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# ADR IN ASIA PACIFIC

SPOTLIGHT ON SINGAPORE



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ISSUE 2



# WELCOME

Welcome to the second edition of our *ADR in Asia Pacific Guide*, focusing on alternative dispute resolution (ADR) in Singapore.

Over the years Singapore has become one of the leading ADR centres in the Asia Pacific region. The last decade has seen Singapore grow in leaps and bounds as a preferred forum for international arbitration and the city state has recently renewed its focus on non-adversarial ADR processes, in particular mediation. At page 2, we summarise the development of ADR processes in Singapore and its future direction.

Singapore's latest ADR centre, the Singapore International Mediation Centre (SIMC), was launched on 5 November 2014. SIMC sits alongside the 18-year old Singapore Mediation Centre (SMC), which serves primarily the domestic market and disputants referred from the courts.

In this issue, we review the role of SIMC, which was set up to service international disputants who may wish to avail themselves of institutional mediation, either as a stand-alone process or to complement arbitration / litigation. At page 6 we interview Ms Eunice Chua, the Deputy CEO of SIMC to discuss hybrid dispute resolution mechanisms such as Med-Arb, and SIMC's innovative new Arb-Med-Arb Protocol (AMA Protocol). We thank Eunice for being generous with her time and insights.

On page 10 we delve deeper into the Arb-Med-Arb process offered by SIMC; its strengths and weaknesses, and how it is different from other hybrid dispute resolution processes more commonly used in Asia.

At page 13 we discuss a recent survey highlighting the approaches by commercial counsel in the region to governing law and jurisdiction clauses. Singapore law and arbitration emerge as the ones to watch.

Finally, we are excited to have taken a leading role in the Global Pound Conference (GPC) series which will canvass thousands of stakeholders worldwide over an extensive 18-month period, on their use of ADR and other dispute resolution processes (see page 14 for more details). The global launch event for this series will take place in Singapore on 17 and 18 March 2016. We encourage you to register now and join us in this ambitious initiative.

Please do not hesitate to contact me if you have any questions about ADR in Singapore.

**February 2016**



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# ADR IN SINGAPORE

## DEVELOPMENTS AND TRENDS



### KEY POINTS

Since the 1990s, Singapore has improved access to various ADR options to resolve disputes. With relative ease, parties may deploy alternatives to traditional court litigation or arbitration, and are actively encouraged to do so.

The Singapore government's enthusiastic support, partnered with backing by senior members of the judiciary over recent years, has driven the city state's embrace of ADR. Mediation's position as a hybrid process to complement the long-established arbitration framework is certainly one to watch. At Kuala Lumpur's Arbitration Week 2015, Singapore's Attorney General VK Rajah and Australian arbitrator Doug Jones both predicted an increase in the use of mediation in the coming years (especially given the success of hybrid mediation procedures in various jurisdictions). Given its support for ADR and the infrastructure already in place, Singapore is well placed to benefit from such trends in the future.

Singapore has taken proactive steps to promote the use of ADR in recent years. Various schemes and initiatives have been developed since the 1990s to encourage disputing parties to consider resolving their differences through ADR before resorting to formal legal proceedings.

These initiatives have mainly been driven by Singapore's courts and legislature, especially through the development of three main categories of institutionalised mediation:

- court-based mediation
- private mediation, and
- community-based mediation.

In this article we consider these interlinked developments, and summarise the position in relation to two other ADR processes, expert determination and dispute adjudication boards.

### MEDIATION

The expansion of institutionalised mediation in the US and Europe in the 1970s and 1980s spilled over into Singapore in the 1990s, where it was used to complement existing court processes.

#### COURT-BASED MEDIATION

The first manifestation was introduced to the court system in 1992 when the judiciary incorporated Pre-Trial Conferences (PTCs) into civil cases before the Supreme and Subordinate Courts (Subordinate Courts were renamed State Courts in 2014). PTCs were led by a registrar who considered how to handle each case in the most efficient manner and encouraged the parties to discuss settlement on a without prejudice basis.

In 1994 the Primary Dispute Resolution Centre (PDRC) was established to provide alternative dispute resolution services within the court system, with judges specifically trained in ADR. The PDRC offered mediation and neutral evaluation for civil matters brought before the courts.

In 1996, PTCs were formalised through O34A of the Rules of Court of Singapore, which empowered the court to order the parties' attendance at confidential PTCs, or to make other orders/directions appropriate for the just, expeditious and economical disposal of the dispute at any point once proceedings had commenced.

### PRIVATE AND COMMUNITY-BASED MEDIATION

Around the same time, a Committee on Alternative Dispute Resolution was established to study how ADR could be promoted outside the courts. The committee found that there was a need for a framework that encompassed fast, inexpensive and non-confrontational mechanisms for conflict resolution. In July 1997, the committee made the following recommendations: (i) create a commercial mediation centre under the Singapore Academy of Law; and (ii) establish a network of accessible community mediation centres to foster community cohesion. The recommendations were quickly acted on, leading to the establishment of the Singapore Mediation Centre (SMC) in 1997 and a network of community mediation centres from 1998.

### SPECIFIC SCHEMES

Subsequently, various pro-ADR schemes were introduced in the courts. These included the pre-action protocol for non-injury motor accident (NIMA) claims in 2002, where a judge would conduct neutral evaluation on the merits of the case, and the ADR Form introduced in 2010 at the Summons for Direction stage of civil disputes before the State Courts. The ADR Form requires parties and lawyers to certify that they have discussed ADR options and indicate on the form the decision they have reached as to its use.

The success of these ADR schemes encouraged many organisations to establish independent ADR services, some of which are industry specific. Examples include: Eagles Mediation and Counselling Centre (a non-profit organisation providing family mediation and counselling services), the Consumer Association of Singapore Mediation Centre, the Financial Industry Dispute Resolution Centre, the Singapore Institutes of Surveyors and Valuers Mediation Centre, the Law Society's SCMediate Scheme, and Law Society's Cost Dispute Resolve scheme.

The Intellectual Property Office of Singapore (IPOS) and the World Intellectual Property Organisation Arbitration and Mediation Centre (WIPO Center) have also entered into a tie-up arrangement whereby, since January 2012, parties to any trademark proceedings pending before the IPOS may submit their dispute to mediation using the WIPO Mediation Rules. It is understood that all three cases referred to mediation under the IPOS-SIPO trademark mediation procedure have resulted in settlement.

#### ADR IN THE HIGH COURT

In a similar vein to the ADR Form used in the State Courts, in 2013 the High Court Practice Directions were amended to allow a party to serve an ADR Offer when it wished to attempt ADR. Such an offer should be taken into account by the High Court when considering costs orders.

#### PRESUMPTION OF ADR IN THE STATE COURTS

The State Courts adopted a "presumption of ADR" for all civil disputes through Practice Directions Amendment No.2 of 2012. It provides that "ADR should be considered at the earliest possible stage". Instead of trial, parties could instead opt for:

- mediation at the PDRC
- mediation at the SMC
- neutral evaluation at the PDRC, or
- arbitration under the Law Society's Arbitration Scheme (LSAS).

Due to the voluntary and consensual nature of ADR, the Practice Directions Amendment allows for parties to opt out of ADR if they so wish. However, in order to discourage parties from easily sidestepping it, the courts are technically permitted under the Rules of the Court to make adverse cost orders against successful parties who refuse to mediate or attempt ADR. To date, such orders have rarely been made.

#### CURRENT TRENDS

Today, the use of ADR is well entrenched in the state courts. In March 2015, the state courts released impressive results of the 2013-14 PDRC survey of mediated claims within the Magistrate's Court jurisdiction:

# 100%

**of the parties surveyed indicated that mediation had reduced the total time they would have spent in court**

# 95%

**of the parties and**

# 98%

**of the lawyers surveyed agreed that mediation helped them to avoid additional legal costs**

# 73%

**of the lawyers surveyed further indicated that participation in mediation had lowered their clients' total litigation costs**

# 94%

**of the lawyers surveyed agreed that mediation had given their clients a more favourable result than going to trial**

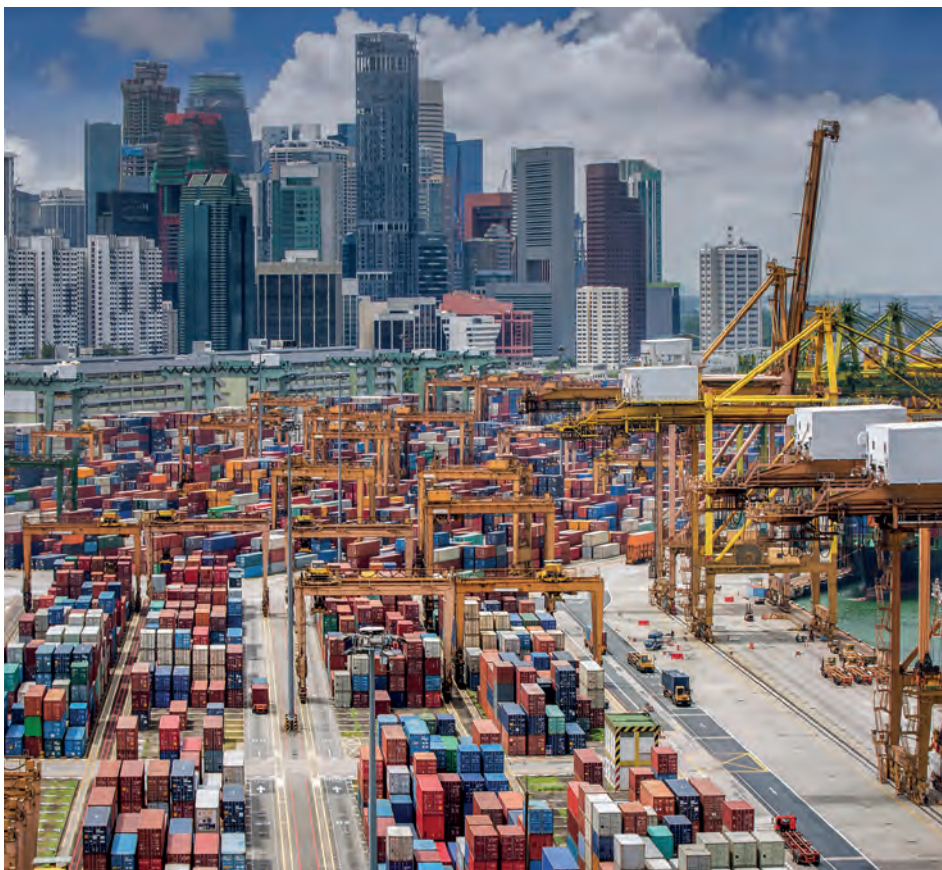
# 81%

**of the parties surveyed agreed that mediation had helped them in their relationship with the other person**

# 99%

**of the lawyers and parties surveyed agreed that they would recommend mediation to others**

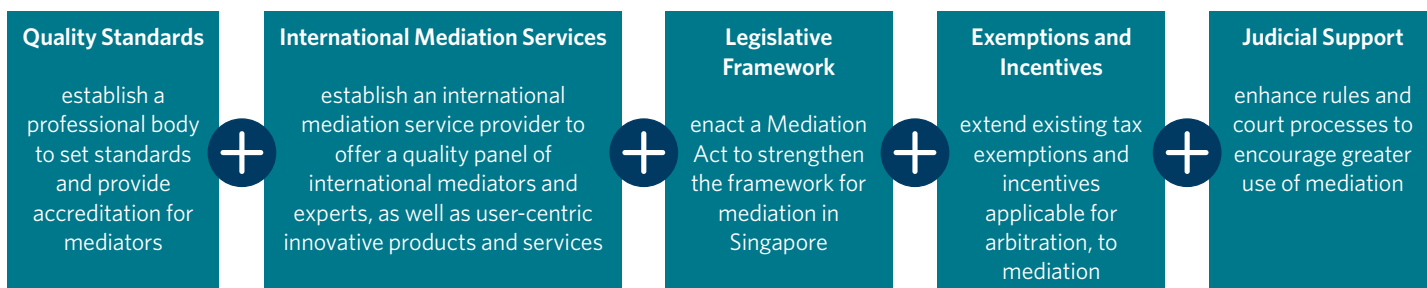
In a court users survey administered by Forbes Research Pty Ltd in 2014, more than 90% of the respondents agreed that mediation services provided by the courts through the PDRC contributed to early settlement, resulting in costs savings for litigants. According to the State Courts, the ADR services it provided led to more than 80% of civil claims and Magistrate's Complaints referred for court ADR being successfully resolved in the survey period.





## DEVELOPMENT OF INTERNATIONAL ADR IN SINGAPORE

In April 2013, Chief Justice Sundaresh Menon and the Ministry of Law appointed Mr Edwin Glasgow CBE QC and Mr George Lim SC to co-chair a nine-member International Commercial Mediation Working Group (ICMWG). The ICMWG was tasked with devising plans to develop international commercial mediation in Singapore in response to the marked growth in trade and investment in Asia. An increase in demand for quality international ADR services was clearly envisaged. The ICMWG's recommendations, submitted in November 2013 included:



The ICMWG's recommendations culminated in the launch of the Singapore International Mediation Centre (SIMC) and the Singapore International Mediation Institute (SIMI) in November 2014. SIMC offers mediation of cross-border commercial disputes, hosting a panel of internationally respected mediators drawn from around the world. One of the distinguishing features of SIMC is its hybrid Arb-Med-Arb Protocol (AMA Protocol), which is discussed in detail on pages 10-12 of this guide.

SIMI's primary function is as a professional standards body for the training, assessment and accreditation of mediators. It is also tasked with increasing public awareness of mediation. Tax and work pass exemptions have been put in place for non-resident mediators practising in Singapore.

The enactment of a Mediation Bill is expected sometime in 2016. It has been proposed that the Mediation Act contain a provision to the effect that mediated settlement agreements are enforceable as court orders. If enacted, this would substantially enhance the enforceability of successfully mediated cases.

### EXPERT DETERMINATION

Expert determination involves the contractual parties appointing an independent third party with recognised expertise in the subject matter of the dispute to resolve the dispute. As such, the types of dispute that are referred to expert determination usually involve discrete technical or valuation issues rather than legal questions.

Expert determination is gaining popularity in Singapore and is most commonly seen in disputes concerned with the construction, intellectual property, energy and resources sectors. For example, the Singapore Institute of Architects (SIA) has provided in its Conditions of Contract the option for contracting parties to resolve their disputes via expert determination under the SIA Expert Determination Rules, which are amongst the first of their kind in Asia. Also, since 1 April 2014, the IPOS-WIPO Center tie-up also give parties to contentious patent proceedings before the IPOS an option to refer such disputes to expert determination under the WIPO Expert Determination Rules.

## A BINDING PROCESS

Expert determination is recognised in Singapore as a creature of contract. It has the advantage of being final and binding, resulting in greater certainty of outcome and advantages in cost and speed. Because an expert's remit is entirely dependent on agreement, parties are generally free to create their own rules for the determination process. An expert decision becomes, in effect, another term in the contract and the winning party may enforce the decision through the courts as a breach of the contract by the recalcitrant losing party (who agreed to be bound by the decision). Should a Singapore law contract provide that disputes are to be resolved by expert determination, the courts would recognise such an agreement. The case of *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No.1256* [2006] SGHC 245 confirms that the only errors a Singapore court may correct are those that appear on the 'face' of the decision. The expert's reasoning itself ought not to be re-examined. This would be synonymous to an appellate hearing and, thus, contrary to what the parties had contracted and "tantamount to rewriting the bargain" (Evergreat at 45).

As such, in Singapore, if two parties agree to employ expert determination, even if the expert makes a mistake (that is not dishonest nor in bad faith), the parties will still be bound by his/her decision. Errors of law or fact would not invalidate an award unless the expert acted *ultra vires* his contractual scope. Essentially, the expert need only adhere to the behaviour provided for in the contract

between the disputing parties. If the parties want, for example, a thoroughly reasoned and analytical award, the contract must provide for it.

## DISPUTE ADJUDICATION BOARDS (DABS)

DABs are a project-specific dispute resolution process, often comprising a panel of three persons (one appointed by each party with a neutral chairperson). DABs provide a binding decision pending subsequent determination by a court or arbitral tribunal, should the losing party fail to comply with the decision.

DABs are used primarily in the construction industry. The issue of enforcement of a DAB decision has been the subject of considerable debate and uncertainty in Singapore recently. The CoA's decision in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2015] SGCA 30 handed down in May 2015 should clear the way for contractors to enforce DAB decisions going forward, providing important support for the 'pay now argue later' framework.

A full analysis of the CoA's decision can be found in our article on HSF Arbitration Notes<sup>1</sup>. In summary, the CoA:

- clarified the differences in terminology between "partial" and "interim" awards capable of enforcement in Singapore under the *International Arbitration Act* (Cap. 143A) (IAA), and "provisional" awards which are not;

- held that insofar as an interim award was a final and binding determination on the specific question of whether the employer is contractually obliged to pay the contractor the disputed sum pending a separate award on the merits, the interim award was a final award under the IAA; and
- held that a failure to comply with a binding DAB decision (here, to make payment) may be directly referred to arbitration.

The decision balances the interests of contractors and employers by ensuring that contractors continue to have necessary cashflow to continue operations, whilst preserving the right of employers to contest the merits of the claim(s) underlying the DAB decision.



<sup>1</sup> <http://hsfnotes.com/arbitration/2015/06/26/singapore-court-of-appeal-decision-on-the-enforceability-of-interim-awards/>

# INTERVIEW WITH MS EUNICE CHUA

## DEPUTY CEO OF THE SINGAPORE INTERNATIONAL MEDIATION CENTRE



Deputy Chief Executive Officer of the Singapore International Mediation Centre (SIMC), Eunice Chua, has been part of SIMC's executive team since its inception in November 2014. Prior to that Eunice served as Assistant Registrar of the Singapore Supreme Court, a Magistrate of the Singapore State Courts and Assistant Director of the Singapore Mediation Centre (SMC). Here, she gives her insights into how mediation in Asia is changing, and SIMC's contribution to that landscape with its innovative AMA Protocol.

**Mediation is not new, but its weakness as a stand-alone ADR mechanism is acknowledged. As a result, Singapore's Attorney General (AG) VK Rajah recently indicated his view at the Regional Arbitral Institutes Forum Conference in Kuala Lumpur that the future belongs to hybrid dispute resolution mechanisms, which combine non-adversarial ADR processes, such as mediation or neutral evaluation, with arbitration or litigation. Is this a view that you share?**

Yes, I do share the AG's view—there are indications that hybrid dispute resolution mechanisms are becoming more commonplace around the globe. A recently published study in the *Harvard Negotiation Law Review* surveyed Fortune 1000 companies about the types of ADR mechanisms they had used in the past three years. Interestingly, the results showed an increase in the use of ADR generally, especially mediation, which 98% of respondents indicated they had used. There was an 11% increase in the use of mediation-arbitration, reaching 51% of respondents.

The Harvard study is in line with the AG's views. When looking at these sources, we can see that companies are seeking out tailor-made dispute resolution mechanisms, and it is becoming clear that these forms of dispute resolution allow them to achieve more at a lower cost.

**Do you think there is a difference in Western and Asian attitudes towards adopting such hybrid dispute resolution mechanisms?**

From my experiences working in Asia, I do think that Asian companies can see the benefits that alternative and hybrid dispute resolution mechanisms can provide although they are not as commonly used as in western companies. Anecdotally, the big Asian companies have very hierarchical structures, and their risk-taking appetite is smaller. When you look at these large companies, bosses are traditionally more familiar with litigation. Also, amounts recovered through litigation can seem larger than amounts agreed in ADR, at least before the time and monetary costs of litigation are factored into the equation.

Western companies may not be entirely comfortable with how mediation has developed in Asia, because some Asian courts have directed disputes to be settled by mediation instead of litigation. Such mediation may be conducted in a very directive, interventionist manner, which Western companies may not be open to, nor understand.

SIMC and SIAC are promoting hybrid dispute resolution as another alternative. They have introduced the AMA Protocol. This Protocol allows parties to commence arbitration, suspend arbitration to attempt mediation, and either return to arbitration if mediation proves

unsuccessful, or if settlement is reached, record the settlement as a consent award in the arbitration (Arb-Med-Arb). This assists with enforcement under the *New York Convention*.

Western companies that are wary of court-annexed mediation should try out ADR conducted by independent bodies such as SIMC and SIAC.

**However, is it correct to say that there still seems to be resistance to utilising these hybrid dispute resolution mechanisms?**

Yes. For example, some parties think that Arb-Med-Arb is cumbersome, adding another process to go through before a dispute can be settled, which leads to more cost.

Personally, I'm of the view that even if the parties do not reach a settlement through ADR, they still derive benefits from going through the process. A good mediator can get to the crux of the issues in the dispute, and help both sides get a clearer idea of what the other side is willing to accept. Parties can also speak more frankly with each other during mediation.

The value of ADR is empirically validated. The Singapore Government has also provided very strong support for ADR as many Asian governments do.



One of the greatest challenges we have in moving forward is how to change the mindsets of reluctant parties. This is going to take time.

**What can hybrid ADR mechanisms offer that traditional methods such as litigation or arbitration cannot?**

This question takes me back to my days as an Assistant Registrar in the High Court. I witnessed many litigation cases where procedure was, and still is, used to hinder the opposing parties' legal case. I think the procedural requirements in litigation, and sometimes arbitration, do get in the way of really getting to the heart of the dispute. You might win an interlocutory hearing but in the grand scheme of things it might not move the case forward towards a proper resolution.

In contrast, mediation under the AMA Protocol, for example, is not so concerned about procedural formalities. The focus is very much on what the parties need to move forward and what the ideal solution is. There is a strong emphasis on finding commercial business solutions.

**You mentioned that parties to ADR get a better idea of what the other side is willing to accept, and this—in and of itself—creates value for them. But aren't parties also concerned that revealing how far they are willing to go could prejudice their case in court if the ADR fails?**

Sure, it's a natural concern for parties involved in dispute resolution proceedings. But remember, mediation should not be seen as a legal process. It is not a trial run of your case before the mediator, because the mediator is not going to decide on the merits of the case,

or steer parties to address legal issues. Rather the mediator's goal is to guide the parties to an agreement, in an objective and impartial manner.

Every word uttered during mediation is confidential, and cannot be admitted as evidence if the case goes to court. The parties' cases before the judge will not be affected.

Parties can also ask for private sessions with the mediator, so not all information needs to be revealed to the other party. The mediator is privy to certain important information that is intentionally kept away from other parties and that can help him or her to guide parties to an agreement.

**Would you agree that the mediator's role as—and to be seen as—a figure of authority is very important?**

Absolutely, particularly so in high-value international disputes. The mediator needs authority in order to build rapport and trust between parties. Without this trust, mediation cannot work.

**Do you see SIMC playing an important role in ensuring that neutral parties who are respected figures serve as mediators?**

Yes. SIMC has a strict policy in that all our mediators are required to be certified by the Singapore International Mediation Institute. On the one hand, this is a bit burdensome for mediators because they have to go through the certification process, but such a system assures SIMC's independence, and the quality of our mediators which is our strong selling point.

**In your opinion, are there disputes that are inherently unsuitable for mediation?**

Most disputes can be successfully mediated as long as parties agree to mediate, but being totally frank – yes, there are some situations where mediation might not be the best forum to resolve disputes for the parties. For example, if you have a party who wants a judge to make a public finding, or where parties want to set a precedent. Mediation is a confidential process, so it would not be able to help parties achieve those aims.

Another kind of dispute is where there is a severe power imbalance, such that there is no way for frank and serious negotiations to ever take place. However, those are rare and as long as both parties agree to mediate, that is good enough.

**Under the Arb-Med procedure used by institutions such as the China International Economic and Trade Arbitration Commission (CIETAC), the arbitrator traditionally also sits as mediator. It is said that this gives the arbitrator useful information on parties' respective positions and the facts of the case, which in turn assists in the mediation process. The AMA Protocol procedure introduced by SIMC however engages a third party mediator who has limited background to the matter. This is often cited as an advantage in terms of the perceived impartiality of the mediator? Do you agree?**

Yes, the AMA Protocol procedure does provide that advantage of impartiality.

The awards under the Arb-Med, and even Med-Arb procedures are sometimes challenged on the grounds of bias. Because each party can share information with the

"Mediation should not be seen as a legal process. It is not a trial run of your case before the mediator."

"The mediator needs authority in order to build rapport and trust between parties. Without this trust, mediation cannot work."





mediator privately, the other party is afraid that if the mediation later turns into arbitration or vice versa, the views of the arbitrator (who was previously the mediator) would be coloured by what he/she learnt beforehand.

There is a way around this. The parties can agree that there will be no private sessions with the arbitrator/mediator. But the downside of such an arrangement is that the value of the ADR process cannot be fully realised. The arbitrator/mediator is unable to build trust and rapport with the parties, which is crucial for mediation to succeed.

In contrast, the AMA Protocol ensures that the arbitration and mediation procedures are independent from each other. They are administered by two separate independent institutions, SIAC and SIMC. So the concerns that I just mentioned do not arise.

#### **How do you see the AMA Protocol as being better than another hybrid dispute resolution process, for example Med-Arb?**

One problem with the Med-Arb procedure is that the award may not be enforceable. Often, parties who have successfully mediated under Med-Arb try to record their settlement as a consent arbitral award. Under arbitration rules, this might not be possible because there was no real dispute to begin with.

Such a problem does not arise under the AMA Protocol. Because Arb-Med-Arb begins with parties commencing arbitration with SIAC, any later consent award resulting from a successful mediation can be enforced in the same way as an ordinary arbitration award. In fact, the AMA Protocol was conceived to solve the problem of unenforceable mediation settlements.

#### **Does the AMA Protocol have its disadvantages?**

Yes. But the disadvantage is very minor, if you consider the bigger picture.

A disadvantage I can see is that the AMA Protocol will cost more than Arb-Med or Med-Arb. This is because two separate institutions, SIAC and SIMC, are involved.

However, the corresponding advantages of involving these two institutions are the assurance that the arbitrator and mediator are independent from each other, that the arbitration and mediation are each properly and efficiently managed, and that the eventual outcome of the mediation or arbitration can be enforced. These are significant advantages. When the dispute involves a large sum of money, incurring additional costs becomes more justifiable.

**Another area of concern for end-users is that further to the recent Court of Appeal decision in *HSBC Institutional Trust Services (Singapore) v Toshin Development*, parties who insert Arb-Med-Arb clauses into their contracts will be bound to first utilise these procedures before attempting litigation. The fear is that they will incur unnecessary cost and time complying with these requirements. Instead, they would prefer to let the dispute escalate, then assess whether the nature of the dispute is more suited for Arb-Med-Arb, other forms of ADR, or litigation. Do you see the inclusion of such clauses at the outset as important?**

Definitely, it is important to include the clause at the outset. The start of the relationship is the best point in time to think about possible dispute resolution mechanisms.

You never know what form the dispute takes. It can be an escalation, or a sudden explosion. Parties to the dispute at that point of time may not be in the best frame of mind to think about what will properly solve their dispute, and Arb-Med-Arb may never cross their minds as a viable option.

There is very little to lose in agreeing to try Arb-Med-Arb. At most, you will lose a small fee. There is also an automatic 8-week limit for mediation under the AMA Protocol, so it does not have to lengthen the dispute resolution period by that much. However, you gain the real possibility of resolving your entire dispute in a short period and an enforceable outcome.

#### **There does seem to be a need to encourage parties to try ADR mechanisms. How does SIMC plan to encourage the use of its AMA Protocol?**

SIMC is very active in Singapore and the region already teams up with SIAC in terms of marketing efforts. Because SIAC is more established, it has a wider marketing base than SIMC. When SIAC organises events and roadshows, they help promote the AMA Protocol and spread the word about SIMC. SIAC also includes information about mediation when it sends out its first administrative letter to disputing parties following the filing of the Notice for Arbitration.

SIMC also plans to collect more statistics regarding the usefulness of Arb-Med-Arb and mediation, as it increases its caseload. These statistics will be helpful in convincing parties that Arb-Med-Arb may be a better dispute resolution method than litigation.

**Do arbitrators themselves also play an important role in pushing parties to mediation?**

Yes. But they are more constrained than judges in making such suggestions. Arbitrators tend to be more concerned about how people might view them. They may think that pushing parties to mediation may affect the awards that they grant.

In a sense, asking arbitrators to suggest mediation to parties under the AMA Protocol is to ask them to move away from the more comfortable status quo. But I do hope arbitrators can begin to see their role more holistically—not just as someone who conducts a hearing and writes an award, but someone who is there to help parties resolve a dispute. Sometimes, the dispute must be pushed to mediation which goes beyond legal rights and remedies, in order for the real problem to be resolved.

**Another important stakeholder to ADR success is the legal adviser. Do you agree that if lawyers are not open to ADR, then it is unlikely parties will be receptive to including mediation or the AMA Protocol in a dispute resolution clause?**

I agree that lawyers play a very important role in encouraging parties to try Arb-Med-Arb. Even in the mediation process itself, they play a crucial role. Mediators tell us that the best mediations they have conducted are those where the lawyers have done a lot of preparatory work, and have discussed what their clients really want and what they can give up. In such cases, the mediation plays out almost on its own.

I do like to think that most lawyers will not shy away from encouraging ADR just because they want to make money. Most lawyers know they may be paid less for a dispute that goes to ADR, but they also need to discharge their professional duties to their clients and seek to maintain a long-term relationship with them. ADR has also been around for a long time and no one has gone out of business because of it.

**Given the AG's push for hybrid dispute resolution mechanisms, and the positive steps that the Singapore Government has**

**"Because Arb-Med-Arb begins with parties commencing arbitration with SIAC, any later consent award resulting from a successful mediation can be enforced in the same way as an ordinary arbitration award. In fact, the AMA Protocol was conceived to solve the problem of unenforceable mediation settlements."**

**"In five years' time, I foresee that Arb-Med-Arb clauses will become a common feature in many contracts. "**

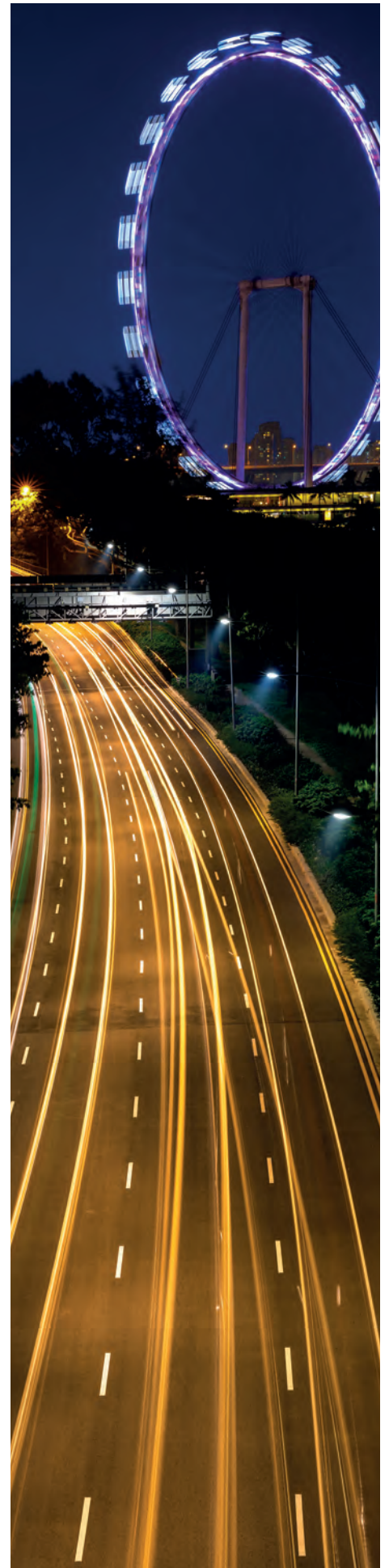
**taken in setting up and supporting SIMC, how do you see the ADR landscape changing in the next 5-10 years?**

In five years' time, I foresee that Arb-Med-Arb clauses will become a common feature in many contracts. We have heard of people already starting to incorporate these clauses in their contracts, and there will be a knock-on effect as people get used to seeing them. SIMC will also increase its caseload as more of these clauses are used.

In 10 years' time, more effort will be put into negotiating dispute resolution clauses as ADR becomes more common. Lawyers will increasingly be called on to justify the dispute resolution clauses that they draft and the dispute resolution mechanisms they recommend. In-house counsel, especially those in larger companies, will also have to familiarise themselves with ADR methods. We have been hearing from larger companies that their company policy is to have some form of early case assessment to determine the most efficient way to resolve disputes.

Another possible development could be the setting up of Asian international mediation institutions, to develop a culturally sensitive international mediation model in Asia. This would hopefully marry cultural differences between Asian and European mediation methods, and incorporate best practices from around the world. This would help make Asia, and hopefully SIMC and SIAC, the go-to destination for hybrid dispute resolution.

Something else to look forward to would be a New York Convention-equivalent for mediation. The US is pushing for such an equivalent, and the UNCITRAL commission approved in July 2015 work on the possible preparation of a convention, model priorities or guides and texts on the enforcement of settlement agreements resulting from international commercial mediation. A lot of issues will need to be worked out before such an instrument can be agreed upon. But the need is there. Currently, mediation relies heavily on voluntary compliance. There is no case law on going to courts to enforce a mediation agreement, and a New York Convention-equivalent for mediation would greatly increase the attractiveness of mediation as an ADR mechanism.



# MED-ARB, ARB-MED AND THE ARB-MED-ARB PROTOCOL

SIMC supplements the array of international dispute resolution options available in Singapore. The new Protocol known as the Arb-Med-Arb Protocol (AMA Protocol), to be administered by SIMC in conjunction with SIAC, has the aim of promoting the use of mediation within the framework of international arbitration.

We consider the issues that hybrid dispute resolution procedures present, and how SIMC aims to tackle these through the AMA Protocol. We also set out a quick-reference flow chart, detailing the AMA procedure.

## HYBRID PROCEDURES

The concept of hybrid arbitration/mediation procedures is not a new one. Various prominent institutions including the International Centre for Dispute Resolution (ICDR), the International Chamber of Commerce (ICC), the Hong Kong International Arbitration Centre (HKIAC) and CIETAC all recognise and support the use of mediation as a precursor to arbitration or during the arbitral process. Indeed, the *Singapore International Arbitration Act, (Cap. 143A) (IAA)* itself already contemplates the use of conciliators / mediators during the arbitral process. Sections 16 and 17 of the IAA in particular provide that an arbitrator may also act as a conciliator during mediation proceedings provided that parties consent.

There have been several perceived issues with hybrid procedures in the past which have resulted in relatively low rates of adoption. We consider these below:

### Mediation-Arbitration (Med-Arb)

The parties undertake a mediation on the basis that, if it is not successful, the mediator will change roles and become an arbitrator of the same dispute.

#### Pros

- The key perceived advantage of Med-Arb is that the arbitrator, being already familiar with the case from the mediation stage, should be well placed to settle matters in the dispute. Parties are also said to be motivated to 'go the extra mile' at the mediation stage, with the prospect of arbitration looming should parties fail to settle. There is also a costs saving element insofar as a separate arbitrator is not required to spend time getting acquainted with the dispute.
- Empirical evidence suggests that Med-Arb is successful in parts of Asia. For example, the secretary general of CIETAC, Yu Jianlong, indicated that 20-30% of CIETAC's caseload is resolved by this method. A study



of Japan Commercial Arbitration Association (JCAA) arbitrations from 1999 to 2008 showed a successful outcome in 25 cases out of 48, in which arbitrators assisted parties in reaching a settlement through negotiation and/or mediation.

#### Cons

- There is a risk that the arbitrator's impartiality may be affected by overseeing a facilitative mediation. In particular, it may be difficult for an arbitrator not to be influenced by supposedly "without prejudice" disclosures or proposals made by the parties during the course of settlement negotiations. The risk of a challenge to either the arbitrator or the award increases. Correspondingly, the desire to avoid the perception of bias may

make a mediator reluctant to comment frankly and candidly with the weaknesses of each party's case, which greatly reduces the efficacy of the mediation process.

- Whether this is in fact the case, there is a perception that parties are reluctant to discuss their respective positions openly with the mediator, if that mediator is also going to be the arbitrator and may go on to issue a final award against that party's interests.
- Med-Arb also gives rise to potential issues of enforcement. The New York Convention applies only to awards arising out of "differences between persons". Insofar as a dispute has been effectively resolved by mediation, the lack of a current dispute at

the time that arbitration is commenced for the purposes of converting such settlement into an award gives rise to doubts as to whether any resulting award would be enforceable under the *New York Convention* (or any other applicable enforcement regime).

### Arbitration-Mediation (Arb-Med)

The parties first go through some or all of the arbitration process, which is then adjourned to allow for mediation. If a settlement is achieved at the mediation, no award is made. If no agreement is reached at the mediation within an agreed time limit, the arbitral tribunal issues an award in the usual way. There have been instances where arbitral awards have been written by the tribunal and put under seal, for it only to be released to the parties where mediation is unsuccessful.

Given the time and costs involved in undertaking the arbitration first and then mediating, this process is more suitable for disputes that turn on relatively short questions not requiring extensive documentation or evidence.

#### Pros

- The risk of losing the arbitration is intended to encourage the parties to adopt a reasonable approach to settlement at the mediation.
- The parties have a better understanding of their strengths and weaknesses, making settlement more likely.

#### Cons

- The same arbitrator/mediator bias issues apply as for Med-Arb, should the mediation be unsuccessful.
- Where the arbitration takes significant time and resources, there is arguably little advantage in the parties attempting to mediate at a very late stage, both in terms of costs and maintaining a working business relationship.

### THE AMA PROTOCOL IN A NUTSHELL

The new model AMA Protocol allows a party to commence arbitration under the auspices of SIAC, and then proceed to mediation quickly under the SIMC, then to resume arbitration if the mediation fails.

In practice, parties will, as they would in a regular arbitration, commence proceedings under the AMA Protocol by filing with the Registrar of SIAC a Notice of Arbitration. The Registrar will inform SIMC of the arbitration within four working days from its commencement (or, if the parties have not

adopted the AMA Protocol at the outset, from the agreement of the parties to refer to their dispute to mediation under the AMA Protocol). After the filing of the Response to the Notice of Arbitration, and the subsequent constitution of the tribunal, the tribunal will stay the arbitration for mediation at SIMC. SIMC will fix a date for the commencement of mediation at SIMC, which will be conducted under SIMC's Mediation Rules.

Unless the Registrar of SIAC in consultation with SIMC extends time, the mediation must be completed within eight weeks of the Mediation Commencement Date.

Several key factors set the AMA Protocol apart from other hybrid procedures mentioned earlier:

- speed and certainty of the process
- associated reduction in the risk of enforcement
- impartiality of arbitrators and mediators, and
- assurance of institutional support.

Parties to the AMA Protocol have their mediation/arbitration administered by and under the respective rules of SIMC and SIAC, with the option of appointing an internationally recognised mediator/arbitrator from SIMC and SIAC's respective panels. Perhaps uniquely in the context of the traditional understanding in Asia of the Arb-Med process (where arbitration and mediation proceedings are generally understood to be conducted by the same person), the default position under the AMA Protocol provides for the arbitrator(s) and mediator(s) to be separately and independently appointed by SIAC and SIMC respectively. This is likely to lead to increased confidence in the process as parties can be assured that their respective positions in the arbitration will not be affected by the mediation.

If the mediation is successful, parties may formalise the terms of the settlement in the form of a consent award in the arbitration. A consent award is generally accepted as an arbitral award and, subject to any local legislation and/or requirements, is enforceable in the approximately 150 *New York Convention* member states. The non-justiciable elements of any mediated settlement (for example, settled disputes that fall outside the scope of the arbitration agreement and hence the tribunal's jurisdiction) would need to be recorded in a separate settlement agreement (which would not be enforceable under the *New York Convention*). Parties who cannot settle their disputes through mediation may continue with the arbitration proceedings.

### AMA CLAUSE

Parties can avail themselves of the AMA Protocol in Singapore by incorporating the model Arb-Med-Arb clause (Model Clause) into their contracts referring disputes to SIAC and SIMC for arbitration and mediation. The Model Clause reads:

All disputes, controversies or differences ("Dispute") arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC") for the time being in force. The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

It is worth noting that the Model Clause contains a very bare reference to arbitration. In the absence of express agreement by the parties, SIAC's Arbitration Rules (which the Model Clause incorporates by reference) deal with key matters such as the number of arbitrators, the seat of the arbitration and the language of the proceedings. Parties should consider supplementing the Model Clause with bespoke drafting to reflect parties' intention on other aspects of the arbitration, such as the language and seat of the arbitration.

Parties who have already commenced arbitration at SIAC may also, at any stage of the arbitration, refer their dispute to SIMC for mediation. The arbitration will be stayed by the tribunal pending completion of the mediation process.

Although the AMA Protocol does not specifically refer to this, it is also open to the parties to elect to refer their dispute to SIMC for mediation first, and if mediation does not result in settlement, proceed to arbitration.

### AMA PROTOCOL WITHIN SINGAPORE'S ADR FRAMEWORK

The AMA Protocol is the latest move to encourage the use of ADR in Singapore. The pro-ADR stance is well illustrated in the decision in *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and anor* [2013] SGCA 55. There, the Singapore Court

of Appeal upheld a multi-tiered dispute resolution clause requiring parties to escalate any dispute for negotiation as a precondition to arbitration and stressed that "[w]here the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled". Insofar as the use of the Model Clause represents a clear intention by parties to engage in mediation as a precursor to arbitration, it is likely to be upheld by the Singapore courts.

Further measures can be taken to ensure the viability and popularity of the AMA Protocol in Singapore. For one, the input of legal advisers is generally recognised as a decisive factor in determining whether parties consider mediation as an option. The Singapore International Mediation Institute (SIMI) also launched in November 2014 primarily as a professional standards body for mediators and to increase awareness of ADR, will play an important role in making practitioners aware of the benefits of, and providing training on, mediation.

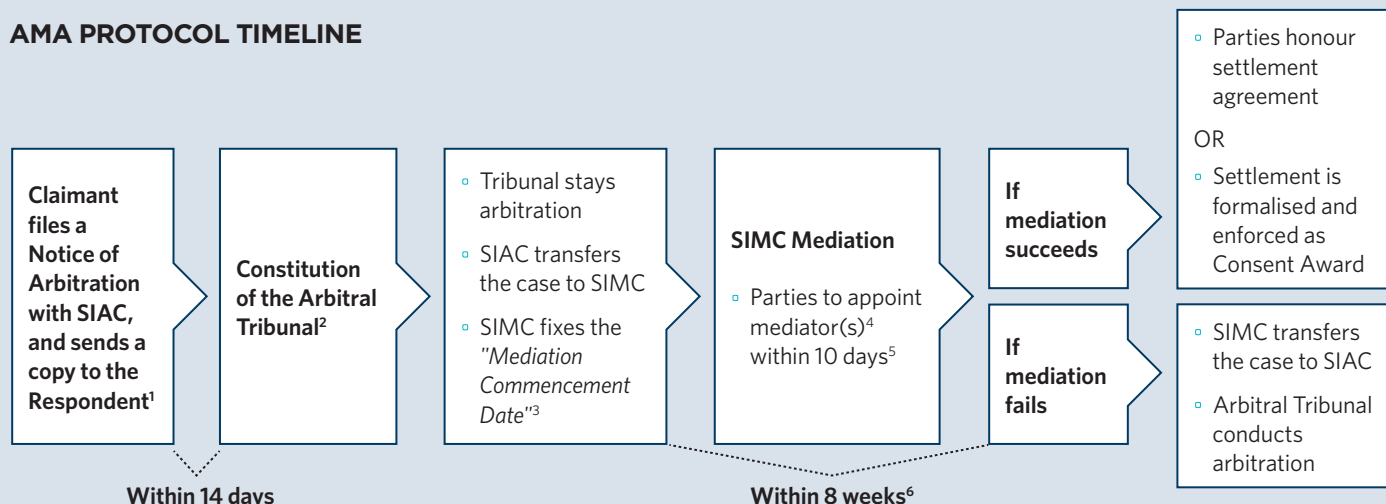
Arbitrators will also play an important role in directing the minds of parties to arbitration to the possibility of mediation during the arbitration process. Aside from SIAC arbitrations, the ICC, the ICDR and the American Arbitration Association (AAA) (amongst others) all make provision in their arbitral rules for encouragement and facilitation of mediation during the arbitral proceedings (in some cases, with different person(s) sitting as mediator(s)).

## OUR OBSERVATIONS

The AMA Protocol represents another boost for ADR in Asia, and an example of dispute resolution institutions honing arbitration and mediation practice. It is further evidence of Singapore's commitment to staying ahead of the curve as a leading one-stop dispute resolution venue. Having said that, whether the AMA Protocol will mature into a dispute resolution option of choice will significantly depend on the parties' awareness regarding the benefits of mediation and, once mediation is entered into, the quality of the mediations conducted by SIMC.

For more information on the use of mediation with arbitration, please see our ADR Practical Guide No.6.<sup>1</sup>

### AMA PROTOCOL TIMELINE



### AMA PROTOCOL TIMELINE ENDNOTES

- SIAC Registrar will inform SIMC of the arbitration within four working days of: (i) commencement pursuant to an AMA clause; or (ii) agreement of the parties to refer the dispute to mediation under the AMA Protocol. SIAC will send SIMC a copy of the Notice of Arbitration.
- The Tribunal is to be constituted by SIAC before it is transferred to SIMC for mediation. The timeline for constitution of the Tribunal is dependent on the number of arbitrators to be appointed:
  - Where a sole arbitrator is to be appointed, unless agreed otherwise, the parties have 21 days from the date of filing the Notice of Arbitration to agree on the nomination of the arbitrator, failing which SIAC's President will make the appointment as soon as practicable.
  - Where the Tribunal is to consist of three arbitrators:
    - Unless agreed otherwise, a party has 14 days to nominate an arbitrator after receipt of the nomination of the other party (the Claimant's arbitrator nominations are to be contained in the Notice of Arbitration, unless agreed otherwise). After this period, SIAC's President will proceed to appoint an arbitrator on its behalf.
    - Unless the parties have agreed upon another procedure for appointing the third arbitrator, or if such agreed procedure does not result in a nomination within the time limit fixed by the parties or by SIAC's Registrar, the third arbitrator, who will act as the presiding arbitrator, will be appointed by SIAC's President.
- The relevant date will be the date on which SIMC informs SIAC's Registrar of the commencement.
- The parties may nominate, or request SIMC to appoint, more than one mediator. SIMC may also propose to the parties that there be more than one mediator.
- Where the parties are unable to agree on a mediator to be nominated within 10 days from the Mediation Commencement Date, SIMC will appoint a mediator.
- Unless the deadline is extended by SIAC's Registrar in consultation with SIMC.

<sup>1</sup> <http://sites.herbertsmithfreehills.vulturevx.com/20/8765/landing-pages/0883a-adr-practical-guides-no6-d7.pdf>

# RECENT TRENDS IN GOVERNING LAW AND JURISDICTION CLAUSES

On 10 January 2016, the Singapore Academy of Law (SAL) published the results of its study on preferences for the choice of governing law and jurisdiction made by those involved in cross-border transactions "in Singapore and the region" (the Study). The Study reflects the views of around 500 commercial law practitioners and in-house counsel who have involvement in cross-border transactions. The Study results can be accessed [here](#).<sup>1</sup>

The Study responses suggest growth in:

- (i) the internationalisation of transactions in the region
- (ii) the importance of Singapore law and
- (iii) Singapore as a preferred choice of forum for the resolution of disputes.

The value in the Study in signalling the strength of Singapore as an international centre of dispute resolution is of course influenced by the demographics of the Study population. With this in mind, the most noteworthy points are:

- **48%** said that their preferred choice of governing law in cross-border transactions was English law. Singapore law was second at **25%**, with New York at **7%** and Hong Kong at **3%**. Amongst the Study population, Singapore law was widely accepted as a valid choice for the governing law of cross-border agreements in the region.
- **52%** said that their preferred venue for dispute resolution amongst study participants was Singapore, with Hong Kong second at **22%**. The UK was only preferred by **7%** of respondents. The top three reasons cited in the Study for choosing Singapore as a venue were proximity, efficiency, and neutrality (the first indicating a study population based in or near Singapore).

- **71%** of respondents indicated that arbitration was the favoured method of dispute resolution, compared to **24%** for litigation and **5%** for mediation. Mediation's low score is perhaps surprising and the outcome may reflect the way the Study question was framed, given that mediation is often attempted within the framework of litigation or arbitration and should not be selected as a sole method of dispute resolution on the basis that it may not reach a determinative outcome.
- Enforceability of decisions was cited as a key priority. Given the importance of enforceability in choosing litigation or arbitration, the introduction of the hybrid AMA Protocol in Singapore (see pages 6 and 10) may prove popular since the combined process can result in a consent award enforceable under the *New York Convention*.
- All industry sectors represented by the Study showed a strong preference for arbitration. Consistent with our own experience, the highest scores were shown in the Construction and Oil & Gas sectors, at **84%** and **82%** respectively. The highest score for litigation was the Banking and Finance sector at **30%**.

The general trend suggested by results of the Study matches our own experience both in Singapore and across our network that international arbitration is the most popular dispute resolution mechanism for cross-border transactions. This was also reflected in the 2015 Queen Mary University of London International Arbitration Survey published in October 2015 where survey respondents were predominantly from Europe and Asia (see [here](#)<sup>2</sup> for more details).

Whilst the potential limitations of the Study are noted, undoubtedly Singapore continues to increase in popularity as a venue for dispute resolution and Singapore law may begin to challenge the established use of English law as the preferred choice of governing law in cross-border transactions in the region. These points and more will be scrutinised at the Global Pound Conference (GPC) Series, where Herbert Smith Freehills is taking a leading role (see page 14 for more details).

<sup>1</sup> [http://www.singaporelawwatch.sg/slw/attachments/75874/SAL\\_Singapore\\_Law\\_SurveyV3.pdf](http://www.singaporelawwatch.sg/slw/attachments/75874/SAL_Singapore_Law_SurveyV3.pdf)

<sup>2</sup> <http://hsfnotes.com/arbitration/2015/10/09/musings-on-the-2015-qmul-international-arbitration-survey-are-clients-and-counsel-aligned-in-their-views-of-arbitration/>

# SINGAPORE'S LANDMARK GLOBAL CONFERENCE ON THE FUTURE OF DISPUTE RESOLUTION

As Global Platinum Sponsor, Herbert Smith Freehills is collaborating with dispute resolution practitioners, users and academics across the globe to run *The Global Pound Conference (GPC) Series 2016-17*<sup>1</sup> Click here<sup>2</sup> to watch a brief video explaining the GPC Series.

## GLOBAL CONVERSATION

The aim of this ambitious worldwide series is to build a global conversation about the current landscape of civil and commercial dispute resolution and how we can respond to the needs of 21st century businesses.

Research by Herbert Smith Freehills<sup>3</sup> and others suggests that there is a significant gap between what those with commercial and civil disputes expect and need from the system, and the systems and services provided by their lawyers, judges, arbitrators, mediators, educators and policy makers. The GPC Series will test the scale of this gap, and suggest practical ways to resolve it.

The events will use interactive voting software similar to that already deployed by our Hong Kong and London offices (see issue one of this Guide: *ADR in APAC: Spotlight on Mediation in Hong Kong*<sup>4</sup>). Through delegate polling, the GPC Series will gather standardised and actionable data on what users of dispute resolution mechanisms need and want and whether those needs are being met.

So far 36 cities in 26 countries worldwide have committed to holding a GPC event in 2016 and 2017. The launch will take place in Singapore in March 2016. The last event is scheduled to be held in London in July 2017. Other cities hosting events include Hong Kong, Mumbai, Sydney, Auckland, Toronto, New York, Washington DC, Bogota, Sao Paulo, Paris, Madrid, Berlin, Dubai and Lagos.

## SINGAPORE-THE FIRST PORT OF CALL

Singapore's programme on 17 and 18 March 2016 at the Supreme Court of Singapore is testament to the high level of global interest shown in the GPC Series. As well as the involvement of Herbert Smith Freehills' specialists including Alastair Henderson, Alexander Oddy and Gitta Satryani, Judicial Commissioner See Kee Oon, Presiding Judge of the Singapore State Courts, will open the conference, and a keynote address will be provided by the Honourable Chief Justice Sundaresh Menon of the Supreme Court of Singapore. Other speakers include senior executives from major multi-national corporations and representatives from the Singapore Supreme Court, SIMC, Singapore Ministry of Law, the Law Society of Singapore and SIMC.

## CALL TO USERS

The GPC Series represents a unique opportunity for our clients and all those who use or encounter dispute resolution to voice their views and help shape its future direction. It is a chance to understand what other organisations need, how they operate, and to share ideas and learning. Click here<sup>5</sup> to find out more about the Singapore event and join the debate.

Subscribe to our ADR blog (<http://hsfnotes.com/adr/>) for regular updates on the GPC Series and other important ADR news and developments. Follow the GPC Series on [Linked In](#)<sup>6</sup> and Twitter (@GPCseries, #GPCSeries).



<sup>1</sup> <http://www.globalpoundconference.org/>

<sup>2</sup> <http://www.globalpoundconference.org/media-community/video-gallery>

<sup>3</sup> Our acclaimed client research on how corporates use ADR can be found at <http://hsfnotes.com/adr/key-adr-publications/>. Details on the landmark convention in October 2014 (the pre-cursor to the GPC Series) can be found at <http://hsfnotes.com/adr/2014/11/10/landmark-convention-in-london-produces-new-data-on-what-corporate-users-need-from-adr/>

<sup>4</sup> <http://www.herbertsmithfreehills.com/insights/guides/adr-in-asia-spotlight-on-mediation-in-hong-kong>

<sup>5</sup> [http://singapore2016.globalpoundconference.org/?mkt\\_tok=3RkMMJWWf9wsRomrfCcl63Em2iQPJWpsrBOB%2FDC18kX3RUsIrmYfkz6htBZF5s8TM3DUJFXqFU60ENS7k%3D](http://singapore2016.globalpoundconference.org/?mkt_tok=3RkMMJWWf9wsRomrfCcl63Em2iQPJWpsrBOB%2FDC18kX3RUsIrmYfkz6htBZF5s8TM3DUJFXqFU60ENS7k%3D)

<sup>6</sup> <https://www.linkedin.com/groups/8408796>



# OUR ADR PRACTICE

The delivery of innovative, creative and cost-effective solutions through ADR has, for many years, been a pivotal aspect of our pre-eminent dispute resolution brand. Our award-winning ADR practice encompasses our entire disputes division, and extends to our international network of offices.

We have a deep understanding of how corporates develop and refine strategies for using ADR at both the policy and operational level. We can provide high impact insight and value adding strategic advice regarding ADR process options, dynamics and influence management.

We have extensive expertise in a wide range of ADR processes including:

- **Mediation** – we are committed to leadership in mediation advocacy and understand the critical role of cultural and communication styles in international negotiation and ADR
- **Expert determination** – we have a wealth of experience in advising on expert determination, in particular in relation to energy, projects and completion account disputes
- **Adjudication** – we have advised and acted in relation to many adjudications, including three of the largest adjudications ever conducted in the UK, international construction disputes involving bespoke variations on the UK adjudication procedure, and adjudications conducted under Australian Building and Construction Industry Security of Payment legislation
- **Bespoke solutions and other ADR processes** – we have experience in designing and executing multi-stage, bespoke ADR solutions for the largest international commercial disputes, as well as conducting early neutral evaluations and baseball arbitrations

## Mediation

- **We have acted on high value mediations involving:**
  - shareholder issues
  - construction and engineering
  - energy
  - insurance and reinsurance
  - product liability
  - banking and finance
  - class actions
  - joint venture disputes
  - employment
  - IP/IT/TMT
  - real estate
  - media and fraud

At mediation we have represented:

- **Hong Kong banks and private wealth managers** in disputes with account holders over alleged incidents of mis-selling or unauthorised trading
- An **Australian financial services business** in fiercely contested copyright and related Federal Court claims. Settlement was secured shortly after the mediation
- A **European industrial company** in a mediation held in Singapore under ICC ADR Rules, relating to cost and time overruns in the construction of an industrial chemicals complex in Malaysia
- **Hong Kong solicitors** over professional negligence claims by clients
- **Mining companies** in Australia to resolve a dispute with insurers over coverage of losses arising from flooding
- **Tenants** in Hong Kong property disputes
- **Australia Securities Exchange (ASX) listed entities** in the settlement of class actions brought on behalf of shareholders
- An **international hotel management company** in a mediation held in Singapore under the auspices of the Singapore Mediation Centre, relating to a dispute with a property owner under a management contract for a 5-star hotel property in Bangkok, Thailand (agreement and settlement achieved)
- **Shareholders** in a number of joint venture disputes in the financial services, energy and gaming sectors
- **Australian banks** in the recovery of funds from borrowers and valuers
- An **IT consultant** in a dispute over a project with a regional government agency
- In Australia, representing administrators of **Sons of Gwalia** in multi-million dollar actions against directors and auditors for breach of duty and driving settlement via mediation
- A **manufacturer** in a dispute with a mainland Chinese supplier
- Representing an **international contractor** on a multi-million dollar negligence claim in

relation to the collapse of a drilling rig of the coast of South Australia. The claims were successfully settled at a two day mediation

- An Asian subsidiary of a **major European pharmaceutical company** in a dispute concerning the termination of a co-promotion agreement
- A **Thai mobile phone network operator** in an ad hoc mediation held in Alabama, USA, leading to the successful settlement of a dispute with a US technology company concerning handset design and development
- Representing a **Chinese State-Owned Enterprise (SOE)** as mediation counsel in a mediation to resolve disputes with a US counterparty around the financial value of trade secrets
- An **ASX top 100 client** in USD 40 million Supreme Court litigation and related mediations. Settlement was successfully reached concerning product liability, negligence and misrepresentation claims
- A **major ASX listed infrastructure fund** in Federal Court proceedings and related mediation against the Australian Tax Office

## Expert determination

- **Advising a consortium of leading multinational energy companies** in expert determination proceedings against a Central Asian Republic. The case concerned budget and schedule disputes worth USD 9 billion in a high-profile politically significant dispute concerning one of the world's largest oil and gas projects
- Successfully acting for an **ASX listed iron ore mining company** about the proper construction of a price review mechanism in a long term offtake agreement with a Chinese SOE
- A **global energy super-major** in an expert determination in The Hague, Netherlands, to set a new price for chemical feedstock for a chemical manufacturing plant in South East Asia
- **Acting successfully for a group of oil majors** in an expert determination regarding price review provisions in long term gas sales agreements

- In Australia, acting for a **global insurance company** in relation to AUD 140 million expert determination following the sale of a regional business unit, including tax and cross-border pricing issues
- **Advising the seller of a well-known group of recruitment and temporary staffing agencies** on a claim made by the purchaser arising out of a completion accounts calculation process
- In Australia, acting for **major utility companies** in expert determinations concerning changes to pricing indices and asset valuations
- **Advising the sellers of a hedge fund** against purchasers in relation to a contractual expert determination
- Successfully resolving a joint venture dispute for one of Australia's **major oil and gas** companies
- **Acting on an expert determination** concerning non-payment of milestone payments under a pharmaceutical drug licensing agreement
- **Advising experts themselves** in relation to, for example, questions of jurisdiction and the interpretation of expert determination clauses
- **Successfully defending a major public transport supplier** in a test case adjudication brought by its contractor for USD 350 million. In the short time frame permitted, we prepared detailed written submissions, 21 witness statements and four expert reports
- **Eastlink Tolling Project:** acting on the adjudication and subsequent mediation of significant claims arising out of this major project in Australia
- **Winterthur Swiss Insurance Company**, a member of the Credit Suisse Group: advising in a major dispute with XL Insurance (Bermuda) Limited, a subsidiary of XL Capital, which was resolved in Winterthur's favour following what is believed to be the world's biggest ever 'baseball arbitration'
- A **FTSE 250 company:** advising in relation to its dispute with a government department regarding the interpretation of particular contractual provisions referred to non-binding ENE
- **Columbus Stainless**, a South African supplier of stainless steel, and its UK based insurers: acting in the successful settlement of a USD 100 million claim brought against our client and other participants involved in the design and manufacture of Australian coal wagons. The firm was instrumental in development a bespoke ADR process that ran for two years to achieve a settlement with minimal litigation
- **Lend Lease group** of companies: acting in relation to the World Trade Centre clean-up litigation, where over 18,000 plaintiffs sued the City of New York and several prime contractors for respiratory diseases alleged to have resulted from the WTC clean-up operations. The litigation is reported to be one of the largest mass tort actions in the United States. We drove a resolution which involved a mass settlement and the enactment of federal legislation in the United States (the *James Zadroga 9/11 Health and Compensation Act of 2010*), the result of which now means that Bovis Lend Lease's exposure is effectively limited to available insurance

#### Other / bespoke processes

- **Docklands Gasworks Remediation project:** advising in relation to the tailored structuring, management and successful implementation of a staged consensual alternate resolution process concerning significant claims, in number and value, associated with this project, the largest remediation project of its kind in Australia
  - **Negotiating and implementing a unique and tailored fast track international arbitration process** focusing on defined key issues to successfully achieve a resolution of fundamental issues for the major XOM PNG LNG project, within critical project timeframes to the mutual satisfaction of all parties
  - **Developing a number of bespoke dispute resolution procedures** for very large infrastructure clients, in which the firm has developed an holistic approach with adjudication being an important component of a multi-stage dispute resolution procedure
  - **BHP Billiton-Mitsubishi Alliance:** acting for the BHP Billion-Mitsubishi Alliance in mediating the settlement of its billion dollar business interruption claim arising from the 2008 floods to its central Queensland coal mines. The process involved six months of presentations and meetings of various experts culminating in a five day mediation in Singapore with representatives of 37 reinsurers as counterparties
- #### Adjudication
- An **Indian client:** acting in relation to an international *ad hoc* adjudication against a Tanzanian company under a contract governed by Indian law
  - **Shell:** acting for Shell in an adjudication and subsequent litigation in the Supreme Court of New South Wales concerning the upgrade of an oil refinery
  - A **major international chemical company** in two statutory adjudications in Kuala Lumpur, Malaysia, relating to construction works for a major petrochemical facility
  - A **leading electricity distribution company:** advising on the adjudication and mediation of contractor disputes relating to network assets

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# PUBLICATIONS AND ACCOLADES

## ADR BLOG

'ADR notes' is Herbert Smith Freehills' alternative dispute resolution know-how blog, where you will find the latest developments on ADR topics.

It has been created as a way to share updates and insights in an effective and user-friendly manner. There are a number of ways to navigate the site, depending on what you require.

Please click on the link below for ADR notes.  
<http://hsfnotes.com/adr>

Our other ADR guides can be accessed at  
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## OTHER BLOGS

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## RANKINGS AND AWARDS

We are consistently ranked Band 1/Tier 1 for dispute resolution and international arbitration across Asia Pacific (including China, Hong Kong, Indonesia, Japan, Singapore and Thailand) by *Chambers Asia Pacific and Asia Pacific Legal 500*. In Australia, we are the only firm to have achieved a band 1 ranking for dispute resolution, and have been ranked the number one firm in Australia since 2008.

Our global ADR practice has received awards from the Centre for Effective Dispute Resolution (CEDR) and the International Institute for Conflict Prevention and Resolution (CPR). Issue 1 of this guide and accompanying iPad app was shortlisted for the FT's Innovative Lawyers Awards Asia Pacific 2015.

In addition, our partners are often recognised in legal guides and awarded accolades. Recently, two of our partners were recognised by Best Lawyers: Konrad de Kerloy (Best Lawyers 2015 Perth Alternative Dispute Resolution lawyer of the year) and Elizabeth Macknay (2015 Best Lawyers in Australia for Alternative Dispute Resolution). Hong Kong partner Justin D'Agostino was also named as Disputes Star of the Year in the AsiaLaw Asia Pacific Disputes Awards 2015.

Some of our other 2015 awards include:

"INTERNATIONAL LAW FIRM  
OF THE YEAR"  
ASIALAW ASIA PACIFIC  
DISPUTES AWARDS 2015

"DISPUTE RESOLUTION LAW  
FIRM OF THE YEAR"  
ALB HONG KONG LAW AWARDS  
2000-15

"LITIGATION LAW FIRM  
OF THE YEAR"  
ALB ASIAN LEGAL BUSINESS  
AWARDS 2015

"DISPUTE OF THE YEAR"  
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"INTERNATIONAL DISPUTES  
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