

# MEDIATION ADVOCACY

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Singapore  
Mediation  
Centre



# INTRODUCTION: MEDIATION

# Introduction: Mediation

- ❖ Mediation and other Dispute Resolution Mechanisms
- ❖ What is Mediation?
- ❖ Mediation Institutions
- ❖ Evolving Roles of Advocate in Mediation
- ❖ Benefits of Mediation
- ❖ Disadvantages of Mediation
- ❖ Common Types of Mediation and Mediators

# Mediation and other Dispute Resolution Mechanisms

	<b>Negotiation</b>	<b>Mediation</b>	<b>Arbitration</b>	<b>Litigation</b>
<b>Decision-Maker</b>	Parties	Parties	Neutral Arbitrator(s)	Neutral Judge(s)
<b>Nature</b>	<ul style="list-style-type: none"> <li>• Interest-based, Consensual</li> <li>• Problem-solving</li> <li>• Confidential</li> </ul>	<ul style="list-style-type: none"> <li>• Interest-based, Consensual</li> <li>• Problem-solving</li> <li>• Confidential</li> <li>• Binding Settlement Agreement</li> </ul>	<ul style="list-style-type: none"> <li>• Rights-based</li> <li>• Adversarial</li> <li>• Confidential</li> <li>• Binding Award</li> </ul>	<ul style="list-style-type: none"> <li>• Rights-based</li> <li>• Adversarial</li> <li>• Public forum</li> <li>• Binding Judgment</li> </ul>
<b>Costs</b>	Inexpensive	Inexpensive	Expensive	Expensive
<b>Duration</b>	Shorter	Shorter	Longer	Longer
<b>Focus</b>	<ul style="list-style-type: none"> <li>• Solution</li> <li>• Possible Future relationship</li> </ul>	<ul style="list-style-type: none"> <li>• Solution</li> <li>• Possible Future relationship</li> </ul>	<ul style="list-style-type: none"> <li>• Legal Rights</li> <li>• Past Events</li> </ul>	<ul style="list-style-type: none"> <li>• Legal Rights</li> <li>• Past Events</li> </ul>

# Mediation Institutions

- ❖ Courts
  - State Courts (including Family Justice Courts, Small Claims Tribunal)
  - Supreme Court
- ❖ Singapore Mediation Centre
- ❖ Singapore International Mediation Centre
- ❖ Singapore International Mediation Institute
- ❖ Industry-specific mediation schemes (e.g. Medical, IPOS)

# Singapore's Mediation Landscape

## SINGAPORE COURTS

The Judiciary



SUPREME COURT  
SINGAPORE



SYARIAH COURT  
SINGAPORE

FAMILY JUSTICE COURTS  
SINGAPORE



## Mediation Institutions



## Commercial Dispute Resolution Centres

Singapore  
Mediation  
Centre



## Other Industry Dispute Resolution Organisations



Consumers  
Association  
of Singapore



## Evolving Roles of Advocate in Mediation

- ❖ Before dispute:
  - Advise on Alternative Dispute Resolution clauses in contract
- ❖ When there is a dispute:
  - Advise / Assist Client:
    - to assess if mediation is a viable option
    - by proposing mediation for client's consideration, when(ever) appropriate
    - prepare for mediation
  - Assist the Mediator (while protecting Client's interests)
  - Draft any Settlement Agreement (with opposing Counsel)

## Benefits of Mediation

### ❖ For Client:

- Quicker resolution
- Client's control of outcome
- Greater number of possible solutions
- Less expensive as compared to other dispute resolution mechanisms
- Confidential
- Preservation / improvement of relationship between disputants
- Choice of Mediator

## Benefits of Mediation

- ❖ For Counsel:
    - Possibly greater Client satisfaction
    - Opportunity to test strengths and weaknesses of Client's case
- [in case mediation fails, and court/arbitral proceedings were to commence]*

## Disadvantages of Mediation

- ❖ No certainty of settlement
  - whereas in litigation or arbitration, there would be a court order or arbitral award
- ❖ No legal precedent
  - due to the confidential nature of the process
  - therefore, creative / good mediated solutions not readily available to serve as a guide in future disputes
- ❖ No formal discovery process to compel disclosure of pertinent information

# Common Types of Mediation and Mediators

	<b>Facilitative Mediation</b>	<b>Evaluative Mediation</b>
<b>Also known as</b>	Interest-based, problem solving mediation	Advisory, managerial mediation
<b>Main Objective</b>	To avoid positions and negotiate based on parties' underlying needs and interests instead of their strict legal entitlement	To reach a settlement according to the legal rights and entitlement of the parties, within the anticipated range of court outcomes
<b>Types of Mediators</b>	Expertise in mediation process and techniques; no necessary expert knowledge of the subject matter of dispute	Expertise in substantive areas of the dispute, no necessary qualifications in mediation techniques
<b>Mediator's Main Role</b>	Conduct the process, maintain a constructive dialogue between the parties and enhance negotiation process	Provide additional information, advise and persuade the parties, bring professional expertise to bear on content of negotiation
<b>Other Characteristics</b>	Less intervention by mediator, parties encouraged to fashion creative outcomes around mutual interests.	Greater intervention by mediator, less party control over outcome.

# 2. MEDIATION INSTITUTIONS

## Mediation Institutions

- A. Singapore Mediation Centre (SMC)
- B. Singapore International Mediation Centre (SIMC)
- C. Singapore International Mediation Institute (SIMI)
- D. Singapore International Dispute Resolution Academy (SIDRA)
- E. Community Mediation Centre (CMC)
- F. Industry Specific Mediation
- G. Private Organisations

# Institutions

## A. Singapore Mediation Centre (SMC)

- ❖ Set up in 1997 as a not-for-profit organization
- ❖ Objective
  - To promote, develop and facilitate the settlement of disputes by using alternative dispute resolution processes.
- ❖ Function
  - To provide mediator training and accreditation
  - To provide and administer mediation services
- ❖ <http://www.mediation.com.sg/>

# Institutions

## B. Singapore International Mediation Centre (SIMC)

- ❖ Set up in 2014 as a non-for-profit organization
- ❖ Function:
  - To provide mediation services
  - Collaborate with Singapore International Arbitration Centre to administer the “Arb-Med-Arb” protocol

❖ <https://simc.com.sg/>

internationally angled SMC  
panel of international mediators, can deal with multiple jurisdictions

## Institutions

### C. Singapore International Mediation Institute (SIMI)

- ❖ Set up in 2014 as a non-for-profit organization
- ❖ Independent Professional Standards body for mediation in Singapore and the region.
- ❖ <http://www.sim.org.sg/>

sets standards, offers accreditation

4 levels

## Institutions

### D. Singapore International Dispute Resolution Academy (SIDRA)

- ❖ Not-for-profit Organization that was launched in 2016
- ❖ Provides Research, Training, Consultation services relating to mediation and negotiation
- ❖ <http://www.sidra.academy/our-services/>

platform for mediators to exchange ideas

# Institutions

## E. Community Mediation Centre (CMC)

- ❖ Established in 1998 under CMC Act
- ❖ Provide mediation services for social, community or family disputes that do not involve an arrestable offence
  - e.g. neighbour disputes, landlord-tenant disputes  
mediators are grassroots leaders
- ❖ <https://www.mlaw.gov.sg/content/cmc/en.html>

## Institutions

### F. SMC Mediation & Industry Mediation Schemes

#### Mediation Procedure Rules

Any civil case - any quantum, no geographical limits

#### Industry Mediation Schemes

- Council for Estate Agencies Mediation Sub-Scheme
- Committee for Private Education Mediation-Arbitration Scheme
- Healthcare Mediation Scheme
- IPOS Mediation Promotion Scheme
- Fair Tenancy Industry Committee
- Singapore Medical Council Mediation Scheme
- Singapore Infrastructure Dispute-Management Protocol

# Institutions

## F. SMC's Industry Mediation Schemes

### Council for Estate Agencies Mediation Sub-Scheme

- Aims to help settle disputes between clients and their estate agents
- Applicable for disputes which arise in relation to estate agency agreements as well as the sale, purchase, and lease of residential property

### Fair Tenancy Industry Committee

- Aims to help settle disputes under the Code of Conduct for Leasing of Retail Premises in Singapore

### Healthcare Mediation Scheme

- Aims to help settle disputes between individuals and healthcare institutions
- Supported by MOH Holdings Pte Ltd, the holding company of Singapore's public healthcare clusters

### SMC-Singapore Medical Council Mediation Scheme for doctors

- Aims to help settle disputes between individuals and registered medical practitioners over issues such as serious misconduct, breach of duty, or neglect
- Referral programme in partnership with the Singapore Medical Council Complaints Committee

# Institutions

## F. SMC's Industry Mediation Schemes

### Committee for Private Education Mediation-Arbitration Scheme

- Aims to help settle disputes between students and private education institutions over issues relating to enrolment, course fees, disciplinary matters, etc.
- Launched by the Committee for Private Education in conjunction with SMC and the Singapore Institute of Arbitrators

### Intellectual Property Office of Singapore (IPOS) Mediation Promotion Scheme

- Funding scheme that promotes use of mediation to resolve intellectual property disputes by subsidising parties' mediation costs
- Parties will be subsidised up to \$10,000 or up to \$14,000 if their dispute includes issues on foreign IP rights

### Singapore Infrastructure Dispute-Management Protocol

- Appointed Dispute Board follows large construction or infrastructure projects to manage and resolve issues arising from start to finish
- Can be used as collaborative tool for efficient management of potential conflicts

# Institutions

## F. Industry Specific Mediation

### ❖ Others (not administered by SMC):

- Financial Industry Disputes Resolution Centre Ltd (FIDReC)
  - <https://www.fidrec.com.sg/website/background.html>
- Consumers Association of Singapore (CASE)
  - <https://www.case.org.sg/>
- Strata Title Board Mediation
  - <https://www.stratatb.gov.sg/mediation.html>
- Law Society Mediation Scheme
  - <https://www.lawsociety.org.sg/For-Public/Dispute-Resolution-Schemes/Mediation-Scheme>
- Etc.

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# Institutions

## G. Private Organizations

❖ For example:

- Eagles Mediation and Counselling Centre
- Harmony Mediation Group
- Marican Mediation Services
- Med8
- Peacemakers Consulting Services
- Resolvers
- Etc.

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# 3. LEGAL FRAMEWORK

# Legal Framework

- A. Legal Sources
- B. Basis of Mediation
- C. Mediation Act 2017
- D. Conduct of Lawyers
- E. Conduct of Parties and Costs Consequences

## A. Legal Sources

❖ Statutes

❖ Subsidiary Legislation

❖ Practice Directions

❖ Case Law

## A. Legal Sources

### ❖ Statutes

- Mediation Act 2017 (Act 1 of 2017)
- Community Mediation Centre Act (Cap. 49A)
- Family Justice Court Act 2014 (Act 27 of 2014)
- Supreme Court of Judicature Act (Cap 322)
- Protection from Harassment Act 2014
- Legal Profession Act (Cap 161)
- Women's Charter (Cap 353)

## A. Legal Sources

### ❖ Subsidiary Legislation

- Mediation Rules 2017
- Family Justice Rules 2014
- Rules of Court
- Small Claims Tribunals Rules
- Legal Professional (Professional Conduct) Rules 2015
- Women's Charter (Mediation and Counselling) (Prescribed Persons) Rules 2011

## A. Legal Sources

### ❖ Practice Directions

- Supreme Court
- State Courts
- Family Justice Court
- Singapore International Commercial Court

## A. Legal Sources

### ❖ Case Law

- *UJN v UJO* [2018] SGFC 16
- *Legis Point LLC v Tay Choon Ai* [2018] 3 SLR 1269
- *Sita Jaswant Kaur v Surindar Singh s/o Jaswant Singh* [2013] 4 SLR 838

## B. Basis of Mediation

- ❖ By Agreement

- ❖ By Statutes or Sub-legislation
- ❖ By Court's / Authorised Body's Directions

## B. Basis of Mediation

### ❖ By Agreement

- Mediation Agreement

➤ *Cable & Wireless Plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm)*

- Multi-tier DR agreement

➤ *Heartronics Corporation v EPI Life Pte Ltd and others [2017] SGHCR 17 at [71]*

- The Court held that the multi-tier dispute resolution clauses were regarded as an unitary dispute resolution mechanism. The defendant's repudiatory breaches of the mediation portion of the ADR clauses had rendered the arbitration portion of the clauses inoperative. Hence, the defendant was unable to rely on the arbitration agreement. Accordingly, the Court dismissed the defendant's application to stay in the court proceedings.

## B. Basis of Mediation

- ❖ **By Statutes and Sub-legislation**

- ❖ **For Example:**

- Building Maintenance and Strata Management Act s 89(2)
- Industrial Relations Act, s 30H
- Employment Claims Act 2016, s 3(1)
- FJC PD 11(2) and (3)
- Supreme Court of Judicature Act, First Schedule [21]
- Medical Registration Act, s 42(4)(b)(ii)
- Land Titles (Strata) Act s 84E(6A)(a)
- Criminal Procedure Code, s 16(1)(c)

## B. Basis of Mediation

### ❖ By Court's / Authorised Body's Directions

❖ For Example:

- ROC O 108 R 3 (3)
- Personal Data Protection Act 2012, s 27(1)  
error, should be s 48G

## C. Mediation Act 2017

- ❖ Mediation as defined by the Act
- ❖ Applicability of Mediation Act
- ❖ Stay of Court Proceedings
- ❖ Confidentiality
- ❖ Without Prejudice Privilege

## C. Mediation Act 2017

### ❖ **Mediation as defined by Mediation Act 2017, s 3:**

- a process comprising of one or more sessions in which one or more mediators will assist the parties to a dispute to do all or any of the following with a view to facilitate the resolution of the whole or part of the dispute:
  - (a) identify the issues in dispute;
  - (b) explore and generate options;
  - (c) communicate with one another;
  - (d) voluntarily reach an agreement.

## C. Mediation Act 2017

### ❖ Applicability of Mediation Act, Mediation Act 2017 s 6

- Apply when:
  - the mediation is **wholly or partly conducted** in Singapore; OR
  - the agreement provides that **this Act or the law of Singapore is to apply** to the mediation.
- Not applicable when:
  - any mediation or conciliation proceeding, process, scheme or framework **conducted under, or provided by or under, any written law**;
  - unless otherwise provided in an order under subsection (3), any mediation **conducted by, or under a direction by, a court**; ...

## C. Mediation Act 2017

### ❖ Stay of Court Proceedings – Mediation Act s 8

- (1) Where any party to a **mediation agreement** institutes any proceedings before a court against any other party to that agreement in respect of any matter which is the subject of that agreement, **any party to that agreement** may apply to that court to stay the proceedings so far as the **proceedings relate to that matter**.
  
- (2) The court hearing the application **may** make an order, upon such terms or conditions as the court thinks fit, staying the proceedings so far as the proceedings relate to the matter.

Brings Mediation in line with Arbi, which already had Stay orders

## C. Mediation Act 2017

### ❖ Confidentiality

- Mediation Act 2017
  - 9.—(1) Subject to subsections (2) and (3), a person must not **disclose any mediation communication relating to a mediation to any third party to the mediation.**
  - Exceptions, see ss 9(2) and 9(3) of Mediation Act

as a general rule, mediation is confidential.

## C. Mediation Act 2017

### ❖ Confidentiality

- Definition of “mediation communication”, see s 1:
  - “mediation communication”, in relation to a mediation, means —
    - (a) anything said or done; (b) any document prepared; or
    - (c) any information provided,
  - for the purpose of or in the course of the mediation, and includes a ***mediation agreement or mediated settlement agreement***;
- C.f. common law scope of confidentiality

## C. Mediation Act 2017

### ❖ Without Prejudice Privilege

- Mediation Act, s 10. A mediation communication is not to be admitted in evidence in any court, arbitral or disciplinary proceedings **except with the leave of a court or an arbitral tribunal under section 11.**

additionally, rule that mediation communications cannot be admitted in court

## C. Mediation Act 2017

### ❖Without Prejudice Privilege

- Definition of “mediation communication”, see s 1:
  - “mediation communication”, in relation to a mediation, means —
    - (a) anything said or done;
    - (b) any document prepared; or
    - (c) any information provided,
  - for the purposes of or in the course of the mediation, and includes **a mediation agreement or mediated settlement agreement**;

## C. Mediation Act 2017

### ❖ Without Prejudice Privilege

- Cases:

➤ *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [24]

- ❖ Even though a statement is not expressly made ‘without prejudice’ the law holds that it is made without prejudice because it was made in the course of negotiations to settle a dispute
- ❖ QUARE: Is mediation a course of negotiation to settle a dispute? See Mediation Act, s 4.

## C. Mediation Act 2017

### ❖Without Prejudice Privilege

- Cases:

➤ *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40

- Waiver of WP privilege by producing the document in the court
- *C.f. Krishna Kumaran s/o K Ramakrishnan v Kuppusamy s/o Ramakrishnan* [2014] 4 SLR 232

## C. Mediation Act 2017

### ❖ Mediated Settlement Agreement

- Drafting Mediation Settlement Agreement
  - Contract formation:
    - Offer Acceptance,
    - Consideration,
    - Certainty,
    - Intention to enter legal relationship, etc.

## C. Mediation Act 2017

### ❖ Mediated Settlement Agreement

- Checklist for Settlement Agreement
  - Party to the agreement / third parties
  - The scope of claim being settled
  - Formality
  - Disposal of court proceedings
  - Warranties
  - Conditional or unconditional settlement?
  - Default provisions
  - Payment arrangement/tax/legal costs
  - Confidentiality
  - Governing law and jurisdiction
  - Capacity and authority to settle

## C. Mediation Act 2017

### ❖ Mediated Settlement Agreement

- Subject to Contract doctrines
  - E.g. *Tiong Swee Eng v Yeo Khee Siang* [2015] 3 SLR 1141 at [19]
    - A settlement agreement was simply a species of contract to which the general legal principles laid down in *Lim Koon Park v Yap Jin Meng Bryan* [2013] 4 SLR 150 in relation to an actionable misrepresentation apply.
- NOTE: Exceptions on confidentiality and without prejudice privilege, s 9(2) and (3) of Mediation Act

## C. Mediation Act 2017

### ❖ Settlement Agreement recorded as consent Order

- Requirement – Mediation Act, s 12:

(1) Where a mediated settlement agreement has been made in a mediation in relation to a dispute for which **no proceedings have been commenced** in a court, **any party** to the agreement may, **with the consent of all the other parties to that agreement**, apply to a court to record the agreement as an order of court.

(2) The application must be made within —

- 8 weeks after the mediated settlement agreement is made**; or
- such longer period as the court may allow.

Recorded as consent order - enforceable immediately.

## C. Mediation Act 2017

### ❖ Settlement Agreement recorded as consent Order

- Formality - Mediation Act, s 12 read with Mediation Rules 2017, s 2
  - (a) the name of each party to the mediated settlement agreement;
  - (b) the name of each mediator conducting the mediation;
  - (c) the name of the mediation service provider (if any) administering the mediation;
  - (d) the name of each certification scheme (if any) under which each mediator conducting the mediation is certified;
  - (e) the date on which the mediated settlement agreement is made;
  - (f) the terms of the settlement reached by the parties at the mediation.

## C. Mediation Act 2017

### ❖ Settlement Agreement recorded as consent Order

- Court's Discretion - Mediation Act, ss 12(3) and (4)
  - (3) Subject to subsection (4), a court may record a mediated settlement agreement as an order of court if —
    - (a) the mediation is administered by a **designated mediation service provider** or conducted by a **certified mediator**;
    - (b) the agreement is **in writing** and **signed** by or on behalf of all the parties to the agreement; and
    - (c) the agreement **contains** such information as may be prescribed.

## C. Mediation Act 2017

### ❖ Settlement Agreement recorded as consent Order

- Court's Discretion – Continued

(4) The court may refuse to record a mediated settlement agreement as an order of court if —

- (a) the agreement is **void or voidable** because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract;
- (b) the subject matter of the agreement is **not capable of settlement**;
- (c) any term of the agreement is **not capable of enforcement** as an order of court;
- (d) where the subject matter of the dispute to which the agreement relates involves the **welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child**; or
- (e) the recording of the agreement as an order of court is **contrary to public policy**.

## C. Mediation Act 2017

### ❖ Mediated Settlement Agreement in Family law

- *UJN v UJO [2018] SGFC 16*

➤ That is not to say the Settlement Agreement should be ignored in its entirety; rather, it is ***for the Court hearing the ancillary matters to consider the Settlement Agreement, whether it is binding***, and if so, to what extent it is should be given effect.

- Consistent with pre-mediation decisions, see *Sita Jaswant Kaur v Surindar Singh s/o Jaswant Singh [2013] 4 SLR 838 at [5] and [6]*

## C. Mediation Act 2017

### ❖ Enforcement of Settlement Agreement

- As a Court Order
  - Enforcement of Court Order/Arbitral Award
  - Mediation Act, s 12(5)
    - (5) A mediated settlement agreement that is recorded under this section as an order of court may be enforced in the same manner as a judgment given or an order made by a court.

- As a Contract

➤ Recourses for Breach/Repudiation  
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## D. Conduct of Lawyers

- ❖ Duty to be respectful, courteous and to act in good faith
- ❖ Duty to advance and act in client's best interests
- ❖ Duty to evaluate the use of ADR processes
- ❖ Duty to advise on mediation

## **D. Conduct of Lawyers**

### **❖ Duty to be respectful, courteous and to act in good faith**

- PCR Rule 8A – Conduct of ADR process

## ❖ Duty to advance and act in client's best interests

- PCR Rules 5(2)(j), 17(1)

## ❖ Duty to evaluate the use of ADR processes

- PCR Rules 17(2)(e) cost benefit analysis

## D. Conduct of Lawyers

### ❖ Duty to advise on mediation

- Supreme Court Practice Directions 53:
  - (2) It is the professional duty of advocates and solicitors to advise their clients to consider ADR as well as to give their clients sufficient information about the different ways in which their disputes may be resolved using an appropriate form of ADR. In this connection, the attention of the advocates and solicitors is drawn to Rule 17(2)(e) of the Legal Profession (Professional Conduct) Rules 2015.
  - (6) The attention of advocates and solicitors as well as all the parties is drawn to Order 21, Rule 4(c) of the Rules of Court 2021. Advocates and solicitors should advise their clients on potential adverse costs orders for any unreasonable refusal to engage in ADR.

## D. Conduct of Lawyers

### ❖Duty to advise on mediation

- Supreme Court Practice Directions 53 and Appendix D: Guideline for Advocates and solicitors advising clients about ADR
- Family Justice Court Practice Directions 11(1A)

## D. Conduct of Lawyers

### ❖ Duty to advise on mediation

- Observation in *Lock Han Chng Jonathan (Jonathan Luo Hancheng) v Goh Jessiline* [2007] SGCA 56 at [45]:
  - The role of counsel in pursuing their clients' interests in a court of law where paltry monetary claims were involved was to exercise the degree of responsibility expected of an officer of the court and advise their clients to settle the dispute with **minimum fuss and minimum cost**.

## D. Conduct of Lawyers

### ❖ Duty to advise on mediation

- Other Cases:

*Maxx Engineering v PQ Builders Pte Ltd [2023] SGHC 71:*

Where the High Court dealt with the issue of whether a party can be compelled, through the remedy of specific performance, to refer a dispute to mediation in line with their contractual obligations.

## E. Conduct of Parties and Costs Consequences

- ❖ Rules of Court 2021, O. 5, r. 1 and r. 2
- ❖ Rules of Court 2021, O. 21, r. 2(2)(a)
- ❖ Supreme Court Practice Directions 53
- ❖ State Courts Practice Directions 34
- ❖ The consideration of whether a party has unreasonably refused ADR

## B. Basis of Mediation

### ❖ ROC 2021 (O. 5, r. 1)

- **Duty to consider amicable resolution of disputes**

*1.—(1) A party to any proceedings has the duty to consider amicable resolution of the party's dispute before the commencement and during the course of any action or appeal.*

*(2) A party is to make an offer of amicable resolution before commencing the action unless the party has reasonable grounds not to do so.*

*(3) An offer of amicable resolution in this Order means making an offer to settle the action or appeal or making an offer to resolve the dispute other than by litigation, whether in whole or in part.*

*(4) A party to any proceedings must not reject an offer of amicable resolution unless the party has reasonable grounds to do so.*

## B. Basis of Mediation

### ❖ ROC 2021 (O. 5, r. 2)

- **Terms of amicable resolution**

- 2.—(1) *An offer of amicable resolution and any rejection must be in writing.*
- (2) *An offer of amicable resolution must be open for acceptance within a reasonable period of time and in any case, for at least 14 days, unless the parties otherwise agree.*
- (3) *The terms of an offer that has been made and not accepted must not be relied upon or made known to the Court until after the Court has determined the merits of the action or appeal and is dealing with the issue of costs.*
- (4) *Any offer of amicable resolution which does not state an expiry date expires once the Court has determined the merits of the action or appeal to which it relates unless the offeror has stated otherwise.*

## B. Basis of Mediation

### ❖ ROC 2021 (O. 21, r. 2(2)(a))

- **Power of Court**
  - *In exercising its power to fix or assess costs, the Court must have regard to all relevant circumstances, including efforts made by the parties at amicable resolution.*
- Parties that do not adhere to the duty may face consequences on costs

## E. Conduct of Parties and Costs Consequences

### ❖ Supreme Court Practice Directions 2021 para 53 and Appendix D

- (2) It is the professional duty of advocates and solicitors to advise their clients to consider ADR as well as to give their clients sufficient information about the different ways in which their disputes may be resolved using an appropriate form of ADR. In this connection, the attention of advocates and solicitors is drawn to Rule 17(2)(e) of the Legal Profession (Professional Conduct) Rules 2015.
- (3) The guidelines in Appendix D of these Practice Directions on advising clients about ADR apply.
- (4) ADR must be considered before the commencement and during the course of any action or appeal in order to facilitate the just, expeditious and economical disposal of civil cases. This is especially where ADR may save costs, achieve a quicker amicable resolution and a surer way of meeting the parties' needs.

## E. Conduct of Parties and Costs Consequences

### ❖ State Courts Practice Directions 34

- (5) A “presumption of Alternative Dispute Resolution” applies to all civil claims filed in the State Courts. For this purpose, the Court may refer appropriate matters for parties to attempt the amicable resolution of disputes through one of the Court alternative dispute resolution modalities (“Court ADR modalities”) during a CC.

## E. Conduct of Parties and Costs Consequences

### ❖ State Courts Practice Directions 34 (con't)

- (6) As the use of Court ADR modalities gives parties the opportunity to resolve their disputes faster and more economically compared to determination at trial, parties who wish to undergo Court ADR at an earlier stage must file a request using Form 2 of Appendix A1 to these Practice Directions.
- (7) The provisions pertaining to matters undergoing Court ADR modalities are provided for in Practice Directions 38, 42 to 44.

## E. Conduct of Parties and Costs Consequences

### ❖ State Courts Practice Directions 34 (con't)

- (8) Where the Court is of the view that an ADR (including Court ADR) process is suitable, and the party/parties have opted out of the ADR process for reasons deemed to be unsatisfactory, this conduct may be taken into account by the Court when making subsequent costs orders pursuant to Order 21, Rule 2(2)(a) of the Rules of Court 2021, which states:

“In exercising its power to fix or assess costs, the Court must have regard to all relevant circumstances, including — (a) efforts made by the parties at amicable resolution;”

## E. Conduct of Parties and Costs Consequences

- ❖ Test: Whether a party has unreasonably refused ADR
- ❖ *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 at [16] (The Halsey Checklist, non-exhaustive)
  - (a) the nature of the dispute;
  - (b) the merits of the case;
  - (c) the extent to which other settlement methods have been attempted;
  - (d) whether the costs of the ADR would be disproportionately high;
  - (e) whether any delay in setting up and attending the ADR would have been prejudicial; and
  - (f) whether the ADR had a reasonable prospect of success.

## E. Conduct of Parties and Costs Consequences

### ❖ Other Cases:

- *Nigel Witham Ltd v Smith and another* [2008] EWHC 12 (TCC), at [32]  
“[32] It is a common difficulty in cases of this sort, trying to work out when the best time might be to attempt ADR or mediation. Mediation is often suggested by the claiming party at an early stage. But the responding party, who is likely to be the party writing the cheque, will often want proper information relating to the claim in order to be able to assess the commercial risk that the claim represents before embarking on a sensible mediation. **A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides** which make any subsequent attempt of settlement doomed to fail. ...”

## E. Conduct of Parties and Costs Consequences

### ❖ Other Cases:

- *Nigel Witham Ltd v Smith and another* [2008] EWHC 12 (TCC), at [32]:  
“...Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have been incurred to get to that point themselves become the principal obstacle to a successful mediation. The trick in many cases is to **identify the happy medium**: the point when the detail of the claim and the response are known to both sides, but before the costs that have been incurred in reaching that stage are so great that a settlement is no longer possible.”

## E. Conduct of Parties and Costs Consequences

### ❖ Other Cases:

- PGF II SA v OMFS Co 1 Ltd [2014] 1 WLR 1386  
...silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds.

## E. Conduct of Parties and Costs Consequences

### ❖ Other Cases:

- *Legis Point LLC v Tay Choon Ai* [2018] 3 SLR 1269 at [94]

The costs of mediation work is claimable: The costs of mediation work could also have been taken into account by the Court when awarding party-and-party costs.

# 4. LAWYER AS A NEGOTIATOR: 7 ELEMENTS

Interests  
Options  
Criteria  
Alternatives  
Communication  
Relationship  
Commitment

## Interests

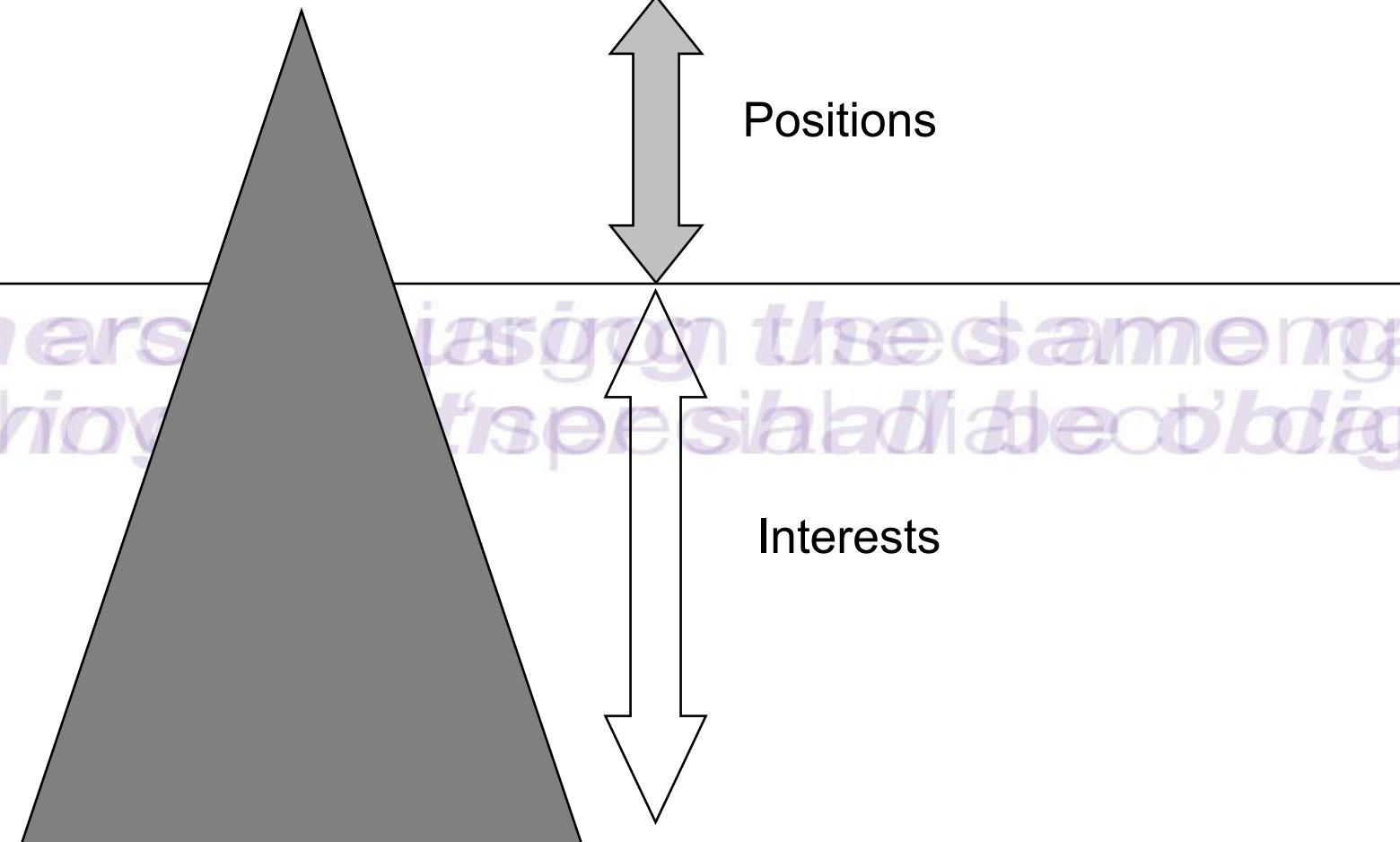
- ❖ An interest is a motivation behind a demand made by a party to a dispute. It represents the needs and concerns of the party.
- ❖ A position is a demand made by a party. It is merely one way to satisfy a perceived interest or set of interests.

### ❖ E.g.

Position: “I want my neighbour to stop playing his piano”

Interest: “I need my rest as I’m working the early shift”

**Interests**



## Interests

- ❖ Focus on interests, not positions.
- ❖ Clarify and prioritise party's interests.
- ❖ Interests must be understood before a dispute can be effectively resolved.

## Interests

- ❖ Dig under positions for interests - ask “why”, “why not”.
- ❖ Clarify and prioritise interests.
- ❖ Capitalise on joint interests.
- ❖ Help parties realise that to resolve a dispute, the other party's interest(s) will have to be addressed.

## Interests

### ❖ Examples of interests:

- Goodwill
- Reputation
- Relationships
- Security
- Business Opportunities
- Recognition

## Options

- ❖ An option is a way to satisfy an interest. Options are the possible solutions to resolving the dispute.
- ❖ Invent options guided by the parties' interests.

invent options (brainstorm)  
then decide on options using CRITERIA (see next)

## Options

- ❖ Separate inventing from deciding. So that one can choose from the best of many or all possible options.
- ❖ Generate options through brainstorming.
- ❖ Lay ground rules for inventing phase - no commitment, no attribution, no criticism, no evaluation.
- ❖ Expand the “pie”. So that the smaller slice of a big ‘pie’ is even better than the larger slice of a small ‘pie’.

## Options

- ❖ Agreement that is reached should be among the best of many options generated and packaged together.
- ❖ Make commitments only at the end of the process.

## Criteria

relevant in deciding on OPTIONS

- ❖ Use objective criteria (also known as legitimacy) to evaluate an option.
- ❖ Basis: parties want to be treated fairly.
- ❖ Sword (to persuade someone that an option is fair) and shield (to protect against an option that is not fair).
- ❖ Leads to face-saving and justifiable results (especially if negotiating party is a representative).

## Criteria

❖ Identify standards by which the parties may measure the fairness of an option

- What precedents exist?
- Is there a standard operating procedure?
- What is the position at law?
- What is the custom/tradition?
- Is there an industry practice?
- What is the market value?
- What is a likely outcome if the matter went to court?

## Criteria

- ❖ In the absence of objective criteria, identify fair procedures

- One cuts, other chooses.
- Taking turns.
- Drawing lots.
- Letting a neutral party decide.

## Criteria

- ❖ Ask, “Why is that fair?”
- ❖ Look to objective standards and fair procedures.
- ❖ In some cases, frame the issue as a search for an objective standard - ask how the issue ought to be decided. E.g. “What standards can we use to decide on fair compensation?”

## Alternatives (to a Negotiated Agreement)

- ❖ What can you do if there is no settlement?
- ❖ Purpose - Evaluation of whether or not to accept option(s)
- ❖ Options are ‘bilateral’ – involves the other party. Alternatives are ‘unilateral’ – what one can do without cooperation of the other party.

## Alternatives

- ❖ BATNA - Best Alternative to a Negotiated Agreement.
- ❖ WATNA - Worst Alternative to a Negotiated Agreement.
- ❖ MLATNA – Most Likely Alternative to a Negotiated Agreement.

## Alternatives

- ❖ Reality testing - Is one's BATNA realistic? E.g. if a party says that he is “sure to win in court”, raise questions to help parties realise that that view may not be realistic.
- ❖ Estimate the other party's BATNA. To have a better appreciation of the strength of the other's bargaining power.
- ❖ Accept if:
  - Offer  $\geq$  BATNA
  - In other words, if the BATNA is better than the offer, parties should walk away.

## Communication

### ❖ Receiving - Listening:

- first and foremost to understand (not to debate or attack)
- for “positive” voices to help parties see the positives in the situation.

### ❖ Conveying - Speak:

- to let parties know that they have been heard.
- to help parties ‘hear’ each other

## Relationship

- ❖ Two components to every dispute: Substantive issues and relationship issues.
- ❖ Relationship issues can stand in the way of settlement of substantive issues.
- ❖ “Separate people from problem.” A reminder to look at the issues objectively and not be influenced (negatively) by how you feel about the person.

framing the issue in a constructive way, etc

## Relationship

- ❖ Apart from the relationship between the parties, think about the relationship between the mediator and the parties.
- ❖ At the minimum, parties must have a ‘working relationship’ to jointly solve the dispute.

# Relationship

## ❖ How to improve the relationship

- Perception
  - Put yourself in the other's shoes to appreciate a different perspective.
- Emotion
  - Allow venting.
- Communication
  - Build rapport through verbal / non-verbal communication

## Relationship

- ❖ Build at the earliest opportunity. Can even begin before mediation proper.
- ❖ Be unconditionally constructive in building a good relationship.

## Commitment

- ❖ Timing:

- ❖ When
  - interests understood and prioritised.
  - options that satisfy interests generated.
  - options evaluated according to objective criteria or fair procedure.
  - alternatives considered.

## Commitment

- ❖ Preferably in writing.
- ❖ Draft realistic commitments.
- ❖ Minimise the possibility of future disputes :
  - use clear and specific language.
  - check that all issues are dealt with.

# 5. ETHICAL CONSIDERATIONS

# ETHICAL CONSIDERATIONS

# Ethical Considerations

- ❖ Role of a Mediation Advocate
- ❖ Ethical Considerations for a Mediation Advocate
  - ❖ Duties of a lawyer to a client

Same duties as all those when representing client in negotiations + more

## Role of a Mediation Advocate

- ❖ Prepare your client for mediation.
- ❖ Support and assist your client in —
  - presenting his/her account, perspectives & proposals;
  - negotiating with & persuading the other party.
- ❖ Assist the Mediator in —
  - understanding the dispute;
  - keeping the negotiation on track and constructive;
  - managing your client's emotions, conduct and expectations.

## Role of a Mediation Advocate

- ❖ Ensure that any decision made by your client is a well-considered & informed decision.
- ❖ Ensure terms of settlement—
  - are in your client's best interests;
  - reflect your client's intentions; and
  - assist in the preparation of the terms of settlement.
- ❖ Assist your client in any follow-up action.

## Role of a Mediation Advocate

- ❖ In any mediation, a lawyer must protect and uphold his client's interest no less robustly or zealously than in a litigation.
- ❖ However, the approach to be taken should be —
  - less (or non-) adversarial;
  - focused on collaborative problem solving;
  - constructive if facilitating a resolution of the dispute in a mutually acceptable manner; and
  - consistent with the purpose and tone of mediation.

## Role of a Mediation Advocate

- ❖ Specifically for family proceedings (PCR r 15A):
  - Must inform client of all available dispute resolution options including mediation so as to enable client to make informed decision on how to resolve
  - From the time family proceedings are contemplated and whenever reasonably possible, advise client to consider resolving proceedings amicably.
  - Advise client to be constructive and reasonable when participating in these proceedings.

## Ethical Considerations for a Mediation Advocate

- ❖ Rule 5 – Competence in advising the client.
- ❖ Rule 6 – Protection of the client's confidentiality.
- ❖ Rule 7 – Courtesy and Fairness .
- ❖ Rule 8 – Honesty, honourability and good faith in conducting the negotiation
- ❖ Rule 22 – Avoidance of conflict of interest.

# Ethical Considerations for a Mediation Advocate

## 1. Competence in advising your client

- ❖ Legal Profession (Professional Conduct Rules) 2015 - rule 5 (Honesty, competence, diligence).
- ❖ Ensure your client is in a position to make objective, well-considered, informed decisions at the mediation.

# Ethical Considerations for a Mediation Advocate

## 1. Competence in advising your client

- ❖ Realistically and objectively assess for your client —
  - the strengths and merits of his/her case & the other party's case;
  - the best (BATNA) and worst (WATNA) alternatives for your client to settling the case at mediation; do not mislead client into thinking they have a better case than they have
  - the implications for your client in terms of costs, time, convenience, and other relevant considerations (e.g. goodwill, relationships, reputation) if the matter is not settled confidentially at mediation.

# Ethical Considerations for a Mediation Advocate

## 2. Protection of confidentiality

- ❖ Do not reveal (whether to the Mediator or the other party) any information that your client has instructed you not to reveal.
- ❖ Seek your client's permission if you are unsure whether a particular piece of information may be revealed during the mediation (including the preliminary conference between the lawyers and the Mediator).

# Ethical Considerations for a Mediation Advocate

## 2. Protection of confidentiality

- ❖ Do not share any information about the mediation or its outcome with other persons without your client's authorisation.
- ❖ In relation to any information concerning the other party that has come to your and/or your client's knowledge during the mediation —
  - do not disclose this information to anyone without the authorisation of that other party;
  - and
  - Impress on your client to maintain the confidentiality of that information.

# Ethical Considerations for a Mediation Advocate

## 2. Protection of confidentiality

parties must not disclose mediation info - must advise client of this.

### ❖ Mediation Act 2017

- Section 9 (Restrictions on disclosure)

➤ 9.—(1) Subject to subsections (2) and (3), a person must not disclose any mediation communication relating to a mediation to any third party to the mediation.

- Section 10 (Admissibility of mediation communication in evidence)
- Section 11 (Leave of court or arbitral tribunal for disclosure or admission in evidence)

### ❖ Legal Profession (Professional Conduct Rules) 2015 - rule 6 (Confidentiality).

# Ethical Considerations for a Mediation Advocate

## 3. Avoidance of conflict of interest.

### ❖ Respect your client's decision

- The decision whether and on what terms to settle ultimately lies with your client.
- Respect your client's decision even if it is not in accordance with your opinion or advice.

# Ethical Considerations for a Mediation Advocate

## 3. Avoidance of conflict of interest

### ❖ Adherence to mandate given by client

- Ensure that when you reveal any information or make any proposal during the mediation, you have your client's mandate / authorisation to do so.
- Do not enter into any agreement on behalf of your client when you do not have any mandate / authorisation to do so.

# Ethical Considerations for a Mediation Advocate

## 3. Avoidance of conflict of interest

- ❖ Ensure your own interests are not in conflict with your client's.
- ❖ Ensure that you are not also acting for any other person whose interests are inconsistent with your client's.
- ❖ If you have acted as mediator in a mediation, you must not subsequently act for any party to the mediation in relation to the subject of the mediation or any matter discussed during the mediation.
- ❖ Do not resort to threats or undue influence to sway your client.

# Ethical Considerations for a Mediation Advocate

## 4. Honesty, honourability and good faith in conducting the negotiation

### ❖ Legal Profession (Professional Conduct) Rules 2015

### ❖ Conduct of alternative dispute resolution process

8A.—(1) A legal practitioner must always be **respectful** of the alternative dispute resolution process and the adjudicator, mediator or other person conducting the process. **worded similar to r 13(2).**

(2) A legal practitioner must always be **courteous** in the conduct or presentation of his or her client's case in an alternative dispute resolution process. **avoid harsh or rude language or behaviour**

(3) A legal practitioner must **act in good faith** throughout the alternative dispute resolution process.

(4) A legal practitioner must not knowingly mislead or attempt to mislead in any way an adjudicator, a mediator or other person conducting the alternative dispute resolution process. **4 and 5 can be read tgt  
- just don't mislead mediator**

(5) A legal practitioner must not knowingly assist or permit his or her client to mislead an adjudicator, a mediator or **mediation.com.sg** other person conducting the alternative dispute resolution process.

- respect mediator -
- courteous to them
- trust them in the process of mediation
- respect them when explaining legal concepts to them (they may be non-law)

## Ethical Considerations for a Mediation Advocate

### 4. Honesty, honourability and good faith in conducting the negotiation

- ❖ While a Mediation Advocate may adopt any negotiation strategy that is in the best interest of his/her client —
  - do not resort to underhanded negotiation tactics;
  - do not mislead the other party or his/her lawyer with false information;
  - endeavour to keep the negotiation constructive and collaborative with a view to resolving the dispute in a manner that is mutually acceptable by the parties.

## Duties of a lawyer to a client

Though less adversarial in nature, lawyers must still do everything they can to advance their client's interests

- ❖ Render competent legal advice & representation to the client.
- ❖ Act in the client' best interests.
- ❖ Use all legal means to advance the client's interests, to the extent that the legal practitioner may reasonably be expected to do so (Legal Profession (Professional Conduct Rules 2015 –  
**Should be r 5(2)(j), not r 5(2)(f).**)
- ❖ Secure the best outcome for the client in any negotiation or litigation.
- ❖ Keep costs within the client's budget.

## Duties of a lawyer to a client

- ❖ Avoid being in a position of conflict with the client's interests.
- ❖ Maintain and protect the confidentiality of the client's confidential information.
- ❖ Ensure that legal practitioner has relevant knowledge, skills and attributes required for each matter undertaken and apply the knowledge, skills and attributes in a manner appropriate to that matter (PCR r 5(2)(d))

**Thank  
You.**