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THE ENFORCEABILITY OF MEDIATION CLAUSES IN SINGAPORE

This article examines the enforceability of mediation clauses in Singapore. The various arguments against enforceability are examined and this article will argue that in light of current legal conditions in Singapore, a strong case can be made for the enforceability of mediation clauses. In addition the article will also explore some ancillary issues related to the enforceability of mediation clauses as well as recommend potential solutions.

I. INTRODUCTION

IT would not be an exaggeration to say that mediation has taken Singapore by storm. Over the last 5 years, Singapore has seen the establishment of the Court Mediation Centre, the offering of mediation services under the Commercial Mediation Service, the opening of the Singapore Mediation Centre and the establishment of Community Mediation Centres. In fact it would be fair to say that mediation, as a dispute resolution process, is now firmly part of Singapore's legal system. This progress can be seen with the increasing number of cases that are referred to and resolved by mediation.

With this dedication to the resolution of disputes through mediation, it will be a matter of time, if it has not already occurred, that clauses referring disputes to the process of mediation will become commonplace in business contracts. The Attorney-General's Chambers has already taken the first step by recommending that future government contracts should carry a clause referring disputes for mediation, wherever appropriate.[1]

However, the increasing number of these clauses referring disputes to mediation brings with it a problem that up till now has not been considered in Singapore. This problem can be stated thus: Are clauses referring disputes to mediation enforceable? This paper seeks to address this issue by first providing a definitional and factual context within which to consider this question. The writer will then go on to consider the 4 arguments against enforcement. Where appropriate, the paper will examine the relevant case

[1] See Chief Justice's address at the official opening of the Singapore Mediation Centre, Singapore Academy of Law Newsletter, Sep/Oct 1997, Issue 50 at 4.

authorities. Policy considerations supporting and detracting from the enforcement of such clauses will also be considered as well as some related issues.

II. The Context

In this section, the writer will provide the reader with a factual and definitional context within which to make sense of the problem. As a starting point, it would be useful to consider what mediation is. Mediation is one of the main forms of alternative dispute resolution (ADR)[2] and is a dispute resolution process by which a dispute is referred to an independent third party neutral, the mediator, for resolution. While there are different models upon which the dispute may be resolved,[3] a defining feature of mediation is that the mediator does not have the authority to impose a settlement on the parties. Put another way, the mediation process does not guarantee a resolution to the dispute.

By way of contrast, arbitration is another dispute resolution process, which is considered to be a main form of ADR. In arbitration, a neutral third party considers the dispute and then makes an award, which is binding, on the parties.[4] This is an important distinction to make here as it forms part of the basis for an argument against enforcing a mediation clause.[5] It would also follow that this distinction is important not only as it applies to mediation, but that the arguments against enforcement equally apply to other non-binding ADR processes like negotiation and the mini-trial.

A mediation clause then is a clause incorporated into a contract that refers disputes arising from the contract to the mediation process for resolution. The purpose presumably is to capitalize on the advantages of the mediation process[6] and to facilitate a speedy and amicable resolution of the dispute.

2 For a discussion of the term ADR and the processes it comprises of, see J Lee "The ADR Movement in Singapore" *The Singapore Legal System* (Singapore University Press, Singapore, 1999, ed Kevin YL Tan) at 414-415.

3 Two of the main models operating in Singapore are the facilitative and directive models. For a discussion of these models and the mediation process generally, see Lim LT & J Lee "A Lawyer's Introduction to Mediation" (1997) 9 SAcLJ 100.

4 The distinctions between the dispute resolution processes of litigation, arbitration, mediation and negotiation have been considered in more detail in J Lee "The ADR Movement in Singapore" *The Singapore Legal System* (Singapore University Press, Singapore, 1999, ed Kevin YL Tan) at 415-421.

5 See text accompanying notes 7-22.

6 For discussions relating to the advantages of mediation see J Lee "The ADR Movement in Singapore" *The Singapore Legal System* (Singapore University Press, Singapore, 1999, ed Kevin YL Tan); Lim LT & J Lee "A Lawyer's Introduction to Mediation" (1997) 9 SAcLJ 100.

Now that we have a definitional framework to consider the problem, the writer will suggest a factual context in which to consider the problem. A common factual matrix might be this: A and B enter into a contract. In the contract is a clause that provides "All disputes arising under this contract will be referred to mediation for resolution." Relations under the contract progress for a time until a dispute arises at which time A commences proceedings in court. B, relying on the mediation clause, applies to the court to enforce the mediation clause and stay the proceedings. In this context, the question, of course, is what will the court do? Will it enforce the clause and direct the parties to mediate their dispute? Or will it refuse to enforce the clause (for whatever reason) and allow the trial to continue? It quickly becomes clear at this point that should the court adopt the latter approach, *ie*, refuse to enforce the mediation clause, then the purpose for which mediation clauses are incorporated in contracts is effectively negated and all the parties have left is good intentions.

It is within this definitional and factual context that the paper will now turn to the arguments against enforcement of mediation clauses.

III. Arguments Against Enforcement

While it is generally the intention of the courts to hold parties to their agreements and give effect to their intention, there are instances where courts would be reluctant to enforce certain mediation clauses. The arguments against enforcement of mediation clauses can take one of four forms. First is the argument that the clause is unenforceable for uncertainty. The second argument is that a mediation clause may seek to oust the jurisdiction of the courts and is therefore unenforceable. The third argument is that while the mediation clause may be enforceable, the court will not enforce it because it would be a futile gesture. The fourth argument is based on the notion that equity will only provide a remedy where the common law is inadequate. Since the breach of a mediation clause can be remedied in damages or in some situations do not give rise to damages, the court will therefore not enforce the clause through a decree of specific performance.

The first two arguments will render the mediation clause unenforceable *per se* whereas the latter two will render the mediation clause ineffective. This paper will now look at each of these arguments against enforcement in turn.

A. *The Uncertainty Argument*

The first argument against enforcement is based on the notion of contractual uncertainty. It is generally accepted that contracts need to satisfy a requirement of certainty before they are considered to be valid. The mediation

clause is like any other contractual clause and as such is subject to the requirements of validity imposed by the law of contract.

This question arose in *Paul Smith Ltd* v *H & S International Holding Inc*,[7] where the court had to consider an agreement with a dispute resolution clause providing that the parties "shall strive to settle the [dispute] amicably". Only when the parties were unable to do so would the matter be referred to arbitration.

The main issue revolved around the validity of the arbitration agreement. Therefore, this case was not about the enforceability of a non-arbitral dispute resolution clause. However, in the course of argument, the plaintiffs conceded that the dispute resolution clause did not create enforceable legal obligations. Steyn J accepted this without analysis save for a reference to *Courtney and Fairbairn Ltd* v *Tolaini Brothers (Hotels) Ltd*.[8]

This rationale for this was looked at in more detail in *Walford* v *Miles*.[9] In that case, the respondent Miles was seeking to sell a photographic processing business. There was an existing offer by a third party when the appellant Walford heard about the sale and began negotiations with the respondent Miles. In the course of negotiations, the parties agreed that the respondent Miles would terminate negotiations with any third party and would not initiate new negotiations with any third party. As Lord Ackner put it: "not only were the respondents 'locked out' for some unspecified time from dealing with any third party, but were 'locked in' to dealing with the appellants, also for an unspecified period".[10]

Again, counsel for the appellant Walford accepted that an agreement to negotiate is not recognised as an enforceable contract. The case of *Courtney and Fairbairn Ltd* was again cited as authority. The court considered this case in more detail and cited Lord Denning:[11]

> "If the law does not recognise a contract to enter into a contract (where there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force ... It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law ... I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract."

7 [1991] 2 Lloyd's LR 127.
8 [1975] 1 WLR 297.
9 [1992] 1 All ER 453.
10 *Ibid*, at 458.
11 *Supra*, note 8, at 301-302.

From this, it is clear that the objection to enforcing an agreement to negotiate is based on the idea that the agreement is uncertain. Before looking at this objection more closely, it is useful to mention that this view was by no means held universally. Lord Wright in *Hillas & Co Ltd* v *Arcos Ltd*[12] held the view that even though negotiations may not result in agreement and that repudiation of an agreement to negotiate may only result in nominal damages, nonetheless, the agreement was an enforceable contract.

Lord Wright's view was adopted by Kerr J in *Mallozzi* v *Carapelli SpA*[13] who held that an agreement to negotiate was enforceable and required parties to at least negotiate *bona fide* with a view to trying to reach agreement. On appeal, the Court of Appeal reversed this decision and held that an agreement to negotiate was unenforceable and did not legally compel the parties to negotiate.

From this point in time, the position in *Courtney and Fairbairn Ltd* has been preferred over that in *Hillas*. Upon analysis, the court in *Walford* v *Miles* considered that the agreement to negotiate is unenforceable because it lacks the necessary certainty. Lord Ackner opined that the uncertainty arose from parties not knowing when they are entitled to withdraw from negotiations. While it was argued that the answer could be whether the negotiations were determined in good faith, Lord Ackner held the view that the concept of negotiating in good faith is "inherently repugnant to the adversarial position of the parties when involved in negotiations."[14]

Following from this, an agreement to conciliate or mediate would be similarly uncertain because it would be difficult for the parties and the court to ascertain when the conciliation or mediation had been properly determined. It also follows that an arbitration would not suffer from this as there are very specific rules and procedures within which the arbitration must operate and this overcomes the objection of uncertainty.

Another way of looking at this is that arbitration is not subject to an uncertainty argument because the arbitral process will inevitably lead to an award. With processes like negotiation, mediation and conciliation, there is no guarantee of resolution, which raises the uncertainty regarding termination of these processes.[15]

It is submitted that there are difficulties with Lord Ackner's analysis. There is nothing fundamentally wrong with the proposition that parties can agree to negotiate. Lord Wright's approach in *Hillas* could easily have been

[12] [1932] All ER Rep 494, 505.

[13] [1975] 1 Lloyd's Rep 229; [1976] 1 Lloyd's Rep 407.

[14] *Supra*, note 9, at 460.

[15] There may be some overlap between the uncertainty argument and the futility argument. See text accompanying notes 37-45.

the approach adopted. As Lord Wright pointed out, the only difficulty is that the negotiation may not result in agreement and breach of the agreement might only result in nominal damages. There is no policy that dictates against the enforceability of such an agreement.

Admittedly, there is a problem with uncertainty. However, it is submitted that there are 2 ways to get around this difficulty. The first way is to require the parties to negotiate in good faith. Lord Ackner's view was that this was untenable because negotiating in good faith is "inherently repugnant to the adversarial position of the parties when involved in negotiations."[16] With respect, Lord Ackner's view is problematic. Just because parties in a negotiation may be in an adversarial relationship does not mean that they cannot negotiate in good faith. You can still negotiate in good faith while pursuing one's own interest. There is not an exclusive relationship between negotiation and the notion of good faith.[17]

And even if a requirement of good faith can be seen as "inherently repugnant to negotiation", the writer submits that this results from a limited understanding of negotiation. It is only one model of negotiation where the parties are in an adversarial position and where the result is win-lose. Other models of negotiation revolve around a problem-solving paradigm where the result can be win-win.[18] Surely with this other approach to negotiation, a requirement of good faith is not repugnant?

So, the good faith approach is one way to overcome the problem of uncertainty. The second way is simply to build in a contractual mechanism so that the uncertainty is obviated. The parties can provide a certain time period for them to negotiate, mediate or conciliate, after which termination of that process is permissible. It therefore becomes very clear when the parties are entitled to move on from the chosen process.

Following from this, as long as certainty is built into the agreement to negotiate, mediate or conciliate, the uncertainty argument would be obviated and the agreement would be enforceable.

This was the position taken in *Hooper Bailie Associated Ltd* v *Natcon Group Pty Ltd*[19] where Giles J held that an agreement to conciliate or mediate is enforceable in principle, as long as the conduct required of the parties for participation in the process is sufficiently certain.[20] In this case, the parties had agreed to conciliate before resorting to arbitration. The agreement

16 *Supra*, note 9, at 460.

17 In the same way, barristers can represent their client in an adversarial system, yet function ethically and with integrity.

18 R Fisher & W Ury *Getting to Yes* (London, Arrow Books Limited, 1987).

19 (1992) 28 NSWLR 194.

20 *Ibid*, at 209.

to conciliate was breached and the question of its enforceability came up for consideration.

As a starting point, Giles J acknowledged that the cases on enforceability to conciliate or mediate, in his words, "do not speak clearly or with one voice". His honour considered, *inter alia*, *Paul Smith Ltd* and *Walford* v *Miles*. Giles J then contrasted these English cases with the position in New South Wales.[21]

It is not necessary to consider this in detail. Suffice it to say, Giles J held that the agreement to conciliate was enforceable as long as it was sufficiently certain. In doing so, he did not follow the position in *Paul Smith Ltd*. This was sufficient to dispose of the issue of enforceability.

However, his honour went on to state that agreements to negotiate and indeed agreements to negotiate in good faith did not necessarily lack certainty. Neither did an agreement to negotiate in good faith mean that parties were obligated to act against their interests. Hence, agreements to negotiate could similarly be enforceable. While Giles J did not analyze this in detail, it is submitted that, following the writer's analysis earlier, this position is both defensible and correct.[22]

It would therefore seem that Australia has taken the position that agreements to negotiate, conciliate or mediate are enforceable in so far as the clause or agreement meets the requirement of certainty established by the law of contracts.

The writer submits that this is the correct direction to take and that when the issue arises for consideration in Singapore, the Singapore courts should take a similar approach.

The uncertainty argument aside, it would be appropriate to now consider the second argument against enforcement, that of the ouster of jurisdiction argument.

B. *The Ouster of Jurisdiction Argument*

The second argument against the enforcement of a mediation clause is that the court will not permit an ouster of its jurisdiction. This objection is not new and has been earlier considered in the context of another ADR process, *ie*, Arbitration. The principle can be expressed thus: where there is an agreement to create legal rights, the parties cannot by contract remove from the court the jurisdiction to enforce those rights, and confer it upon a private tribunal.[23]

[21] *Coal Cliff Collieries Pty Ltd* v *Sijehema Pty Ltd* (1991) 24 NSWLR 1.

[22] See text accompanying notes 14-18.

[23] Michael J Mustill & Stewart C Boyd *Commercial Arbitration* (1989, Butterworths, London, 2nd Ed) at 154. While there is disagreement as to the actual reason for this rule, it is agreed that the principle was established by *Thomas* v *Charnock* (1799) 8 Term Rep 139.

This principle would clearly exclude any clause that requires the parties to a contract to refer disputes to arbitration. Needless to say, for a period of time, this objection was an obstacle to the enforcement of an arbitration clause. It is submitted that this forms the objection to enforcing mediation clauses as well.

This principle was considered in the landmark case of *Scott* v *Avery*.[24] The court there re-affirmed the principle that parties could not by contract oust the jurisdiction of the court and therefore a conventional clause requiring parties to refer a dispute to arbitration would be unenforceable. However, the clause that was the subject of deliberation in *Scott* v *Avery* was drafted in a way that made reference to arbitration and an award made as a condition precedent to the creation of liability. So, unless the arbitration had occurred and an award made, the plaintiff technically had no rights to enforce in a court of law.

Prima facie, this may seem to some as a legal device to get around the principle of non-ouster. However, the court considered this and held it to be valid. The reasoning was that since the effect of the condition precedent is to prevent a cause of action from arising in the first place, the clause did not oust the jurisdiction of the court because there was nothing to oust.

Since then, it has been accepted that clauses drafted in *Scott* v *Avery* form are enforceable. Such a clause does not technically provide grounds for a stay of proceedings but acts as a defence to the action brought.[25] Of course, the practical effect is the same.

At this point, it is useful to mention that the *Scott* v *Avery* form is no longer as relevant to arbitration in the Singapore context as it was in the past. This is due to the provisions of the Arbitration Act 1953[26] and the International Arbitration Act 1995.[27] Section 6 of the Arbitration Act[28] provides the court with the discretion to stay proceedings in a domestic arbitration agreement. Section 7 of the International Arbitration Act provides for a mandatory stay in an International Arbitration Agreement. So, in the context of arbitration, the objection created by the principle of non-ouster is no longer a problem.

[24] (1856) 5 HL Cas 811.
[25] *Supra*, note 23, at 162.
[26] Cap 10, 1985 (Rev Ed).
[27] Cap 143A, 1995 (Rev Ed).
[28] *Supra*, note 26.

However, the position established by *Scott* v *Avery* has been cited with approval in Singapore[29] and Malaysia[30] and has even been applied in contexts outside arbitration. For instance, in the Malaysian cases of *Datuk Pasamanickam & Ors* v *Agnes Joseph*[31] and *Subramaniam Lakshamanasamy* v *Datuk S Samy Vellu & 4 Ors*,[32] the court applied *Scott* v *Avery* to the context of the rules of a society and a political party respectively. So it would seem that rules of a society or political party can be drafted in *Scott* v *Avery* form as well.

It is not necessary to explore these cases in detail. Suffice it to say that the fact that courts have applied *Scott* v *Avery* to contexts outside arbitration is significant. Since the analysis in *Scott* v *Avery* is based on the idea that there is no ouster of the court's jurisdiction if a condition precedent to the arising of liability is not satisfied, it need not be limited to the context of arbitration. It is submitted that the approach in *Scott* v *Avery* can be applied to the context of mediation.

Put another way, as long as a clause referring a dispute to mediation is drafted in *Scott* v *Avery* form, it should be considered enforceable. Indeed, this argument should apply to a clause referring a dispute to any form of ADR.

To date, this matter has not arisen for consideration by the Singapore courts. In Australia however, the Queensland court had the opportunity to consider this matter in *Allco Steel (Queensland) Pty Limited* v *Torres Strait Gold Pty Ltd & Ors.*[33] Because *Allco Steel* may be interpreted as a case which proposes that ADR clauses in *Scott* v *Avery* form is still not enforceable, it would be useful to examine this case.

In *Allco Steel*, the contract provided that disputes arising from the contract will be referred to a conciliation meeting[34] failing which recourse may be had to litigation or arbitration.

A dispute arose between the parties and Allco Steel commenced proceedings under the contract. Torres Strait Gold applied to the court for a

[29] *Sun-Line (Management) Ltd* v *Canpotex Shipping Services Ltd* [1986] 2 MLJ 348.

[30] *New Acres Sdn Bhd* v *Sri Alam Sdn Bhd* [1991] 3 MLJ 474; *Perbadanan Kemjuan Negeri Perak* v *Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309; *Pembenaan Keng Ting (Sabah) Sdn Bhd* v *Seloga Jaya Snd Bhd* [1994] 1 MLJ 422; *Matthias Chang Wen Chieh* v *Joseph William Yee Eu & Anor* [1997] 5 MLJ 727.

[31] [1980] 2 MLJ 92.

[32] [1998] 1 MLJ 42.

[33] Unreported, Supreme Court of Queensland, No 2742 of 1989, 12 March 1990).

[34] It is not clear what conciliation means in this context. It could refer to a session where the disputing parties meet to negotiate a settlement alone or with the aid of a third party. For the purposes of this paper, it is sufficient to note that the clause refers the dispute to a non-binding ADR process.

stay of the action based on the conciliation clause. The presiding judge, Master Horton QC, refused the stay.

Before considering Master Horton's reasons for refusing the stay, it is useful to note that before this set of proceedings, Torres Strait Gold had earlier commenced proceedings without complying with the conciliation clause. An application for a stay succeeded and the parties were ordered to proceed to conciliation.

Theoretically, Master Horton's decision could be justified on the basis that the conciliation clause had already been complied with and was therefore no bar to the commencement of this set of proceedings. However, it is clear that this consideration did not form the basis of Master Horton's decision. Instead, Master Horton first started by considering the nature of the conciliation clause. The court concluded that the clause was not an arbitration clause and that the line of cases dealing with *Scott* v *Avery* clauses did not apply.

Secondly, Master Horton noted that the principle of non-ouster of the court's jurisdiction had precedence over the principle of holding parties to their contractual obligations. This is the same argument used against the enforcement of arbitration clauses before *Scott* v *Avery*. This was sufficient to dispose of the matter and Master Horton refused the applicant the stay of proceedings.

The decision of Master Horton has been criticized.[35] The main criticism that can be made relates to Master Horton's conclusion that since the conciliation clause was not an arbitration clause, the line of cases relating to *Scott* v *Avery* clauses did not apply.

It is not clear if Master Horton decided this because the conciliation clause was not in *Scott* v *Avery* form, or because there is some distinction between arbitration and conciliation.

If Master Horton's rationale was the former, then the decision in *Allco Steel* is consistent with the authorities and is not a relevant authority where the factual matrix reveals a conciliation clause drafted in *Scott* v *Avery* form.

If Master Horton's rationale was the latter, then with respect, I submit that the learned Master had erred. While it is true that the *Scott* v *Avery* form dealt with a dispute resolution clause in the context of arbitration, there is no reason why the *Scott* v *Avery* form cannot apply to contexts other than arbitration. The reason for enforcing arbitration clauses in *Scott*

[35] See M Shirley & A Wood "Dispute Resolution Clauses" (1991) 7 Queensland University of Technology Law Journal 165-166; R Angyal "Alternative Dispute Resolution Clauses: Are They Enforceable?" (1991:Feb) 29 Law Society Journal 62-64.

v *Avery* form is based on a point of drafting and interpretation and not something which is peculiar to the arbitration context.

Since the principle in *Scott* v *Avery* is not peculiar to the context of arbitration, it can and should be applied cross-contextually. Following from this, it is submitted that while the principle of non-ouster of the court's jurisdiction is a strong one against the enforcement of clauses referring disputes to mediation, drafting a mediation clause in *Scott* v *Avery* form should be sufficient to overcome this objection.

In addition, Master Horton made two other comments that the writer will briefly set out.

The first comment was that a breach of a conciliation clause is best remedied by an action for damages against the party breaching the clause.[36] The second comment was that even if the Court could grant a stay, the discretion should not be exercised because it was clear that the parties were not amenable to conciliation.

While these comments are not directly relevant to the current discussion of the principle of ouster of jurisdiction as an argument against enforcement, it becomes relevant in relation to the next two arguments against enforcement. It is to these that the paper will now turn.

C. *The Futility Argument*

The previous argument related to whether the mediation clause was enforceable and it was argued that as long as the mediation clause was in *Scott* v *Avery* form, there would be no problem with the principle of non-ouster of the court's jurisdiction.

The third argument deals with the question of, not whether the mediation clause is enforceable, but what form that enforcement should entail. In the absence of legislation specific to mediation, a mediation clause should ideally be enforced by a decree of specific performance. Put another way, if one party begins proceedings in breach of a mediation clause, the court should stay the proceedings and direct the parties to refer the dispute to mediation. However, the third argument draws on basic principles of equity[37] that the court will not enforce the clause if it would be a futile gesture. Put another way, the court will not require parties to do something that would be ineffective or futile.

In relation to a mediation clause, the argument is that since mediation (and indeed many of the other ADR processes) is a consensual process,

[36] Relying on *Anderson* v *GH Mitchell & Sons Ltd* (1941) 65 CLR 543.
[37] *New Brunswick & Canada Railway & Land Co* v *Muggeridge* (1859) 62 ER 263.

ordering parties to go to mediation would be inconsistent with the voluntary and consensual nature of mediation. After all, the parties could render the order futile through non-cooperation.

Presumably, this notion forms the basis of Master Horton's in *Allco Steel* comment that even if the Court could grant a stay, the discretion should not be exercised because it was clear that the parties were not amenable to conciliation. It follows that the appropriate remedy for a breach of a mediation clause is, not a decree of specific performance, but damages.[38] Again, this comment was also made by Master Horton in *Allco Steel* that a breach of a conciliation clause is best remedied by damages.

At this juncture, it is useful to point out what the writer perceives as an error. Thus far, it is clear that the objection raised by the futility argument is based on the consensual nature of mediation. This has been the way it has been expressed by cases like *Allco Steel* and academic commentary on this point.[39]

However, it is submitted that the objection cannot be due to the consensual nature of the mediation process. If this were so, then arbitration would be also subject to the same objection of futility since it too is a consensual and voluntary process.

A more accurate way of framing the futility argument is not that mediation is consensual but rather that the process of mediation does not necessarily lead to a settlement of the relevant dispute. Then it becomes clearer why the futility argument would apply to all forms of ADR processes which are non-binding in nature[40] and why the process of arbitration is excluded from the ambit of the futility argument. In arbitration, an award is made by the arbitrator and so the parties are assured of a resolution of the dispute.

So the objection of the futility argument is that requiring the parties to go to mediation (or any other non-binding ADR process) would really be a waste of time especially if at least one of the parties has made it clear that settlement is not sought or forthcoming. This is a strong argument and the cases of *Paul Smith Ltd* and *Walford* v *Miles*, while dealing with the issue of uncertainty, can also be seen as a concern that an agreement to negotiate, mediate or conciliate can result in futility.[41]

[38] The question of whether damages would even be awarded for breach of a mediation clause will be considered in the next argument. See text accompanying notes 46-50.

[39] See LV Katz "Enforcing an ADR Clause – Are Good Intentions All You Have?" (1988) 26 American Business Law Journal 575, 583; M Shirley "Breach of an ADR Clause – A Wrong Without Remedy?" [1991] Australian Dispute Resolution Journal 117, 118.

[40] Like negotiation, mediation, conciliation and the mini-trial.

[41] For a discussion of these cases and the uncertainty argument, see text accompanying notes 7-22.

The writer agrees that the court should not make orders that are futile. It is submitted, however, that the futility argument is a flawed one and arises from two sources.

The first source is a bias of the legal mentality that litigation is the main and preferred form of dispute resolution. In this mentality, everything else is alternative to litigation so unless one can be certain of the results of these alternative processes, litigation is preferred.[42] Yet, the experienced legal practitioner will be familiar with the situation that just because parties have declared that settlement is impossible does not necessarily mean that it is. Otherwise, the number of pre-trial settlements cannot be explained.

The second source is a failure to recognize the nature of the ADR processes. The assumption made by proponents of the futility argument is that ADR will only work when 2 parties want to settle a dispute and cannot agree on the details.[43] However, they do not recognize that the ADR processes are designed to deal with parties who do not believe that resolution of their dispute is possible.[44] Through the ADR process, hostility between the parties is reduced, the needs of the parties are identified, the scope of agreement established and settlement encouraged. Very often, parties who start out hostile and in disagreement end up finding common ground and settling. The parties initially resorting to litigation is only a statement about their inability at that point to communicate and find common ground. It is not a statement about whether settlement is possible and certainly not a suggestion that reference to an ADR process would be futile. This appears to be the position adopted by Giles J in *Hooper Bailie*.[45]

In light of this, it becomes clear that the futility argument loses much of its strength. Coupled with the current legal climate in Singapore of encouraging disputes to be referred to mediation for resolution, it is submitted that the futility argument does not present a significant obstacle to the enforcement of a mediation clause by requiring the parties to go for mediation.

D. *The Damages Argument*

The damages argument is closely related to the futility argument and forms the fourth argument against enforcement of mediation clauses. As with the

[42] For a discussion of this issue, see J Lee "The ADR Movement in Singapore" *The Singapore Legal System* (ed: Kevin YL Tan)(Singapore University Press, Singapore, 1999), at 414-445.

[43] LV Katz "Enforcing an ADR Clause – Are Good Intentions All You Have?" (1988) 26 American Business Law Journal 575, 584.

[44] M Shirley "Breach of an ADR Clause – A Wrong Without Remedy?" [1991] Australian Dispute Resolution Journal 117, 118.

[45] *Supra*, note 19, at 206.

futility argument, the point is not that the clause is unenforceable but that the form of enforcement should be one other than a decree of specific performance. The damages argument is based on the principle that equity[46] will provide a remedy only where the common law remedy of damages is inadequate.[47]

The argument is that a breach of a mediation clause (or an ADR clause) by one party does not cause a loss to the other party. After all, if the breaching party has no intention of settling, then refusing to engage in the chosen process does not harm the other party. So while there may technically be a breach of contract, the non-breaching party would only be entitled to nominal damages. This was the view taken by Lord Wright in *Hillas* where he stated that a breach of an agreement to negotiate might only result in nominal damages.

Even if some harm is suffered, the argument follows that damages are sufficient and indeed appropriate as a remedy for the breach. There is therefore no need for a decree of specific performance. This was the view taken by Master Horton in *Allco Steel* where he commented that a breach of a conciliation clause is best remedied by an action for damages against the party breaching the clause.

To this, there are two points that could be made. The first point is a practical one. If it is likely for a court to find that a breach of a mediation clause does not cause a loss to the non-breaching party and will result only in nominal damages, then there arises the temptation of parties reneging on what they have previously agreed. The writer submits that to prevent this from happening, a liquidated damages clause should be incorporated into commercial contracts so that upon breach of a mediation or ADR clause, damages of a certain sum becomes automatically payable. Provided the liquidated damages clause is significant, this will hopefully give parties pause should they consider breaching the mediation clause.

The second point relates to whether common-law damages are sufficient as a remedy for breach of a mediation clause. It is clear from the statements in *Allco Steel* that Master Horton considers damages sufficient. With respect, the writer submits that this view stems once again from an inaccurate understanding of the ADR processes. This view does not consider that the process of mediation is inherently valuable to the parties.[48] The value lies in the removal of the parties' dispute from the litigation process and allows them to regain control over the resolution of their dispute. So even if the

[46] *Cud* v *Rutter* (1720) 1 P Wms 570.
[47] *Supra*, note 43, at 583-584.
[48] *Supra*, note 43, at 586-588.

mediation process does not ultimately result in settlement, there is intangible benefit to the parties in the satisfaction and empowerment resulting from the process itself. The writer submits that this value which the parties have contracted for cannot be adequately remedied by damages and can only be addressed with a decree for specific performance.

The writer foresees two ancillary arguments arising from this conclusion. The first is that the courts do not traditionally order specific performance in situations where performance of the obligation requires the constant supervision of the court.[49] This was one of the considerations of the court in *Walford* v *Miles*. It is submitted that a decree of specific performance directing parties to mediation will not require the constant supervision of the court. As long as it is clear when the parties are entitled to terminate the mediation, either through specification in the mediation clause or by reference to the rules of the institution providing mediation, there is no need for the supervision of the court. If settlement is achieved in the mediation, then the settlement is enforceable as a contract and the supervision of the court is still not necessary.

The second ancillary argument is that a contract for personal services will not be granted specific performance. This is because it is undesirable to compel unwilling parties to maintain continuous personal relations with one another.[50] It is submitted that a mediation clause is not a clause for personal service. While specific performance of a mediation clause will require parties to maintain personal relations with one another, this will be in a context of resolving the dispute between the parties. As pointed out earlier, the parties will be interacting within a process that is designed to reduce hostility, enhance communication, improve working relationships and foster agreement.

In light of this discussion, the damages argument also loses much of its persuasiveness. The writer submits that in a situation where one party has breached a mediation clause, not only is there a loss to the non-breaching party, common law damages are inadequate as a remedy and a decree of specific performance is both appropriate and necessary.

IV. Related Issues

This paper has so far considered the various arguments against enforcement of a mediation clause. The first two arguments, that of uncertainty and ouster of the court's jurisdiction had the potential to be fatal to the proposition of the enforceability of a mediation clause. Each of these two arguments

[49] ABL Phang *Law of Contract* (Butterworths, Singapore, 1994), at 916.
[50] *Ibid*, at 916.

has been examined and the conclusion is that they are not necessarily fatal to the enforcement of a mediation clause.

From the point of view of practice, lawyers seeking to incorporate a mediation clause into their contracts should build in a time period within which the mediation must be completed. Alternatively, they should make reference to the rules of a particular mediation institution so that there is sufficient certainty for the clause to be enforced. Lawyers can also choose to draft the mediation clause in *Scott* v *Avery* form so that it will not be seen as an ouster of the jurisdiction of the courts.

The last two arguments, *ie,* the futility and damages arguments, had the potential to render the mediation clause impotent. The futility argument sought to do this by suggesting that an order requiring the parties to mediate would be futile. The damages argument suggested that the loss, if any, caused by the breach of the mediation clause could be remedied by damages.

Again, the writer has examined these arguments and has concluded that the futility and damages arguments arise out of an inaccurate understanding of the mediation process. When taking into proper account the philosophy and methodology behind mediation, the conclusion is that not only would a decree of specific performance be effective, it would also be appropriate.

Further, there are a number of other considerations supporting this conclusion. The first consideration is a general one and that is the courts should endeavour to hold parties to their agreements that they had freely negotiated and made. The second consideration is the flip side of the first, which is that if courts considered mediation clauses unenforceable, this would encourage parties to breach their agreements. This should be discouraged.

The third consideration relates to the current climate of the Singapore legal system. Considering Singapore's current interest and growth in ADR processes, especially mediation, it would be ironic and counter-productive for mediation clauses to be found unenforceable. This would be contrary to the intention of encouraging parties to go for mediation. It is submitted that as a matter of policy, courts should require very strong reasons for not enforcing a mediation clause.

It is useful at this point to raise a related matter. Even if the courts were minded to enforce a mediation clause, do they have the power to stay the proceedings? As mentioned earlier,[51] the field of arbitration is now governed by legislation.[52] Mediation has no such legislation governing it in Singapore.

[51] See text accompanying notes 26-28.

[52] International Arbitration Act 1995 Cap 143A, 1995 (Rev Ed) and the Arbitration Act 1953 Cap 10, 1985 (Rev Ed).

To the writer's knowledge, legislation relating to this issue has not been passed elsewhere either.

There have been pronouncements in a number of cases that support that proposition that courts have the inherent jurisdiction to stay proceedings. Further, there is also the indication that courts are increasingly more willing to exercise this inherent jurisdiction to stay proceedings in favour of ADR processes.

In *Hooper Bailie*, Giles J held that the court could enforce an agreement to mediate or conciliate by staying proceedings and this power is derived from both statute and its inherent jurisdiction to prevent abuse of its process.[53]

In *Channel Tunnel Group Ltd* v *Balfour Beatty Construction Ltd*,[54] the House of Lords were faced with a non-arbitral dispute resolution clause which referred disputes to a panel of independent experts. Lord Mustill, with whom the other Law Lords agreed, opined that since the court had the inherent jurisdiction to stay proceedings on the basis of a jurisdiction clause, this provided a "decisive analogy" for granting a stay where proceedings were brought in breach of an agreement to refer disputes to alternative methods.[55]

Lord Mustill's approach was followed in a decision of the English High Court in *Cott UK Ltd* v *FE Barber Ltd*.[56] Hegarty J acknowledged that the form of dispute resolution considered in Channel Tunnel, although not strictly arbitration, was close to arbitration.[57] The question then was whether a stay should be granted in relation to alternative forms of dispute resolution other than arbitration. After examining the basis for Lord Mustill's judgment, Hegarty J concluded that:[58]

> "in light of the observations of Lord Mustill [...] and in light of the *changing attitudes of our legal system*, the court plainly has a jurisdiction to stay under its inherent jurisdiction, where the parties have chosen some alternative means of dispute resolution." (emphasis added)

Hegarty J goes on to say that a presumption is then created in favour of a stay and this presumption may be rebutted by the party opposing the stay.[59] It is not clear what the standard of proof must be to adequately rebut

53 *Supra*, note 19, at 210-211.
54 [1993] AC 334.
55 *Ibid*, at 352.
56 [1997] 3 All ER 540.
57 *Ibid*, at 547.
58 *Ibid*, at 548.
59 *Ibid*, at 548.

the presumption. In this case, the learned judge held that there were good grounds for refusing the stay. It would appear that the standard of proof required is not a high one.

With respect, it is submitted that the standard of proof required should be a high one. As mentioned earlier, Lord Mustill in creating his proposition in Channel Tunnel drew an analogy between an ADR clause and a jurisdiction clause.[60] Fundamental to both types of clause is the starting point that parties should be held to their agreements. Hence, in relation to jurisdiction clauses, before the court will refuse a stay, the party opposing the stay has to show "strong cause" and this is a higher standard than on the basis of natural forum principles.[61] Similarly, it is submitted that the standard of proof required for rebutting the presumption of a stay should be a similarly high one. Otherwise, it would only be paying lip service to the notion of encouraging disputes to go for mediation.

At present, there are no Singapore cases on the point of a stay in relation to an agreement to refer a dispute to ADR processes. There are suggestions that the Singapore courts have an inherent jurisdiction to stay proceedings in relation to arbitration agreements not covered by current legislation.[62] It is submitted that in view of the trend in Singapore towards ADR, it is likely that that the Singapore courts will use its inherent jurisdiction to stay proceedings in favour of ADR processes.

The discussion should be sufficient to make a strong case for the enforcement of a mediation clause through a stay of proceedings and an order for specific performance. For completeness, it would be useful to mention two potential problems. The first is that despite the arguments presented, the court might nonetheless choose not to enforce a mediation clause. The second is, even if the court were willing to stay the proceedings, the party opposing the stay might be able to rebut the presumption created. As discussed earlier, the standard required in *Cott UK Ltd* does not seem to be a high one.

To pre-empt these problems, it is submitted that Parliament should pass legislation which address these issues. The content of this legislation can vary according to what parliament would consider to be useful. This could cover a range of issues like accreditation and registration of mediators, admissibility of material adduced in mediation and protection of mediators

60 *Supra*, note 54, at 352.

61 *The Eleftheria* [1970] P 94; *The Asian Plutus* [1990] 2 MLJ 449; *The Vishva Apurva* [1992] 2 SLR 175. For a discussion of the principles and standard involved in opposing a stay based on a jurisdiction clause, see KS Toh , "Stay of Actions Based on Exclusive Jurisdiction Clauses under English and Singapore Law" [1991] SJLS 103 and 410.

62 *Star-Trans Far East Pte Ltd* v *Norske-Tech Ltd* [1996] 2 SLR 409.

from suit.[63] At the very least however, the legislation should provide for a stay of proceedings much like those provided for in arbitration.[64]

V. Conclusion

In this article, the writer has examined the arguments against enforcing a mediation clause and has found these arguments surmountable. It is argued that on an analysis of both the legal and policy considerations, mediation clauses are enforceable. The writer has also pointed some possible issues relating to a stay of proceedings based on mediation clauses as well as calling for a legislative solution to clarify matters.

At the end of the day, the writer submits that the ADR processes, in particular mediation, are here to stay. It would not make sense if Singapore's push to have matters resolved by ADR were hampered by an inability to enforce a contractual clause referring disputes to an ADR process. This would discourage commercial parties from providing for this possibility in their contracts and may even encourage parties to breach their obligations under a mediation clause.

The trend in many jurisdictions is towards considering ADR clauses enforceable and it is submitted that it would make good commercial and legal sense, in the absence of parliamentary guidance, for the Singapore courts to do the same.

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63 For an example of such legislation, see The Mediation Act 1997 (Australian Capital Territory). This legislation does not address the issue of enforceability of mediation clauses.

64 *Supra*, note 52.

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