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23. MEDIATION AND APPROPRIATE DISPUTE RESOLUTION

Nadja **ALEXANDER**[1]
BA, LLB (Hons) (Qld), Dip International Studies (Vienna),
LLM D Jur (Summa Cum Laude) (Tübingen);
Professor, Yong Pung How School of Law, Singapore Management University;
Director, Singapore International Dispute Resolution Academy (SIDRA);
Mediator, Singapore International Mediation Centre (SIMI certified).

Shouyu **CHONG**
LLM (National University of Singapore),
PhD, AKC (King's College London);
Research Fellow, Singapore International Dispute Resolution Academy (SIDRA), Singapore Management University;
Lecturer in Business Law, School of Law, University of Leeds.

I. Introduction

23.1 This chapter on mediation and appropriate dispute resolution ("ADR") is drafted to complement the Singapore courts' continuing advocacy for the proactive pursuit of non-litigious methods of dispute resolution. We aim to inform readers about the evolving legal landscape of ADR in Singapore.

23.2 The body of judgments on subject matters relating to mediation and ADR in Singapore continues to develop, necessitating some slight variations in the categories of cases we examine yearly. For the 2023 Singapore Academy of Law Annual Review of Singapore Cases ("SAL Ann Rev"), we offer a review of cases in four categories.

23.3 First, we examine two cases which address the issue of enforcing mediation or ADR provisions. Second, we examine two noteworthy cases on whether or not negotiated (and/or mediated) settlement agreements had been concluded, and five cases on the enforcement of negotiated (and/or mediated) settlement agreements. In this chapter, negotiated settlement agreements are examined on the same level as mediated settlement agreements, bearing in mind the observation by Andrew Phang Boon Leong JA, that "parties' negotiations with a view

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to a settlement also happen on platforms that 'effectively [take] the place of a mediation'".[2] Third, we review two cases which address issues in mediation and ADR practice and ethics. Finally, we consider two cases that deal with mediation, ADR and civil procedure.

23.4 Some of these cases may be examined in other chapters of this year's SAL Ann Rev, as they may deal with legal issues beyond mediation. In this chapter, we focus on mediation and ADR-related issues only.

Category	Focus of review comments	Case
Mediation agreements	Enforcing mediation agreements (also referred to as agreements to mediate) and agreements to proceed to ADR before arbitration	*Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 *CZQ v CZS* [2024] 3 SLR 111
Recognition and enforcement of (mediated) settlement agreements	Conclusion of (mediated) settlement agreements	*Tsudakoma Corp v Global Trade Well Pte Ltd* [2023] SGHC 26 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945
	Enforcement of (mediated) settlement agreements	*Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 *Tan Hong Joo v Full House Building Construction Pte Ltd* [2023] SGHC(A) 39; *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114

2 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [28], citing *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd* [2011] VSC 287 at [25].

		Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd [2024] 4 SLR 276 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888
Mediation, ADR practice and ethics	A solicitor's duty to direct their clients to consider ADR	*Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280
	Solicitor's obligations to notify court if a settlement agreement was concluded	*The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15
Mediation, ADR and civil procedure	Adverse costs order for failure to comply with mediation agreement	*Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333
	Adverse costs order when offers to settle are not accepted	*Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56

II. Enforcing mediation agreements and/or agreements to proceed to ADR

23.5 The enforcement of mediation agreements and provisions to proceed to ADR forums before litigation or arbitration is an issue of procedural importance. In commercial disputes, the common law generally takes an accommodating approach towards the enforcement of adequately drafted mediation agreements and ADR provisions.[3] Furthermore, mediation agreements may be enforced pursuant to s 8 of the Mediation Act 2017,[4] which specifically provides the Singapore courts with powers to enforce mediation agreements.[5]

3 See *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130; *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871 at [25]; *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC) and *Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd* [2023] EWCA Civ 292.

4 2020 Rev Ed.

5 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9.

23.6 In *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd*[6] ("*Maxx Engineering*") and *CZQ v CZS*,[7] the courts were tasked with enforcing mediation and ADR provisions at different points in the dispute resolution process. In the former, the General Division of the High Court ("General Division") was asked to specifically enforce a mediation provision after a party to the contract referred the dispute to arbitration without first complying with the mediation clause.[8] In the latter, the Singapore International Commercial Court ("SICC") heard an application arising from a disputant's challenge[9] of an arbitral tribunal's finding of jurisdiction over a dispute on the grounds that the contract contained an amicable dispute resolution provision that was a condition precedent to arbitration;[10] for the purposes of this chapter, this may be framed as an application for an indirect enforcement of that amicable dispute resolution provision.

A. Specific performance of mediation agreement

23.7 In *Maxx Engineering*,[11] the parties were bound by a contract containing the following dispute resolution provisions:[12]

> 54. If a dispute arises between the parties under or out of or in connection with this Sub Contract [*sic*] or under or out of or in connection with the Sub-Contract Works, the parties shall endeavor to resolve the dispute through negotiations. If negotiations fail, the parties shall refer the dispute for mediation at the Singapore Mediation Centre in accordance with the Mediation Rules for the time being in force. For the avoidance of doubt, prior reference of the dispute to mediation under this clause shall not be a condition precedent for its reference to arbitration by either party nor shall it affect either party's rights to refer the dispute to arbitration under Clause 55 below.
>
> 55. In the event of any dispute between the parties in connection with or arising out of this Sub-Contract or the Sub-Contract Works, including any dispute as to the existence, validity or termination of this Sub-Contract, and such dispute is not resolved by the parties in accordance with Clause 54, the parties shall refer the dispute for arbitration by an arbitrator agreed upon by the parties within 14 days of either party giving written notice requiring arbitration to the other, …. The place of the arbitration shall be Singapore and the arbitration shall be governed by the Arbitration Act (Chapter 10) as may be amended from time to time.

6 [2024] 3 SLR 715.
7 [2024] 3 SLR 111.
8 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [5].
9 See s 10 of the International Arbitration Act 1994 (2020 Rev Ed).
10 *CZQ v CZS* [2024] 3 SLR 111 at [2].
11 [2024] 3 SLR 715.
12 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [4].

23.8 Maxx Engineering Works Pte Ltd ("Maxx") applied for an order to compel PQ Builders Pte Ltd ("PQ") to comply with the mediation agreement, when the latter submitted a dispute between them to arbitration. Applications for specific performance of a mediation agreement in a commercial contract have not been decided by any published judgment in the Singapore courts.[13] Therefore this decision is significant in the development of Singapore mediation law.[14]

23.9 Kwek Mean Luck J granted Maxx's application for an order of specific performance of the mediation agreement.[15] First, on a plain reading of the provisions, the court found that the parties were legally obliged to refer their disputes to mediation.[16] Next, the court examined the issue of enforcing the mediation agreement from the perspective of "whether Maxx should be granted an order for specific performance to compel PQ to perform its contractual obligation to refer the dispute to mediation".[17] When deciding the issue of whether specific performance should be awarded, Kwek J ruled that the court had to evaluate whether it was just and equitable to do so, considering the context of the specific dispute.[18] The following factors would be considered:[19]

> (a) if awarding damages is adequate when specific performance was not ordered;
>
> (b) if PQ may suffer substantial hardship due to specific performance;
>
> (c) if it would be futile to order specific performance;
>
> (d) if it would be impractical to order specific performance; and
>
> (e) if it would be just and equitable to order specific performance given the circumstances of this case.

13 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [3].

14 For context, courts have historically been reluctant to issue orders of specific performance to directly enforce mediation agreements, consequently resulting in a preference for indirect enforcement by issuing stays of proceedings – see Nadja Alexander, *International and Comparative Mediation* (Wolters Kluwer Law & Business, 2009) at p 203.

15 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [31].

16 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [15].

17 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [16]. Contrast this with the usual application by disputants to stay litigation or arbitration proceedings in favour of mediation: see, *eg, EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9.

18 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [17], citing *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [53].

19 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [17].

23.10 First, Kwek J found that an award of damages would have been an "inadequate and unsuitable substitute" for the parties' obligation to refer their disputes to mediation.[20] This is based on the principle that the "substitutability of a good or service is a relevant factor in the consideration of whether damages are adequate".[21] Second, the court found that there was no evidence that PQ would incur substantial hardship if it were compelled to comply with their obligations to proceed to mediation.[22] Third, the court found that there was no basis to believe that compelling the parties to proceed to mediation would lead to futility: There was no evidence to indicate that any of the parties were not amenable to mediation or unwilling to mediate.[23] Fourth, Kwek J found that an order for specific performance in this case would not be impractical. This was because the order could be framed to compel PQ to take precise and concrete actions to comply with the mediation procedure, such as:[24]

> (a) replying to the Singapore Mediation Centre's communications to confirm their agreement to begin the mediation process;
>
> (b) exchanging dates for mediation; and
>
> (c) drafting and submitting a case summary of the relevant dispute to the mediator.

23.11 The court needed only to be appraised factually of whether PQ performed these actions, and there was no need for excessive supervision. Finally, the court opined that in the context of this dispute, it would be just and equitable to order specific performance.[25] Kwek J thought that having the parties engage in the mediation process could mitigate against future legal costs or any other delay in dispute resolution.[26] Additionally, the court would be giving effect to party autonomy in commercial contracts when it compelled parties to comply with their contractually-agreed dispute resolution provisions.[27] Moreover, the court recognised a powerful policy and case management factor in promoting amicable dispute resolution by specifically enforcing mediation and ADR provisions. Such policy considerations may be drawn from O 5 r 3 of

20 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [20].
21 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [19], citing *Tay Ah Poon v Chionh Hai Guan* [1997] 1 SLR(R) 596 at [13].
22 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [21].
23 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [23].
24 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [25].
25 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [27]–[30].
26 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [27].
27 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [28].

the Rules of Court 2021, which empowers the court "to order parties to attempt to resolve the dispute by amicable resolution".[28]

23.12 Therefore, the court found just and equitable reasons to grant Maxx's application for an order of specific performance of the mediation agreement, compelling PQ to comply with its obligations to proceed to mediation before arbitration.

23.13 It is noteworthy that the General Division has, in this instance, taken a different approach to specifically enforcing mediation agreements, compared to a number of other common law jurisdictions[29] such as in Australia.[30] It remains to be seen if the Appellate Division of the High Court or the Court of Appeal would endorse this approach, if it had the benefit of considering further academic arguments and the law of other jurisdictions.[31] Of relevance is the fact that disputants may be exposed to punitive sanctions (flowing from contempt of court for not complying with a court order,[32] which would include specific performance orders) for not engaging with a dispute resolution procedure to which they have agreed.

B. ADR provisions as pre-condition to arbitration

23.14 In *CZQ v CZS*,[33] the respondents to an arbitration applied to the SICC to challenge[34] the arbitral tribunal's finding of jurisdiction over a dispute, on the ground that the contract contained an amicable dispute resolution provision that was a condition precedent to the commencement

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28 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [29] and [30].

29 See Nadja Alexander, Joel Lee & Kit-Wye Lum, *The Singapore Mediation Handbook* (LexisNexis, 2019) at paras 9.160–9.163; and Nadja Alexander *et al*, *The Hong Kong Mediation Manual* (3rd Ed, LexisNexis, 2022) at paras 10-129–10-131. See also Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Hart Publishing, 2017) at p 148, where it was observed:

> Although English law confirmed the enforceable nature of ADR clauses, it does not permit an order for specific performance to enforce the duties arising from them. Under English law an order for specific performance is an equitable remedy awarded in exceptional circumstances.

30 See the seminal cases of *State of New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503 at [29] and *Hooper Bailie Associated Ltd v NatconGroup Pty Ltd* (1992) NSWLR 194 at 210. See also the discussion on the current state of Australian case law in Laurence Boulle, *Mediation and Conciliation in Australia: Principles, Process, Practice* (LexisNexis, 2023) at pp 410–411.

31 Compare Nadja Alexander, Joel Lee & Kit-Wye Lum, *The Singapore Mediation Handbook* (LexisNexis, 2019) at paras 9.160–9.163.

32 See s 4(1) of the Administration of Justice (Protection) Act 2016 (2020 Rev Ed).

33 [2024] 3 SLR 111.

34 See s 10 of the International Arbitration Act 1994 (2020 Rev Ed).

of arbitration.[35] It is noteworthy that unlike in *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd*[36] (where the parties had applied directly to the court for specific performance of an obligation to proceed to mediation), this case involved an application for indirect enforcement of an ADR provision. Thus, the dispute was framed differently: The respondents sought an indirect enforcement of the ADR provisions, arguing that unless they were complied with, the claimants should not be able to bring the dispute to arbitration, as arbitral jurisdiction arguably only arises upon satisfaction of the ADR preconditions.

23.15 The relevant parts of the dispute resolution provision are reproduced as follows:[37]

> **CLAUSE 20 CLAIMS, DISPUTE AND ARBITRATION**
>
> **20.1 – Contractor's Claims**
>
> [*Various stipulations concerning the Contractor's Claims*]
>
> **20.2 – Appointment of Dispute Adjudication Board**
>
> [*FIDIC Conditions sub-cl 20.2 was deleted and replaced with the following*]
>
> All references to the Dispute Adjudication Board will not apply and all disputes will be dealt with under Sub-Clause 20.5.
>
> **20.5 – Amicable Settlement**
>
> [*FIDIC Conditions sub-cl 20.5 was deleted and replaced with the following*]
>
> (a) If any dispute arises out of or in connection with the Contract, or the execution of Works, including any dispute as to certification, determination, instruction, opinion or valuation of the Engineer, then either Party shall notify the other Party that a formal dispute exists. Representatives of the Parties shall, in good faith, meet within 7 days of the date of the notice to attempt to amicably resolve the dispute,
>
> (b) If the representatives of the Parties cannot resolve a dispute within 7 days from the first meeting, 1 or more senior officer(s) from each Party shall meet in person within 14 days from the first meeting of the representatives in an effort to resolve the dispute. If the senior officers of the Parties are unable to resolve the dispute within 7 days from their first meeting, then either Party shall notify the other Party that the dispute will be submitted to arbitration in accordance with Sub-Clause 20.6.

35 *CZQ v CZS* [2024] 3 SLR 111 at [2].
36 [2024] 3 SLR 715.
37 *CZQ v CZS* [2024] 3 SLR 111 at [10].

20.6 – Arbitration

[*FIDIC Conditions sub-cl 20.6 was amended to the following*]

Unless settled amicably, any dispute shall be finally settled by international arbitration.

Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the Singapore International Arbitration Centre,

(b) unless the parties otherwise agree, the dispute shall be settled by one arbitrator appointed in accordance with these Rules,

(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

(d) The seat of arbitration will be Singapore, and

(e) The arbitration will be confidential.

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

20.9 – Continuity

Despite the existence of a Dispute, the parties must continue to perform their obligations under the Contract.

20.10 – Injunctive or Urgent Relief

Nothing in Clause 20 prejudices either Party's right to institute proceedings to seek injunctive relief or urgent declaratory relief in a competent Brunei court in respect of a Dispute under Clause 20 or any other matter arising under the Contract.

[emphasis in original]

23.16 It should also be noted that the court explicitly recognised that both parties had shown an "admitted lack of enthusiasm" for negotiation or settlement during the course of the dispute,[38] and found it "ironic" that

38 *CZQ v CZS* [2024] 3 SLR 111 at [48(a)].

the respondents subsequently chose to rely on the indirect enforcement of the ADR provisions to challenge arbitral tribunal jurisdiction.[39]

23.17 Delivering the judgment of the SICC, Andre Maniam J dismissed the respondents' application.[40] The court first examined whether the ADR provisions set out in cl 20.5 could be construed as enforceable conditions precedent to the commencement of arbitration.[41] The court required that enforceable provisions be expressed with clear words and language.[42] Furthermore, upon analysing the judicial precedents, the court opined that the mechanism of condition precedent must be *explicitly* articulated.[43] Referring to *International Research Corp PLC v Lufthansa Systems Asia Pacific Ltd*,[44] the court noted that in that case the provisions that the disputants had agreed to were clearly a condition precedent to arbitration, based on the express wording,[45] as well as on the parties' concessions[46] made at trial.[47] Considering the English cases of *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*[48] and *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*,[49] Maniam J noted that the disputants had expressly agreed that they would "first" proceed to their agreed ADR mechanisms before proceeding to the agreed court or arbitral tribunal.[50] The SICC distinguished the parties' dispute resolution provisions from these precedents, because it "did not contain [specific] language like the clauses in *Emirates* or *Ohpen*".[51]

23.18 The court observed that the words "[u]nless settled amicably" in cl 20.6 should not affect the reading of the ADR provisions in cl 20.5. This is because cl 20.6 "contains no reference to [cl] 20.5 or the amicable settlement procedure in [cl] 20.5".[52] On a plain reading of the words "[u]nless settled amicably", the court opined that there may be many general ways for cl 20.6 to be triggered, and it does not require

39 *CZQ v CZS* [2024] 3 SLR 111 at [2].
40 *CZQ v CZS* [2024] 3 SLR 111 at [47].
41 *CZQ v CZS* [2024] 3 SLR 111 at [11].
42 *CZQ v CZS* [2024] 3 SLR 111 at [14] and [17].
43 *CZQ v CZS* [2024] 3 SLR 111 at [17].
44 [2013] 1 SLR 973 at [100], affirmed by the Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Ltd* [2014] 1 SLR 130 at [54].
45 *International Research Corp PLC v Lufthansa Systems Asia Pacific Ltd* [2014] 1 SLR 130 at [54]: The parties may only proceed to arbitration if it still had outstanding "disputes … which cannot be settled by mediation pursuant to Clause 37.2".
46 *International Research Corp PLC v Lufthansa Systems Asia Pacific Ltd* [2013] 1 SLR 973 at [100].
47 *CZQ v CZS* [2024] 3 SLR 111 at [16(b)] and [16(c)].
48 [2014] EWHC 2104.
49 [2019] EWHC 2246 (TCC).
50 *CZQ v CZS* [2024] 3 SLR 111 at [16(d)] and [16(e)].
51 *CZQ v CZS* [2024] 3 SLR 111 at [27].
52 *CZQ v CZS* [2024] 3 SLR 111 at [20].

the exhaustion of the specific procedure set out in cl 20.5.[53] Therefore, it would be an inappropriate stretch to read the words "[u]nless settled amicably" in cl 20.6 as implying a provision that "unless [cl] 20.5 has been complied with", the parties may not resort to arbitration under cl 20.6.[54]

23.19 Moreover, the court observed that the mechanism in cl 20.5 was not an exclusive ADR mechanism, because on its plain reading it may be possible for the disputants to pursue other methods of settlement.[55] The court noted for instance that "it would not be a breach of the Contract if, instead of initiating the [cl] 20.5 process, the Parties attempted another method of settlement, such a [*sic*] mediation, or direct negotiations that did not strictly follow the [cl 20.5] procedure".[56] Therefore, it "did not oblige the Parties to initiate the amicable settlement procedure if neither of them wished to do so".[57] Consequently, the SICC opined that the ADR provisions set out in cl 20.5 could not be indirectly enforced by the disputants as a condition precedent to the commencement of arbitration under cl 20.6.[58]

23.20 Ultimately, the enforceability of mediation and ADR provisions turns on the precise drafting and structuring of the clause. *CZQ v CZS,* and the other Singapore and English cases discussed by the court therein, make it clear that parties should keep that consideration in mind when drafting mediation and ADR provisions.

III. Recognition and enforcement of (mediated) settlement agreements

23.21 It is widely accepted that disputing parties usually comply with their obligations set out in negotiated settlements or mediated settlement agreements.[59] Yet there will be some situations where disputants may disagree over the terms of the settlement agreement they have concluded, leading to further litigation.

23.22 As indicated above, in this year's review, we consider two cases where the parties were in dispute over whether a settlement agreement

53 *CZQ v CZS* [2024] 3 SLR 111 at [22].
54 *CZQ v CZS* [2024] 3 SLR 111 at [25].
55 *CZQ v CZS* [2024] 3 SLR 111 at [30].
56 *CZQ v CZS* [2024] 3 SLR 111 at [30].
57 *CZQ v CZS* [2024] 3 SLR 111 at [33].
58 *CZQ v CZS* [2024] 3 SLR 111 at [47].
59 Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation Under the Singapore Convention – Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at para 5.

had been concluded,[60] and five cases where disputants sought to enforce the terms of their settlement agreement. The latter group of cases involved: (a) a case where the General Division was asked to set aside a consent order which recorded and enforced a settlement agreement concluded between parties over a Protection from Harassment Act[61] matter;[62] (b) a case where the General Division was asked to enforce a negotiated settlement agreement concluded between disputing shareholders of a company to transfer company assets;[63] (c) a case where the mediated settlement agreement concluded contained warranties which were subsequently breached by the parties;[64] (d) a case where one of the parties alleged that the concluded mediated settlement agreement was a sham;[65] and (e) a case where the General Division was asked to specifically enforce the terms of a mediated settlement agreement.[66]

23.23 In this section, judgments addressing settlement agreements resulting from mediation and those resulting from negotiation are examined together because the jurisprudence on negotiated settlement agreements is relevant to mediated settlement agreements.[67] This is the reason for the references to (mediated) settlement agreements throughout this chapter.

A. Conclusion of (mediated) settlement agreements

(1) Substance over form

23.24 In *Tsudakoma Corp v Global Trade Well Pte Ltd*,[68] the General Division was presented with the opportunity to revisit the widely-accepted notion that the substance of settlement agreements should be enforced over its form. In this case, the disputants were bound by a chain of contracts which contained an exclusive jurisdiction agreement favouring the courts of Japan.[69] However, the claimant, Tsudakoma Corp ("Tsudakoma"), decided to file a claim against the defendant, Global

60 *Tsudakoma Corp v Global Trade Well Pte Ltd* [2023] SGHC 26 and *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945.
61 Cap 256A, 2015 Rev Ed.
62 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079.
63 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276.
64 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114; *Tan Hong Joo v Full House Building Construction Pte Ltd* [2023] SGHC(A) 39.
65 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276.
66 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888.
67 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [28].
68 [2023] SGHC 26.
69 *Tsudakoma Corp v Global Trade Well Pte Ltd* [2023] SGHC 26 at [3].

Trade Well Pte Ltd ("GTW") in Singapore. In order to avoid the exclusive jurisdiction agreement, Tsudakoma argued that it had concluded a settlement agreement with GTW, which superseded the chain of contracts, therefore the exclusive jurisdiction agreement favouring Japan should not apply. The alleged settlement agreement was contained in a letter dated 29 September 2021, sent by GTW, which provided details of GTW's "total pending payment, payment terms, payment amount and due date, Tsudakoma's bank details, GTW's bank details and other conditions".[70] It did not contain a jurisdiction agreement. Furthermore, the letter was prefaced with the following words: "GLOBAL TRADE WELL PTE LTD hereby confirm and settle for the pending payment with interest on the terms and conditions hereinafter set forth ….".[71]

23.25 Choo Han Teck J opined that the letter was not a settlement agreement. The court ruled: "The mere fact that the word 'settle' appears in the letter does not make a document a settlement agreement."[72] Reading the letter in its appropriate context, Choo J judged that the letter "at best constitutes an acknowledgement of debt owed by GTW, and a variation to the terms of payment [which GTW was originally bound by]".[73] Because the letter was not in substance a settlement agreement which superseded the terms of the original chain of contracts, the exclusive jurisdiction agreement stood to be enforced. Therefore, the court granted a stay of Singapore court proceedings in favour of Japan.[74]

(2) Contract law principles underpinning conclusion of (mediated) settlement agreements

23.26 In *Chen Xiaoqi v Chen Fangqi*,[75] the General Division restated the applicable principles that determine if a (mediated) settlement agreement has in substance been concluded between the parties. In this case, the parties were in dispute over the sale and distribution of proceeds from some real estate.[76] Before the court could make a decision over the substance of the dispute, it had to address the contention that the parties had in fact concluded a settlement agreement before trial. Goh Yihan JC set out three applicable principles.[77]

70 *Tsudakoma Corp v Global Trade Well Pte Ltd* [2023] SGHC 26 at [5].
71 *Tsudakoma Corp v Global Trade Well Pte Ltd* [2023] SGHC 26 at [5].
72 *Tsudakoma Corp v Global Trade Well Pte Ltd* [2023] SGHC 26 at [12].
73 *Tsudakoma Corp v Global Trade Well Pte Ltd* [2023] SGHC 26 at [12].
74 *Tsudakoma Corp v Global Trade Well Pte Ltd* [2023] SGHC 26 at [18].
75 [2023] 5 SLR 945.
76 See *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [1] and [2].
77 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [13].

23.27 First, the general principles of contract law govern how these settlement agreements are concluded.[78] Second, the terms of the concluded settlement agreement need to be articulated in clear and certain terms.[79] Third, the context of how the parties arrived at the concluded settlement agreement will be considered by the courts (including examining the communications between the parties leading up to the compromise), when determining if a valid settlement agreement had been reached.[80]

23.28 With these principles in mind, Goh JC found that there was simply no agreement reached by the parties,[81] considering the parties' negotiated agreements are typically made holistically "as a package, rather than on a term-by-term basis".[82] Whilst the court accepted that the parties may have agreed on some of the terms for compromise, there were several other remaining points of disagreement[83] which were outstanding. Moreover, the court accepted that "the parties had been negotiating on the basis that they will record what terms had been agreed, so as to make clear the remaining points of disagreement".[84] The court also suggested that the following test in *The Rainbow Spring*[85] may be applicable: "Ultimately, the important question is whether the parties, by their words and conduct, have made it objectively clear that they intend to be bound despite the unsettled terms".[86] In the parties' communications with each other, it was clear that there remained some remaining points of disagreement.[87] This meant that the parties could not have arrived at an overall compromise, recorded in an enforceable settlement agreement. Since the court recognised that the parties had envisaged the conclusion of the settlement agreement as a "package" compromise, rather than on a term-by-term basis, Goh JC was unable to find that the parties had concluded an enforceable settlement agreement.

78 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [13], citing *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [46], *per* Andrew Phang Boon Leong JA.

79 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [14], citing *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at p 162 and *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 13.

80 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [15], citing *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [53], *per* Andrew Phang Boon Leong JA, and *The Ka Wah Bank Ltd v Nadinusa Sdn Bhd* [1998] 2 MLJ 350 at 366.

81 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [16].

82 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [17].

83 See *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [18]: The court considered the parties' communications, which expressly stated that "negotiations have dragged on for more than 5 months *without concrete progress being made*" [emphasis added].

84 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [17].

85 [2003] 3 SLR(R) 362 at [20].

86 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [19].

87 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [17].

23.29 Furthermore, the court found that the alleged settlement agreement would not have been enforceable as its terms were too uncertain.[88] Goh JC opined:[89]

> [I]t lacked a number of material terms. For example, the parties did not agree on how the defendants could buy over the claimants' interests in the Properties. This is a material term because it constitutes the fallback position in the event that the Properties are not sold on the open market.

B. Enforcing (mediated) settlement agreements

23.30 As indicated above, this subsection covers five cases. The General Division's decision of *Johan Daniel Blomberg v Khan Zhi Yan*[90] considered when contractual consent orders recording and enforcing settlement agreements concluded between disputing parties may be set aside. The decision of *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd*[91] provided an interesting illustration of when a settlement agreement may be void for mistake. In *Full House Building Construction Pte Ltd v Tan Hong Joo*,[92] the General Division enforced a settlement agreement by granting an injunction to restrain parties from reventilating old disputes which had already been resolved by that settlement agreement. Furthermore, the court granted damages for the defendants' breach of the warranty contained in the mediated settlement agreement. In *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd*,[93] the General Division dismissed allegations that a mediated settlement agreement was a sham and enforced the agreement. In *Ho Chee Kian v Ho Kwek Sin*,[94] the General Division declined to issue an order for specific performance to enforce the terms of a mediated settlement agreement.

(1) Setting aside of contractual consent orders

23.31 In *Johan Daniel Blomberg v Khan Zhi Yan*,[95] the parties had obtained an Order of Court by consent dated 10 May 2021 (the "Consent Order")[96] to resolve a dispute instituted under the Protection from Harassment Act[97] ("POHA"). For context, the Consent Order resolved

88 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [22].
89 *Chen Xiaoqi v Chen Fangqi* [2023] 5 SLR 945 at [22].
90 [2024] 3 SLR 1079.
91 [2023] SGHC 276.
92 [2023] SGHC 114; affirmed by the Appellate Division of the High Court in *Tan Hong Joo v Full House Building Construction Pte Ltd* [2023] SGHC(A) 39.
93 [2024] 4 SLR 276.
94 [2024] 3 SLR 888.
95 [2024] 3 SLR 1079.
96 See *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [3].
97 Cap 256A, 2015 Rev Ed.

a dispute concerning allegations by the appellant ("Mr Blomberg") that his ex-wife ("Ms Khan") had harassed him by making false statements and/or police reports against him, leading Mr Blomberg to seek a protection order against Ms Khan.[98] The dispute was settled privately[99] and the Consent Order was entered, the terms of which required Ms Khan not to file any statement or report regarding Mr Blomberg in any court or to any public authority without first obtaining leave from the court to do so. On 10 June 2022, Ms Khan applied to the District Court to set aside the Consent Order *ab initio* or in accordance with terms which the court believed were appropriate.[100] The application was granted on 3 October 2022. Mr Blomberg appealed the decision.

23.32 The General Division allowed the appeal.[101] The court first observed that the parties were bound by a contractual consent order: It was concluded after the parties – having received legal advice and assistance – voluntarily concluded a settlement agreement to resolve their dispute in relation to the POHA.[102] The cornerstone for contractual consent orders lies in whether the parties had engaged in some prior negotiations or clear written communications with each other,[103] supported by good contractual consideration.[104] See Kee Oon J observed that the courts may only set aside contractual consent orders *ab initio* under some limited circumstances.[105] Specifically, See J ruled as such:[106]

> 40 I find that a contractual consent order should only be set aside pursuant to ordinary principles of contract law, and accordingly only the existence of recognised vitiating factors in contract law can justify setting aside such contractual consent orders: [*Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252] at [27]; *Bakery Mart Pte Ltd v Ng Wei Teck Michael and others* [2005] 1 SLR(R) 28 ('*Bakery Mart*') at [11]; *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda* [2014] 2 SLR 693 at [22]; [*Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12] at [151] and [163]. The authorities also show that where a contractual consent order is set aside due to the existence of vitiating factors, it is set aside *ab initio* (*Turf Club Auto Emporium* at [151]).
>
> 41 I also find that the court does not retain a residual discretion to set aside substantive contractual consent orders in order to prevent injustice. In

98 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [3].
99 See *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [10] and [54].
100 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [4].
101 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [57].
102 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [54].
103 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [38], citing *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [30].
104 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [38], citing *Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252 at [19].
105 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [35], [40] and [41].
106 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [40]–[42].

this connection, I am bound by the Court of Appeal's decision in *Turf Club Auto Emporium* (at [159], [163] and [164]). In particular, the Court of Appeal stated in no uncertain terms at [159] that the court's residual discretion does not extend to not enforcing substantive contractual consent orders, and much less to setting aside such orders:

> While we agree … that the court has a residual discretion *not to enforce* contractual or consensual "unless" orders or other consensual procedural orders, as has been established in a line of authorities, such a discretion does not, in our judgment, extend to contractual consent orders that relate to the substantive issues in the case and the substantive rights of the parties, much less to *set aside* such orders. [emphasis in original]

The Court of Appeal further explained (*Turf Club Auto Emporium* at [163]) that there is 'no conceptual basis for extending such a discretion to a contractual consent order that encapsulates a settlement agreement covering the substantive causes of action between the parties, much less to *set aside* such orders' … This ruling was followed by the High Court in [*Sumber Indah Pte Ltd v Kamala Jewellers Pte Ltd* [2018] SGHC 70] at [49] and [74].

23.33 The General Division ruled that it was bound by the Court of Appeal decision in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[107] to hold that – barring the presence of contractual vitiating factors (such as common mistake)[108] – there is no residual discretion for the Singapore courts to set aside contractual consent orders.[109] There are four justifications for this:[110]

(a) the court must uphold the principle of finality when contractual consent orders are made;

(b) the court must give effect to party autonomy when a consent order has been issued in this context to enforce a settlement agreement which represents their compromise, rather than supervise the transaction;

(c) the court needs to enforce contractual consent orders consistently with contracts; and

(d) it would be fair to enforce what the parties had autonomously bargained for.

107 [2017] 2 SLR 12.

108 See *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276, discussed later in this chapter at para 23.35.

109 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [42].

110 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [42], citing *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [163].

23.34 Whilst the court acknowledged that specific statutory provisions (for instance, specific provisions in the POHA) may serve to displace this common law rule,[111] See J found "nothing in the POHA regime which displaces or is inconsistent with the above analysis concerning contractual consent orders", with respect to that particular dispute.[112] Since there were no vitiating factors demonstrated, the General Division ruled that it had no power to set aside the contractual Consent Order *ab initio*, and allowed Mr Blomberg's appeal against the District Court's decision.[113]

(2) Settlement agreement void for mistake

23.35 In *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd*,[114] a settlement agreement was declared void for common mistake by the General Division. The disputants in this case were disputing shareholders of a family business. Central to the issues in contention was the control and ownership of a piece of real estate, which was a private landed residence purchased with surplus money from the business in 1991.[115] When the property was purchased, it was registered in the names of Tan Yew Huat ("TYH") and Tan Joo See ("TJS") (who were the disputing shareholders).[116] TYH and TJS held the property on trust for the family business.[117]

23.36 The dispute arose from a shareholder meeting in January 2014.[118] After some negotiations through solicitors, it was allegedly settled in a letter that was dated 29 December 2014, which set out the following terms:[119]

> We have been instructed that our respective clients have reached a settlement of all corporate and family interest as follows which they propose encompassing in a Deed of Settlement:-
>
> **1. <u>Transfer of [the Property] to Tan Joo See</u>**
>
> Our client Tan Yew Huat will transfer his entire legal and beneficial interest in [the Property] to your client Miss Tan Joo See free from encumbrances. Your client will be released of any duties and obligations arising out of and in respect of any Trusts previously declared by your client in favour of the Company and/or SJH with respect to this property. Your client will bear all costs incurred in

111 See *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [47].
112 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [47].
113 *Johan Daniel Blomberg v Khan Zhi Yan* [2024] 3 SLR 1079 at [57].
114 [2023] SGHC 276.
115 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [6].
116 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [6].
117 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [6].
118 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [7].
119 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [8].

> effecting this transfer including all stamp fees/ [*sic*] buyer additional stamp fees *etc* arising out of or in respect of the said Transfer.
>
> …
>
> Please note that the above offer for settlement, shall not be binding upon our clients unless it is unconditionally accepted by your client without any qualification whatsoever. In this respect, we hope that all parties would allow good sense, logic and reason to prevail to allow for an amicable and lasting resolution of all outstanding issues[.]

23.37 However, the court ruled that the alleged settlement agreement above was void for common mistake.[120] Adeit Abdullah J found that the settlement agreement was founded on the mistaken premise that TYH had a "legal and beneficial interest" in the property; all the disputants were similarly mistaken when the alleged settlement agreement was concluded.[121] In fact, TYH did not have the beneficial interest of the property; rather, he held the legal title of the property on trust (and as a legal co-owner with TJS) for the business (which in turn held the said beneficial interest).[122]

23.38 Applying the test for common mistake,[123] Abdullah J found that the parties to the alleged settlement agreement all held the mistaken assumption that TYH held both the legal and beneficial interest of the property in dispute.[124] The court next found that none of the parties had provided any warranties for the mistaken state of affairs,[125] nor were they at fault for the fact that TYH did not hold the beneficial ownership of the property.[126] Because TYH did not hold the beneficial interest of the property, it would be impossible[127] for him to perform his obligations under the alleged settlement agreement, because "*nemo dat quod non habet* (that is, no one can give what they do not have)".[128] The parties' mistaken assumption that TYH held the beneficial interest of the property was vital to the conclusion and performance of the alleged settlement

120 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [39].
121 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [39].
122 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [40].
123 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [41], citing *Olivine Capital Pte Ltd v Chia Chin Yan* [2014] 2 SLR 1371 at [66], which in turn cited the English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 at [76].
124 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [42].
125 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [43].
126 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [44].
127 See *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [40].
128 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [45].

agreement.[129] As the test for common mistake was satisfied, the court ruled that the alleged settlement agreement was void.

23.39 This case highlights how careful drafting and framing of the terms and obligations in mediated and/or negotiated settlement agreements are crucial in ensuring the enforceability of the disputants' hard-fought compromise. The mistaken addition of two words (that is, "and beneficial") into the draft led to this otherwise enforceable[130] settlement agreement being declared void. Legal advisers and drafters of such settlements are well-advised to check that the obligations the parties are agreeing to can indeed be performed or executed, or if further refinement of the obligations, as drafted, is necessary.

(3) Settlement agreement premised on warranties made by disputants –Terms enforced by injunction

23.40 In *Full House Building Construction Pte Ltd v Tan Hong Joo*,[131] the General Division enforced a mediated settlement agreement by granting an injunction to restrain parties from reventilating old disputes which had already been resolved by that settlement agreement.[132] Furthermore, the court granted damages for the defendants' breach of the warranty contained in the mediated settlement agreement.[133]

23.41 The parties were disputing shareholders of a private limited company which conducted business in the construction industry. The parties' initial disputes were resolved after a mediation, and they concluded a mediated settlement agreement on 20 April 2018 setting out how the various shareholders would be bought out of their shareholding.[134] After the parties performed the obligations under the mediated settlement agreement, the shareholders who took over the company discovered that the company's trade receivables were substantially less than what was declared at the mediation.[135] This was in breach of the warranty made when the mediated settlement agreement was concluded (contained in cl 18 of the agreement):[136]

129 *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [45].
130 See *Tan Yew Huat v Sin Joo Huat Hardware Pte Ltd* [2023] SGHC 276 at [32]–[38].
131 [2023] SGHC 114; affirmed by the Appellate Division of the High Court in *Tan Hong Joo v Full House Building Construction Pte Ltd* [2023] SGHC(A) 39.
132 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [86].
133 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [56].
134 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [9].
135 See *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [31] and [32].
136 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [31].

> Each Party represents and warrants that it has full capacity, power and authority to enter into and perform this Settlement Agreement on its own behalf and/or on behalf of any party or parties that it represents, and all corporate acts required to enable each Party to lawfully enter into and perform this Settlement Agreement have been carried out. In this regard, the Current Directors warrant that as of 28 February 2018, the trade payables of Full House is not more than Singapore Dollars Two Million (SGD$2,000,000.00), *the trade receivables are not less than Singapore Dollars Three Million and Three Hundred Thousand (SGD$3,300,000.00)* million [*sic*], the cash in bank balances are not less than Singapore Dollars Three Million and Four Hundred Thousand (SGD$3,400,000.00), and there are no bank borrowings other than hire purchases and a mortgage. [emphasis added]

Therefore, the new shareholders filed a claim against the outgoing shareholders for the breach.

23.42 Considering the arguments of the defendant outgoing shareholders, Andrew Ang SJ found that there was no good or reasonable excuse for them to over-declare the company's trade receivables at the time when the initial dispute was settled.[137] Consequently, the court found that the outgoing shareholders were liable to the company for the difference of $465,207.57: On a reasonable and objective assessment, the company's actual receivables totalled $2,834,792.43, which was substantially less than the $3,300,000 that the outgoing shareholders had warranted.[138]

23.43 The court also found that, when the new shareholders took over the company, they weaponised the winding-up procedure of a related company to dig into the past transactions of both companies from before the mediated settlement agreement was concluded.[139] It was clear to the court that they exploited the winding-up procedure to "[apply] pressure on the liquidators to look into what [they] felt to be 'questionable' transactions" which occurred before the initial resolution of the dispute in 2018.[140] This was in breach of cl 10 of the mediated settlement agreement, which provided:[141]

> No issue or objection shall be taken with the running and management of Full House and Prime Maintenance Pte Ltd (now in liquidation) (UEN No. 201324630C) ('Prime Maintenance') or its affairs prior to the date of signing of the Agreement …

137 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [47] and [48].
138 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [54].
139 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [83].
140 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [84].
141 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [24].

23.44 Consequently, the outgoing shareholders were successful in obtaining an injunction to enforce cl 10 of the mediated settlement agreement, restraining the new shareholders from making any allegations or requests for investigations regarding the dealings of the companies prior to the mediation.[142]

23.45 This case illustrates how it is important for parties to be upfront, realistic and reasonable when disclosing their respective positions to the other parties at mediation. If the information disclosed is relied upon or becomes an essential part of the parties' compromise and becomes integrated into the settlement agreement as a warranty, there is a risk that the party providing such a warranty may fall liable to pay substantial damages, if such warranties are ultimately breached when the obligations under the settlement agreement are performed.

(4) Sham mediated settlement agreements

23.46 In *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd*,[143] the General Division, when tasked with enforcing a mediated settlement agreement, dismissed allegations that the settlement agreement was a sham. In this case, the parties were locked in a business dispute, where substantial sums of money were left outstanding, owed by MTN Consultants & Building Management Pte Ltd ("MTN") to Cradle Wealth Solutions Pte Ltd ("Cradle Wealth").[144] Cradle Wealth filed two claims in court against MTN in 2019 ("Suit 612" and "Suit 940") (though Suit 612 was withdrawn).[145] In respect of Suit 940, the parties agreed to mediate the dispute.[146] On 28 February 2020, after nearly a full day of mediation, the disputing parties finally broke ground in the late afternoon when they met for a private discussion at the Supreme Court Café without their lawyers and the mediator present.[147] Subsequently, the parties signed and entered into a written settlement agreement, in the presence of their respective lawyers. The essential terms of the agreement are as follows:[148]

142 *Full House Building Construction Pte Ltd v Tan Hong Joo* [2023] SGHC 114 at [90].
143 [2024] 4 SLR 276.
144 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [4]–[6].
145 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [5] and [6].
146 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [8].
147 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [8].
148 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [11].

> 1. In full and final settlement of Suit 940, the Parties agree as follows:-
>
> (1) [MTN] and [Nazarisham] shall, jointly and severally, pay the sum of US$4,000,000 (the '**Settlement Sum**') to [Cradle Wealth] by 29 June 2020, with time being of the essence.
>
> (2) [MTN] and [Nazarisham] shall pay the Settlement Sum by way of cheque to **Rajah & Tann Singapore LLP** as solicitors for [Cradle Wealth].
>
> (3) In the event of any default on the part of [MTN] and [Nazarisham] in complying with the obligations under this Agreement, [Cradle Wealth] shall be at liberty to commence fresh proceedings in the High Court of the Republic of Singapore and to obtain judgment for the Settlement Sum on a default/summary basis against [MTN] and [Nazarisham] jointly and severally … [Cradle Wealth] shall not commence fresh proceedings against [Razeez] and [Ishak] in relation to the subject matter of Suit 940 and the Settlement Sum herein.
>
> (4) Within three (3) working days from the date of this Agreement, [Cradle Wealth] shall discontinue Suit 940 against each of the Defendants. The Parties further agree that there shall be no orders as to costs.
>
> (5) This Agreement is entered into by the Parties without admission of any liability by any Party whatsoever.
>
> …
>
> 5. This Agreement contains the entire agreement between the Parties with regard to the matters set forth herein. No representations, inducements, promises or agreements, oral or otherwise that are not embodied herein shall be of any force or effect.
>
> [emphasis in original]

23.47 Cradle Wealth filed a notice of discontinuance on 2 March 2020. However, as MTN did not comply with its obligations to pay US$4m on 29 June 2020, Cradle Wealth filed a claim in the General Division to enforce the settlement agreement in August 2020. Lee Seiu Kin J neatly summarised the crux of the dispute over the settlement agreement:[149]

> [Cradle Wealth's] case is a straightforward enforcement of the settlement agreement. [MTN's] primary case is that the settlement agreement in writing was a sham. [MTN] also ran the alternative case that, notwithstanding the presence of an entire agreement clause in the settlement agreement, the parties had orally agreed *not* to enforce the settlement agreement until the successful

149 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [1].

> 'monetisation' of [some raw materials called] alexandrite gemstones which [MTN] had in [their] possession. [emphasis in original]

23.48 The court first considered whether the mediated settlement agreement created was a sham. Lee J set out what MTN had to prove in law:[150]

> 30 … Put another way, the essential element of a sham is that the parties did not intend to create the legal relations that the acts done or documents executed give the impression of creating ([*Toh Eng Tiah v Jiang Angelina* [2021] 1 SLR 1176] at [74]).
>
> 31 In *Toh Eng Tiah*, the Court of Appeal further affirmed (at [75]) the principle as summarised by GP Selvam JC (as he then was) in *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 at [48] as follows:
>
> > To ascertain whether documents represent the true relationship between parties the following test as laid down by Lindley LJ in the *Yorkshire Wagon Company* case … and Diplock LJ in the *Snook* case … may be formulated: Whether the documents *were intended to create legal relationships* and whether the parties did actually act according to the apparent purpose and tenor of the documents. [emphasis in original]
>
> 32 Following from the above, the crux of the sham concept is that there must be a common intention to mislead (*Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 ('*Chng Bee Kheng*') at [52]). This question turns on the subjective intentions of the parties to the sham (*Chng Bee Kheng* at [54]). In the absence of a common intention to mislead, the court will simply construe an agreement according to the objective intention of the parties (*Chng Bee Kheng* at [52], citing *Yorkshire Railway Wagon Company v Maclure* (1882) 21 Ch D 309 at 318).

23.49 The crux of MTN's case was that there was a collateral oral agreement – involving the monetisation of certain raw materials called alexandrite gemstones so that they could turn their business partnership around for profit – which formed the true basis of the parties' agreement.[151] The written mediated settlement agreement was produced to "stave off" Cradle Wealth's creditors, who were in turn trying to recover a substantial amount of money from MTN;[152] had these creditors succeeded, their collateral objective of monetising the alexandrite gemstones for profit

150 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [30]–[32].

151 See *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [34]–[36].

152 See *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [41].

would be completely stifled. Therefore, MTN alleged that the written mediated settlement agreement was produced by Cradle Wealth to show its creditors that it "was taking steps to recover millions of dollars from MTN".[153]

23.50 Lee J dismissed MTN's allegations of a sham, because they were ultimately "unable to produce *any* contemporaneous (even informal) record in writing showing the terms of the purported Actual Agreement".[154] The court thought that it was jarring for MTN to not have any written account or record of the actual collateral oral agreement, because:[155]

> If indeed the parties ever agreed that Cradle Wealth would not be paid unless the Alexandrite Gemstones were monetised, it is reasonable to expect *some* form of contemporaneous record referring to the Actual Agreement as such, especially if it was intended to contradict or vary the written terms of the Settlement Agreement. [emphasis in original]

Furthermore, neither MTN nor its lawyers sought the removal of the entire agreement clause contained in cl 5 of the mediated settlement agreement, which could have been done without compromising the alleged purpose of staving off Cradle Wealth's creditors.[156] Additionally, the court considered the totality of the evidence, including parties' text communications and subsequent conduct,[157] and concluded that MTN and the other defendants had not discharged the burden of proving that the mediated settlement agreement was a sham.[158] The court stated:[159]

> … whilst the evidence shows that the topic of [the] Alexandrite Gemstones was at the very least mentioned by the parties during the day of the mediation, and that the parties anticipated working together to achieve a 'comeback' for their respective businesses, such an expectation *never* extended to *agreeing* that the Alexandrite Gemstones must be successfully monetised before Cradle Wealth would become entitled to be paid the sum of US$4,000,000 … [emphasis in original]

153 See *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [41].
154 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [39].
155 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [39].
156 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [39].
157 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [45]–[69].
158 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [70] and [71].
159 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [70].

23.51 Next, the court opined that even if there were a collateral oral agreement to modify the payment timelines (that is, payment after the monetisation of the alexandrite gemstones), the entire agreement clause contained in cl 5 of the mediated settlement agreement would have "deprived any pre-contractual or collateral agreement of legal effect".[160] Lee J noted that MTN ought to have taken the advice of their solicitors, who had labelled the mediated settlement agreement as a "one sided agreement"[161] and advised them not to sign it. However, MTN's sole director and shareholder admitted under cross-examination that he had read and understood cl 5 before signing the mediated settlement agreement,[162] thus effectively accepting the risk of the terms of the settlement agreement anyway.

23.52 This case illustrates how the courts will test allegations of sham (mediated) settlement agreements. Drawing from this case, it appears that courts will examine all communications between the parties, including communications with their solicitors and legal advisers where appropriate and necessary, to discover the true common intentions behind the parties when they signed off on a settlement agreement. This approach is consistent with contract law principles and further underscores the importance for disputing parties to set out their obligations in as much detail as possible when they conclude a (mediated) settlement agreement, including any preconditions to be satisfied before exchanges or payments fall due. Interestingly, this case also illustrates the risks of parties signing off on a (mediated) settlement agreement *against* legal advice. Having understood their client's desired objectives (that is, to create some sort of collateral agreement in spite of pending disputes which need resolution first), MTN's solicitors were clearly concerned by some provisions and expressed strong reservations about the written settlement agreement, which the clients ultimately signed against legal advice. Whilst complex and multi-layered outcomes or objectives *may* be designed for the parties through settlement agreements, disputants ought to be cognisant of the risks associated with imprecisely drafted settlement agreements, as well as the potential legal effects of routine clauses such as entire agreement clauses.

160 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [83].

161 See *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [80].

162 See *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2024] 4 SLR 276 at [81].

(5) Specific performance of mediated settlement agreement terms

23.53 In *Ho Chee Kian v Ho Kwek Sin*,[163] the General Division declined to issue an order for specific performance to enforce the terms of a mediated settlement agreement and ordered damages to be paid instead. In this dispute, the parties were uncle ("HKS") and nephew ("HCK"), who were originally in dispute over the administration of a deceased relative's property. After proceeding to mediation, the parties resolved their disputes by agreeing to donate[164] the proceeds of sale of the property in the following manner:[165]

> 2. The Parties agree to make donations to charity as follows:
>
> (a) Upon the receipt of their respective shares of the inheritance, Mr HCK and his sibling Mr Ho Chee Sin shall within 14 days inform Mr HKS in writing on the name of the charity and percentage share in actual amount of their inheritance they wish to donate.
>
> (b) Upon the receipt of the above written confirmation by Mr HCK and Mr Ho Chee Sin of amount of their donation and the charity name and that they having donated the aforesaid amount to the said charity, Mr HKS shall within 14 days from the date thereof, confirm in writing, his donation to a charity matching the same percentage and actual amount of the inheritance donated by Mr HCK and Mr Ho Chee Sin.
>
> (c) Upon the receipt of the above written confirmation, Parties shall exchange documentary evidence on their respective donations within the next 28 days.
>
> (d) Each Party is at liberty to donate to a charity of their choice provided the charity is registered as an IPC (Institution of a Public Character) and each Party shall provide proof of the donation by way of receipt from the said charity.

23.54 HCK performed his obligations in accordance with the mediated settlement agreement and donated $154,019.17 (the full amount he received from the estate of the deceased relative) to the Sian Chay Medical Institution (which is a registered Institution of Public Character).[166] However, HKS did not comply with his obligations as he did not provide a matching donation to a charity. Therefore, HCK instituted proceedings in the General Division to enforce the terms of the mediated settlement agreement.

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163 [2024] 3 SLR 888.
164 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [7].
165 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [20].
166 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [9].

23.55 Goh Yihan JC granted summary judgment in favour of HCK.[167] However, rather than grant an order of specific performance to enforce HKS's obligation to make a donation to charity, the court entered summary judgment for damages arising from that breach (which was left to be assessed by the Registrar).[168] Noting that "it is trite law that when damages are available, then a court should be slow to order specific performance (see the High Court decision of *Lee Chee Wei v Tan Hor Peow Victor and others* [2006] SGHC 116 (at [9]))",[169] the court opined that it:[170]

> … will only exercise its discretion to grant specific performance if it is just and equitable to do so, by considering factors such as: (a) whether damages would be an adequate remedy; and (b) whether the person against whom the relief of specific performance is being sought would suffer substantial hardship (see *Lee Chee Wei (CA)* (at [53])).

Because HCK had not "sufficiently explained why [the court] should exercise [its] discretion to grant specific performance of the Settlement Agreement, wherein damages can be an adequate remedy",[171] the court declined to order specific performance.

23.56 It is respectfully suggested that, had the court's attention been drawn to the House of Lords judgment of *Beswick v Beswick*[172] ("*Beswick*") – specifically, the principle that specific performance may be granted where the remedies available for a breach of terms in settlement agreements lead to nominal damages and therefore cause the party in breach to enjoy some unjust gains – the court might have granted specific performance in this claim.

23.57 First, mediated settlement agreements may encapsulate obligations that are beyond simple payments of money or transfers of tangible property. Such obligations are difficult to enforce through an award of substantial damages, as they are oftentimes difficult to quantify.[173] While Shouyu Chong and Felix Steffek had observed in 2019

167 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [61]. As this is a chapter on mediation and appropriate dispute resolution, the authors will not detail the court's reasoning behind the grant of summary judgment in this case.
168 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [61].
169 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [62].
170 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [62].
171 *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [63].
172 [1968] AC 58.
173 Consider an example where the disputing parties have agreed in a settlement agreement that one of them should publish some predetermined words in a newspaper, to the effect of a public apology for some of their actions: These obligations are incredibly difficult to quantify if they are breached.

that common law courts are hesitant to order specific performance of obligations in mediated settlement agreements,[174] the attitude of courts in various jurisdictions has changed over the last five years in this respect.[175] This change in attitude was based on an extension of the principle drawn from *Beswick*, that specific performance may be granted in cases where the remedies available for a breach of terms in settlement agreements lead to nominal damages and therefore cause the party in breach to enjoy some unjust gains.[176] For instance, when enforcing settlement agreements through specific performance, some courts in the UK have reformulated the test for granting specific performance as: "Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy."[177]

23.58 Second, *Beswick* may also be more directly applied in this case. As explained in a detailed commentary by the author of *Treitel on the Law of Contract*:[178]

> In *Beswick v Beswick* A promised B to pay an annuity to C in consideration of B's transferring the goodwill of his business to A. It was held that, although the promise did not give C any right of action, it could be specifically enforced by B's personal representative against A; with the result that A was ordered to make the promised payments to C. … In holding that [the specific performance] remedy was available to B, the House of Lords … stressed three points: that B's remedy at law was inadequate as the damages which he could recover would be purely nominal; that A had received the entire consideration for his promise as the business had been transferred to him; and that the contract could have been specifically enforced by A, if B had failed to perform his promise to transfer the business. … It does not, however, follow from *Beswick v Beswick* that specific performance in favour of a third party will be granted to the promise *only* if the circumstances are such that the remedy would have been available in a two-party case. Thus, it seems that specific performance could be ordered of a promise to pay a single lump sum to a third party [citing *Gurtner v Circuit* [1968] 2 QB 587], though in a two-party case such an obligation would more appropriately be enforceable by a common law action for the agreed sum. Again, it seems that specific performance in favour of a third party would not

174 Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation Under the Singapore Convention – Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at para 7.

175 See, for instance, *Prathitha Hewavisenti v Kosala Wickramsinghe* [2021] EWHC 2045 (Ch) and *Tomlinson v Tomlinson* [2023] EWHC 2083 (Ch).

176 See Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 15th Ed, 2020) at para 21-024.

177 *Prathitha Hewavisenti v Kosala Wickramsinghe* [2021] EWHC 2045 (Ch) at [88], quoting directly from *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64 at 73 (*per* Lawrence Collins QC DHCJ).

178 Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 15th Ed, 2020) at para 21-057.

be excluded merely because substantial damages, constituting an 'adequate' remedy, were available to the promise.

23.59 The compromise made between HCK and HKS at mediation had created such enforceable obligations, which fit analogously within the framework of *Beswick*. It is therefore suggested that, had *Beswick* been considered, the outcome in *Ho Chee Kian v Ho Kwek Sin* may have been different.

IV. Mediation, ADR practice and ethics

23.60 In this section, we examine two cases. First, we review a case heard by the Court of Three Judges, where a solicitor was accused of breaching the Legal Profession (Professional Conduct) Rules 2015 ("PCR 2015") for not sufficiently advising his client on pursuing ADR mechanisms to resolve disputes. Second, we outline a case from the Disciplinary Tribunal ("DT"), where two solicitors were referred to the Court of Three Judges for disciplinary action, for not discontinuing an appeal which dealt with issues that had been resolved through a settlement agreement.

A. ADR practice: a solicitor's duty to direct clients to consider ADR

(1) Duty under PCR 2015 to evaluate the use of ADR processes

23.61 In *Law Society of Singapore v Hanam, Andrew John*,[179] the Court of Three Judges affirmed the DT's finding that the solicitor in question had breached r 17(2)(*e*)(ii) of the PCR 2015 by failing to advise his client on his ADR options. Pertinent to this chapter's coverage of settlement agreements, there were also allegations concerning the solicitor's failure to advise on the offers to settle received from the opposing party, as well as the solicitor issuing an offer to settle without the client's instructions. For these and other instances of misconduct, the court found the solicitor to be in breach of rr 17(2)(*e*)(ii) and 17(2)(*f*) of the PCR 2015, which breaches were found to amount to improper conduct as an advocate and solicitor within the meaning of s 83(2)(*b*) of the Legal Profession Act 1966[180] ("LPA"). The court suspended the solicitor for nine months.

179 [2023] 4 SLR 1280.
180 2020 Rev Ed.

23.62 As detailed in last year's chapter when discussing the DT's decision,[181] the solicitor had represented his client in proceedings concerning unpaid invoices due under two subcontracts for the construction of the Marina Bay Mass Rapid Transit Station. The complainant was the director of P&P Engineering & Construction Pte Ltd ("P&P"), which had contracts with Kori Construction (S) Pte Ltd ("Kori") for the provision of manpower and steel fabrication works. Kori had failed to pay P&P close to $1.5m that was due under the subcontracts, and the complainant engaged the respondent lawyer to pursue the matter.

23.63 On 25 November 2016, P&P filed HC/S 1255/2016 ("Suit 1255") in the High Court for payment of money due under both subcontracts. However, the suit only covered invoices that had fallen due on or before November 2016. Further invoices only due in December 2016 were not included in the suit. Parties subsequently settled the claim under the manpower subcontract on 17 October 2017, with Kori agreeing to pay an agreed sum to P&P (the "Settlement Sum"). However, Kori then took the position that the Settlement Sum would become payable only upon the conclusion of Suit 1255, which was continuing so that the claims under the steel fabrication subcontract could be decided.

23.64 In the meantime, on 11 December 2017, P&P filed another suit, HC/S 1167/2017 ("Suit 1167"), in the High Court against Kori for the sums under the invoices that had become due in December 2016. On 22 May 2018, P&P issued an offer to settle ("OTS"), under which Kori would pay the sum of $350,000 in full and final settlement, plus interest and costs, within 14 days of acceptance.

23.65 On 9 April 2018, P&P filed DC/OC 1043/2018 ("DC Suit 1043") against Kori for payment of the Settlement Sum. On 27 July 2018, Kori issued an offer to settle DC Suit 1043, but P&P did not respond.

23.66 On 31 December 2018, the High Court in Suit 1255 found in favour of P&P overall, and again on 21 January 2019 in respect of Suit 1167. This left just DC Suit 1043 ongoing.

23.67 By the end of January 2019, Kori had paid the Settlement Sum, so the only outstanding issue in DC Suit 1043 was interest of $9,588.19 and costs. On 30 January 2019, Kori issued a second offer to settle in DC Suit 1043, offering to pay half of the interest amount claimed and proposing that parties bear their own costs. P&P did not accept and proceeded to trial in order to claim the full interest amount. Ultimately,

181 Nadja Alexander & Shouyu Chong, "Mediation and Appropriate Dispute Resolution" (2022) 23 SAL Ann Rev 670 at 694–699.

the District Court on 16 August 2019 dismissed DC Suit 1043 and awarded costs of around $20,000 to Kori, including indemnity costs for costs incurred after Kori's second offer to settle had been issued. P&P discharged the respondent lawyer in the same month.

23.68 The relevant PCR 2015 rules are set out below:

> (2) A legal practitioner —
>
> …
>
> (*e*) must, in an appropriate case, together with his or her client —
>
> (i) evaluate whether any consequence of a matter involving the client justifies the expense of, or the risk involved in, pursuing the matter; and
>
> (ii) evaluate the use of alternative dispute resolution processes; and
>
> (*f*) must advise his or her client on the relevant legal issues in a matter, to enable the client to make an informed decision about how to act in the matter.

23.69 On 27 May 2022, the DT found some of the Law Society of Singapore's ("Law Society") charges against the solicitor to be proven on 14 counts, and determined that cause of sufficient gravity for disciplinary action existed under s 83 of the LPA. The Law Society subsequently applied to the Court of Three Judges for sanctions against the solicitor.

23.70 The court set aside six of the 14 counts. The court then re-organised the remaining eight counts into the following categories: (a) acting without the client's authority; (b) failure to discuss the use of ADR options; (c) failure to render legal advice; and (d) failure to provide proper legal advice. This chapter will only cover those counts relevant to mediation and ADR.

23.71 The court identified two instances of the solicitor's failure to advise his client of his ADR options: (a) failure to advise the client of the adjudication regime under the Building and Construction Industry Security of Payment Act,[182] also known as "SOPA Adjudication" (this adjudication scheme was deliberately designed to provide a quicker and lower-cost resolution of payment disputes in the construction industry); and (b) failure to advise the client on his ADR options in Suit 1167.

182 Cap 30B, 2006 Rev Ed.

23.72 In relation to the solicitor's failure to advise the client of the option of SOPA Adjudication, the solicitor claimed that he had raised the option but that the complainant had rejected it because he prioritised speed and wanted to "proceed first".[183] The court described this claim as illogical and one that "beggar[s] belief",[184] given that the SOPA Adjudication would have been speedier and cheaper than court litigation, and that commencing SOPA Adjudication as the claimant would also have meant that the client was proceeding first.

23.73 Aside from referring to r 17(2)(*e*)(ii) of the PCR 2015, the court also referred to the Supreme Court Practice Directions 2013 and pointed out that it was a lawyer's "professional *duty*"[185] [emphasis in original] to advise clients about the appropriate forms of ADR. The court also exhorted lawyers to consider ADR "at the earliest stage possible 'especially where ADR may save costs, achieve a quicker resolution and a surer way of meeting their client's needs'".[186] The court accordingly noted that, in the context of the client's known financial predicament and the features of SOPA Adjudication, it was incumbent upon the solicitor to discuss the use of this ADR option.[187]

23.74 As to the solicitor's failure to advise the client of his ADR options in Suit 1167, the solicitor argued that Suit 1167 was not an "appropriate" case to evaluate the use of ADR processes, as he had previously advised the client of his ADR options in the earlier Suit 1255. As an alternative, he argued that he had advised the client on his ADR options.

23.75 The court rejected the primary argument, saying that r 17(2)(*e*)(ii) of the PCR 2015 requires lawyers in an "appropriate" case to evaluate the use of ADR options together with the client. Previously advising on ADR in respect of a different lawsuit did not excuse the solicitor because the duty "is to provide a *case-specific* evaluation of ADR options" [emphasis in original].[188] The circumstances of Suit 1167 were different from those of the earlier Suit 1255 – notably, it was for payment of a compromised sum – so it was necessary to do a fresh evaluation of the ADR options.[189]

23.76 The court also made a point of addressing the solicitor's argument, which he repeated multiple times in respect of multiple allegations, that he was excused from his duty to advise the client in situations where

183 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [94].
184 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [97].
185 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [98].
186 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [98].
187 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [94]–[100].
188 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [103].
189 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [103].

the client should or would have already known about certain options (including his ADR options). The court categorically rejected the argument, stating:[190]

> It is clear that rr 17(2)(*e*) and 17(2)(*f*) involve a process of evaluation which requires [the solicitor] to condescend to specifics, and to conduct a 'full and frank discussion with the client for the purpose of determining what course(s) of action should be taken' … This entails a *case-specific analysis* of the potential benefits and adverse consequences on the course(s) of actions to be taken, including the possible costs exposure where applications and/or suits succeed or go in the opposite direction. [The client's] purported knowledge or general familiarity with certain matters is therefore no answer to Mr Hanam's breaches of the PCR … [emphasis in original]

23.77 The court further noted that the solicitor had not even forwarded the standard form letter from the Singapore Mediation Centre urging litigation parties to consider mediation.[191] Additionally, there was no uncorroborated evidence that the solicitor had advised on SOPA Adjudication or other ADR options in Suit 1167, thus leading the court to disbelieve the alternative argument that the solicitor had in fact advised the client of his ADR options.[192]

23.78 Turning to the solicitor's failure to render advice to the client, the court affirmed the DT's finding that the solicitor did not advise the client of Kori's 27 July 2018 OTS made in DC Suit 1043 and had therefore breached rr 17(2)(*e*)(i) and 17(2)(*f*) of the PCR 2015. The solicitor claimed that he had done so; however, there were no contemporaneous records or attendance notes to back his claim, and the OTS had not even been forwarded to the client. The court also rejected the solicitor's alternative argument, that the client would likely have rejected the offer anyway, noting that what mattered was whether the solicitor provided advice and evaluation on the OTS, and it mattered not what the client would have done.[193]

23.79 As mentioned above at para 23.70, the court set aside six of the counts of misconduct, including the following two which concerned mediation and ADR: (a) the solicitor's alleged issuance of an OTS in Suit 1167 without the consent of the client; and (b) the solicitor's alleged failure to advise on the second OTS from Kori in DC Suit 1043 dated 29 January 2019.

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190 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [88].
191 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [103].
192 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [103], and the reference therein to [87].
193 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [107] and [108].

23.80 The DT found that the solicitor had not obtained the client's consent when he issued an OTS in Suit 1167 on 22 May 2018. Arguing against the DT's finding before the court, the solicitor pointed out that the complainant had admitted under cross-examination and re-examination that he could not remember whether the solicitor had issued the OTS without his consent. Further, the complainant did not question him about the OTS after receiving a copy.[194]

23.81 The court agreed with the solicitor. Additionally, the court rejected the Law Society's argument that this OTS differed from a previous OTS where the client had signed a document authorising the solicitor to make an offer, and the absence of such a signed document here pointed to the solicitor making the offer without authorisation. The court considered that the absence of a signed document here could not overcome the client's equivocal position on the witness stand, and further:[195]

> For the Law Society to rely on the absence of signed instructions to issue this OTS, it must show that the [earlier] signed document … was not an isolated instance, and that it was part of a pattern of behaviour between Mr Hanam and [the client] when it came to making offers to settle. Only then can it be said that the absence of a similar document is of significance.

23.82 The other count of misconduct relevant to this chapter that was set aside concerned the solicitor's alleged failure to advise on the second OTS from Kori in DC Suit 1043 dated 29 January 2019. As mentioned above at para 23.67, by January 2019, Kori had already paid the Settlement Sum, which also constituted the subject of DC Suit 1043, so the only outstanding issue was interest of $9,588.19 and costs. The OTS in question proposed that Kori would pay half the interest and parties would pay their own costs.[196]

23.83 The solicitor had informed the client of this OTS, and in the same letter had also: (a) informed the client of the court's remark in DC Suit 1043 that the issue of when the Settlement Sum should be paid could go either way; (b) set out the options available; and (c) recommended that the client make a counter-offer seeking the full sum of interest,[197] as he believed that Kori would accept this in order to achieve its greater objective, which was for parties to pay their own costs.[198] However, the DT did not consider this sufficient as the advice did not also balance the

194 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [67]–[71].
195 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [72].
196 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [74].
197 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [74].
198 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [76].

benefits of accepting the OTS against the potential costs consequences of proceeding to trial.[199]

23.84 The court disagreed with the DT. It pointed out that the solicitor's advice was for the client to make a counter-offer and did not recommend proceeding to trial. With that context in mind, the court therefore did not fault the solicitor for not balancing the benefits of accepting the OTS against the possible costs consequences of proceeding to trial.[200]

23.85 This case highlights the importance of taking seriously the solicitor's obligation to advise on mediation and ADR options. The courts require solicitors to present the full range of ADR options relevant to the client, especially where the clients have financial constraints and ADR could potentially save them significant costs. Solicitors should also not rely on a client's knowledge (or presumed knowledge) regarding their general ADR options, and should provide case-specific advice to their clients. Additionally, it is incumbent upon solicitors to maintain written records and attendance notes regarding their communications with clients.

B. ADR practice: solicitor's obligations to notify court if settlement agreement was concluded

(1) Duty to inform courts of settlement and to discontinue proceedings after settlement

23.86 In *The Law Society of Singapore v Seah Zhen Wei Paul*,[201] two lawyers were referred to a DT by the Registrar of the Supreme Court on 19 March 2021. This reference was a continuation of the Court of Appeal's admonition in *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd*[202] of the lawyers' conduct of the appeal proceedings. The facts were reported in the Mediation and Appropriate Dispute Resolution chapter of the 2021 SAL Ann Rev.[203]

23.87 Here, both lawyers were found to have: (a) knowingly misled the Court of Appeal by withholding information or not informing the court that the appeal it was hearing had already been settled more than a year

199 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [75].
200 *Law Society of Singapore v Hanam, Andrew John* [2023] 4 SLR 1280 at [76].
201 [2023] SGDT 15.
202 [2021] 1 SLR 1135.
203 Nadja Alexander & Shouyu Chong, "Mediation and Appropriate Dispute Resolution" (2021) 22 SAL Ann Rev 665 at 689–693.

prior;[204] and (b) caused a wastage of court time and resources (and more onerously, the time and resources required to convene a five-judge panel of the Court of Appeal).[205] It was not difficult for the DT to find that the lawyers had knowingly misled the court. The "smoking gun" was found in the settlement agreement itself, which was worded cleverly to allow parties to explain its existence to the court "[o]nly if necessary".[206] The inclusion of that term indicated that the lawyers, who knew there was a risk that the Court of Appeal would not hear the appeal upon being informed that there had been a settlement agreement, "had the requisite knowledge to mislead the Court (or at least were reckless in so doing)".[207] The DT opined that:[208]

> … there should have been no negotiation or hesitation about bringing the fact of the settlement to the Court of Appeal's attention at the earliest opportunity. The failure to do so based on the terms of the Settlement Agreement, which would have given the Court of Appeal the impression that the matter between [the disputants] was live, led to the Court being misled.

23.88 The DT also found that the lawyers, in allowing the appeal to continue despite the settlement agreement being concluded, had caused a wastage of court time and resources.[209] The lawyers were aware that the settlement agreement had rendered the questions of law to be litigated on appeal academic and that the Court of Appeal might refuse to hear the case.[210] The lawyers would also have known that the Court of Appeal does not answer hypothetical or academic questions for a variety of reasons, including the important policy reason of avoiding a deluge of hypothetical cases that would detract from cases with real impacts on the rights of parties.[211]

23.89 The DT did have some sympathy for the lawyers, who had attempted to find a balance between the demands and interests of their clients and their duties as officers of the court, for instance by pushing back against some of the client's instructions.[212] Nevertheless, the DT opined that the lawyers should have been forthcoming and upfront with the existence of the parties' settlement agreement, and applied for leave from the court for the appeal to proceed,[213] so that the court

204 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [96].
205 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [60] and [79].
206 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [92].
207 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [91] and [92].
208 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [92].
209 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [59] and [60].
210 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [67]–[69].
211 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [61].
212 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [93] and [94].
213 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [70].

could decide for itself if it would nevertheless hear the appeal, for the benefit of an abstract "greater good" or to set a precedent for related proceedings which involve the same company that was the subject matter of liquidation proceedings.[214] In such circumstances, the lawyers' duty to the court trumped their duty to their clients,[215] and the lawyers should have informed the court of the settlement agreement; or, if the client insisted on keeping silent about the settlement agreement, the lawyers should have discharged themselves from acting for the clients.[216]

23.90 Consequently, the DT referred the two lawyers to the Court of Three Judges for disciplinary action.[217]

23.91 This case serves as an important cautionary illustration for legal advisers whose clients have resolved their disputes out of court before a scheduled court hearing. If clients conclude a settlement agreement before trial or another scheduled court hearing, they are obliged to inform the court expediently about it, and endeavour to file for the necessary orders (for example, a stay of proceedings, a withdrawal of proceedings, a discontinuance or other relevant order which has been embodied in the compromise) in good time.

23.92 It is not difficult to imagine situations where repeat players such as large corporates may have two competing sets of strategic interests: on one hand to settle disputes quickly and quietly and, on the other hand, to know how a court would decide a particular (possibly new) point of law. In these situations, lawyers need to advise their clients to make an election: The clients can continue with the case and obtain their answer, settle the case and abide in uncertainty for a while longer, or settle the case, disclose the settlement and throw themselves upon the mercy of the court, with the slim hope that the court may deign to answer an academic question or hypothetical case. But failing to disclose the settlement agreement so that court proceedings may continue is not a choice that will be tolerated by the Singapore courts.

V. Mediation, ADR and civil procedure

23.93 In this section, we review two cases from the General Division where litigants had applied for adverse costs orders to be made against their opponent in court who: (a) failed to fully comply with an ADR or

214 See *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [71].
215 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [93].
216 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [98].
217 *The Law Society of Singapore v Seah Zhen Wei Paul* [2023] SGDT 15 at [99].

mediation agreement;[218] and (b) did not accept an offer to settle made in advance of trial, which was more favourable to them than the verdict of litigation.[219]

A. Adverse costs order for failure to comply with mediation agreement

(1) Costs on indemnity basis may be awarded if parties lack good faith when breaching mediation agreement

23.94 In *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd*,[220] the defendant, Attika Interior + MEP Pte Ltd ("Attika"), applied for costs on an indemnity basis, having won most of its counterclaim against the claimant, Terrenus Energy SL2 Pte Ltd ("Terrenus"). Attika took issue with the fact that Terrenus did not technically comply with the mediation agreement contained in their main contract (the "Main Builder Agreement"). Whilst the mediation provisions in the Main Builder Agreement required parties to first submit any disputes to the Singapore Mediation Centre for amicable dispute resolution before they proceed to file a claim in court,[221] Terrenus had filed a claim in court without first submitting that dispute to the Singapore Mediation Centre for resolution.[222] Kwek Mean Luck J noted that the parties did eventually proceed to mediation, but no settlement agreement was reached.[223]

23.95 Whilst the court made it clear that it does not condone any breaches of mediation agreements, it nevertheless opined that a mere technical breach of a mediation agreement should not always attract a sanction of costs on an indemnity basis. Kwek J observed that there was no evidence to demonstrate that Terrenus acted in bad faith. Even when the parties eventually were at mediation, there was no evidence to demonstrate that Terrenus had not acted in good faith through the mediation process. The court made it clear that the mere and singular action of filing a claim in court before proceeding to mediation is not a sufficient indicator of a lack of good faith at mediation. Furthermore, the fact that a mediation does not lead to any positive or productive outcome does not necessarily indicate that a party to the mediation had

218 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333.
219 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56.
220 [2023] SGHC 333.
221 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [270].
222 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [272].
223 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [272].

acted in bad faith. Consequently, the court declined to issue an order for indemnity costs against Terrenus, as Attika had not proved that Terrenus' conduct met the threshold for awarding indemnity costs.[224]

B. Adverse costs order when offers to settle are not accepted

(1) Costs on an indemnity basis – Order 22A r 9(3) of Rules of Court

23.96 In *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd*,[225] the claimant filed a claim as an administrator of his late mother's estate against Tan Tock Seng Hospital and several doctors (the "defendants") for medical negligence. Before the commencement of trial in 2022, the defendants jointly made the claimant an open offer to settle (with no deadline for acceptance) on 24 April 2020,[226] of $15,000 in full and final settlement.[227] The claimant's case was dismissed entirely by the General Division on 13 October 2022.[228] As the claimant did not accept the offer to settle made on 24 April 2020, which was more favourable to him than the verdict of litigation, the defendants applied for costs on an indemnity basis, *per* O 22A r 9(3) of the Rules of Court,[229] starting from 25 April 2020.

23.97 Choo J saw no difficulty in awarding the defendants costs on an indemnity basis,[230] and also ordered that the costs for all claims filed by the claimant be borne by him (in his capacity as administrator of his mother's estate).[231] Furthermore, Choo J had the following remarks for the claimant:[232]

> Costs are not meant to punish a failed civil action, but when a reasonable offer to settle was refused and the party refusing ended worse off than the terms offered, the other party should not have to bear the resulting costs that might have been saved. In this case, even an offer of mediation was rebuffed. In such circumstances, the law allows the court, unless for strong reasons otherwise, to order indemnity costs.

224 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [272].
225 [2023] SGHC 56.
226 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56 at [1].
227 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56 at [2].
228 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56 at [2].
229 2014 Rev Ed.
230 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56 at [2] and [7].
231 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56 at [5].
232 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56 at [7].

23.98 Finally, Choo J opined that the parties would have been much better off financially, had the dispute been resolved at mediation in totality:[233]

> The amount [in costs owed by the claimant] is undoubtedly very high, and from the evidence I have seen at trial, the deceased does not seem to be a wealthy person. It may be that the defendants will not be able to recover the costs. In that sense, they will not even be compensated by costs. Had the parties gone for mediation, a better idea of the merits of the case and the burden of costs may have been impressed upon them by the mediator, and we might have had a different outcome to this suit.

233 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2023] SGHC 56 at [10].