

Alternative Dispute Resolution and Regional Prosperity – A View from Singapore^{*}

Address by Judge of Appeal Justice Andrew Phang, Supreme Court of Singapore

I. INTRODUCTION

1 What we know as Alternative Dispute Resolution, or ADR, is defined by what it is not – that is, anything but the full works of the court litigation process. In approaching this varied and multidisciplinary field of scholarship and practice, I propose to focus on the theme of the relationship between ADR and the courts by sharing Singapore’s experience with two key processes on the ADR spectrum, arbitration and mediation. I will then offer some brief thoughts on the future direction of ADR and what it could mean for the region.

II. ARBITRATION

2 Arbitration has a long historical lineage dating back to antiquity, and after sustained periods of fluctuations in its fortunes, it now seems safe to say that the chapter on the common law judicial animosity towards arbitration is almost closed. Today, the New York Convention on the Enforcement and Recognition of Foreign Arbitration Awards has 150 state signatories, creating a uniform set of baseline rules for the enforcement and recognition of awards that give the arbitral award a degree of international potency that is matched by few judgments emanating from domestic courts. This qualitative shift is supported by the quantitative evidence; numerical statistics on the use of arbitration continue to show an upward trend.¹

3 Singapore has been a beneficiary of the spectacular expansion of the arbitration industry. Over the past ten years, the number of new cases handled by the Singapore

^{*} I would like to express my deepest gratitude to Ms Melissa Mak, Assistant Registrar, Supreme Court of Singapore, for all her kindness and assistance with the preparation of this paper. However, all errors remain mine alone.

¹ A sampling of the statistics released by various arbitration institutions indicates that in 2013, 767 arbitration requests were filed with the ICC International Court of Arbitration, 1043 cases were resolved by the China International Economic and Trade Arbitration Commission and 290 cases were referred to the London Court of Arbitration.

International Arbitration Centre has increased more than four-fold, and Singapore is now one of the key arbitration centres in Asia.² This growth is attributable to the prevailing judicial and legislative philosophy toward arbitration as a *parallel and complementary* adjudicatory mechanism, as well as the rapid expansion in the volume and scope of transnational commercial disputes within the region.

4 We are often said to be a pro-arbitration jurisdiction, but I should emphasise that we are *pro-arbitration* and not *pro-arbitral tribunal or award*. The fundamental basis of arbitration – party autonomy – is accorded primacy through the principle of minimal curial intervention; if parties have chosen to settle their disputes through arbitration, due deference will be given to the outcomes of this consensual process. When the Singapore courts are called upon to review an award at the conclusion of the life cycle of the dispute, we are generally not concerned with errors of judgment³ – whether in law or fact – and awards may only be challenged on very narrowly circumscribed grounds such as public policy or breach of natural justice.⁴

5 But although parties have contracted out of a public process of adjudication, they are still dependent on the domestic legal framework to confer on the ensuing award a legally binding quality. The principle of minimal curial intervention is subject to the judicial philosophy of preserving the integrity of the wider institution of arbitration, and the courts will step in when the process in the immediate case threatens this.⁵ A pro-arbitration policy is therefore one that recognises the interface between national courts and arbitral tribunals as one of co-existence and collaboration and which finds the right equilibrium between furthering the *efficacy* and *legitimacy* of arbitration on the one hand and respect for the

² See the *White & Case 2010 International Arbitration Survey: Choices in International Arbitration* at p 19, available at <http://www.whitecase.com/files/upload/fileRepository/2010-International-Arbitration-Survey-Choices-International-Arbitration.PDF>.

³ Different regimes apply to international arbitrations and domestic arbitrations. Under s 49 of the Arbitration Act (Cap 10, 2002 Rev Ed), there is a limited right to seek leave to appeal on a question of law arising out of an award. This right of appeal is not available under the International Arbitration Act (Cap 143A, 2002 Rev Ed).

⁴ See Art 34 of the Model Law (setting aside) and Art 5 of the New York Convention (refusal of enforcement), incorporated as part of Singapore law by the International Arbitration Act (Cap 143A, 2002 Rev Ed).

⁵ The Singapore courts will intervene when when an arbitrator has exceeded his mandate (see, for example, the Singapore High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972), if a party has not agreed to arbitration (see, for example, the Singapore Court of Appeal decisions of *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 and *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372), or if minimum standards of fairness have not been respected (see, for example, the Singapore Court of Appeal decision of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305).

parties' autonomy on the other. This is well illustrated by the ostensible reversal of the minimal intervention approach when the courts are called upon to play a supporting role. Under our International Arbitration Act, the court may assist the conduct of pending arbitrations by making interlocutory orders such as injunctions⁶ and issuing witness subpoenas.⁷ The legislative intention to support arbitration is closely aligned with our judicial philosophy, and is equally influential in driving Singapore's liberal approach towards arbitration.⁸

III. MEDIATION

6 Arbitration remains an adjudicatory process, but the adversarial nature of adjudication – which entails the determination of opposing rights and entitlements – is not always the most appropriate way of resolving disputes. I now move across the spectrum I referred to earlier to the process of mediation. An often referred to definition of mediation identifies its central quality as “its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another”.⁹ Mediation is distinctive in its focus on consensus and party-directed outcomes.

7 In the early 1990s, the mediation culture started to take root in Singapore, largely through an institutionalised framework that was encouraged by the courts and legislature. I will touch briefly on three broad categories of mediation that are currently practiced in Singapore: court-based mediation, community-based mediation and private mediation.

8 Court-based mediation was first introduced in our Subordinate Courts, now renamed the State Courts, to promote a conciliatory approach towards the resolution of disputes. The Primary Dispute Resolution Centre offers mediation and neutral evaluation for civil matters lodged in the courts.¹⁰ There is also a presumption of ADR in order to encourage parties to

⁶ See s 12A of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

⁷ See s 13 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and the recent Singapore High Court decision of *The Lao People's Democratic Republic v Sanum Investments Ltd and another and another matter* [2013] 4 SLR 947.

⁸ See generally, Charles Lim, “The Developmental Life Cycle of International Arbitration Legislation – Singapore IAA Case Study” (2011) 7 Asian International Arbitration Journal 1.

⁹ See Lon L Fuller, “Mediation – Its Forms and Functions” (1971) 44 S Cal L Rev 305 at 325.

¹⁰ See State Courts, *Court Dispute Resolution/Mediation*, available at <<https://app.statecourts.gov.sg/civil/page.aspx?pageid=54106>>.

actively explore their options at an early stage of the proceedings before their positions become too entrenched and to minimise the escalating costs of litigation.¹¹

9 A framework of community mediation was also created through the establishment of a network of Community Mediation Centres for the informal resolution of familial or neighbourly disputes within the immediate community.¹² The process is akin to the traditional “kampong” – the Malay word for village – approach of resolving problems, with a respected member of the community acting as the voice of reason in reconciling the deeper relational interests that underlie what may appear to be trivial or petty squabbles.¹³

10 Finally, private mediation is now a viable option even for the resolution of high-value commercial disputes, where it might be thought that parties with deep pockets will pursue the case through the full court process.¹⁴ The judiciary has played an important role in entrenching mediation as a parallel process to litigation.¹⁵ Suitable cases are referred to mediation during pre-trial conferences and case management conferences by Judges and Registrars.¹⁶ And under the Rules of Court, the court may, in exercising its discretion to award costs, take into account the parties’ conduct in relation to any attempt at resolving a matter through mediation or other means of dispute resolution.¹⁷ This creates an overt incentive for parties and their lawyers to consider the appropriateness of other modes of dispute resolution.¹⁸

¹¹ See para 25 of the State Courts Practice Directions; Joyce Low and Dorcas Quek, “Introducing a “Presumption of ADR” for Civil Matters in the Subordinate Courts”, *Singapore Law Gazette*, May 2012.

¹² Cases may reach the Community Mediation Centres either directly or through judicial referrals. In 2012, 60% of mediated cases were referred by the court: see Community Mediation Centre, *Annual Report 2012/2013*, at p 4.

¹³ See Ho Peng Kee and Gloria Lim, “Promoting Mediation as an Alternative Dispute Resolution Process to Resolve Community and Social Disputes” [2012] *Asian Journal of Mediation* 1 at para 12.

¹⁴ The Singapore Mediation Centre has mediated over 2300 matters with a success rate of about 75% and its caseload has increased almost four-fold in the past eight years: see Singapore Mediation Centre, *Our Statistics*, available at <<http://www.mediation.com.sg/about-us/>>; Chang Ai-Lien, “More Choosing Mediation over Court”, *The Straits Times* (24 December 2014).

¹⁵ See Teh Hwee Hwee, “Mediation Practices in ASEAN: The Singapore Experience” (Paper delivered at the 11th General Assembly of the ASEAN Law Association on 17 February 2012) at p 14, available at <<http://www.aseanlawassociation.org/11GAdocs/workshop5-sg.pdf>>.

¹⁶ In 2011, 46.6% of the cases handled by the Singapore Mediation Centre were referred by the Supreme Court: see Teh Hwee Hwee, “Mediation Practices in ASEAN: The Singapore Experience” (Paper delivered at the 11th General Assembly of the ASEAN Law Association on 17 February 2012) at p 14, available at <<http://www.aseanlawassociation.org/11GAdocs/workshop5-sg.pdf>>.

¹⁷ Order 59 rule 5(c) of the Rules of Court.

¹⁸ A recent amendment to the Practice Directions also introduced a framework for parties to make and accept offers to mediate and for the court to give directions to adjourn pending proceedings in the interim: see Paragraphs 35B and 35C of the Supreme Court Practice Directions.

11 The main theme underlying our experience with mediation – as well as with arbitration – is the notion that *alternative* dispute resolution does not primarily serve a diversionary function away from litigation in order to relieve judicial backlogs. Instead, the broader objective is the principled search for *appropriate* dispute resolution.¹⁹ The growing trend of community mediation and private mediation in Singapore illustrates how stakeholders beyond the courts can participate in recreating a culture of mediation that draws inspiration both from indigenous forms of community mediation and modern scholarship. Access to justice is promoted not only by enhancing the accessibility of courts to the public, but also by channelling cases to the appropriate avenues and implementing dispute-prevention strategies.

IV. THE FUTURE OF ADR

12 The privatisation of civil justice in the form of ADR has created a full-fledged professional service industry that will be influenced by market forces and the demands of transnational businesses. I would like to conclude by making a few tentative observations on the future of ADR in the region by combining two themes – the internationalisation of dispute resolution and regional opportunities in the practice of ADR.

13 International arbitration offers commercial persons the ability to prescribe a neutral denominator of common expectations that are not limited by the strictures of domestic procedural laws or rooted in legal traditions that may be more favourable or familiar to one party. And with the ubiquity of the UNCITRAL Model Law, now adopted as the foundational framework for domestic legislation in over 60 jurisdictions, there is some degree of convergence and coherence in the body of procedures that govern the relationship between national courts and arbitration. As the global economic centre of gravity continues its gradual drift eastwards,²⁰ it is timely for Asia to firmly stake its position on the global arbitration map by signalling its commitment to the development of a mature and arbitration-friendly legal infrastructure that is capable of handling the increasingly complex and sophisticated work that emanates from Asia. Looking further into the future, a comprehensive and harmonised regional dispute resolution network structured on the existing foundations of the international

¹⁹ See Chan Sek Keong, “Keynote Address for the Alternative Dispute Resolution Conference” (Speech delivered at the Alternative Dispute Resolution (ADR) Conference on 4 October 2012) at paras 4-5.

²⁰ In 2014, East and Southeast Asia attracted almost 20% of global investment flows: see UNCTAD, *World Investment Report 2014* at p 14, available at <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf>.

commercial regime will go some way in addressing the challenges and costs that businesses face in transacting in a region that is characterised by considerable heterogeneity in its domestic legal institutions and traditions.²¹

14 Similarly, the internationalisation of mediation practice represents a potential growth industry in our region²² as the practice of cross-border mediation spills over from international diplomacy into business diplomacy.²³ Mediation has permeated into international business disputes and it is not uncommon to see mediation or good faith negotiation clauses in contracts. In line with this trend, Singapore is currently in the midst of conceptualising the creation of the Singapore International Mediation Centre to provide a comprehensive suite of mediation services to complement arbitration and litigation. These include case management services and the provision of mediators to support parties in the negotiation of sustainable business deals and implementation of agreed strategies at the post-transaction stage.²⁴ Seen in this wider context, mediation extends beyond the facilitation of *ex post* settlement of disputes; the conflict management process is also of considerable value at the pre and post-transaction stages.

15 New methods of international dispute resolution may also be explored as a precursor for the development of a collective regional legal superstructure that may eventually be decoupled from the traditional jurisdictional anchors of national boundaries. Here, I wish to briefly mention the creation of the Singapore International Commercial Court (“SICC”). As the name suggests, the SICC’s jurisdiction is truly international in reach – it is envisaged that the court can and will hear cases with no connection to Singapore,²⁵ and its jurisdiction will largely be premised on the fundamental concepts of party autonomy and agreement.²⁶ **The procedures adopted by the SICC will also vary from those adopted in national courts.** Parties

²¹ See Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence” [2013] SJLS 231 at 244.

²² A small scale survey conducted by the International Institute for Conflict Prevention and Resolution in 2011 indicated that 78% of corporate respondents in East or Southeast Asia have used mediation to resolve disputes over the past three years: see *Attitudes towards ADR in the Asia-Pacific Region: A CPR Survey*, available at <<http://www.cpradr.org/Portals/0/Asia-Pacific%20Survey.pdf>>.

²³ This term is borrowed from Eileen Carroll and Karl Mackie, *International Mediation – The Art of Business Diplomacy* (Tottel Publishing, 2006, 2nd Ed).

²⁴ See the Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation at paras 12-14.

²⁵ See Denise Wong, “The Rise of the International Commercial Court: What is it and Will it Work?” (2014) 33 CJQ 209-213, 215-216.

²⁶ See the Report of the Singapore International Commercial Court Committee at para 21.

may opt for confidentiality in certain types of cases²⁷ and foreign law may be determined on the basis of legal submissions instead of evidential proof.²⁸ We hope that an international commercial court will provide yet another choice for those who do business in the region but do not find arbitration an attractive solution due to rising costs and delays, concerns over the legitimacy of arbitration or the absence of an appellate mechanism.

V. CONCLUSION

16 The renewal of interest in arbitration and mediation in the region is in some respects a return to the traditional community norms of many Asian cultures,²⁹ where litigation is frowned upon and viewed as a last resort. As China and ASEAN continue to build deeper economic ties, the legal sector will benefit from closer collaboration and dialogue that will enable us to draw on our collective wisdom and diversity of experiences. An encouraging development in this regard is the establishment of the Asian Mediation Association, which counts mediation centres in Singapore, Malaysia, Thailand, Indonesia and the Philippines, as well as the Hong Kong Mediation Centre and five other Asian mediation centres within its group of members.³⁰ The Asian Mediation Association seeks to facilitate close collaboration in the provision of conflict and dispute resolution services, including the sharing of resources and best practices, the establishment of a referral mechanism, and the joint development of culturally sensitive modes of ADR for Asia.³¹ I trust that this will be the first of many shared ideas.

²⁷ See the Report of the Singapore International Commercial Court Committee at para 32 to 33.

²⁸ See the Report of the Singapore International Commercial Court Committee at para 34.

²⁹ See Joel Lee and Teh Hwee Hwee, *An Asian Perspective on Mediation* (Academy Publishing, 2009) at ch 1, paras 1.3 to 1.5.

³⁰ See Asian Mediation Association, *AMA Members*, available at <<http://www.asianmediationassociation.org/node/5>>

³¹ See Teh Hwee Hwee, "Mediation Practices in ASEAN: The Singapore Experience" (Paper delivered at the 11th General Assembly of the ASEAN Law Association on 17 February 2012) at p 25, available at <<http://www.aseanlawassociation.org/11GAdocs/workshop5-sg.pdf>>.