

Summary of Key Feedback from Public Consultation on the draft Mediation Bill

| Feedback | | Response |
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| Meaning of mediation, mediation agreement (clauses 3 and 4) | | |
| 1. | Definition of mediation should be broad, avoid being prescriptive. | <u>No further changes proposed.</u> Definition of “mediation” is inclusive, accommodates a broad range of mediation practices. The Bill applies to “mediations” conducted under a written “mediation agreement” (clause 6(1)), and is unlikely to catch informal mediations. |
| 2. | Definition of mediation should be clear that informal mediations will not be covered. | |
| 3. | Definition should include reference to party autonomy, and the fact that the mediator does not have the authority to impose a solution on parties. | <u>No further changes proposed.</u> <u>Clause 3 emphasises that the mediator’s role is to facilitate resolution between parties in a mediation, and that parties should voluntarily reach an agreement.</u> |
| 4. | Definition of a mediation agreement is too narrow, should be kept broad. Also questionable why a mediation clause in a bill of lading is highlighted and distinguished. | <u>No further changes proposed.</u> Provisions mirror requirements under arbitration legislation, and will ensure consistency between the treatment of mediation and arbitration clauses, in particular for hybrid dispute resolution clauses. |
| 5. | The Mediation Bill provides a requirement for a mediation agreement to be in writing, where this is satisfied by an electronic communication. This is unnecessary, duplicates Electronic Transactions Act. | |
| Types of mediation covered by the Bill (clause 6) | | |
| 6. | The Bill should not empower the courts to force parties to mediate if they are not ready. | The Bill does not seek to add to the court’s existing powers to make an order or direction for mediation. <u>We will revise the drafting for clauses 6(1)(b), (c) and (d), to clarify this.</u> |
| 7. | Will mediations under the Community Mediation Centre be excluded? Where will excluded mediations from the Mediation Bill be listed? | The Bill will exclude mediations which are conducted under other written laws, such as mediations under the Community Mediation Centre Act. This is to prevent inconsistency with various domestic mediation schemes that already exist in other legislation and have their own processes and rules. |
| Designated mediation service provider and approved certification scheme (clause 7) | | |

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| 8. | <p>Provision for designated mediation service provider and approved certification scheme should be done transparently.</p> | <p>This provision is closely tied to the proposed mechanism under clause 12, a new process intended to enable the enforcement of a mediated settlement agreement as a recorded court order. Accordingly, the intention is to limit the use of the provision at the start, to test out these relatively new Mediation Bill provisions, and ensure that the mediated settlement agreements are of a quality where they can be readily recorded by the courts. The mechanism will be opened up to more institutions once this is more established and successfully implemented. For now, the designated mediation service provider will be the Singapore International Mediation Centre and the Singapore Mediation Centre, while the approved certification scheme will be the Singapore International Mediation Institute Credentialing (SIMI) Scheme (SIMI Certified Mediator).</p> |
| Confidentiality of mediation, admissibility of mediation communications (clauses 9, 10 and 11) | | |
| 9. | <p>Mixed feedback was received on whether the mediated settlement agreement should be included as a confidential mediation communication. Some noted there is a strong user preference for a default confidentiality.</p> <p>Others noted that not all mediated settlement agreements today are made confidential, and that requiring the court's leave to disclose and enforce this is onerous, especially if one was seeking to record this as a court order under clause 12.</p> | <p><u>No further changes proposed.</u> On balance, it is agreed that the mediated settlement agreement should be covered by confidentiality provisions. The fact that mediated outcomes can be kept confidential is one of the main attractions of mediation today. If parties do not want confidentiality to apply to their mediated settlement agreement, they can agree to waive this.</p> |
| 10. | <p>The Mediation Bill should also regulate the confidentiality within the mediation proceedings itself (e.g. when mediation sessions are confidential).</p> | <p><u>No further changes proposed.</u> While the Bill will set out a broad framework to support mediation proceedings, it does not seek to regulate the conduct of mediation itself, which should be left to parties' agreement.</p> |
| 11. | <p>The issues of confidentiality and admissibility of mediation communications should be kept distinct, unclear which provision applies when a document is to be admitted into court.</p> | <p><u>No further changes proposed.</u> Confidentiality and admissibility are distinct concepts, but similar principles apply to both. Hence, overlap is necessary, to make clear that an application to admit mediation evidence into court will not be a breach of confidentiality.</p> |

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| 12. | Provisions state that mediation communications cannot be disclosed to a “third party” to a mediation, i.e. anyone other than a mediator or party to the mediation. Other mediation participants should also be excluded, such as the mediation service provider, lawyers, insurers, or where corporations are involved, any relevant personnel. | <u>Propose to also exclude a “mediation service provider”, taking into consideration the feedback received.</u> Disclosures to other mediation participants can already be addressed through other provisions which allow for disclosure under clause 9(2), such as disclosure with party consent, or disclosure for legal advice, etc. We are also proposing to expand clause 9(2) to include situations where disclosure is necessary for regulatory compliance (see item 14 below). |
| 13. | The Mediation Bill should provide for a “mediator privilege”, which prevents a mediator from being compellable as a witness in court. | <u>No further changes proposed.</u> Clauses 9, 10 and 11 already provide that any disclosure, or admission into evidence of a mediation communication is subject to the leave of court. A mediator will already enjoy protection from having to give testimony in court on such mediation communications, unless the court or arbitral tribunal, taking into account the matters set out under clause 11(2)(a) to(c), decides to grant leave. |
| 14. | Clause 9(2)(g), which covers disclosure required by court or law, should extend to situations of regulatory compliance. | <u>Propose to expand the provision, taking into consideration the feedback received,</u> to cover disclosures necessary for regulatory compliance. |
| 15. | Clause 9(2)(c)(ii) should be extended to include vulnerable adults and mentally incapacitated adults. | <u>No further changes proposed.</u> These should fall under clause 9(2)(c)(i), or where there is a breach of law, clause 9(2)(h). |
| 16. | Clause 9(3)(a) requires leave of court, or in arbitral proceedings, the arbitral tribunal, if a party wishes to disclose a mediation communication to enforce or dispute a mediated settlement agreement. This is onerous, as it adds an additional procedural step for parties in enforcing the mediated settlement agreement. | <u>No further changes proposed.</u> Leave requirements are necessary to safeguard the confidentiality of the mediation proceeding. As parties expect the mediated settlement agreement to be confidential, any disclosure should be subject to leave of court. While this adds an additional procedural layer for parties to meet, process refinements could be introduced to mitigate the inconvenience (e.g. by joining leave application with application to admit evidence). |
| 17. | Clause 9(3)(d), which allows the court or arbitral tribunal to grant leave to a person to disclose a mediation communication for any purpose considered justifiable in the circumstances of a case, is too wide and intrusive. | <u>No further changes proposed.</u> The court, and in arbitral proceedings the arbitral tribunal, must consider the factors set out at clause 11(2) in granting leave for disclosure, including considerations of whether such disclosure is in the public interest, or in the interests of the administration of justice. |

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| 18. | Not clear if the test for the court or arbitral tribunal to grant leave for a mediation communication to be disclosed or admitted into evidence overrides common law principles. | The test aims to codify certain common law principles, which the court must take into account when deciding whether to grant leave. <u>No further changes proposed.</u> |
| Recording of mediated settlement agreement as court order (clause 12) | | |
| 19. | Time period for recording mediated settlement agreement should be more flexible, should include such longer period as parties may agree. | Taking into consideration this feedback, <u>we propose to lengthen the time period for recording to 8 weeks, or such longer time as the court may order.</u> The court may take into account the fact of party agreement in extending the time. |
| 20. | <p>Mixed views were expressed on whether an application under clause 12 should require consent by all parties to the mediated settlement agreement.</p> <p>Those in favour noted that:</p> <ul style="list-style-type: none"> • Offering this mechanism in contested cases would defeat the purpose of the expedited enforcement process. • Party consent preserves party autonomy to decide how the agreement will be enforced • Parties can still enforce and rely on a mediated settlement agreement without this provision. <p>Those against noted that:</p> <ul style="list-style-type: none"> • Dispensing with a requirement for party consent would better promote the Mediation Bill’s intention of heightening enforceability of mediated settlement agreements. • While in usual cases parties should consent, an additional limb should be added where parties could enforce upon a later breach of agreement. • Alternatively, the provision should be structured as an “opt-out” provision. | <p><u>On balance, we propose to keep the requirement for party consent, for the reasons expressed.</u> If there is dispute between parties, there are concerns that the court may encounter difficulties when recording the mediated settlement agreement. An additional concern is that the Bill does not limit the type of mediations which can make use of this mechanism. In non-commercial cases, where parties may not always be legally sophisticated, a concern is that without explicit consent, they may not be aware of the implications of using this mechanism.</p> <p>Practically, mediators or mediation service providers may choose to include default clauses in mediation agreements, or mediated settlement agreements, that parties consent to the procedure.</p> <p>As noted above we are also proposing to lengthen the time period for an application to be made under this section.</p> |

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| 21. | Court should be able to record “all or part” of the mediated settlement agreement as a court order. | Clause 12 provides that the court “may” refuse to record the mediated settlement agreement if any of the terms of the agreement are not capable of enforcement as an order of court. <u>No further changes are proposed</u> , as there are concerns that this will require the court to review the substance / merits of the case. This provision seeks to strengthen the mediation process by giving effect to the parties’ intent that the agreement they arrived at pursuant to mediation should be enforceable as an order of court. The court should not be put in a position where it is required to rewrite that agreement. |
| 22. | Under clause 12, the court may refuse to record the mediated settlement agreement where certain invalidating factors are “brought to the attention of the court”. This makes it too easy for parties to argue the mediated settlement agreement should not be recorded. These factors should also be reviewed. | Taking into consideration this feedback, <u>we will clarify the wording in clause 12</u> to make clear that the existence of such invalidating factors must be proven, and will review the factors listed. |
| 23. | The Mediation Bill should set out the effect of a mediated settlement agreement which is not capable of being recorded as a court order under clause 12. | <u>No further changes are proposed</u> . The result will be that parties cannot record the mediated settlement agreement as a court order under section 12. Section 12 is limited to cases where there are “no ongoing court proceedings”. It does not preclude other existing methods of enforcing the mediated settlement agreement, such as enforcement in court under the usual contractual principles, or if there are ongoing proceedings, recording a consent order. It is not necessary for the Mediation Bill to regulate this. |
| 24. | Family Justice Court should also be allowed to refuse to record a mediated settlement agreement if it is not in the interests of the child. | <u>We agree, and propose to adopt this feedback</u> . |
| Other issues | | |
| 25. | The Mediation Bill should provide for the separability of the mediation clause. | <u>No further changes are proposed</u> . We note the concept of severability under section 21(2) of the Arbitration Act and Article 16(1) of the First Schedule of the International Arbitration Act is linked to the issue of competence of an |

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| | | arbitral tribunal to rule on its own jurisdiction. It is not clear however if a similar purpose can be served in mediation. If there is a challenge to the existence or validity of a mediation clause in an agreement, this can be left to the courts to determine, on common law principles. |
| 26. | The Mediation Bill should provide for a regulatory framework for mediator standards, and professional responsibilities. This should include a complaints procedure and when a mediator can be found liable. | <u>No further changes proposed.</u> While the Bill will set out a broad framework to support mediation proceedings, it does not seek to regulate the conduct of mediation itself, or set out mediator standards. |
| 27. | The Mediation Bill should regulate the conduct of the mediation proceedings, including the appointment of mediator and duties of the mediator, and if there is a change of mediator. | |
| 28. | The Mediation Bill should enable a mediated settlement agreement to be recorded as an arbitration agreement. | <u>No further changes proposed.</u> Section 37 of the Arbitration Act and section 18 of the International Arbitration Act already provide for enforceability of such consent awards. |
| 29. | Desirable to have mediator immunity, similar to arbitrator immunity provisions. Some suggested mediation immunity should be limited to only certified mediators, or mediators under a designated mediation service provider, which will encourage professionalisation. | <u>No further changes proposed.</u> Immunity can already be addressed through contractual provisions or professional indemnity. Moreover, mediation is facilitative in nature, compared to arbitration, which requires adjudication and where an award is issued. Other jurisdictions do not generally provide for general mediator immunity, except for court-based or volunteer mediators. |