Singapore Developments - The Mediation Act 2016

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In November 2016, the Ministry of Law Working Group on International Commercial Mediation delivered its report on developing international commercial mediation in Singapore. Amongst the key recommendations in this report were the creation of a mediation service provider for international matters, the Singapore International Mediation Institute, the creation of an international accreditation body (the Singapore International Mediation Accreditation Board), and the establishment of a Mediation Act.

The end of 2016 saw the culmination of months of drafting and consultation work with the Mediation Bill being introduced and being passed into law on 30 January 2017. Although the Act is still in draft, it is hoped that its provisions encourage the use of mediation both domestically and internationally and underscore Singapore's position as a dispute resolution hub.

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In this entry, I would like to devote this entry to exploring key aspects to the Act which has as its stated purpose to promote, encourage and facilitate the resolution of disputes by mediation.

The Act provides an innovative set of provisions for the key provisions in this Act, apart from the definition of various terms, the “Certification Scheme”, “Certified Mediator”, and “Designated Mediation Service Provider” (Sections 2 of the Act define mediation as:

“a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute:
(a) identify the issues in dispute;
(b) communicate with one another;
(c) voluntarily reach an agreement.”

On one reading, this definition seems to mirror a mediation where the mediator plays a facilitative role and sessions in the mediation include, meetings and discussions, where no such draft language and video conferencing. The definition, when specifically to disputes and seems to exclude the possibility of near nothing mediation (where a mediator can be brought in to help to parties negotiate a deal even where no dispute exists).

Section 2(2) provides that in a mediation agreement (an agreement to refer a matter to mediation) can be a part of a larger agreement or a separate agreement as its own. It is not clear, if it is satisfied as long as the larger agreement provides for mediation to the parties.

Section 2(6) makes clear that the provisions in the Act apply to mediations which are at least in part conducted in Singapore or the relevant mediation agreement provides for the Act or the law of Singapore to apply. Under this framework, it appears possible for a mediation to not actually be physically situated in Singapore. This is not a bad thing as it acknowledges the present commercial reality where physical meetings between international parties is probably becoming less of the norm. To avoid inconsistency with existing mediation schemes, Section 6 excludes mediations which are covered by other written laws.

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

First, where a party to a mediation agreement has instituting proceedings in court in breach of that agreement, Section 8 provides for a court to stay proceedings on the application of any party to the mediation agreement and to make interim and supplementary orders in order to preserve the rights of parties. This is a significant development. While the common law in Singapore has been moving in the direction of enforcing a mediation clause, it is now absolutely clear at least in the case of mediations to which the Act applies, that a party cannot, with impunity, breach a mediation clause or agreement. Further, the broad wording of this provision means that a court is not just limited to staying proceedings. It can also set terms of reference for mediation, order parties to attend mediation, and set it or an order to the parties to decide whether mediation is appropriate or the necessary evidence.

Second, the Act sets out the parameters for disclosure and admissibility of mediation communications. Section 9 restricts disclosure except in specified situations. For example, where disclosure is necessary to prevent harassment or other improper conduct, or where disclosure is necessary to prevent harm to a child or the protection of a victim. Paragraphs 6(4) and 9(4) provide that a mediation communication is not admissible in evidence in any court, arbitral or disciplinary proceedings. Section 11 also specifies matters which must be taken into account by a court or arbitral body when deciding whether to grant leave to record.

Finally, Section 12 provides for the recording of a mediated settlement agreement as an order of court which can then be enforced accordingly. This addresses the concerns that mediated settlement agreements have no teeth. Section 12 provides that a mediated settlement agreement will be enforceable to the court if it is recorded under Section 8. Section 12 also provides for those instances where the court may refuse to record a mediated settlement agreement where the term is not technically capable of enforcement as an order of court e.g. an agreement which sets out a rule of conduct or a confidentiality agreement or where the term is not court.

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