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Comment

A COMING OF AGE FOR MEDIATION IN SINGAPORE?

Mediation Act 2016

The Mediation Act 2016 was recently passed by the Singapore Parliament and is soon to come into operation. This legislative comment compares the Act's key provisions to the common law principles concerning confidentiality and admissibility, enforcement of mediated settlement agreements and stay of proceedings pending mediation. It argues that the Act has refined the common law in certain areas, but has brought about greater uncertainty in other aspects. It also discusses how the major provisions are likely to be applied by the court in the light of similar developments in other jurisdictions.

Dorcas **QUEK ANDERSON**
LLB (Hons) (National University of Singapore), LLM (Harvard University);
Assistant Professor of Law, Singapore Management University School of Law.

I. Introduction

1 A new statute concerning mediation is about to take effect in Singapore. Passed by Parliament on 10 January 2017, the Mediation Act[1] ("MA") has introduced a legislative framework for commercial mediation. The MA has been enacted after several seminal changes were implemented in the mediation profession, including the establishment of the Singapore International Mediation Institute. Indeed, more than two decades have passed since mediation was first institutionalised within Singapore.[2]

2 Does the MA signify the coming of age of the mediation process within Singapore? This legislative comment analyses the MA with this

1 The Mediation Bill (Bill No 37/2016) introduced the Mediation Act 2016. The first reading in Parliament was on 7 November 2016. It was passed by the Parliament during the second reading on 10 January 2017. As at the date of publication of this comment, the notification of the date of operation for the Mediation Act has yet to be published in the Gazette.

2 The State Courts' Primary Dispute Resolution Centre was established in 1994, the Singapore Mediation Centre in 1997 and Community Mediation Centres in 1998.

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overarching question in mind. It compares its key provisions to the common law principles concerning confidentiality and admissibility, enforcement of mediated settlement agreements and stay of proceedings pending mediation. It argues that the MA has refined the common law in certain areas, but has brought about greater uncertainty in other aspects. It also discusses how the major provisions are likely to be applied by the court in the light of similar developments in other jurisdictions.

II. Scope of the Mediation Act

A. Application

3 The enactment of the MA brings to fruition the last of a series of recommendations made by a working group in 2013 to develop Singapore as a hub for international commercial mediation.[3] Given the background of the MA, the statute has been drafted to apply principally to international commercial mediations that are connected to Singapore. Under s 6, the statute applies to any mediation that is "wholly or partly conducted in Singapore", or any mediation stipulating that Singapore law or the MA applies to the mediation.

4 The MA currently excludes mediation sessions conducted by the court or taking place under the court's direction.[4] Mediation sessions conducted by judges, staff or volunteers of the Family Justice Courts and the State Courts are thus excluded. The MA also does not apply to mediation proceedings that are conducted under "any written law".[5] As such, mediation programmes run by the Community Mediation Centres,[6] the Tripartite Alliance for Dispute Management under the Ministry of Manpower[7] and the Small Claims Tribunals[8] are not bound by the MA.

5 In short, the MA currently has limited application to private mediations that are connected to Singapore. It complements the work of the Singapore International Mediation Centre, which was set up in 2014 to offer mediation services for cross-border disputes. The exclusion of certain types of mediation is meant to avoid potential inconsistency of

3 *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law).
4 Mediation Act 2016 s 6(2)(*b*).
5 Mediation Act 2016 s 6(2)(*a*).
6 Community Mediation Centres Act (Cap 49A, 1998 Rev Ed).
7 Employment Claims Bill (Bill No 20/2016) cll 3–7 and the Industrial Relations Act (Cap 136, 2004 Rev Ed) s 30F.
8 Small Claims Tribunals Act (Cap 308, 1998 Rev Ed).

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the MA with existing mediation frameworks that have their own established rules.[9] However, it seems anomalous that sectors that have utilised mediation extensively for many years, such as the courts and Community Mediation Centres, have been excluded from the Act. The narrow scope of the Act also runs counter to the policy of having the Singapore International Mediation Institute ("SIMI") set professional standards for *all mediators* in Singapore.[10]

6 Section 6(3) allows the Minister to make a future order in the *Gazette* extending the application of the MA to mediations conducted by the courts or done pursuant to the courts' direction. It is hoped that the scope of the MA has only been conservatively framed as a start, with the possibility of incremental expansion in the future. This approach was also adopted by Hong Kong's Mediation Ordinance, in order to specifically target the private mediation sphere.[11] It is in the interest of the overall mediation industry and users to eventually have a uniform set of legal principles governing all types of mediation.

B. The Mediation Act does not legislate on mediation standards or mediation accreditation

7 The MA has been intentionally drafted to give a light touch to professional issues. Under s 3, the process of mediation has been broadly defined as facilitating the resolution of a dispute through identifying issues, exploring options and assisting in communication. There is also specific reference to the parties "voluntarily reach[ing] an agreement". This underscores the consensual nature of mediation, and effectively distinguishes it from adjudicative processes in which a binding decision is imposed on the parties. The definition of mediation is also framed broadly to include mediation conducted online through electronic means. The MA will thus potentially apply to online dispute resolution processes involving a third party facilitating settlement.

8 Apart from the above provisions, the MA does not legislate on mediation standards or accreditation issues. Hong Kong adopted the same approach in its Mediation Ordinance. In this connection, one commentator explained that soft forms of regulations such as codes of conduct or institutional rules are more flexible than legislation and

9 *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law).

10 Indranee Rajah SC, Senior Minister for State for Law, "Speech at the Launch of the Singapore International Mediation Institute" (5 November 2014) <https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/SMS-speech-at-SIMI-launch.html> (accessed 1 February 2017) at para 14, stating that the Singapore International Mediation Institute is the professional body for mediators within Singapore.

11 Mediation Ordinance (Cap 620) (Hong Kong) s 5.

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therefore deemed by the Hong Kong taskforce to be more suitable to regulate the professionalisation of mediation.[12] Likewise, Singapore has chosen to rely on SIMI to regulate mediation standards. This body currently administers a four-tiered mediation credentialing scheme.[13] It is a prudent choice to limit the scope of the MA to legal principles that support the mediation process. Such principles have to be articulated with clarity, without being frequently changed. By contrast, the professional standards of mediation require the input of the mediation industry, and have to be sufficiently flexible to fit different contexts of mediation.

III. Confidentiality and scope of admissibility of mediation communications

9 We turn then to the first area of legal provisions – confidentiality and admissibility of mediation communications. One of the tenets of the mediation process is its private and confidential nature. It is therefore fitting that a substantial portion of the MA is devoted to clarify these rules. As the Senior Minister of State for Law explained, these rules are currently a mixture of common law privileges, contractual protections and equitable remedies, rendering them thoroughly confusing to the individual mediation user.[14]

A. Position in common law

10 Common law has provided general protection to mediation through two overlapping concepts of confidentiality and admissibility. The concept of confidentiality generally refers to the obligation of all the parties not to disclose mediation communications to any third party. Mediation confidentiality is premised on two sources – an express obligation of confidentiality in the mediation contract, and implied confidentiality: *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)*[15] ("*Farm Assist*"). The duty of confidentiality can only be breached when all the parties, including the

12 Nadja Alexander, "The New Hong Kong Mediation Ordinance: Much Ado About Nothing" Kluwer Mediation Blog (10 December 2012) <http://kluwermediationblog.com/2012/12/10/the-new-hong-kong-mediation-ordinance-much-ado-about-nothing/> (accessed 23 January 2017).

13 *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law); Singapore International Mediation Institute <http://www.simi.org.sg> (accessed 23 January 2017).

14 *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law); Singapore International Mediation Institute <http://www.simi.org.sg> (accessed 23 January 2017).

15 [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 (Jun).

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mediator, collectively waive it. However, regardless of any waiver, the court may still order the disclosure of mediation communications when it is "in the interest of justice".[16]

11 By comparison, the concept of admissibility is an evidential one, referring to situations when mediation communications may be properly adduced as evidence in court. Unfortunately, the legal position on admissibility of mediation communications has not been entirely clear. Both the UK and Singapore courts have relied heavily on the "without prejudice" rule to decide on admissibility. Under this rule, statements or offers made in the course of negotiations for settlement are not admissible in court: *Rush & Tompkins Ltd v Greater London Council*,[17] followed in Singapore by *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd*[18] ("*Mariwu*") and *Ng Chee Weng v Lim Jit Ming Bryan*[19] ("*Ng Chee Weng*"). In Singapore, there has been some ambiguity concerning the sources of this rule. It appears to be derived from both common law and s 23 of the Singapore Evidence Act,[20] which provides that "no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given". This section applies the "without prejudice" rule only to the parties involved in the negotiations.[21] However, it has been accepted that common law extends the rule to third parties as well.[22]

12 It is also uncertain as to whether the "without prejudice" rule is synonymous with a "privilege" held by the parties. The Court of Appeal in *Mariwu* referred to a privilege while discussing the without prejudice rule.[23] Yet Pinsler has noted that s 23, strictly speaking, is not a privilege since it merely states that such admission is not relevant. Admissibility of relevant facts is determined by law and not subject to the party's intention, whereas the doctrine of privilege is concerned with a party's right to withhold information, a right he can maintain or abandon through consent or waiver. Nonetheless, Pinsler posits that the principle

16 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 (Jun) at [29].
17 [1989] AC 1280 (HL).
18 [2006] 4 SLR(R) 807 (CA) at [24]–[28].
19 [2012] 1 SLR 457 (CA) at [94]–[97].
20 Cap 97, 1997 Rev Ed.
21 The High Court in *Ng Chee Weng v Lim Jit Ming Bryan* [2010] SGHC 35 at [8]–[11] specifically held that the "without prejudice" rule in relation to s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) applied to communications made between the parties *with the assistance of a mediator*.
22 *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [28].
23 *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [26].

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of waiver is still applicable in the context of communications for the purpose of settlement.[24]

13 It is evident that the "without prejudice" rule is not an absolute one. The UK court in *Unilever plc v The Procter & Gamble Co*[25] ("*Unilever*") set out some exceptions to the rule, including the admissibility of evidence of negotiations to show that an agreement apparently concluded between the parties should be set aside on the ground of misrepresentation, fraud or undue influence.[26] The Singapore courts in *Ng Chee Weng* and *Quek Kheng Leong Nicky v Teo Beng Ngoh*[27] ("*Quek Kheng Leong*") have only applied one of the exceptions – when using the relevant communications to determine whether a compromise was reached and the terms of the compromise agreement.[28] It is therefore uncertain whether all the *Unilever* exceptions apply in Singapore.

14 In addition, it appears that only the parties, and not the mediator, may waive the privilege protecting their "without prejudice" communications (if at all a privilege exists).[29] It is not a privilege owned by the mediator. In *Farm Assist*, the court ordered the mediator to be a witness because the disputing parties had waived their privilege, and the court deemed the disclosure to be in the interest of justice. This ruling effectively means that a mediator may have to provide evidence on "without prejudice" matters against his or her will. Following the *Farm Assist* decision, some commentators have urged the court to specifically create a mediation privilege.[30] Such a statutory privilege has been

24 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) at para 15.011.

25 [2000] 1 WLR 2436 (CA) at 2444–2445.

26 The court in *Brown v Rice* [2007] EWHC 625 (Ch); [2007] All ER (D) 252 (Mar) (HC) at [10] allowed exceptions based on two grounds in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436 – whether the communications showed a concluded settlement, and whether a statement acted on by a party created an estoppel.

27 [2009] 4 SLR(R) 181 (CA).

28 *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [95]–[97]; *Quek Kheng Leong Nicky v Teo Beng Ngoh* [2009] 4 SLR(R) 181 at [22]–[24].

29 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 (Jun) at [29].

30 D Cornes, "Mediation Privilege & the EU Directive: An Opportunity?" (2008) 74(4) *Arbitration* 384; Justice Briggs, "Mediation Privilege" (2009) 159 *New Law Journal* 550 at 508; M Kallipetis, "Mediation Privilege and Confidentiality and the EU Directive" in *ADR in Business: Practice and Issues Across Countries and Cultures Volume 2* (Arnold Ingen-Housz ed) (Kluwer Law International, 2011); A K C Koo, "Confidentiality of mediation communications" (2011) 30(2) CJQ 192 at 201–202.

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enacted in the US Uniform Mediation Act[31] and within the European Union Mediation Directive.[32] No positive ruling in this direction has occurred in either the UK or Singapore.

B. General legislative framework in the Mediation Act

15 The MA has now delineated the scope of mediation communications clearly. Section 2 provides that mediation communications include anything said or done, document prepared, or information provided for the purpose of the mediation. Notably, these communications also include the mediation agreement entered prior to the mediation and the mediated settlement agreement.[33] Section 9 now declares that all such communications are confidential, subject to stipulated exceptions. In addition, s 10 states that these communications are generally inadmissible as evidence, with exceptions set out in ss 9(3) and 9(11). The scope of "mediation communications" is noticeably broader than in Hong Kong's Mediation Ordinance, which does not include the agreement to mediate and the mediated settlement agreement. It has been noted in this regard that the Ordinance's provisions were contrary to common practice.[34] There is therefore a commendable effort in the MA to reflect the parties' usual preference for their settlement terms to be confidential. Such confidentiality is usually waived by the parties or overruled by the court only when a party wishes to enforce the settlement terms in court.

C. Legislative framework for confidentiality

16 Confidentiality may be breached under ten situations listed in s 9(2). These include well-accepted exceptions such as party consent, seeking legal advice, disclosure to protect a person from injury and disclosure of communications relating to a potential offence or illegal

31 Uniform Mediation Act (2003) (US) ss 4 and 6. This Act provides for a general privilege of mediation communications subject to certain exceptions, including admitting terms of a signed settlement agreement and admitting communication that is a threat or statement of a plan to inflict bodily injury. When there are court proceedings to advance a defence to avoid liability under the agreement under mediation, the Act prescribes a balancing test of whether the "need for the evidence … substantially outweighs the interest in protecting confidentiality". This determination is to be made in a hearing *in camera*.

32 Directive 2008/52/EC. Article 7(1) provides that mediators can refuse to testify in judicial proceedings or arbitrations regarding any information arising out of or in connection with a mediation process, unless the parties agree, overriding considerations of public policy arise, or the disclosure is necessary in order to implement or enforce a concluded agreement.

33 Mediation Act 2016 ss 2 and 4.

34 A K C Koo, "Institutionalising Mediation in Hong Kong" (2015) 45 HKLJ 769 at 788.

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act. In all other situations, a person who wishes to breach mediation confidentiality must obtain the leave of the court or the arbitral tribunal. The court must take into account these factors set out in s 11(2) in deciding whether to grant leave:

(a) whether the communication has already been disclosed;

(b) whether it is in the public interest or interest of the administration of justice for disclosure to be made; and

(c) any other circumstances that the court or arbitral tribunal considers relevant.

17 Factor (b) is strikingly similar to the articulation of "the interest of justice" in *Farm Assist*.[35] The concept of "public interest" is consonant with the specific exceptions listed in s 9(2). Many of them take into account interests relating to safety, avoiding harm and injury, research and investigation of potential offences. Although factor (c) seems to be framed widely as any factor the court considers relevant, it is submitted that the court is likely to consider reasons comparable to s 9(2) concerning public interest or the administration of justice.

18 One of the listed exceptions to confidentiality detracts from the current common law. Section 9(2)(*a*) allows disclosure only with the consent of "the parties". Under s 2, the mediator is not defined as a party to a mediation, meaning that disclosure can be made by the disputing parties against the mediator's wishes. Section 9(2)(*a*)(ii) requires the additional consent of the maker of the communication, if that particular communication is to be disclosed. Effectively, these provisions imply that the mediator's consent is only required when the parties seek to reveal a statement made by the mediator.

19 This is a departure from Ramsey J's clear statement in *Farm Assist* that the duty of confidentiality can be waived only with the consent of all the parties, *including the mediator*.[36] It is curious that the mediator's consent is not required before the parties decide to breach the sacrosanct duty of confidentiality. This is a conspicuous difference between the MA and the Hong Kong Ordinance.[37] There was, perhaps, a considered intention to give predominant protection to the disputing parties, and to grant the mediator limited protection only in respect of communications made by him or her. Nonetheless, it is a slight

35 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 (Jun) at [29].

36 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 (Jun) at [29].

37 Mediation Ordinance (Cap 620) (Hong Kong) s 8(2)(a).

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regression from the common law, putting the mediator in a relatively disadvantageous position.

20 The MA has been drafted with the implicit recognition of the overlap between confidentiality and admissibility. Accordingly, s 9(3), when referring to when leave will be granted to breach confidentiality, has listed three specific circumstances that also relate to the *admissibility* of evidence:

> (a) One situation is to use communications for the purpose of enforcing or disputing a settlement agreement. This provision reflects the exception to the "without prejudice" rule in *Ng Chee Weng* and *Unilever*.[38]
>
> (b) The second situation refers to disciplinary proceedings for mediator or solicitor misconduct. It is remarkably similar to the well-accepted exception in *Unilever* allowing admissibility of evidence that was used for "unambiguous impropriety".[39]
>
> (c) The last circumstance refers to disclosure and/or admissibility for the purpose of discovery. One commentator noted that a parallel provision within s 8(2)(c) of the Hong Kong Ordinance was potentially confusing. It seems to suggest that both confidentiality and admissibility may be readily breached whenever a party in court proceedings seeks discovery of the relevant communication.[40]
>
> Nevertheless, it is likely that the discovery process will ultimately be subordinated to the overall rules of confidentiality and inadmissibility of mediation communications encapsulated by ss 9 and 10 respectively. The court will be obliged under s 11(1) to consider the factors listed in s 11(2), including public interest, before it grants leave for the communication to be disclosed and admitted as evidence under the discovery process. This approach is in line with the long-standing approach in the "without prejudice" rule.

38 *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [94]–[97]; *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436 at 2444–2445.

39 The UK Court of Appeal recently applied the *Unilever* "unambiguous impropriety" exception in *Ferster v Ferster* [2016] EWCA Civ 717, finding that a settlement offer made following a mediation was an improper threat in the form of blackmail and therefore not protected by the "without prejudice" rule.

40 R Keady & W Ganesh, "Mediation Bill Introduced into Hong Kong Legislation" (2011) *Dispute Resolution Update November* <http://www.clydeco.org.uk/uploads/Files/Publications/2011/Dispute%20Resolution%20Update%20(Nov%202011).pdf> (accessed 23 January 2017).

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D. Legislative framework for admissibility

21 The MA's framework on admissibility is *in pari materia* with the approach in Hong Kong's Mediation Ordinance. A person must obtain the court's or arbitral tribunal's leave before admitting any mediation communication as evidence: s 10. Section 10 provides an additional layer of protection over and above the common law, under which admissibility is automatically allowed for accepted exceptions to the "without prejudice" rule without the need to obtain leave. Such leave is also required even in the three instances set out in s 9(3), circumstances that are well-established exceptions to the "without prejudice" rule. In practice, parties must first obtain the court's approval before referring to any mediation communications in their discovery documents or affidavits of evidence-in-chief. This is a favourable change, as it places the onus of application on the party seeking to default on the general rule of admissibility. The burden does not fall on the non-defaulting party to raise objections, by which time disclosure may have already been made to the court and then has to be undone.

22 The MA does not go so far as to create a statutory privilege that is owned and waivable by the disputing parties as well as the mediator. Waiver by the parties and the mediator alone is insufficient to result in an exception to inadmissibility. By contrast, UK cases such as *Farm Assist*[41] and *Cumbria Waste Management v Baines Wilson*[42] have referred to a without prejudice "privilege", though the privilege has been deemed to be owned only by the disputing parties.

23 The "privilege" doctrine could have provided greater flexibility and dexterity, allowing automatic exceptions in situations of waiver without the need for leave, and only requiring leave when the court has to balance the privilege against public interest considerations. Both the US Uniform Mediation Act[43] and Malaysia's Mediation Act[44] utilise the "privilege" mechanism, probably because of these reasons. It is regrettable that the MA has not embraced this doctrine which is present within common law.

24 There is also no specific "mediation" privilege in the MA. A mediation privilege would have symbolised the strongest protection accorded to mediation, as it would have put it on equal footing with other established privileges like the legal professional privilege and

41 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 (Jun) at [44].

42 [2008] EWHC 786 (QBD). See also *Muller v Linsley & Mortimer* [1996] PNLR 74 (CA).

43 Uniform Mediation Act (2003) (US) ss 4 and 6.

44 Mediation Act 2012 (Act 749/2012) (Malaysia) s 16.

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litigation privilege. As in the Hong Kong Mediation Ordinance, there has been a missed opportunity in the Singapore MA to send a strong signal about the general inadmissibility of mediation communications due to the great public interest in settlement. It is understandable though that a conservative stance is being taken in the early days of the MA, till Singapore jurisprudence is deemed ripe enough to accept a distinct mediation privilege. The same conservative approach has been adopted in many other common law jurisdictions such as the UK.

25 In any event, the current framework in the MA has probably replaced the common law "without prejudice" regime for private mediations. A question arises as to whether the court will still draw guidance from common law principles when considering public interest and administration of justice, as well as any other circumstances under ss 11(2)(*b*) and 11(2)(*c*) respectively. Section 11(2) appears sufficiently broad to allow the court to refer to the exceptions to the "without prejudice" rule. There are many other exceptions in *Unilever* that have yet to be formally accepted into the Singapore jurisprudence. These exceptions are arguably consonant with the broad principles articulated in s 11(2), and should be used by the court as guidance in an appropriate leave application under s 11.[45]

E. Separate regimes for different types of mediation

26 All the preceding discussions apply only to private mediations that are conducted in Singapore, or which have Singapore law as the applicable law. The common law position on "without prejudice" and confidentiality continues to apply to other types of mediation such as court mediations and community mediations. There are effectively separate regimes governing different types of mediation. Certain domestic mediation schemes currently have their own statutory provisions concerning admissibility. For instance, s 19 of the Community Mediation Centres Act[46] unequivocally states that "evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court, tribunal or body". No exceptions are allowed to this blanket rule of non-admissibility.

27 As argued above, it is desirable for the different regimes on confidentiality and admissibility to be rationalised in the future. There is no reason to have fragmented legal frameworks on mediations indefinitely. The parallel frameworks potentially confuse the commercial

45 Koo adopts this view in interpreting the Hong Kong Mediation Ordinance (Cap 620) in A K C Koo, "Institutionalising Mediation in Hong Kong" (2015) 45 HKLJ 769 at 789.

46 Cap 49A, 1998 Rev Ed.

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mediator user who is likely to use private mediation as well as other mediation programmes. Such a result defeats the intent of the MA to grant greater certainty to mediation users.

IV. Enforceability of mediated settlement agreements

28 Section 12 is arguably the most novel provision within the MA. It provides certain mediations an expedited enforcement mechanism for their settlement terms. The strengthening of our enforceability regime is aimed at attracting a greater number of cross-border users to conduct their mediation in Singapore.

A. Current common law position

29 Presently, mediated settlement agreements are enforced by the courts as contracts. Legal proceedings have to be commenced to assert that an agreement was validly formed based on contractual formation principles, subject to vitiating factors such as mistake and duress: *Brown v Rice*.[47] By way of illustration, the Court of Appeal in *Ng Chee Weng* analysed the parties' conversations and correspondences to determine whether a settlement agreement concerning the purchase of shares had been reached. Part of the negotiations required the assistance of the disputing parties' mutual friend. The Court of Appeal affirmed the High Court's decision to rely on this impartial mediator's evidence to find that there was indeed *consensus ad idem*.[48] The court has also relied on contractual principles when ascertaining whether parties in matrimonial cases have reached agreements concerning the division of their assets.[49]

30 This conventional method of enforcing settlement agreements has caused substantial inconvenience. First, additional expense is needed to commence a legal action. Second, where there are disputes concerning the existence of a contract and its terms, mediation confidentiality is likely to be compromised as the court will probably make an exception to the "without prejudice" rule and examine the parties' mediation communications as evidence.

31 The uncertainties in enforcement have led to doubts over the utility of the mediation process. As the Minister for State put it: "This lack of enforceability is seen as an inhibiting factor in attracting commercial parties to mediate a dispute, since finality and certainty of

47 [2007] EWHC 625 (Ch); [2007] All ER (D) 252 (Mar) (HC).
48 *Ng Chee Weng v Lim Jit Ming Bryan* [2015] 3 SLR 92 at [54]–[63].
49 *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur* [2014] 3 SLR 1284 (CA).

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dispute resolution outcomes is key."[50] In a 2014 survey conducted by the International Mediation Institute ("IMI"), 90% of respondents agreed that the absence of any kind of international enforcement mechanism for mediated settlement agreements presented an impediment to the growth of mediation in resolving cross-border disputes.[51] There are thus ongoing efforts by the United Nations Commission on International Trade Law ("UNCITRAL") to create an international instrument for the cross-border enforcement of mediated settlement agreements.[52]

32 Mediated settlement agreements may currently be encapsulated in an order of court if there are pending legal proceedings. A court order is readily enforceable without necessitating further expenses to start a fresh action. Accordingly, mediations conducted for pending cases in the State Courts and the Family Justice Courts often result in the settlement terms being reflected in a consent court order. Alternatively, the parties may agree that the non-defaulting party may extract a court order reflecting the terms of settlement in the event of a breach of settlement terms. However, many private mediations that do not involve court proceedings do not have the benefit of obtaining a court order.

B. What is new in the enforcement procedure

33 It is therefore not surprising that the MA has created a mechanism for a privately mediated settlement to be converted into *a court order* that is immediately enforceable. Section 12(5) clarifies that a court order recorded under this section "may be enforced in the same manner as a judgment given or an order made by a court". The expedited mechanism is presently available only to mediations administered by the Singapore Mediation Centre or conducted by a mediator accredited by SIMI.[53]

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50 *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law).

51 International Mediation Institute, "How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements" (3 December 2014) <https://imimediation.org/uncitral-survey-results-news-item> (accessed 23 January 2017). See also S I Strong, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation" (2014) *University of Missouri School of Law Legal Studies Research Paper No 2014-28* at 44–45.

52 United Nations Commission on International Trade Law Working Group II, *Settlement of Commercial Disputes: International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting From Conciliation* (A/CN.9/WG.II/WP.200, 28 November 2016).

53 Section 12(3)(*a*) of the Mediation Act 2016, read with s 7, allow the enforcement provision to be availed of when the mediation is administered by a "designated

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34 These other conditions also have to be fulfilled:

(a) all the parties to the agreement (excluding the mediator) must consent to making the application: s 12(1);

(b) the mediated settlement agreement must be in writing and signed by all the parties to the agreement: s 12(3)(*b*); and

(c) the application must be made within eight weeks after arriving at the settlement agreement. Any other longer duration has to be approved by the court: s 12(2).

35 It was explained in Parliament that the safeguards, such as requiring the settlement to be in writing, "aim to ensure that the quality of the mediated settlement agreement is appropriate for being recorded and enforced as a court order".[54] It is also submitted that the writing requirement, coupled with the requirement for party consent, is appropriate in granting an expedited mechanism only to mediation with undisputed circumstances. An expedited mechanism is an ill fit for situations where the existence of a settlement is disputed, or there are vitiating factors invaliding the settlement. Such disputes of fact have to be fully litigated through a trial, and cannot be dealt with through an expedited application. Moreover, s 12 encourages parties who undergo mediation to comply with the good practice of recording their settlements and confirming their agreement to convert settlement terms into a court order.[55] The time restriction of eight weeks further encourages timely applications to be made before any potential breaches of settlement terms.

36 Section 12(4) stresses that the court will not enforce *every* agreement that the parties consent to. Under existing contractual law, there are vitiating factors such as illegality that limit the enforcement of agreements. In this respect, the Hong Kong Working Group on Mediation noted that an enforcement mechanism runs the risk of bypassing the existing protection provided by the vitiating factors in

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mediation service provider" or "conducted by a certified mediator". See Ministry of Law, *Responses to Feedback Received From Public Consultation on the Draft Mediation Bill* <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/responses-to-feedback-received-from-public-consultation-on-the-d.html> (accessed 24 January 2017), stating at para 8: "For now, the designated mediation service provider will be the Singapore International Mediation Centre and the Singapore Mediation Centre, while the approved certification scheme will be the Singapore International Mediation Institute Credentialing (SIMI) Scheme (SIMI Certified Mediator)."

54 *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law).

55 Dorcas Quek Anderson, "Litigating Over Mediation – How Should the Courts Enforce Mediated Settlement Agreements" [2015] Sing JLS 105.

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contract, and being potentially abused by sophisticated parties to the detriment of weaker parties.[56] It is therefore apt that the MA has subjected the expedited enforcement mechanism to certain limits. Otherwise the court may be relegated to a rubber stamp of private agreements. Under this section, the court may exercise its discretion not to record the terms as a court order in the following circumstances:

> (a) the agreement is invalidated due to vitiating factors such as duress, fraud and misrepresentation;
>
> (b) the subject matter of the agreement is not capable of settlement;
>
> (c) the terms are not in the best interest of a child (where the dispute involves the welfare of a child); or
>
> (d) when the settlement is contrary to public policy.[57]

37 The first situation encapsulates the usual contractual principles determining whether a contract is void or voidable. The Ministry of Law explained that these invaliding factors "must be proven" before the court will consider them to be grounds for non-enforcement.[58] This suggests that weak allegations and aspersions will be unsustainable. The usual evidential burden to establish vitiating factors has to be discharged.

38 The second situation is similar to a draft provision which is presently being considered by UNCITRAL's working group on conciliation and arbitration.[59] This provision in turn draws inspiration from Art V(2) of the New York Convention[60] that allows for non-recognition of an arbitral award when the subject matter is not capable of arbitration under the law of the country where recognition or enforcement is sought. Section 12(4)(*b*) of the MA is likely to be interpreted in a similar vein as these established provisions. In this

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56 Hong Kong Department of Justice, *Report of the Working Group on Mediation* (February 2010) at para 7.187; Australia National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters* (November 2006) at para 11.31.

57 Mediation Act 2016 s 12(4).

58 *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law).

59 United Nations Commission on International Trade Law Working Group II, *Settlement of Commercial Disputes: International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting From Conciliation* (A/CN.9/WG.II/WP.200, 28 November 2016) at paras 37–45, listing draft provision 4(2)(b): "The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of that State."

60 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959).

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respect, some commentators have highlighted how there are existing constraints in the law in giving effect to certain obligations, such as an agreement to apologise, and conditional or contingent agreements.[61] It is therefore crucial for solicitors assisting their clients in drafting settlement terms to ensure that the key areas of agreement are enforceable under Singapore law.

39 The third ground of non-enforcement reflects the court's existing duty under s 125 of the Women's Charter[62] to consider the child's welfare in making court orders.[63] It is foreseeable that parties reaching an agreement on matrimonial disputes will seek to make use of the expedited enforcement mechanism. The Family Justice Courts will continue to consider the child's welfare before allowing the parties' agreement to be recorded as a court order.

40 Similarly, the court has the discretion under s 112 of the Women's Charter to assess whether the parties' settlement is "just and equitable". Elaborating on this discretion, the Court of Appeal in *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur*[64] stressed that it would give the parties' settlement agreement significant weight, unless there are good and substantial grounds to conclude that to do so would result in injustice.[65] The Family Justice Courts' oversight of matrimonial settlements is probably covered under the fourth ground of "public policy".

41 The fourth ground for non-enforcement mirrors the court's power to refuse enforcement of arbitral awards based on public policy.[66] There is thus consistency in how both arbitral awards and privately mediated settlement agreements will be reviewed in the light of public policy. This ground is also consistent with the court's current power not to uphold contracts that are illegal or contrary to public policy.

42 Overall, s 12(4) is fairly comprehensive in codifying the current legal principles guiding the court's discretion in enforcing agreements.

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61 Winnie Jo-Mei Ma, Chang-Fa Lo, Laurence Boulle & Bobette Wolski. "Enforcing cross-border mediated settlement agreements: colloquium held at Bond University Faculty of Law on November 2013" (2014) 7(1) Contemp Asia Arb J 3 at 18, "a definition of what is enforceable is needed; examples include being compelled to do something by a court, compulsory sale or realization of assets … What about apology, could that be enforceable?"

62 Cap 353, 2009 Rev Ed.

63 Women's Charter (Cap 353, 2009 Rev Ed) s 112.

64 [2014] 3 SLR 1284 (CA).

65 *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur* [2014] 3 SLR 1284 at [49]–[54].

66 Arbitration Act (Cap 10, 2002 Rev Ed) s 46; International Arbitration Act (Cap 143A, 2002 Rev Ed) s 31.

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Other jurisdictions with similar enforcement provisions have struggled with articulating the grounds for non-enforcement exhaustively. Ontario's Commercial Mediation Act narrowed down the grounds for non-enforcement to three grounds – a party not having signed the agreement or consented to the agreement; the presence of fraud; or the terms not accurately reflecting the parties' agreement.[67] However, questions may arise as to whether the concept of consent is wider or narrower than the common law principles of duress and undue influence. Ireland's draft Mediation Bill is soon to be passed this year. It lists a few exceptions to enforceability, including when a party has been overborne or unduly influenced; and when the settlement does not adequately protect the rights of the parties and their dependants.[68] Once again, there is uncertainty concerning whether to interpret the provisions of undue influence and overborne will in the light of the common law, or to apply the statutory provisions alone. By contrast, the MA's specific reference to "ground of invalidating a contract" clearly indicates that the common law contractual principles for vitiating factors are to be applied in determining these grounds.

43 The Hong Kong Working Group on Mediation wrestled with a slightly different question – whether an enforcement mechanism was necessary. In its opinion, the inclusion of the grounds for non-enforcement would not offer much real advantage different from the current position under the common law. It therefore recommended that no such statutory mechanism be created.[69] Granted that the legal position in s 12 of the MA does not vastly differ from the common law, it nonetheless gives mediation parties the additional benefit of swiftly obtaining an enforceable court order without having to commence full legal proceedings. It is a favourable development that is likely to increase the allure of mediation amongst commercial parties.

V. Stay of proceedings pending mediation

44 The final aspect of the MA clarifies that the court may order a stay of proceedings pending the completion of a mediation, similar to how it has been ordering stays pending arbitration. Section 8 of the MA

67 Commercial Mediation Act (RSO 2010, c 16) (Ontario) s 13(6).

68 Ireland Department of Justice, *Draft General Scheme of Mediation Bill 2012* <http://www.justice.ie/en/JELR/MedBillGSFinal.pdf/Files/MedBillGSFinal.pdf> (accessed 23 January 2017) s 11.

69 Hong Kong Department of Justice, *Report of the Working Group on Mediation* (February 2010) at para 7.190, stating: "If the grounds for rescinding or terminating a contract … are included, the statutory mechanism would not offer much real advantage … since court proceedings would remain necessary even if such a statutory mechanism is to be put in place."

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is largely similar to s 6 of both the Arbitration Act[70] and International Arbitration Act.[71] As is the case with arbitration, the parties must have a "mediation agreement" before the stay is granted. Section 4 elaborates that the mediation agreement may take the form of a mediation clause within a contract or a bill of lading. The mediation clause must oblige the parties to refer "the whole or part of a dispute" for mediation: s 4(1). The court may make the usual interim orders to preserve the parties' rights pending the completion of the mediation.

45 This is a welcome legislative change. Mediation clauses and multi-tiered dispute resolution clauses have been increasingly used in commercial contracts. Yet there has been considerable uncertainty concerning the enforceability of these clauses. The UK Court in *Cable & Wireless plc v IBM United Kingdom Ltd*[72] granted a stay of proceedings based on a clause that obliged the parties to use an ADR process recommended by the Centre for Dispute Resolution. This clause was deemed certain enough to be enforced. However, the Court of Appeal in *Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia SA*[73] subsequently adopted a stricter stance, holding that the tiered dispute resolution clause that obliged parties to "seek to have the dispute resolved amicably by mediation" did not set out a defined process or the procedure of a specific mediation provider.[74] It has been suggested that the Singapore courts are likely to be more lenient in enforcing mediation clauses, given the Court of Appeal's decision in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*[75] to uphold an agreement to negotiate in good faith. In another decision *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd*,[76] the contract obliged the parties to explore a series of meetings by stipulated committees. The arbitration clause referred to these meetings as "mediation". The Court of Appeal found that the language in this tiered dispute resolution clause was clear enough to be upheld.

46 Section 8, read with s 4, has now cleared the long-standing ambivalence described above. It has given the court the statutory power to grant a stay of proceedings pending mediation, thus granting

70 Cap 10, 2002 Rev Ed.
71 Cap 143A, 2002 Rev Ed.
72 [2002] EWHC 2059 (Comm).
73 [2012] EWCA Civ 638 (CA) at [36].
74 See also Loong Seng Onn & Deborah Koh, "Enforceability of Dispute Resolution Clauses in Singapore" [2016] Asian JM 51 at [27]–[45]; Joel Lee, "Agreements to Negotiate in Good Faith: HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd" [2013] 1 Sing JLS 212 and Keith Han & Nicholas Poon, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues" (2013) 25 SAcLJ 455.
75 [2012] 4 SLR 738 (CA) at [55] and [68].
76 [2014] 1 SLR 130 (CA).

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mediation the same standing as arbitration. The MA simply requires a mediation clause to require a reference of a dispute to mediation, without mandating reference to further details about the procedure of mediation and the mediation provider. This legislative change is very likely to encourage more widespread use of mediation clauses.

VI. Conclusion

47 For more than 20 years, mediation programmes have been operating within Singapore without a uniform legislative framework. The common law, which has been nebulous in several aspects, has been relied on as the legal foundation for mediation. The enactment of the MA was an opportune moment to engender consistency of legal principles, and thereby grant all mediation users better guidance. This goal has been partially achieved by an Act that applies only to a narrow category of mediations in Singapore. It nonetheless reflects a sound recognition of the pressing need to provide uniformity of legal principles. It is hoped that the MA will mature together with the Singapore mediation profession in the near future, and be increasingly extended to many other mediation regimes. Perhaps it can then be truly said that mediation has come of age in Singapore.

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