Recent Developments in International Mediation: Singapore's Unique Approach

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Introduction

Singapore's vibrant dispute resolution sector has been growing on the back of a significant rise in commercial transactions in Asia and a corresponding increase in the number and complexity of cross-border disputes. In particular, Singapore has achieved significant success in the field of international arbitration.[1] Singapore has been recognised as the third most preferred seat of arbitration, after London and Geneva, and the Singapore International Arbitration Centre ("SIAC") is the fourth most preferred arbitral institution worldwide despite being a relatively young institution.[2] In recent years, Singapore law firms have also ranked amongst the top international arbitration practices in Asia.[3]

In order to make Singapore stand out as a premier destination for legal services and resolution of disputes for Asia and the world, the Ministry of Law of Singapore concluded that focus needed to be placed on developing the mediation space, particularly to deal with international commercial disputes, as a complement to arbitration and litigation.[4]

In April 2013, the Chief Justice and the Ministry of Law appointed an International Commercial Mediation Working Group ("the Working Group") in April 2013 with the weighty task of making recommendations to develop Singapore into a centre for international commercial mediation. The Working Group's recommendations were submitted on 29 November 2013 and the three main recommendations were to: (a) establish the Singapore International Mediation Institute ("SIMI") as a professional standards body; (b) establish the Singapore International Mediation Centre ("SIMC") as a provider of world-class commercial mediation services; and (c) enact a Mediation Act to strengthen the legal framework to

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[1] Parliamentary responses, Speech by Minister for Law, K Shanmugam, during the Committee of Supply Debate 2014, Ministry of Law (2014), https://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/speech-by-minister-during-cos-2014.html (last visited Aug 19, 2015).

[2] 2010 International Arbitration Survey: Choices in International Arbitration, pp 19, 23 (2010), http://events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf (last visited Aug 19, 2015).

[3] See, for example, rankings by the Global Arbitration Review, which consistently places Singapore law firms in their top 41 ranked firms and by Chambers & Partners where Singapore law firms are placed alongside other top international and Asian firms.

4 Keynote speech by Minister for Law, Mr K Shanmugam, at the 26th LAWASIA Conference 2013, Ministry of Law (2013), http://www.mlaw.gov.sg/news/speeches/keynote-speech-by-Minister-at-LAWASIA-conference-2013.html (last visited Aug 19, 2015).

support mediation and enhance enforceability of mediated settlement agreements. SIMI and SIMC were both officially launched on 5 November 2014 and the Mediation Act is currently being prepared by the Ministry of Law.

This paper seeks to examine the significance of SIMI and SIMC in the context of the present mediation scene in Asia. In particular, SIMI has a unique tiered accreditation framework aimed at allowing mediators to gradually obtain higher levels of accreditation and ultimately achieve certification over time as they grow in skills, experience and knowledge. SIMC offers user-centric services and products, including an arbitration-mediation-arbitration service in collaboration with the Singapore International Arbitration Centre that allows mediated settlement agreements to be made enforceable as consent arbitral awards.

Finally, the paper makes some suggestions in relation to the Mediation Act under development, particularly in view of the experiences of other jurisdictions, including Hong Kong and the United States.

In order to gather real world feedback on the Working Group's recommendations and test their view on certain key issues, the authors conducted a survey ("the Authors' Survey") of in-house counsel, legal advisors, senior management and other ADR practitioners that garnered 52 responses. The Authors' Survey was distributed over email and other online platforms. The Authors' Survey will be referenced, where appropriate, throughout the article.

The Singapore International Mediation Institute ("SIMI")

The Working Group envisaged SIMI playing the role of a professional body for mediation in Singapore to certify the competency of mediators, apply and enforce standards and ethics (including requiring continuing professional development for mediators accredited by SIMI), as well as deliver information and make tools available to help people to make basic decisions about mediation.[5] The Working Group further proposed that SIMI be formed as a collaboration between the International Mediation Institute ("IMI")[6] and the National University of Singapore ("NUS").

Overview of SIMI

SIMI was incorporated on 15 July 2014 as a not-for-profit organisation supported by the Ministry of Law.[7] In line with the recommendations of the Working Group, SIMI's key objectives are to create accreditation standards for mediators with the aim of professionalising mediation as a service, as well as to incubate an ecosystem for mediation to thrive.[8] This would necessarily involve an element of research and innovation, in addition to

[5] Ministry of Law, Singapore, Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation, pp 3 (2013).

[6] IMI is a non-profit public interest initiative with the mission of driving transparency and high competency standards into mediation practice across all fields, worldwide. More information is available on the IMI website at www.imimediation.org .

[7] Singapore International Mediation Institute, About SIMI (2015), http://www.simi.org.sg/About-Us/Organisation-Information/About-SIMI (last visited Aug 19, 2015).

[8] *Ibid.*

projects aimed at promoting awareness of mediation in general, and specifically mediation resources available in Singapore.

Structurally, SIMI is a subsidiary of NUS and is physically located together with the Faculty of Law at NUS. SIMI is partnered with IMI and a representative from IMI sits on the board of directors of SIMI. SIMI's board of directors is chaired by Associate Professor Joel Lee Tye Beng and includes representatives from mediation practitioners as well as corporate users of mediation. Since its launch, SIMI has established a website portal to provide information and tools to prospective users about mediation, which includes a decision tree to help users to decide whether they want a mediation administered by an institution or proceed on an ad hoc basis without the assistance of an institution as well as a dispute analysis tool known as "Ole!", which was originally developed by IMI to help parties analyse and assess their situation in order to determine the best way possible way forward once a dispute arises.[9]

SIMI's Credentialing Scheme

SIMI has further developed a tiered credentialing scheme that has been designed to ensure that individuals with diverse mediation skills and experience can be recognised and also contains an "inter-cultural component" to distinguish mediators accredited with SIMI as possessing knowledge in identifying and dealing with cultural differences.

The credentialing scheme comprises four tiers with different requirements and annual fees chargeable ranging from S$75 to S$200 depending on the tier of accreditation obtained.[10]

Briefly, a person wishing to obtain SIMI accreditation can begin at SIMI Accredited Mediator Level 1 after completing and passing a SIMI Registered Training Program. The mediator can then work towards Level 2 (after acquiring mediation experience from 5 full-scale mediations or at least 50 hours of mediation and providing feedback received from 2 or more mediations) and Level 3 (after acquiring mediation experience from 12 full-scale mediations or at least 120 hours of mediation and providing feedback received from 5 or more mediations) before obtaining the highest level, which is to become a SIMI Certified Mediator.[11]

A SIMI Certified Mediator is required to acquire mediation experience from 20 full-scale mediations or 200 hours of mediation within the 3-year period immediately preceding the date of application, complete a SIMI Certified Mediator profile, which includes a Feedback Digest prepared by a reviewer based on at least 10 mediations from the 3-year period, as well as pass an assessment by a SIMI Qualifying Assessment Program within 1 year from the date of the application.

[9] Singapore International Mediation Institute, Introduction To Mediation (2015), http://www.simi.org.sg/What-We-Offer/Users-Of-Mediation/Introduction-To-Mediation (last visited Aug 19, 2015).

[10] Singapore International Mediation Institute, SIMI Credentialing Scheme (2015), http://www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme (last visited Aug 19, 2015).

[11] The authors understand from SIMI that it is not strictly necessary for a mediator to obtain tiered accreditation sequentially. For example, it may be possible for a mediator who is particularly active to apply from Level 1 directly to Level 3.

A SIMI Certified Mediator will be able to apply to IMI to become an IMI Certified Mediator with minimal administrative work required and without the need to provide additional feedback received from more mediations due to SIMI's partnership with IMI.

It should be noted that the mediations that can be counted towards obtaining SIMI accreditation have to be done through a SIMI Registered Service Provider, which would refer to recognised institutional mediation service providers.[12] If a mediator wishes to obtain SIMI accreditation by relying on non-administered mediations, the mediator will have to make a separate application to do so under the SIMI Private Mediation Verification Scheme, which contains additional steps for SIMI to verify the cases submitted by the mediator.

For existing mediators, SIMI has provided an alternative path known as the "Experience Qualification Path" to allow a mediator to apply directly to become a SIMI Certified Mediator by obtaining IMI certification and applying through a SIMI Qualifying Assessment Program.

Although this was one of the Working Group's recommendations, it is presently unclear what the continuing professional development criteria will be for SIMI accredited mediators.

SIMI and other professional mediation bodies

SIMI is a unique development in its own right although it shares some features with other professional mediation bodies from around the world, including IMI, the Hong Kong Mediation Accreditation Association Limited ("HKMAAL"),[13] the Mediator Standards Board ("MSB") from Australia,[14] the ADR Institute of Canada ("ADR Canada")[15] and the Civil Mediation Council ("CMC")[16] in the UK which has only in March 2015 launched a registration scheme for individual mediators.

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[12] At the time of writing, the Singapore International Mediation Centre (SIMC) is the only SIMI Registered Service Provider. See Singapore International Mediation Institute, SIMI Registered Service Provider (2015), http://www.simi.org.sg/What-We-Offer/Service-Providers/SIMI-Registered-Service-Provider (last visited Aug 19, 2015).

[13] HKMAAL was incorporated in August 2012 and aims to be the premier mediation accreditation body in Hong Kong and accredits mediators and training courses. The mediators are accredited in two categories – Family and General. See HKMAAL, 無標題文件 (2015), http://www.hkmaal.org.hk (last visited Aug 19, 2015).

[14] MSB was officially launched in September 2010 to be the central entity responsible for mediator standards and implementation of the National Mediator Accreditation System ("NMAS") in Australia. NMAS was introduced in 2008 as an industry-based scheme relying on voluntary compliance by mediator organisations that accredit mediators in accordance with NMAS standards. About 2000 mediators have since been accredited under this scheme. More information on MSB is available at: http://www.msb.org.au

[15] ADR Canada is a national non-profit organisation which serves as the professional body for mediators in Canada. Amongst others, it provides members with a regulatory framework as well as practice designations of Chartered Mediator and Qualified Mediator. It has a membership of over 2000 individuals and business and community organisations. More information on ADR Canada is available at: http://www.adrcanada.ca

[16] CMC is the authority in mediation for England and Wales and aims to inspire all sectors of society to use mediation when managing and resolving disputes. CMC recently in March 2015 launched a registration scheme for individual mediators that adds to its pre-existing mediation provider registration scheme. The main requirements of individual registration are: successful completion of an assessed training course recognised by the CMC; current mediator experience; adherence to an acceptable ethical code; professional indemnity

It should be noted that the United States of America ("USA") does not yet have any primary professional mediation standards body. Despite recognising that there appears to be a lack of consensus about the attributes of the mediation process and a process for determining competency for a nationwide credentialing system, the American Bar Association ("ABA") Section of Dispute Resolution has supported local and State initiatives in mediator credentialing meeting the following guidelines: (1) clearly define the skills, knowledge and values which persons it credentials must possess; (2) ensure that candidates have training adequate to instil those skills, knowledge and values; (3) be administered by an organisation distinct from the organisation which trains the candidate; (4) have an assessment process capable of determining with consistency whether or not candidates possess the defined skills, knowledge and values; (5) explain clearly to persons likely to rely on its credential what is being certified; and (6) provide an accessible, transparent system to register complaints against credentialed mediators.[17]

A survey done by the IMI validates these considerations as it showed that 76% of the respondents agreed that "All Neutrals should belong to an ADR professional institution that has a *rigorous and public code of ethics* backed up by a *disciplinary process* [emphasis added]" and 60% with the statement that "ADR professional institutions *should not be a service provider/earn income from services to users* [emphasis added]".[18]

All the above-mentioned institutes satisfy most of the ABA guidelines to some degree save for that of a complaints registration system which is not the norm. In fact, save for ADR Canada and CMC, none of the other organisations provide such a system, relying instead on complaints being made to the specific organisation that provided the mediation training or administered the mediation.

In the Authors' Survey, 75% of the respondents indicated that they agreed that an ideal accreditation system should include a grievance process. This was less than the responses received in respect of all the other ABA guidelines, which exceeded 90%, but was still higher than the responses to the guideline relating to an independent accreditation body, which had 65% of respondents agreeing that it should be included.

Accordingly, this is an area that SIMI may wish to consider as part of enforcing the standards it sets. Although the Working Group also proposed Continuing Education for SIMI mediators, this is also something that has not yet been made clear.

As an aside, it should be noted that although HKMAAL was founded by the four main service providers in Hong Kong at the time, the authors nevertheless consider it an independent body as these founder members do not make decisions relating to their own mediators without going through the committees established by the HKMAAL Council.

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insurance cover; continuing professional development; and a published complaints handling procedure. More information on CMC is available at: http://www.civilmediation.org

[17] Task Force on Mediator Credentialing 2012 Report, pp 2-3, (2015), http://www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf (last visited Aug 19, 2015).

[18] International Mediation Institute, IMI International Corporate Users ADR Survey - Summary (2015), https://imimediation.org/imi-international-corporate-users-adr-survey-summary (last visited Aug 19, 2015).

However, SIMI's unique value propositions lie in it possessing a combination of specific factors not alluded to by the ABA guidelines.

SIMI's Unique Value Propositions

First, apart from the IMI, none of the other professional mediation bodies have a cross-cultural or international element in their accreditation criteria or as part of their mission and goals. In the Authors' Survey, 77% of the respondents agreed that an ideal accreditation system for mediators should include a cross-cultural or cross-border competency criteria, reflecting that this aspect of SIMI's accreditation framework is valued.

This is not surprising as SIMI's international outlook and requirement for its highest level of mediators to be competent to deal with cross-cultural disputes is particularly relevant in today's globalised world. The strong message undergirding this requirement is that SIMI considers a mediator's ability to transcend cultural barriers in the performance of his or her duties to be a core competency. It is also an implicit recognition that a significant volume of disputes which can be mediated may comprise of cross-border matters or brought forth by parties with diverging cultural norms. The international composition of SIMI's board of directors further lends credibility to the organisation's commitment to setting standards that are relevant internationally.

Second, SIMI has a tiered accreditation structure which better provides information on the skills, knowledge and experience a mediator possesses. In the Authors' Survey, 85% of the respondents agreed that an ideal accreditation system for mediators should include a tiered framework that enables progressive and higher levels of accreditation to be obtained based on experience.

Although it may be unlikely that users will employ mediators who have only obtained the basic level of competency by completing a recognised training program (Level 1) or who have only limited experience in mediation (Level 2), the tiered structure may be useful at the two higher levels. This makes the SIMI accreditation structure, practically-speaking, similar to the two-tiered structure for credentialing mediators by ADR Canada save that SIMI's criteria for distinguishing between tiers additionally contains the IMI's requirements for user feedback.

The inclusion of the user's point of view on the entire mediation experience, delivered in a systematic, organised fashion, is perhaps the element most glaring in its absence from many other professional mediation bodies. In the Authors' Survey, 58% of the respondents agreed that an ideal accreditation system should include a requirement for a feedback digest and the remaining 42% indicated they had no view. Although this was not as significant a factor as compared to others, the figures still show that most people find this helpful. User feedback provides another form of metric by which to assess whether accredited mediators have the required abilities and possess the defined skills, knowledge and values that SIMI stands for. It also enables assessment criteria to be expanded beyond mere settlement rate, and takes into account the other factors which make up the standards developed by SIMI.

Finally, while SIMI's role in education and outreach is also shared by institutions such as the IMI, ADR Canada and CMC, SIMI's role is unique in that it fills an institutional gap in Asia given the volume of transactions that occur in the region and the ensuing potential for disputes. This gap is already partially occupied by various other institutions of which

HKMAAL is one, but given the scale of the region and its increasing commercial activities, the mediation landscape in Asia is far from its saturation point. SIMI can therefore still play an important role in creating awareness of international commercial mediation and information about what quality services should offer as well as how users can or should approach decision-making in relation to mediation and dispute resolution generally. This role will also complement the unique credentialing and accreditation function of SIMI, thus adding to the menu of products mediation users can look forward to exploring.

Other factors may also be alluded to such as strong support from the government as well as mediation service providers although these relate more to the ability of SIMI to carry out its functions rather than the quality of SIMI as a professional standards body.

As a further affirmation of SIMI's uniqueness and value, it is interesting that although SIMI is not even a year old, 58% of the respondents to the Authors' Survey indicated "yes" to the question of whether they would prefer a SIMI accredited mediator over a mediator by another accreditation body if they were a user. 85% of the respondents answered "yes" to the question of whether they would consider being accredited by SIMI if they were a mediator. SIMI does, however, have some way to go in terms of creating awareness of its role as 35% of the respondents to the Authors' Survey were not aware of the existence and activities of SIMI prior to receiving the questionnaire.

For ease of reference, the features of SIMI and other mediation professional bodies are summarised in the table below.

	Primary standards body	Independent	Cross-cultural/ border element	Tiered	User feedback component	Education and outreach function	Complaints procedure
SIMI	✓	✓	✓	✓ (4 tiers)	✓	✓	
IMI		✓	✓		✓	✓	
HKMAAL	✓	✓					
MSB	✓	✓					
ADR Canada	✓	✓		✓ (2 tiers)		✓	✓
CMC	✓	✓				✓	✓

The Singapore International Mediation Centre ("SIMC")

The Working Group's second key recommendation was to establish an international mediation service provider with subscribers such as the Singapore Academy of Law, Singapore Business Federation and SIAC.[19] In terms of the products and services offered to be offered by the mediation service provider, the Working Group recommended that these include: (1) case management service; (2) deal-making service; (3) post-merger facilitation; (4) dispute process design service; (5) online dispute resolution service; (6) e-dossier of profiles of experienced mediators; and (7) appointing authority service.

[19] Ministry of Law, Singapore, Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation, pp 3 (2013).

Overview of SIMC

Since its official launch in November 2014, SIMC has established a panel of world class international mediators as well as a panel of technical experts and specialists.[20] Consistent, with the recommendations of the working group, detailed profiles of the panel members are published on the SIMC website. For the panel of mediators, links to videos of the mediators have also been made available to help potential users get a better sense and feel of their mediator.

SIMC offers a professional case management and administration service under the SIMC Mediation Rules ("SIMC Rules").[21] It also offers user-centric services and products, including an arbitration-mediation-arbitration service ("arb-med-arb") in collaboration with the Singapore International Arbitration Centre ("SIAC") that allows mediated settlement agreements to be made enforceable as consent arbitral awards.

The SIMC Mediation Rules (SIMC Rules)

The SIMC Rules provide a helpful foundational structure for the mediation process and guides the way in which, amongst others:

(a) a mediation can be commenced and terminated (Rules 2 and 7 respectively);
(b) parties enter into an agreement to mediate (Rule 3);
(c) a mediator will be appointed (Rule 4);
(d) the mediator's fees and costs of mediation will be determined (Rule 5); and
(e) confidentiality is assured for the mediation and the disclosures made during it (Rule 9).

Recognising the parties need for self-determination and the value of mediation as a flexible process, the SIMC Rules may be modified by mutual agreement of the parties and the consent of both the mediator and SIMC.

SIMC's primary role is to manage and administer the mediation proceedings under the SIMC Rules. The SIMC Rules explicitly allow SIMC to render assistance to parties contemplating referring their dispute to mediation even in circumstances where the parties have no prior agreement for mediation.[22] SIMC will also assist parties to reach agreement on procedural issues such as venue and the exchange of pertinent information before the mediation.[23]

The SIMC Rules envisage SIMC playing an active role in case management, including to arrange for a pre-mediation conference to discuss the manner and timelines for the conduct of mediation, as well as proposing to the parties that more than one mediator be appointed. SIMC will consult with the parties in relation to the conduct of the mediation. However, if parties fail to reach agreement on procedural matters such as the language the mediation is to

[20] George Lim SC, Eunice Chua, *Singapore*, in *Asia Mediation Handbook*, para 16.041. (Dr Raymond H M Leung (Gen Ed), Thomson Reuters Hong Kong Limited, 2015)

[21] Singapore International Mediation Centre, SIMC Mediation Rules - Singapore International Mediation Centre (2015), http://simc.com.sg/mediation-rules (last visited Aug 19, 2015).

[22] SIMC Mediation Rules, Rules 4.1-4.4.

[23] SIMC Mediation Rules, Rules 6.1(b) and (c).

be conducted, the SIMC Rules allow SIMC to make a determination in consultation with the mediator. This mechanism can ensure that parties will not be held back from reaching the mediation table.

Although parties may have flexibility of choice as to their mediation venue, SIMC has worked with Maxwell Chambers in customising a set of mediation suites that have been designed to provide an environment more conducive for settlement. Maxwell Chambers also has state-of-the art facilities, including video and telephone conferencing.

SIMC's Arb-Med-Arb Service

The discernible growth in demand for mediation within the international business community has resulted in the current practice of linking mediation with arbitration in a single case through hybrid med-arb or arb-med processes. However, concerns have been raised relating to the integrity of the process, particularly where the arbitrator is only appointed after the mediation settlement agreement is concluded, and the independence of the mediator and/or arbitrator, particularly where these roles are played by the same person.[24]

Addressing these concerns, SIMC offers in collaboration with the SIAC an arb-med-arb service, so named because it involves parties commencing arbitration proceedings before attempting to settle their disputes through mediation and then, after mediation, returning to arbitration to either record their settlement as a consent award or proceed with arbitration of any outstanding issues. There is no issue of the arbitral award being challenged on the basis that no dispute existed between the parties at the time arbitral proceedings were commenced because mediation is attempted only after arbitration is properly commenced and the tribunal appointed. Given that SIAC and SIMC separately and independently administer the arbitration and mediation components respectively, the arbitrator and mediator will be separate persons unless parties expressly agree that this should be otherwise.

In order to offer seamless transition between arbitration and mediation, avoid duplication of effort and to save parties time and costs, SIAC and SIMC have published an Arb-Med-Arb Protocol that sets out simple but detailed steps for the entire process, including providing a default 8-week maximum period within which the mediation must be completed and having payments being collected by a single entity. [25] The Protocol supplements the procedural rules of both organisations.

The SIAC-SIMC arb-med-arb service has been described as "combin[ing] the best of both systems, granting the efficiency of mediation and the certainty and enforceability of an arbitral award".[26] Another commentator writes: "Two key factors … set the SIAC-SIMC

[24] Bernadette Wolski, *Arb-Med-Arb (and MSAs): A Whole Which is Less Than, Not Greater Than, the Sum of its Parts?*, 6 Contemporary Asia Arbitration Journal 259-260, 262.

[25] The SIAC-SIMC-Arb-Med-Arb Protocol is published in both the SIAC and SIMC official websites.

[26] Christopher Boog & Elisabeth Leimbacher, *The Singapore International Mediation Centre and the new AMA Procedure - finally what users have always wanted?*, Schellenberg Wittmer January 2015 Newsletter 3 (2015).

[Arb-Med-Arb] Protocol apart – the clarity and certainty of the process, and the assurance of institutional support".[27]

SIMC's Unique Value Propositions

Although other bodies exist that offer international mediation services such as the International Chamber of Commerce ("ICC") based in Paris, the International Centre for Dispute Resolution ("ICDR") an international division of the American Arbitration Association ("AAA"), Judicial Arbitration and Mediation Services ("JAMS") based in the USA with an international arm headquartered in the United Kingdom, as well as the Centre for Effective Dispute Resolution ("CEDR") based in the UK and Hong Kong, SIMC is unique in that it is a body solely focused on international mediation. The only other organisation like SIMC in this sense is the newly-established Florence International Mediation Chamber ("FIMC").

Because international mediation is SIMC's sole business, SIMC can be committed to promoting, researching, and operating within this field in order to truly gain expertise and meet user needs in the area. This commitment is reflected in the composition of SIMC's board of directors, its panel of mediators and experts, as well as the design of its products and services. For example, the SIMC Rules provides parties maximum flexibility to choose a mediator from outside the SIMC panel, their language of mediation and their venue for mediation. However, they also allow SIMC to actively manage the mediation as described above. The significance of this type of philosophy is apparent from the Authors' Survey. There, 100% of the respondents indicated that it was "very important" (78%) or "important" (22%) in their consideration of SIMC's services that SIMC promised efficient and world-class case management and administration services.

Another unique feature of SIMC is that it requires its panel of mediators to be independently certified by SIMI to ensure that they meet international standards. FIMC follows the SIMC model and requires its mediators to be certified by IMI. 88% of the respondents to the Authors' Survey indicated that it was "very important" (45%) or "important" (43%) in their consideration of SIMC's services that SIMC's mediators were qualified by a separate and independent accreditation body.

The panel of experts maintained by SIMC is another an unusual feature for a dispute resolution service provider. SIMC's justification for the panel is that as cross-border commercial disputes become more complex, technical questions may arise that need to be dealt with in order for the parties to arrive at a mediated settlement which may require in depth and detailed industry knowledge. To facilitate the mediation process for such complex commercial disputes, SIMC has appointed a panel of experts who are able and prepared to assist in the mediation process. Based on the Authors' Survey, this thinking has resonated with people, with 94% of the respondents indicating that it was "very important" (54%) or "important" (40%) in their consideration of SIMC's services that SIMC had the ability to appoint experts to assist the mediator.

The SIMC arb-med-arb service in the way it is offered by SIMC is distinctive in that it is a collaboration between two separate professional institutions specialising in arbitration and

[27] Emmanuel Duncan Chua, *A New Dawn for Mediation? The Launch of the Singapore International Mediation Centre (SIMC) and Introduction of the SIAC-SIMC Arb-Med-Arb Protocol*, Kluwer Arbitration Blog (2014).

mediation. It is an administered process from beginning to end and is governed by the SIAC-SIMC Arb-Med-Arb Protocol. Assistance is available to the parties in the form of case management as well as appointment of suitable arbitrators and mediators for each case from international panels of high quality.

In the Authors' Survey, 96% of the respondents indicated that the fact that SIMC offers solution-driven products, in particular the arb-med-arb service, were "very important" (63%) or "important" (33%) considerations to their consideration of whether to use SIMC's services.

Other professional service providers like ICC, ICDR, JAMS and CEDR recognise and support the integration of mediation with the arbitration process by, for example, incorporating in their arbitration rules and practice directions encouragements to mediate and provisions relating to mediation. ICDR's rules, for instance, allow its conflict management team to broach the possibility of settlement with the parties at the point of receipt of notice of intention to arbitrate.[28] ICDR has also developed a concurrent arbitration and mediation clause which allows parties to start mediation immediately once arbitration has commenced.[29] JAMS International's Mediator-in-Reserve Policy for International Arbitration[30] provides the parties with a list of mediators it thinks are appropriate for the case within one week of commencement of the arbitration and enable parties to reserve a mediator, at no cost. The reserved mediator can be immediately enlisted if parties agree to mediate their settlement at any time during the arbitration proceedings. CEDR's Rules on the Facilitation of Settlement of International Arbitration contain a provision enabling the tribunal to carve out a "mediation window"[31] if the parties wish to enter into settlement discussion. This can be effected by parties by agreement or within a clause requiring arbitration.

These offerings are laudable and cater to the user demand for hybrid processes. It is notable that 80% of the respondents to the Authors' Survey indicated that they or their organisation would consider using an arb-med-arb service.

However, what is missing is something equivalent to the SIAC-SIMC Arb-Med-Arb Protocol providing detailed steps for the transitions between arbitration and mediation and back again if required. It should be noted that SIAC and SIMC have managed to keep to a minimum any additional cost for mediating in the midst of arbitration by providing clear timelines and a single point for fee collection.

Another benefit of the SIAC-SIMC Arb-Med-Arb Protocol is that it can be easily referenced in a dispute resolution clause or agreement, for example, in the terms of the model "Singapore clause" provided by SIAC and SIMC. With 80% of the respondents to the Authors' Survey indicating that they or their organisation would consider using an arb-med-arb clause, the Singapore clause is a valuable offering. One other institution that offers a

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[28] Luiz Manuel Martinez, *A Guide to ICDR Case Management,* in *ICDR Awards & Commentaries,* pp 3-33, (Grant Hanessian, JurisNet LLC, eds., 2012)

[29] ICDR, International Centre for Dispute Resolution (2015), http://www.ICDR.org (last visited Aug 19, 2015).

[30] Jamsinternational.com, Experts in International Arbitration and Mediation | JAMS International (2015), http://www.jamsinternational.com (last visited Aug 19, 2015).

[31] CEDR Rules for the Facilitation of Settlement in International Arbitration, (2009), http://www.cedr.com/about_us/arbitration_commission/Rules.pdf (last visited Aug 19, 2015).

similar model clause is ICDR with its "ICDR Concurrent Arbitration-Mediation Clause" although that clause does not provide for the recording of a consent award in the terms of the mediated settlement agreement or reference any specific document that governs the interfacing of both proceedings.

Finally, SIMC's association with Singapore enables it to leverage on the existing framework that supports international arbitration, including the facilities of Maxwell Chambers, a pro-ADR judiciary, as well as a predictable and non-intrusive legal and regulatory framework. Mediating and arbitrating disputes between Asian-based companies in Singapore also has certain practical benefits, including fuss-free entry into Singapore through a world-class airport, no need to obtain any work permit for foreign lawyers, arbitrators and mediators, and ease of obtaining travel visas. It is worth mentioning that in 2014, Singapore ranked first out of 189 in terms of ease of doing business for the ninth consecutive year,[32] placed third in the world in terms of overall competitiveness,[33] and is also recognised as being one of the least corrupt[34] and safest countries to live in.[35] The value of SIMC's association with "brand Singapore" was tested in the Authors' Survey where 67% of the respondents responded that this was a "very important" or "important" factor in their consideration of whether to use SIMC's services.

SIMC evidently has done well in terms of its outreach efforts and in being relevant to users as despite its relative youth, 73% of the respondents to the Authors' Survey indicated "yes" to the question of whether they were aware of the existence and the activities of the SIMC prior to receiving the questionnaire. 79% of the respondents also indicated that there was a "good" or "average" likelihood that they would use SIMC in the future.

Below is a table summarising the key features of the international mediation service providers referenced above:

	Focus only on int'l mediation	Mediators certified by independent body	Mediators from > 12 countries on panel	Active mediation case manage-ment	Panel of experts	Combines arb and med
SIMC	✓	✓	✓	✓	✓	✓ (with Arb-Med-Arb Protocol)
ICC			No panel			✓
ICDR				✓		✓

[32] Doing Business, Doing Business in Singapore - World Bank Group (2015), http://www.doingbusiness.org/data/exploreeconomies/singapore (last visited Aug 19, 2015).

[33] IMD Business School, Switzerland, 2014 World Competitiveness (2015), http://www.imd.org/news/2014-World-Competitiveness.cfm (last visited Aug 19, 2015).

[34] Transparency International, How corrupt is your country? Cpi.transparency.org (2015), http://cpi.transparency.org/cpi2013/results (last visited Aug 19, 2015).

[35] OSAC, Singapore 2013 Crime and Safety Report (2015), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=13850 (last visited Aug 19, 2015).

JAMS				✓		✓
CEDR			✓	✓		✓
FIMC	✓	✓				

A New Mediation Act

In order to provide the necessary legislative framework and infrastructure to support mediation, the Working Group proposed that a new Mediation Act be enacted to govern issues relating to a stay of proceedings, enforcement and confidentiality of evidence.[36] This would provide certainty to any potential users of mediation and enhance the attractiveness of Singapore as a destination for international commercial mediation.[37]

The enactment of a new Mediation Act would also have the value of creating awareness amongst the general public about mediation and how mediation may be conducted in Singapore. This may be especially helpful to those who practise mediation independently and not through any institution or body.

In short, it would be hoped that a new Mediation Act may have the same positive impact that the enactment of the International Arbitration Act in Singapore in 1994 had on the international arbitration space. In 1994, SIAC, the sole provider of institutional arbitration services in Singapore at the time had a case load of 34.[38] This figure increased to 51 in 1995, and 89 in 1998,[39] and continued to grow almost every year up till 2014. Singapore is today recognised as the third most preferred seat of arbitration in the world, behind London and Geneva and alongside Paris and Tokyo,[40] and SIAC the fourth most preferred arbitral institution.[41]

Correctly, in the authors' view, the proposed Mediation Act seeks only to provide an appropriate framework for the conduct of mediation and does not interfere with the flexibility that is at the heart of mediation in terms of how the process is conducted. A similar approach

[36] Ministry of Law, Singapore, Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation, pp 3 (2013).

[37] George Lim SC and Eunice Chua, *Development of Mediation in Singapore*, in *Mediation in Singapore: A Practical Guide*, at para 1.049 (Danny McFadden & George Lim SC (Gen Eds), Sweet & Maxwell Asia, 2015).

[38] Tong Yong Ang, *: Arbitration in the New Millennium*, Singapore Law Gazette (2000), http://www.lawgazette.com.sg/2000-1/Jan00-23.htm (last visited Aug 19, 2015).

[39] Tong Yong Ang, *: Arbitration in the New Millennium*, Singapore Law Gazette (2000), http://www.lawgazette.com.sg/2000-1/Jan00-23.htm (last visited Aug 19, 2015).

[40] 2010 International Arbitration Survey: Choices in International Arbitration, pp 19, (2010), http://events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf (last visited Aug 19, 2015).

[41] 2010 International Arbitration Survey: Choices in International Arbitration, pp 23 (2010), http://events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf (last visited Aug 19, 2015).

was taken by the Hong Kong Mediation Ordinance[42] and the Uniform Mediation Act – two pieces of mediation legislation that have been studied closely all over the world.

As the draft of the proposed Act has yet to be published at the time of writing, this paper makes some brief comments on two key aspects of the proposed Act – enforceability and confidentiality of evidence.

Enforceability

Enforceability of a mediated settlement agreement may be viewed as somewhat of a contradiction as, unlike an imposed arbitral award, the settlement agreement is voluntarily entered into with the consent of the parties. However, that this is important to potential corporate users of mediation is evident in some recent surveys done in view of the discussions in UNCITRAL Working Group II on the topic of a convention for the enforcement of international mediated settlement agreements.[43]

Curiously, the Hong Kong Mediation Ordinance and the Uniform Mediation Act both do not contain any provisions relating to enforceability. The justification for this stance given by the Hong Kong Working Group tasked with examining the issue was essentially that it was unnecessary and by bypassing the consideration of traditional contract law defences such as duress, unconscionability and mistake, sophisticated parties may be permitted to take advantage of weak or uninformed opponents.[44] However, the Hong Kong Working Group did recognise that there were some benefits to an expedited enforcement process, which apart from being speedy and less costly would offer greater confidentiality protection since reduced contract litigation would lessen the reliance on evidence procured from mediation sessions.

Notably, an earlier draft of the Uniform Mediation Act had originally contained a section on expedited enforcement of mediated settlement agreements in the courts through a process of registration.[45] The registration process was intended to require the agreement of the parties and dispense with the need to prove the validity of the mediated settlement agreement, allowing the matter to "move directly to the issues of whether a particular term had been breached or violated".[46] However, this section was eventually excluded due to a concern similar to that of the Hong Kong Working Group – that there was the possibility of the expedited process for enforcement being used by more sophisticated or more powerful parties to take advantage of those who might be less sophisticated or less powerful.[47] Another related reason posited for excluding such a provision was that situations may arise where parties

[42] Department of Justice, *The Government of Hong Kong, Special Administration Region*, Report of the Working Group on Mediation, para 7.26 (2010).

[43] Eunice Chua Hui Han, *The Future of International Mediated Settlement Agreements: Of Conventions, Challenges and Choices*, Tan Pan Journal (forthcoming).

[44] Department of Justice, *The Government of Hong Kong, Special Administration Region*, Report of the Working Group on Mediation, para 7.186 – 7.188 (2010).

[45] National Conference of Commissioners on Uniform State Laws Drafting Committee on Uniform Mediation Act, *Uniform Mediation Act with Prefatory Notes and Comments*, p 50, under comments on s11 (2001).

[46] *Ibid.*

[47] *Ibid.*

become aware of contractual defences only after joining in an enforcement motion and expedited enforcement would prevent those parties from raising defences after the enforcement motions are underway.[48]

It would be interesting to see how the Singapore draft Mediation Act deals with the concerns surrounding an enforceability provision. It is the authors' view that these may be addressed by, first, calibrating the scope of the Act to apply to mediations conducted by properly accredited mediators and recognised mediation organisations. As mediation is a process of facilitated negotiation, any severe power imbalance that could give rise to the contractual defences of unconscionability and duress, or the presence of any misapprehension of the law or unilateral mistake as to fact that may give rise to the defence of mistake would probably be detected by the mediator in the process of the mediation. The risk of a mediated settlement agreement being entered into unconscionably, under duress, or under a mistake would accordingly be quite small.

Second, although a mutual or common mistake as to fact may be impossible to detect during the mediation or may become apparent only after the enforcement application is brought, this may be addressed by ensuring the courts retain some limited discretion in relation to allowing challenges to the validity of the mediated settlement agreement. However, in considering any challenges to the validity of the mediated settlement agreement, the courts should be careful to give due regard to the nature of the mediation process and not be too quick to intervene.

In any event, given that enforceability seems to be something that is actually valued by corporate users, some risk may be worthwhile and may be for the good of developing the mediation space in Singapore.

Confidentiality

Confidentiality is a value that is essential to mediation and having statutory recognition of that could potentially be important to corporate users of mediation as well as their legal advisors.

The first issue that arises is what is accorded confidential protection at first instance. The Hong Kong Mediation Ordinance provides for confidentiality for a "mediation communication", defined by s 2(1) as "*anything said or done; any document prepared; or any information provided*, for the purpose of or in the course of mediation" However, an agreement to mediate or a mediated settlement agreement are excluded from confidential protection.

Section 2(2) of the Uniform Mediation Act defines "mediation communication" as "a statement, whether *oral or in a record or verbal or nonverbal* that occurs during a mediation or is made for purposes *of considering, conducting, participating in, initiating, continuing or reconvening* a mediation or retaining a mediator" and accords privilege to them. This is a broader starting point than that adopted by Hong Kong and recognises that candour even in the early stages of a party considering or initiating a mediation may be critical. However, s 6(a)(1) of the Uniform Mediation Act provides as an exception to privilege "an agreement evidenced by a record signed by all parties to the agreement". As noted in the commentary to

[48] Ellen E Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 UC Davis Law Review, pp 43, (2015).

that section, this would permit evidence of a signed agreement to mediate or a mediated settlement agreement to be admitted as evidence in court proceedings convened to determine whether the terms of that settlement agreement had been breached.

If is submitted that the approach of the Uniform Mediation Act is preferable and is in fact reflective of the preferences apparent from the results of the Survey where a majority of the respondents agreed that confidentiality should apply to agreements to mediate (84%) as well as the mediated settlement agreement unless parties consent otherwise (98%). However, the Uniform Mediation Act strikes a balance between what users may want and the interests of justice by providing an exception for signed agreements to be used in enforcement proceedings – otherwise, there would be no avenue for enforcement.[49]

This brings us to the second issue of the exceptions to confidentiality or privilege.

Section 8(2) and (3) of the Hong Kong Mediation Ordinance provide for the circumstances under which a person may disclose a mediation communication. Section 8(2) relates to disclosure that may be made without leave of court and includes uncontroversial bases, such as where there is consent of the parties and the mediator (and if the mediation communication is made by a person other than a party or a mediator, that person who made the communication), where the information is already in the public domain, disclosure for research or educational purposes where there is appropriate redaction, and disclosure to obtain legal advice to name a few. However, s 8(2)(c) which relates to information that is otherwise subject to discovery in civil proceedings or other similar procedures is potentially open to abuse and may be creatively used to narrow the protection of confidentiality. Singapore may wish to be more careful in this respect.

Section 8(3) allows a mediation communication to be disclosed with the leave of the court or tribunal for particular purposes including enforcing or challenging a mediated settlement agreement and establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any person participating in the mediation in a professional capacity. Section 10 provides for the procedure for leave for disclosure or admission in evidence and stipulates two matters for the court or tribunal to consider in making its decision – whether the mediation communication has been disclosed under s 8(2) and "whether [disclosure] is in the public interest or the interests of the administration of justice".

The Uniform Mediation Act similarly maintains two categories of exceptions to mediation privilege. First, s 6(a) applies regardless of the need for the evidence because society's interests in the information outweighs the interest in confidentiality. It is, like s 8(2) of the Hong Kong Mediation Ordinance, largely uncontroversial. Second, s 6(b) applies only in particular situations where there are overriding concerns for justice when measured under the facts and circumstances of a particular case.[50] In the latter situation, an application to a court, administrative agency, or arbitrator is required. It is expressly provided that the hearing will be in camera and a party must show that: (a) the evidence is not otherwise available: (b) there

[49] Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality,* Law and Economics Working Papers Series Working Paper No. 00-24, pp 14, (April 2001).

[50] National Conference of Commissioners on Uniform State Laws Drafting Committee on Uniform Mediation Act, *Uniform Mediation Act with Prefatory Notes and Comments*, p 25, under comments on s6 (2001).

is a need for the evidence that substantially outweighs the interest in protecting confidentiality; and (c) the mediation communication is sought or offered in a court proceeding involving a felony or a "proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation".

A unique feature of the Uniform Mediation Act that was deliberately excluded from the Hong Kong Mediation Ordinance is the protection it gives to mediators – s 6(c) of the Uniform Mediation Act provides that a mediator may not be compelled to provide evidence of a mediation communication where the evidence is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice; or to "prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation". As described by one commentator, the Hong Kong Taskforce formed the view that "mediators like other professionals, must be accountable for delivering mediation services to a professional standard and that such professional accountability would support the professionalisation of the field and encourage quality practice".[51] As explained by the government administration to the Bills Committee in response to queries relating to how mediators can be protected against complaints and civil claims from aggrieved parties that may abuse the complaint or court procedures, abuse can be prevented through the process of requiring leave of court for the admissibility of mediation communication for that purpose.[52]

Both the exceptions regime in the Hong Kong Mediation Ordinance and Uniform Mediation Act were evidently very well thought through and carefully crafted to suit the different mediation environments in the two countries. The two-pronged structure of having one category of exceptions that can be enjoyed without recourse to the court and another category, arguably the greyer areas, where a court or tribunal's decision is required, is sensible. The difficulty is in identifying and crafting the precise exceptional circumstances and Singapore will have to find its own way. The second category of exceptions will present the greatest challenge and there will be an issue of how specific the legislation should be in relation to how the court should exercise its discretion. In this respect, the Uniform Mediation Act offers more specific guidance than the Hong Kong Mediation Ordinance. Finally, the issue of whether to provide some form of protection or immunity to mediators in respect of certain kinds of claims will have to be considered. It should be noted that despite the concerns raised by the Hong Kong Bills Committee, the absence of an equivalent provision for mediator protection has not caused serious consternation in the mediation community in Hong Kong or translated into abusive conduct.

Conclusion

The Working Group's proposals and recommendations to develop Singapore into an international commercial mediation hub are visionary and innovative in numerous ways. However, that is but a first step, and the implementation that follows is key.

Since November 2014, much progress has been made in terms of implementing the recommendations relating to the establishment of SIMI and SIMC and both organisations

[51] Nadja Alexander, *The New Hong Kong Mediation Ordinance: Much Ado About Nothing?*, Kluwer Mediation Blog (2010).

[52] Report of the Bills Committee on Mediation Bill, LC Paper No. CB(2)2049/11-12 , para 31

have made great strides. As at the time of writing, SIMC has received two case filings despite being just over half a year old. Although the draft Mediation Act has taken longer in its gestation than the birth of SIMI and SIMC, it is nevertheless important and the authors look forward to the release of the Mediation Bill.

It is the authors' hope that Singapore can make a unique and valuable contribution to mediation in Asia and the world, and welcome continued conversations on how best to develop the international mediation landscape.