 2 February 2019) plus S\$400,000 in 4 installments (*sic*) of S\$100,000 each commencing 1st June

51 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [115].

52 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [117].

53 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [215].

54 See para 22.3 above. At the time of writing, this case was on appeal. The appeal was dismissed in a judgment delivered by the Court of Appeal on 19 May 2020: *Alphire Group Pte Ltd v Law Chau Loon* [2020] SGCA 50.

55 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [45] *ff*.

56 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [48].

2019 (with cheques issued in advance) and provides all necessary information and contact particulars regarding the debtors owing amounts to Alphire and transfers his shares free of charge in the company to Alicia and confirms he has no claims against Alphire we will agree to the settlement and withdraw our bankruptcy petition.

22.45 Subsequently, Alphire disclaimed the terms of the settlement agreement. It argued that the agreement was subject to contract, and that there was no intention to conclude a binding settlement agreement between the parties. Additionally, it submitted that the investors had no authority to enter into the settlement agreement with Law on its behalf. Consequently, Law applied to the High Court for an order to enforce the settlement agreement.

22.46 The High Court granted an order to enforce the settlement agreement. First, Vincent Hoong JC (as he then was) found that the investors had the implied actual authority to enter into the settlement agreement with Law on Alphire's behalf.⁵⁷ His Honour found that the Alphire directors were actually subservient to the investors, who yielded direct influence over the management and running of the company. There was evidence that the directors were accountable and/or reported on matters with regard to the management, operations and profitability of Alphire to the investors. Moreover, the High Court specifically found that the investors' substantial involvement with the company's financial affairs led to the inference that they possessed an implied actual authority to enter into a settlement agreement over an outstanding judgment debt in favour of Alphire.

22.47 Secondly, the High Court scrutinised the context under which the settlement agreement was concluded. It was reiterated:⁵⁸

For there to be a valid settlement agreement, there must be 'an identifiable agreement that is complete and certain, consideration, as well as an intention to create legal relations' (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ... at [46]).

22.48 Hoong JC opined that the fact that the settlement agreement was recorded on a time-stamped WhatsApp text message was a weighty consideration. Furthermore, the High Court found that there was a complete and uncontradicted coincidence in the agreement reflected in the text message with the outcomes of the negotiation at the hotel lobby between the parties.⁵⁹ The High Court also took some post-contractual

57 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [36].

58 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [39].

59 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [51].

evidence into account: Alphire's solicitors, in a correspondence with Law's solicitors on 15 February 2019, had acknowledged that there was a full and final settlement reached between the parties on 2 February 2019.⁶⁰

22.49 The High Court was satisfied that the terms of the settlement agreement were complete, certain and binding: this was bolstered by the fact that there was clear consideration (that is, Law's obligation to pay S\$1.4m to Alphire on agreed terms, in exchange for the settlement of the judgment debt) stated in the agreement.⁶¹ The High Court also found that there was intention between the parties to create legal relations with each other, on the basis that the WhatsApp text message was couched in legalistic terms, and clearly reflected a *quid pro quo* negotiated between Law and the investors.⁶² Accordingly, as the settlement agreement was valid and binding, Hoong JC granted the declaration, sought by Law, to enforce it.

III. Mediation/appropriate dispute resolution practice and ethics

22.50 In this part, three cases are examined: first, the authors consider a case from the High Court where the expert determination of an independent valuer, nominated in accordance with the terms of a mediated settlement agreement, was unsuccessfully challenged. The authors then revisit a case examined in the previous part in which the findings of an assessor in a neutral evaluation procedure were successfully challenged for not being rendered in accordance with the terms of the mediated settlement agreement. Finally, the authors review a case in which the High Court considered whether there was a conflict of interest in a situation in which a lawyer represented a different client against *the same defendants* in a dispute over the same substantial issues.

A. Expert determination

(1) *Expert determination procedure agreed to in terms of mediated settlement agreement – Challenge to valuation report resulting from expert determination*

22.51 In *Teo Lay Gek v Hoang Trong Binh*,⁶³ the parties had been locked in a minority oppression dispute in 2016. After proceeding to the

60 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [50(c)].

61 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [64].

62 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [65].

63 See para 22.3 above.

Singapore Mediation Centre on 16 June 2017, they concluded a mediated settlement agreement which represented a full and final settlement of all matters regarding a suit that had been filed in the High Court in relation to the aforementioned dispute. As part of their obligations under the mediated settlement agreement, the defendants agreed to buy out the plaintiffs' shareholding in Agape Holdings Pte Ltd ("the Company"); the parties agreed to appoint Ernst & Young Solutions LLP ("EY") as an independent valuer to make an expert determination of the fair market value of the plaintiffs' shareholding in the Company. The defendants were obliged under the terms of the mediated settlement agreement to purchase the plaintiffs' shares based on the fair market value assessed by EY, which the parties had agreed to be final and binding upon them.

22.52 EY produced a valuation report ("the EY Report") dated 2 January 2018, which assessed the fair market value of the shares to be US\$4,165,675 as at 31 December 2016. According to the mediated settlement agreement concluded in June 2017, the defendants were obliged to make two instalment payments to the plaintiffs in April 2018 and June 2018. However, after EY had completed its valuation, the defendants requested EY to reassess the valuation of the shares as they were of the view that the valuation should have considered further relevant documents and information. EY maintained the position that it could not conduct a reassessment, unless it received the approval of all parties, as the defendants had already agreed to the timeline to provide all relevant information leading up to the valuation report. Moreover, EY had already acceded to the defendants' repeated requests for an extension of time to submit relevant documents and information before the report was issued. After participating in an unsuccessful mediation, which was provided for according to the terms of the mediated settlement agreement which resulted from the original mediation, the plaintiffs commenced this suit in the High Court against the defendants to enforce the terms of the mediated settlement agreement, namely, the obligation to buyout their shares in the Company at the assessed value. During the course of filing their affidavits, the defendants produced a contrasting valuation report prepared by Savills Vietnam Co Ltd dated 26 September 2018 ("the Savills Report"). Relying on the Savills Report, the defendants sought to impeach the assessment undertaken in the EY Report. First, they argued that the EY Report contained manifest errors; furthermore, the defendants asserted that EY had in their assessment materially departed from its contractual mandate flowing from the mediated settlement agreement.⁶⁴ The defendants argued that the EY Report be set aside for the above reasons.

64 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [25].

22.53 Tan Siong Thye J first set out the law relevant to mounting a challenge to the EY Report:⁶⁵

The general rule is that the only grounds to challenge a determination of an expert upon whom the parties agreed are as follows (see *Poh Cheng Chew v K P Koh & Partners Pte Ltd and another* [2014] 2 SLR 573 ... at [36]):

- (a) material departure from instructions;
- (b) manifest error; or
- (c) fraud, collusion, partiality and the like.

22.54 The court emphasised that the starting point of its inquiry would be to uphold the parties' contractual bargain, for they had contractually agreed – under the mediated settlement agreement – for an expert's determination to be final and binding on its merits; a court will generally not interfere with the expert's determination based on its own views of the merits.⁶⁶

22.55 Addressing the defendants' first argument in this light, expert determinations may be impeached where parties prove a "manifest error" in the report; the error must be a patent error on the "face" of the award or decision.⁶⁷ The speech delivered by Lord Denning MR in *Campbell v Edwards*⁶⁸ illustrates this sufficiently:⁶⁹

... It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. *Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it.* [emphasis added]

22.56 Keeping in mind that parties had *chosen* their expert, they had to lie in the bed which they had made. As Lawton LJ in *Baber v Kenwood Manufacturing Co Ltd*⁷⁰ opined:

... Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. *Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening.* [emphasis added]

65 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [26].

66 See *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [29].

67 *Geowin Construction Pte Ltd v Management Corporation Strata Title Plan No 1256* [2007] 1 SLR(R) 1004 at [16].

68 [1976] 1 WLR 403.

69 *Campbell v Edwards* [1976] 1 WLR 403 at 407.

70 [1978] 1 Lloyd's Rep 175 at 181.

22.57 The High Court established that there are two elements which a party dissatisfied with an expert determination must prove, in order to demonstrate that a manifest error has indeed occurred. First, the error needs to be obvious and not originate from or be founded upon a difference of opinion; secondly, the error needs to have obviously influenced (or be capable of influencing) the expert's determination.⁷¹ Examples of manifest errors include clear arithmetical errors, or where an expert valuer refers to factual elements (such as buildings) that are non-existent or unfounded.⁷²

22.58 Applying the law to the facts, Tan J found that there were no manifest errors contained in the EY report. To begin with, the errors identified by the defendants were not obvious, as they required the court to conduct an extensive inquiry on whether EY had committed any mistake in its assessment. Furthermore, the alleged errors in law and in fact argued by the defendants flowed from mere differences of opinion between the second report procured privately by them (that is, the Savills Report) in contrast with the EY Report. Tan J felt it proper to emphasise: "It was not proper for the court to adjudicate between the *merits* of the contrasting opinions in deciding whether or not to set aside an expert's determination" [emphasis added].⁷³

22.59 Addressing the defendants' second argument, the court applied the case of *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd*⁷⁴ which had, citing the English Court of Appeal in *Jones v Sherwood Computer Services plc*,⁷⁵ established a two-stage inquiry to determine if an expert assessor had departed from his or her mandate. First, the court will need to determine what exactly was the remit of the expert, as agreed by the parties; secondly, the court will examine the nature of the departure – if the expert's departure engenders a *material* departure from their mandate, the determination shall not be binding on the parties and will be set aside as a nullity.⁷⁶ As to the materiality of the divergence, Tan J adds a caveat:⁷⁷

It is accepted that a departure from instructions must be considered as material unless it can be characterised as trivial or *de minimis* when analysed with respect to the instructions. The expert's determination, even if shown not to be sufficiently different had there been full compliance with the instructions, must still be set aside as it is a nullity and not binding ...

71 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [40].

72 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [39].

73 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [41].

74 [2009] 2 SLR(R) 385 at [48].

75 [1992] 1 WLR 277 at 287.

76 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [53].

77 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [54].

22.60 His Honour also emphasised that it is crucial to recognise that there is a nuanced distinction between a departure from mandate, as against mistakes made by the expert.⁷⁸ The following analogy of answering the right or wrong question, found in *Nikko Hotels (UK) Ltd v MEPC plc*,⁷⁹ may be considered: “If [the expert] has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.”

22.61 Applying the law to the facts, the court observed that EY had a broad mandate in determining the market value of the shares which were subject to assessment. There were no strict restrictions circumscribing how EY may conduct its valuation. In any event, Tan J ruled that there was simply no evidence produced by the defendants indicating that EY had departed from its mandate: the defendants’ submissions as to alleged errors of law made by EY and their affiliates in producing the report were simply inconsequential and irrelevant to the specific question of whether such a departure from mandate had occurred.⁸⁰

22.62 Consequently, the High Court granted the plaintiffs a declaration that the EY Report was final and binding on the parties, in light of the mediated settlement agreement, and ordered that it be enforced accordingly.

B. Neutral evaluation

(1) Neutral evaluation procedure agreed to in terms of mediated settlement agreement – Whether assessor’s report was final and binding

22.63 As outlined previously,⁸¹ the Court of Appeal in *Yashwant Bajaj v Toru Ueda*⁸² was presented with a case to set aside a statutory demand that was issued to enforce an alleged debt owed by the plaintiff, Bajaj, to the defendant, Ueda, under a mediated settlement agreement. In this part, the authors focus on a different aspect of the case, namely, the neutral evaluation procedure.

22.64 The appeal turned on the substance of that alleged debt, founded on a settlement amount which was to be assessed through neutral evaluation by an independent accountant (“the assessor”) *per the*

78 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [55].

79 [1991] 2 EGLR 103 at 108.

80 *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84 at [57].

81 See para 22.18 above.

82 See para 22.3 above.

Singapore Mediation Centre's Neutral Evaluation Rules and in accordance with the terms of a mediated settlement agreement concluded between the parties.

22.65 After the mediated settlement agreement was concluded and the third-party "Neutral" was appointed to provide the required neutral evaluation service (in accordance with the parties' agreed "Documents-only Neutral Evaluation"), the parties were required to submit the necessary and relevant documents to the assessor along an arranged timeline. Read together, cll 1, 2 and 9 of the mediated settlement agreement generally dictate that the Neutral is to determine for the parties through his report (and the administration of a matrix formula represented by "calculat[ing] and populat[ing]" entries in Tables X and Y) a *final and binding* "Settlement Amount". Whilst Ueda complied diligently with the submission timelines, Bajaj was found to have obstructed the evaluation process through a series of delaying tactics. This led to a three-year long delay in the assessor's report (issued in November 2017). Consequently, the assessor was only able to report qualified values in his report as it had access solely to documents submitted by Ueda, and the assessor expressly added a caveat that these values were subject to adjustments.

22.66 The case before the Court of Appeal turned on whether the assessor abided by his terms of reference. As reported in the previous part, where an assessor or expert does not comply or departs from their mandate, their decision or report may be set aside even if parties had agreed in the original terms of reference that the assessor's decision is to be final and binding.⁸³ Here, the Court of Appeal had to characterise the assessor's qualified report, which essentially contemplated a review of the value of the Settlement Amount in line with the express qualifications made by him on the Settlement Amount. As the Settlement Amount in the assessor's report was made "subject to changes depending on adjustments",⁸⁴ the court had to decide if the assessor had reached a Settlement Amount which was final and binding, *per* the terms of his mandate set out in the mediated settlement agreement.

22.67 Interpreting the terms of the mediated settlement agreement, the court opined that the latitude given to the assessor by the mediated settlement agreement did not envisage the option for him to report numbers and figures that the assessor himself thought were subject to adjustments. Clause 1 of the mediated settlement agreement directed the assessor to "calculate and populate" the entries in Tables X and Y. The court opined that this necessarily entailed the need for the assessor to

83 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [56].

84 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [24].

determine such values with certainty. In other words, Chao Hick Tin SJ stated: “It means that the assessor had to reach a set of values for Tables X and Y that was definite and settled, incorporating his professional expertise”.⁸⁵ The fact that cl 9 of the mediated settlement agreement conceived as “final” the Settlement Amount reported by the assessor reinforced the court’s preferred construction, that the assessor’s report was not to be subject to further review. As Chao SJ opined:⁸⁶

There needed to be a *determination* of the calculations that was definite and settled, and in turn, a *determination* of the Settlement Amount that was certain and not subject to review. The requirement of a determination of a final Settlement Amount is consonant with the objective intention of the parties in entering into the Settlement Agreement in the first place – to resolve completely the dispute between them by appointing an independent accountant to determine the values they were unable to agree on. [emphasis in original]

22.68 Unfortunately, as the assessor expressly qualified that the values he administered in Tables X and Y, as well as the derived Settlement Amount, were subject to adjustments, the court inferred that those values “were nothing more than tentative figures”.⁸⁷ This meant that the assessor had applied and reported values that were not final.⁸⁸

22.69 The Court of Appeal then considered if the qualifications within the assessor’s report fell within the meaning of r 10.5(1) of the Singapore Mediation Centre’s Neutral Evaluation Rules. Rule 10.5(1) provides that the Neutral “may qualify the opinion to explain the constraints under which the opinion was rendered” where the opinion is given based solely on the submissions and evidence available, under circumstances where the Neutral thinks that further investigations should be carried out but the parties remain in disagreement over the commencement of such an investigation. But the court perceptively pointed out that the rule only applies to neutral evaluations with evaluation sessions, to the exclusion of documents-only evaluation. As the impugned report in this case was a result of a documents-only evaluation, the assessor was not able to rely on this rule for a mandate to issue a qualified report. In any event, the court clarified that even if the assessor was able to rely on r 10.5(1) in the context of a neutral evaluation with evaluation sessions, the rule only permitted:⁸⁹

85 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [60].

86 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [60].

87 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [65].

88 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [65].

89 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [62].

... a qualification in the sense of an explanation of the constraints under which the opinion is rendered. It does not permit a Neutral to relegate his task by stating that he is unable to come to any final number, i.e., a determination.

22.70 Consequently, the court concluded that the assessor was not in compliance with his mandate *per cl 1* of the mediated settlement agreement, as he had expressly caveated that those values he had determined were subject to adjustments (that is, not final, definite and settled). The Settlement Amount derived by the assessor was not in compliance with the mandate under the settlement agreement, as he had applied tentative values to Tables X and Y and conceived that the Settlement Amount reported was not final. As the assessor was not in compliance with his mandate, the report was not valid for the purposes of defining the payment obligations found within the mediated settlement agreement. Hence the court allowed Bajaj's appeal to set aside the statutory demand order issued against him, as the mediated settlement agreement was not sufficiently clearly defined to be enforced accordingly.⁹⁰ Interestingly, Chao SJ suggested that the outcome may have been different had the assessor drafted his caveat with more finesse, namely, "based on the documents submitted to me, which regrettably did not include any from Mr Bajaj as he refused to do so, I determine that ..."⁹¹

C. *Ethical considerations: conflict of interests*

- (1) *Conflict of interests – Lawyer representing a different client against the same defendants in relation to a substantially similar dispute – Settlement negotiations*

22.71 In *Wan Hoe Keet v LVM Law Chambers LLC*,⁹² the applicants (Wan and Ho) applied for an injunction from the High Court to restrain LVM Law Chambers LLC ("LVM") from representing a person named Chan against themselves in Suit No 806 of 2018 ("Suit 806"). This was because in an earlier suit in the High Court, Suit No 315 of 2016 ("Suit 315"), Mr Lok Vi Ming SC of LVM had represented the plaintiff, Lee, in that suit and in subsequent settlement negotiations against Wan and Ho, who were the defendants in that suit. Wan and Ho sought the injunction as they were aggrieved that LVM would act for Chan in Suit 806, whilst possessing confidential information obtained from

90 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [72].

91 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [65].

92 See para 22.3 above. At the time of writing, this case was on appeal. The appeal was allowed in a judgment delivered by the Singapore Court of Appeal on 3 April 2020: *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083. The appeal judgment will be discussed in this chapter next year.

settlement negotiations from Suit 315; Wan and Ho were defendants in both Suits 806 and 315. The High Court had two issues to answer:⁹³

[F]irst, is there a conflict of interests on the part of LVM in acting for the plaintiffs in both suits, and secondly, if so, have the applicants shown that there is a threat of misuse sufficient to justify an injunction order against LVM from acting for [Chan]?

22.72 Choo Han Teck J granted the injunction. His Honour first found that Mr Lok SC of LVM owed an obligation of confidence to the applicants. The court observed:⁹⁴

The obligation of confidence owed by the solicitors of one party to the counterparty in mediation or settlement negotiations need not strictly arise out of an explicit contractual duty, but may arise in equity 'by applying principles of good faith and conscience' even in the absence of any contract between the parties ... An equitable duty of confidence would be imposed if the circumstances are such that a reasonable solicitor in Mr Lok SC's position should have known that the information was given in confidence ...

22.73 It should be noted that cl 6 of the settlement agreement flowing from Suit 315 provided that:

The circumstances of the Claims, all materials prepared in respect of [Suit 315] ... and/or disclosed in [Suit 315], and any settlement between parties (including the terms of settlement) shall be kept strictly confidential between parties, unless disclosure is (1) required by law, (2) by written consent between parties, (3) sanctioned by the High Court of Singapore, and (4) for enforcement of this Settlement Agreement.

22.74 The court found that because Mr Lok SC negotiated on Lee's behalf (as the latter's lawyer) in the Suit 315 settlement agreement, whilst the express terms of the settlement bound Lee to promise the applicants that he would not use or disclose relevant confidential information except under the circumstances provided for, by extension, an equitable duty of confidence would be imposed on Mr Lok SC.⁹⁵ Referring to *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd*,⁹⁶ the court rejected the notion that there would be a difference between settlement negotiations and formal mediations in this regard. Choo J made clear that the private and confidential nature of negotiations – *regardless of whether they take place at mediation or not* – engenders a serious degree of fidelity, which would in any event bind Mr Lok SC, acting in his capacity as a lawyer to the confidential agreement signed by his client, Lee, with the

93 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [4].

94 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [9].

95 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [9].

96 [2009] NSWCA 354.

applicants. In passing, the court noted: “The fact that parties negotiated instead of mediated made no difference to this finding.”⁹⁷

22.75 Choo J subsequently put his mind to whether there might be a threat of misuse of that confidential information, sufficiently serious to justify an injunction. The court had perceptively observed:⁹⁸

There are many things that Mr Lok SC may not be thinking about – including what he is thinking about. I am referring, of course, to the subconscious currents in our minds and that was what [the precedents] meant when they referred to the possibility of ‘a future breach occurring accidentally or unconsciously’ ...

22.76 Thus, the risk of misuse of the confidential information in Mr Lok SC’s mind might be inevitable, as it was difficult to quarantine conscious or subconscious thoughts when he appeared in related proceedings which could give rise to a conflict of interests.⁹⁹ The court concluded that, in Suit 806 proceedings, the applicants would be disadvantaged by the knowledge that Mr Lok SC possessed, having participated in the Suit 315 settlement negotiations. Not only would Mr Lok SC have inside knowledge of the applicant’s circumstances, “[h]e will know at which point the applicants became malleable and at points they are at their strongest”.¹⁰⁰ Accordingly, the court granted the injunction restraining LVM from representing Chan in Suit 806.

IV. Mediation and civil procedure

22.77 In this part, the authors review three cases. The first two are reviewed with a focus on the courts’ decision in relation to the award of costs; the third case highlights the High Court’s view of the application of confidentiality and without prejudice principles to mediation procedures in the context of subsequent litigation proceedings.

A. Costs

(1) *Costs – Order 22A rules 9(3) and 9(5) of the Rules of Court*

22.78 In *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd*,¹⁰¹ the High Court issued a supplementary judgment on costs and disbursements. The

97 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [9].

98 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [10].

99 *Cf Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354 at [44].

100 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [11].

101 See para 22.3 above.

court awarded some costs to the defendant, Denka, which substantially succeeded in defending an enforcement of liquidated damages claim.¹⁰²

22.79 The court noted that Denka had made an offer to settle the plaintiff's ("Seraya Energy") claims on 31 October 2016, which remained open for five months and was withdrawn on 31 March 2017 before the start of the civil trial on 7 November 2017. When the court delivered its judgment on liability and quantum, Seraya Energy was entitled to receive a net payment amount of \$1,926,814 (excluding interest and costs). However, had they accepted the offer to settle before it was withdrawn, they would have received a greater net payment amount of \$2,642,450 (excluding interest and costs).

22.80 Woo Bih Li J referred first to O 22A r 9(3) of the Rules of Court,¹⁰³ which establishes the general rule that if a defendant has made an offer to settle, which has not been withdrawn nor expired before the disposal of the claim at trial, the defendant is entitled to costs on an indemnity basis calculated from the date of service of the offer, if the plaintiff does not accept the offer and obtains judgment which is not more favourable than the terms of the offer. In this instance, as the offer was withdrawn before the conclusion of trial, the court initially considered that each party was to bear its own costs of the action.¹⁰⁴

22.81 However, Woo J then considered the application of O 22A r 9(5), which could be read without prejudice to other provisions, including O 22A r 9(3). It provides that where an offer to settle has been made, then notwithstanding anything in the offer, the court retains full power to determine by whom and to what degree any costs are to be paid.¹⁰⁵ Giving more weight to the fact that the offer to settle had remained open for acceptance for five months prior to the beginning of trial, and less weight to the fact that it was withdrawn after five months, alongside the consideration that Seraya Energy would not have accepted the offer to settle in any event had it not been withdrawn, the court was inclined to award some costs to Denka. The court considered the difference in the quantum offered under the offer to settle and what was eventually awarded to Seraya Energy was not an insubstantial sum: \$715,636, which was approximately 37% of the principal amount awarded in judgment. Further, in reaching its conclusion, the court paid attention to the

102 *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 2.

103 Cap 322, R 5, 2014 Rev Ed.

104 *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 100 at [6].

105 *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 100 at [5].

maximum aggregate amount of what Seraya Energy had claimed (a sum totalling about \$31m).¹⁰⁶

22.82 This case reflects the High Court’s inclination to encourage parties to – effectively and in their best endeavours – resolve disputes out of court through the imposition of cost sanctions. Where parties have a window of opportunity to accept a settlement offer or participate in mediation, they must seriously consider it, whilst at the same time balancing such opportunity with the chance of success at litigation if the dispute were left to run its course at a full trial.

(2) *Obstructive behaviour during neutral evaluation process – No costs awarded*

22.83 In *Yashwant Bajaj v Toru Ueda*,¹⁰⁷ reviewed in the previous part,¹⁰⁸ the appellant, Bajaj, succeeded in his appeal in setting aside a statutory demand which purported to enforce a mediated settlement agreement containing an unclearly defined debt. However, despite his successful appeal, the Court of Appeal took a very dim view of Bajaj’s conduct,¹⁰⁹ which amounted to obstructing the neutral evaluation process. Chao SJ, therefore, ordered no costs be awarded to Bajaj. This case reflects the court’s prerogative to administer cost sanctions against parties who are uncooperative and disruptive of dispute management timelines agreed to at mediation.

B. Confidential and without prejudice nature of mediation

22.84 The High Court in *Jumaiah bte Amir v Salim bin Abdul Rashid*¹¹⁰ made some helpful remarks on the confidential and without prejudice nature of mediation in the context of evidence admissible in litigation proceedings.

22.85 In reaching his decision that agreement on particular issues was *not* reached at mediation, Choo Han Teck J highlighted the following points:¹¹¹

106 *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 100 at [11].

107 See para 22.3 above.

108 See para 22.18 above (“Recognition and enforcement of (mediated) settlement agreements”), where the facts of the case were summarised. Commentary on this case also appears at para 22.63 above.

109 *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 at [83].

110 See para 22.3 above, reviewed at para 22.13 above.

111 *Jumaiah bte Amir v Salim bin Abdul Rashid* [2019] SGHC 63 at [17].

Correspondence between parties in mediation are confidential and made without prejudice. To retain that confidentiality and to encourage such mediations, the court should therefore not delve into correspondence exchanged in the mediation process unless it is necessary, for example, to determine whether an agreement has been reached or if parties had agreed to disclose such communications (see *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [94]–[97]).

22.86 Further to his Honour's comments, there are some well-established exceptions to the principles of confidentiality and without prejudice: for instance, where parties to a settlement agreement have made express exceptions to such disclosures in court,¹¹² or where a forum mandatory law demands it.¹¹³

112 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [9].

113 *Cf* Dorcas Quek Anderson, "A Coming of Age for Mediation in Singapore? Mediation Act 2016" (2017) 29 SAclJ 275 at 278–289, paras 10–27 and Dorcas Quek Anderson, "Piercing the Veil of Confidentiality in Mediation to Ensure Good Faith Participation – An Untenable Position?" (2019) 31 SAclJ 713.