Singapore Developments – The Mediation Act 2016

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In November 2013, the Ministry of Law Working Group on International Commercial Mediation delivered its report on developing international commercial mediation in Singapore. Amongst the key recommendations in this report were the creation of a mediation service provider for international matters (the Singapore International Mediation Centre), the creation of a mediation accreditation body (the Singapore International Mediation Institute) and the establishment of a Mediation Act.
The end of 2016 saw the culmination of months of drafting and consultation work with the Mediation Bill being introduced in parliament and being passed into law on 10 January 2017 (although at time in writing, not yet in force). I would like to devote this entry to exploring key aspects to the Act which has as its stated purpose "to promote, encourage and facilitate the resolution of disputes by mediation".

The Act provides an interpretive and application framework for the key provisions in this Act. Apart from the definition of various terms like "Certification Scheme", "Certified Mediator" and "Designated Mediation Service Provider", Section 3 of the Act defines mediation as:

"a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute:
(a) identify the issues in dispute;
(b) explore and generate options;

(c) communicate with one another;
(d) voluntarily reach an agreement."

On one reading, this definition seems to endorse a model of mediation where the mediator plays a facilitative role and sessions in the mediation includes meetings via electronic means such as email, data messages and video conferencing. The definition refers specifically to disputes and seems to exclude the possibility of deal-making mediation (where a mediator can be brought in to help to parties negotiate a deal even when no dispute exists).

Section 4 provides clarity that a mediation agreement (an agreement to refer a matter to mediation) can be a part of a larger agreement or a separate agreement on its own. It must be in writing which is satisfied as long as the agreement is recorded in any form.

Section 6 makes clear that the provisions in the Act apply to mediations which are at least in part conducted in Singapore or the relevant mediation agreement provides for the Act or the law of Singapore to apply. Under this framework, it appears possible for a mediation to not actually be physically situated in Singapore. This is not a bad thing as it acknowledges the present commercial reality where physical meetings between international parties is probably becoming less of the norm. To avoid inconsistency with existing mediation schemes, Section 6 excludes mediations which are covered by other written laws.

The framework set up by these provisions is important because of three important aspects provided for by the Act.

First, where a party to a mediation agreement has instituted proceedings in court in breach of that agreement, Section 8 provides for a court to stay proceedings on the application of any party to the mediation agreement and to make interim and supplementary orders in order to preserve parties' rights. This is a significant development. While the common law in Singapore has been moving in the direction of enforcing a mediation clause/agreement, it is now absolutely clear, at least in the case of mediations to which the Act applies, that a party cannot, with impunity, breach a mediation clause or agreement. Further, the broad wording of this provision means that a court is not just limited to staying proceedings, it can also set terms and conditions relating to the stay which presumably include directing parties to actually have the dispute go to mediation and to set a

timeframe so as to obviate the concerns about the uncertainty of whether mediation will lead to a resolution or will take an inordinately long time.

Secondly, the Act sets out the parameters for disclosure and admissibility of mediation communication. Section 9 restricts disclosure except in specified situations like, inter alia, where parties consent, or where disclosure is necessary to prevent/minimize injury or neglect, authorized by a court or law etc. Section 10 specifies that unless leave has been obtained, a mediation communication cannot be admitted in evidence in any court, arbitral or disciplinary proceedings. Section 11 also specifies matters which must be taken into account by a court or arbitral tribunal when deciding whether to grant leave.

Finally, Section 12 provides for the recording of a mediated settlement agreement as an order of court which can then be enforced accordingly. This addresses the common complaint that mediated settlement agreements have no teeth. Section 12 provides the teeth if, inter alia, the mediation is administered by a designated service provider or conducted by a certified mediator. (While not yet done, the understanding is that these will be the Singapore International Mediation Centre and mediators certified by the Singapore International Mediation Institute.) Presumably, this will not only have domestic impact but international impact as well. An order of the Singapore court can potentially be recognized and enforced by other jurisdictions either under a reciprocal statutory regime or via the common law. Curiously, only mediated settlement agreements in relation to a dispute for which no proceedings have been commenced in a court qualify. It is not clear why this is so because it would exclude those cases for which a stay may have been ordered under Section 8. Section 12 also provides for those instances where the court may refuse to record the settlement agreement; for example if the agreement is void/voidable (for a number of vitiating factors) or if recording the agreement is contrary to public policy.

Interestingly, one of these instances is where “any term of the agreement is not capable of enforcement as an order of court”. It is not clear if the original intent is for this to be worded so widely. There are often parts to a settlement agreement where the term is not technically capable of enforcement as an order of court e.g. an apology. It would seem odd to refuse to record an agreement, including those parts of the settlement agreement which could technically be enforced, simply because of the existence of a term or two that could not be. However, this is not a new situation, and Mediators and lawyers have found ways to overcome these

problems through clever and specific drafting.

The Mediation Act is a significant step forwarding in furthering the mediation movement in Singapore. It is hoped that its provisions encourage the use of mediation both domestically and internationally and reinforce Singapore’s position as a dispute resolution hub.