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LITIGATING OVER MEDIATION—HOW SHOULD THE COURTS ENFORCE MEDIATED SETTLEMENT AGREEMENTS?

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The courts have long supported the enforcement of compromise agreements, including settlements arrived at in the course of mediation. However, the recent trend in many countries, including Singapore, of enacting statutory provisions for the enforcement of mediated agreements suggests that the existing legal framework may be inadequate to support the mediation process. This paper examines the current principles used by the courts in determining the enforcement of mediated settlements, assessing them in light of the underlying values of mediation and contract law. This is followed by a brief analysis of how mediation confidentiality has been impacted by the current legal framework. In examining the preferred way forward, the paper also surveys various ways of buttressing the legal framework, and puts forward a few recommendations.

I. INTRODUCTION

> 'The law loves compromise.' So wrote Lord Bingham CJ in his foreword to the 4th edition (1996) of *The Law and Practice of Compromise* by David Foskett QC. The converse is also true. The law, in its promotion of finality and certainty in dispute resolution, loathes litigation about compromises. But such litigation does occur.
> — Mummery LJ in *Dattani v Trio Supermarket Ltd.*[1]

The courts have long supported compromises and private settlements. As observed by Lord Bingham, there are good public policy reasons for this position.[2] Nonetheless,

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* District Judge, Centre for Dispute Resolution, State Courts Singapore. The views expressed in this paper represent the author's personal views, and do not in any way reflect the State Courts' position.

1 [1998] ICR 872 at 874 (CA).

2 David Foskett, ed, *The Law and Practice of Compromise*, 7th ed (London: Thomson Reuters, 2010) at ix:

> It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by court decision. . .
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> The law reflects this philosophy, by making it hard for a party to withdraw from a settlement agreement, as from any other agreement, and by giving special standing to an agreement embodied, by consent, in an order of the court.

unique issues arise from the interface between compromises and litigation. Case law has developed concerning disputes over settlements, and the courts have been grappling with ways of bringing about the finality that settlements are meant to give. Litigation about compromises still occurs, and presents intriguing issues for consideration.

These issues are apposite *in relation to mediated settlements*, given the increasing popularity of mediation. The mediation movement has been growing in intensity within Singapore, with the recent establishment of the Singapore International Mediation Institute and the Singapore International Mediation Centre. The number of cases being referred to the Singapore Mediation Centre has been steadily increasing, while court-connected mediation has also been taking on greater prominence.[3]

Two years ago, a Working Group on International Commercial Mediation was established to examine ways to make Singapore a more attractive venue for international mediation. One of its recommendations was to enact a Mediation Act to strengthen the legal framework for mediation, providing for a stay of proceedings pending mediation and an enforcement mechanism for mediated settlements, amongst other legal aspects.[4] These recommendations have brought to the fore the question of the desirability of the current legal framework for enforcing mediated settlements, and the related question of how much reform is necessary to support the mediation movement.

This paper examines the current principles used by the courts in cases concerning the enforcement of mediated settlements, and evaluates whether the legal framework is appropriate. This is followed by a brief analysis of how mediation confidentiality is impacted by the contractual framework. In examining the preferred way forward, the paper provides a comparative analysis of various ways of buttressing the legal framework to support mediated settlements, and puts forward a few recommendations.

II. The Distinctive Qualities of the Mediation Process

It is crucial to understand the unique nature of the mediation process before deciding on the appropriate legal framework to support it. While the mediation process has been defined in various ways, many statutory instruments and mediation regulatory standards have highlighted common characteristics. The United States's

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See also the English Court of Appeal in *Rothwell v Rothwell* [2008] EWCA Civ 1600 at para 8, stating,

> The Court of Appeal ADR scheme has a relatively low take up from family appeals but an encouragingly high success rate; and as a matter of policy it is important that this court should signify that if the parties arrive at a compromise, a clear compromise, within the mediation process, then that compromise will be robustly upheld by this court.

3 See generally George Lim & Eunice Chua, "Development of Mediation in Singapore" in Danny McFadden & George Lim, eds, *Mediation in Singapore: A Practical Guide* (Singapore: Thomson Reuters, 2015) at 1-19.

4 Ministry of Law, "Executive Summary: Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation" (2013), online: Ministry of Law <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/FINAL%20ICMWG%20Press%20Release%20-%20Annex%20A.pdf>.

(US) *Uniform Mediation Act*[5] frames mediation as a process in which a mediator "facilitates communication and negotiation between parties to assist them in reaching a *voluntary agreement* regarding their dispute".[6] Australia's *National Mediator Accreditation Standards* have a similar focus on the role of the participants:

> A mediation process is a process in which *the participants*, with the support of a mediator, identify issues, develop options, consider alternatives and *make decisions* about future actions and outcomes. The mediator acts as a third party to assist the participants to *reach their decision*.[7]

Mediation is a rather different creature from arbitration or litigation. While the latter processes are characterised by decision-making or adjudication, the distinctive quality of mediation is the absence of a third party decision-maker. In contrast, the third party neutral performs a multi-faceted role of helping the disputing parties to make their own decision through various techniques, such as facilitating communication, crystallising the underlying issues and helping parties to develop options. No solution is imposed on them; instead, the outcome hinges on the parties themselves agreeing on a solution.

The quintessential characteristic of mediation is thus *the parties' right of self-determination or autonomy*. The modern mediation movement in many jurisdictions grew out of such an emphasis on party autonomy, and the continuing allure of mediation is linked to this quality. It is this particular feature of mediation that has preserved the marked difference between mediation and a trial, making the former an 'alternative' dispute resolution ("ADR") process that is known to allow parties greater participation in the outcome of their dispute.

The *basis of the mediation outcome* also vastly differs from adjudication via a trial or arbitration. The mediation outcome is measured not by substantive fairness according to existing legal principles, but by the parties' private considerations. The court in *Lee Min Jai v Chua Cheow Koon*[8] articulated it this way,

> Privately settled terms in respect of the ancillary matters in a divorce *may not always appear to be fair*. But divorce is a very personal matter, and each party would have his own private reasons for demanding, or acquiescing, to any given term or condition in the ultimate settlement.[9]

This particular feature of mediation may be perplexing at first blush, as it seems inconceivable for any dispute resolution process to neglect the law. However, while the basis for the parties' ultimate decision within mediation may not necessarily be substantive law, this does not necessarily imply that the relevant law is not considered during the mediation. It is common in any mediation for all the parties to consider and evaluate the relative strengths of their legal positions, as well as the practical implications of proceeding with litigation. In negotiation parlance, this

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5 (2003, USA), online: Uniform Law Commission <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act> [*US Uniform Mediation Act*].

6 *Ibid*, s 2(1) [emphasis added].

7 *National Mediator Accreditation Standards*, online: Mediator Standards Board <http://www.msb.org.au/sites/default/files/documents/Approval%20Standards.pdf> at para 2.1 [emphasis added].

8 [2005] 1 SLR(R) 548 (HC).

9 *Ibid* at para 5 [emphasis added].

entails considering one's 'alternatives'—what will happen in the event that a settlement is not arrived at.[10] It is also common for proposals within the mediation to be made with reference to legal arguments. Nonetheless, while there may be awareness of what one may potentially be entitled to at a trial, a party may eventually agree on a settlement differing from this outcome because of other personal concerns and priorities, including the need to preserve a relationship or to avoid incurring additional expenses.

Another feature of the mediation process is its *confidential nature*. The mediation process takes the parties' discussion out of public scrutiny, enabling them to negotiate freely without their statements being construed as evidence for or against them. The attraction of mediation in this regard lies in minimising publicity of the dispute. While arbitration, another ADR process, also obliges the parties to maintain confidentiality, it is common for arbitral awards to be scrutinised by the courts based on natural justice, questions of law and other objective grounds.[11] Court proceedings concerning the award are by default heard in open court and may result in published judgments, subject to the parties' application to maintain confidentiality.[12] The degree of confidentiality expected by the parties in mediation is much higher than in arbitration.

As in other ADR processes, mediation is meant to bring about *finality for the parties*, with no further litigation concerning the settled issues. The Singapore Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter*[13] stressed, in this regard, that "[o]nce an agreement has been established. . . that concludes the matter".[14] Expanding on this, the High Court in *Real Estate Consortium Pte Ltd v East Coast Properties Pte Ltd*[15] elaborated that a compromise puts an end to the parties' dispute as the compromise agreement "essentially takes over as the basis of the parties' legal and contractual relationship",[16] such that parties are not allowed to re-open prior issues.

This paper examines the interface between mediated settlements and litigation over such settlements against the backdrop of mediation's distinctive qualities, with the view of assessing whether the existing legal framework to analyse mediated settlement negotiations is consonant with the characteristics of mediation. These considerations have been framed as three potential 'tensions' between:

a. The jurisprudential underpinnings of contract law and the values of mediation;
b. The courts' supervisory role over settlements based on existing legal principles and the parties' private considerations in arriving at a settlement; and

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10 See generally Roger Fisher & William Ury, *Getting to Yes*: *How to Negotiate Agreement Without Giving In* (USA: Penguin Books, 1991).

11 *Arbitration Act* (Cap 10, 2002 Rev Ed Sing), ss 48, 49 [*Arbitration Act*]; *International Arbitration Act* (Cap 143A, 2002 Rev Ed Sing), s 31 [*International Arbitration Act*].

12 Section 22 of the *International Arbitration Act* and s 56 of the *Arbitration Act* provide that the court proceedings under the Acts shall, on the application of any party, be heard otherwise than in open court. Section 23(4) of the *International Arbitration Act* allows the court to direct that a judgment be published if it considers the grounds of decision to be of major legal interest. If a party reasonably wishes to conceal any matter, the court must give directions to conceal the relevant matters.

13 [2009] 2 SLR(R) 332 (CA) [*Gay Choon Ing*].

14 *Ibid* at para 54.

15 [2010] 2 SLR 758 (HC) [*Real Estate Consortium*].

16 *Ibid* at para 58.

c. The courts' public scrutiny of negotiations and the parties' desire for confidentiality of mediation negotiations.

III. The Tension Between the Jurisprudential Underpinnings of Contract Law and the Values of Mediation

Settlement negotiations have routinely been analysed by the common law jurisdictions through the lenses of contract law. Contractual formation principles—including offer and acceptance, consideration and certainty of terms—have been utilised to decide whether the parties have arrived at a contractual agreement to compromise a claim. The vitiating factors developed by common law, such as misrepresentation, mistake and duress, are also relied on in deciding whether the agreement is void or voidable. The Singapore Court of Appeal in *Gay Choon Ing* has comprehensively set out the requirements for finding the presence of a compromise agreement, namely an identifiable agreement that is complete and certain; consideration; and the intention to create legal relations.[17] It has been fairly common for the Singapore courts to use these principles to determine the existence of settlements. By way of illustration, the Court of Appeal in *Quek Kheng Leong Nicky v Teo Beng Ngoh*[18] examined the parties' correspondence and found a meeting of minds based on acceptance of an offer to vary the time of payment for a sale and purchase agreement.[19] The courts have also considered whether there has been valid consideration for a compromise agreement.[20] Contractual principles are equally relied upon when ascertaining whether parties in matrimonial cases have reached agreements concerning the division of their assets.[21]

The same contractual analysis for settlement negotiations has been applied to negotiations facilitated by a mediator. In *Ng Chee Weng v Lim Jit Ming Bryan*,[22] the Court of Appeal analysed the parties' meetings, telephone conversations, correspondence and text messages to determine whether a settlement agreement concerning the purchase of shares had been reached. Part of the negotiations required the assistance of the disputing parties' mutual friend. The Court of Appeal affirmed the High Court's decision to rely on this impartial mediator's evidence to find that there was indeed *consensus ad idem*, and the terms of their agreement were according to the plaintiff's evidence.[23]

It has been observed by some commentators, however, that the application of contractual principles to the mediation process has created difficulties.[24] This assertion

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17 *Gay Choon Ing*, *supra* note 13, at para 46.

18 [2009] 4 SLR(R) 181 (CA) [*Quek Kheng Leong Nicky*].

19 *Ibid* at para 25.

20 *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2006] 4 SLR(R) 778 at paras 40-42 (HC): The court decided that there was proper consideration in the form of giving up one's right to pursue an action which he believes has a fair chance of success.

21 *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur* [2014] 3 SLR 1284 (CA) [*Surindar Singh CA*].

22 [2015] 3 SLR 92 (CA).

23 *Ibid* at paras 54-63.

24 See for instance Peter N Thompson, "Enforcing Rights Generated in Court-Connected Mediation—Tension between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice" (2003-2004) 19 Ohio St J Disp Resol 509 at 524, stating that "[a]pplying contract formation

warrants closer examination. On a more fundamental level, I turn to first examine whether there is any dissonance between the underlying values of contract law and mediation.

A. *Comparing the Jurisprudential Underpinnings of Contract Law and the Values of Mediation*

A contractual relationship is largely premised on *mutual assent*, leading to an agreement between the parties. Fuller and Perdue have argued that the contractual relationship is premised on reliance on the agreement, and the law should therefore compensate the aggrieved party based on reliance or restitutionary losses, such as expenses one has incurred in reliance on the contract.[25] Other scholars have argued that contract law is premised on the enforcement of promises made, which should be upheld based on trust and respect.[26] Whichever theory one subscribes to, it is patent that there is a strong emphasis on determining the contours of the parties' assent. Once such an agreement is established, the parties have mutual obligations based on promises made that have been relied on. No obligation can be validly imposed when the parties have not assented to certain terms and were thus not *ad idem*. There are therefore certain vitiating factors—misrepresentation, mistake, duress, undue influence and unconscionability—that are deemed to undermine the party's consent.

Contract is also based on a *bilateral framework*. In other words, the focus is on finding a meeting of minds only between the parties who are negotiating. The actions of other external parties are seldom taken into account, save perhaps in relation to events that may have frustrated a contract. In sum, contract theory stresses *the finding of parties' assent in a bilateral framework*.

I would argue further that there are other underlying values in contract law that are particularly evident from Singapore case law. One value is the *sanctity of contracts* for the purpose of efficiency and certainty in commercial transactions. Several judgments concerning commercial transactions have reiterated the principle that sanctity of contract should be upheld. The Court of Appeal has referred to this principle in relation to a general reluctance to imply terms into contracts, especially contracts entered between two commercial parties.[27] Likewise, it has also been observed by the Court of Appeal that there is a norm of sanctity of contract, such that the norm should only be departed from in the exceptional case and only when justified in a principled manner.[28]

A countervailing value to sanctity of contract is the *idea of fairness*. The Court of Appeal, when referring to the norm of sanctity of contract, simultaneously highlighted the tension between the norm and the need to ensure that "justice and fairness are not sacrificed at the altar of purely mechanistic certainty".[29] Andrew Phang JA has

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principles developed in the context of adversarial, arms-length bargaining to the consensual mediation process creates some difficulty for the courts".

25 Lon L Fuller & William R Perdue, "The Reliance Interest in Contract Damages" (1936-1937) 46 Yale LJ 52, referred to by Andrew Phang Boon Leong, gen ed, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) at para 02.095 [Phang, *The Law of Contract*].

26 Charles Fried, *Contract as Promise* (Cambridge, Massachusetts: Harvard University Press, 1981) at 31, referred to by Phang, *The Law of Contract*, *ibid* at para 02.096.

27 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at para 26 (CA).

28 *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 at para 31 (CA).

29 *Ibid.*

previously written that one conception of fairness is concerned with situations where a contract has been entered into in less than savoury circumstances, and "it would be unfair for the court concerned to simply hold the contracting parties... to their contract without more [reasons]".[30]

Turning then to evaluate the underlying values of mediation against those of contract theory, it is evident that there is the common emphasis of ensuring that the parties have assented or consented to the agreement. This is the trite basis for contract law, and it is also consonant with mediation's values to ensure that the parties have freely and voluntarily agreed to the final terms of settlement.

Nevertheless, it is proposed that the concept of self-determination within mediation is much wider than that of assent in the contractual framework. While the focus in contract law is on finding the meeting of minds, mediation emphasises *the individual exercise of each party's autonomy* in arriving at the agreement. The hallmark of a well-conducted mediation is each party feeling satisfied that they have been assisted to make their own decision. As such, the degree of assent that should be present within the mediation process goes beyond ensuring that the parties are *ad idem*. It is for this reason that many mediation standards stress the need to honour the parties' right of self-determination and to avoid coercion and improper influence. For instance, Florida's rules for court mediation have highlighted that the "ultimate decision-making authority... rests solely with the parties".[31] Many mediation standards also have safeguards, including prohibiting the mediator from giving an opinion on the merits of the parties' legal case or making suggestions on how a matter should be settled, as these acts may easily be construed as the exertion of pressure on the parties and an impingement on their right to self-determination.[32] The wider scope of self-determination vis-à-vis mutual assent has practical ramifications in the application of contractual principles to mediated settlements, as will be elaborated below.

There is yet another aspect of dissonance between the two frameworks. The bilateral framework for contract law does not take into account the presence and the potential impact of the third party mediator. This inherent constraint within contract law poses challenges to the practical analysis of negotiations conducted in a mediation context, which will also be illustrated below.

B. *The Application of Contractual Formation Principles*

It has been rare within the Singapore courts for a dispute to arise specifically in relation to the formation of a mediated settlement agreement; most disputes concern bilateral settlement negotiations. By contrast, there have been such cases within the US and United Kingdom (UK). Disputes in which no written settlement was documented at the end of the mediation have presented particularly difficult issues.

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[30] Phang, *The Law of Contract*, *supra* note 25 at para 02.103, referring to Andrew Phang, "Doctrine and fairness in the law of contract" (2009) 29(4) Legal Studies 534.

[31] Florida's Rules for Certified and Court-Appointed Mediators, Rule 10.220 (Mediator's Role) and Rule 10.300 (Mediator's Responsibility to the Parties).

[32] See for instance *National Mediator Accreditation System*, online: Mediator Standards Board <http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>, Part III, para 2.2, "A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes."

The UK decision in *Brown v Rice*[33] is an apt illustration of the challenges involved in applying the normal offer and acceptance principles to find bilateral assent, in the absence of a written agreement.

1. *The Decision in* Brown

In this case, there was no settlement at the end of this 13 hour mediation, but the parties continued exchanging proposals, as is common in many mediation sessions. The mediator's notes reflected an offer made by the plaintiff for the defendant to consider. The defendant alleged that he had then accepted this offer the next day, via fax transmission. However, the plaintiff disavowed any intention to make an offer during the mediation, arguing that he had wanted to discuss the matter with his family members the next day before making a formal offer.

The judge used an objective test to find that the plaintiff had indeed made an offer despite his alleged intentions, as his words were "such as to induce a reasonable person to believe that he intended to be bound".[34] Whatever he may have thought, "objectively [he] put forward an offer",[35] and the mediator understood it as such. Although the court did not doubt the plaintiff's evidence that he had not believed that he was making a firm offer, it found that he had not made his subjective intentions clear to the mediator and the other party.[36]

However, the court went further to observe that the offer had not mentioned how the pending litigation would be disposed of, whether by judgment or Tomlin Order. It surmised that this term must have been essential to the parties since "[t]he manner in which litigation generally is to be disposed of by a settlement agreement may be a matter of some importance to the parties to the litigation".[37] Hence the offer was deemed incomplete, and "[i]ts purported acceptance would not give rise to a complete agreement".[38]

There was another basis for the court's conclusion. The parties in *Brown* had signed an agreement to mediate which contained the clause, "Any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of each of the parties."[39] The court decided that the effect of this clause was to make any agreement "subject to contract".[40] Any agreement reached between the parties would be incomplete until reduced to writing and signed by each of the parties.[41]

2. *The Objective Enquiry in* Brown

This case illustrates the challenges encountered by the courts in ascertaining the parties' exact intentions to offer and to accept. In making the determination, the

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33 [2007] All ER (D) 252 (Mar) (HC) [*Brown*].
34 *Ibid* at para 49.
35 *Ibid* at para 50.
36 *Ibid.*
37 *Ibid* at para 51.
38 *Ibid*.
39 *Ibid* at para 24.
40 *Ibid* at para 53.
41 *Ibid* at para 52.

courts invariably reconstruct the parties' intentions. Here the court had utilised the 'promisor objectivity approach' in assessing the plaintiff's intention to offer, basing its analysis on how a reasonable person would have construed his words and conduct, and not on the plaintiff's subjective intentions. The court also appeared to introduce other objective elements, such as the need for the offer to deal with how the pending litigation was to be dealt with. In addition, the parties' intentions were ascertained in relation to their prior written agreement to have any settlement documented and signed.

The Singapore courts have endorsed the objective approach to analysing contractual formation. The High Court in *T2 Networks Pte Ltd v Nasioncom Sdn Bhd*[42] had similarly examined the parties' agreement from an objective perspective, and found that the omission of a schedule of payment for services provided by the plaintiff to the defendant had resulted in lack of certainty in the agreement. In *Gay Choon Ing*, the Court of Appeal observed that many cases have underscored the objective nature of the inquiry into parties' intentions.[43] Referring to *Tribune Investment Trust Inc v Soosan Trading Co Ltd*,[44] the court highlighted these comments by then-Chief Justice Yong Pung How,

> Indeed the task of inferring an assent and of extracting the precise moment, if at all there was one, at which a meeting of the minds between the parties may be said to have been reached is one of obvious difficulty, particularly in a case where there has been protracted negotiations and a considerable exchange of written correspondence between the parties. Nevertheless, the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring *consensus ad idem* is objective. *Thus, the language used by one party, whatever his real intention may be, is to be construed in the sense in which it would reasonably be understood by the other*.[45]

Nonetheless, an overtly objective approach of analysing mediation negotiations may inadvertently frustrate the parties' genuine intentions to arrive at a mediated settlement. As argued above, the mediation process is underpinned not only by finding a meeting of minds, but also ensuring that each party has voluntarily reached agreement, in the full exercise of his or her autonomy. In the event that the parties had freely arrived at an agreement on certain terms, there is a risk that the court would not honour this genuine agreement if it were to adopt an excessively objective stance that unduly neglects the parties' intentions, and imposes requirements that the court deems necessary to form valid offers or acceptances. Furthermore, it is common within the mediation process (or indeed in any negotiations) for a series of offers and acceptances to be made in quick succession, and with multiple variations and permutations. Some of these offers may not be as comprehensive as what the court in *Brown* desired, but they would nonetheless reflect a real intention to be bound once accepted. It is therefore submitted that the objective enquiry in contractual formation has to be sensitively employed with reference to the context, especially

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42 [2008] 2 SLR(R) 1 (HC).

43 *Gay Choon Ing*, *supra* note 13 at para 57.

44 [2000] 3 SLR(R) 407 (CA).

45 *Ibid* at para 40 [emphasis added].

for a mediation setting. In this connection, the court in *Gay Choon Ing*, while noting that the objective inquiry has been approved of in earlier cases, cautioned against being mechanistic in the application of the objective approach:

> [*T*]*he rules relating to offer and acceptance can, on occasion, be rather technical. One result is that rather fine distinctions have sometimes been drawn*... *On other occasions* (*thankfully not often*), *entire contracts might even be* "*invented*", *resulting in no small measure of artificiality*... Indeed, in the Privy Council decision of *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154 ("*The Eurymedon*"), Lord Wilberforce, delivering the judgment of the majority of the Board, observed thus (at 167): '... *English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach*, *often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.*'
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> ...
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> *What is required, however, is a less mechanistic or dogmatic application of these concepts and this can be achieved by having regard to the context in which the agreement was concluded.*[46]

Notwithstanding the above views, the court in *Brown* was probably correct in construing the parties' intentions in light of the pre-mediation agreement they had signed, which stated that a settlement had to be committed to writing. Similar conclusions have been reached in the US courts. The US courts are generally in agreement that the mere intention of the parties to commit their agreement to writing will not prevent the formation of a contract prior to the document's execution.[47] Nevertheless, in situations when "either party [has communicated] an intent not to be bound until he achieves a fully executed document, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract".[48] Hence, in many cases where the parties had signed an agreement to mediate providing that statements made during mediation would not be binding unless reduced to a final agreement of settlement, the courts have found an express reservation of a right not to be bound in the absence of writing, and therefore no binding settlement.[49] Since this clause is commonly inserted into the pre-mediation agreements of many mediation providers, it is reasonable for parties' intentions to be interpreted in conjunction with this clause.

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46 *Gay Choon Ing*, *supra* note 13 at paras 61-63 [emphasis added].

47 *Winston v Mediafare Entertainment Corporation,* 777 F 2d 78 (2d Cir 1986) at 80 [*Winston*]. The court suggested that four factors are taken into consideration:

> (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.

See also *RG Group Inc, and RG Restaurant Associates v The Horn & Hardart Company, and Bojangles' of America, Inc*, 751 F 2d 69 (2d Cir 1984) at 75-77.

48 *Winston*, *ibid*.

49 *Catamount Slade Products Inc v Sheldon*, 845 A 2d 324 (Vt Sub Ct 2003) and *Gildea v Design Distributors Inc*, 378 F Supp 2d 158 (ED NY Dist Ct 2005).

The same result will probably prevail within Singapore, as a similar clause has been used in the Singapore Mediation Centre's pre-mediation agreement.[50]

The upshot of the above arguments is that contractual formation principles have to be applied flexibly and practically, with acute awareness of context, in order for them to be consonant with the mediation setting. Otherwise there may well be results that are artificial and in contravention with the parties' decisions.

C. *Vitiating Factors*

Vitiating factors within contract law present an intriguing issue in relation to the interface between mediation and contractual values. Many Singapore cases concerning vitiating factors are related to bilateral negotiations, without a mediator's involvement. It has been very rare that the courts have found these agreements to be unenforceable based on these factors. The High Court dismissed the submission of mistake in *Ng Guat Hua v Onestoneinvest Pte Ltd*[51] and *Chai Chung Chin Chester v Diversey (Far East) Pte Ltd*.[52] In *Poh Cheng Chew v K P Koh & Partners Ptd Ltd*,[53] Lionel Yee JC severed a portion of a settlement agreement from the rest of the agreement, due to illegality. In *Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd*,[54] the court did not find any misrepresentation that affected the various compromise agreements concluded between the plaintiff bank and the defendant company (the bank's customer) concerning the repayment of a short-term advance facility.[55]

I will be focusing on the vitiating factors of duress and undue influence in the mediation context, as they connote serious threats to party autonomy, which is a distinctive feature of the mediation process. In the UK, a decision in *Farm Assist*

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50 *Singapore Mediation Centre Mediation Service Mediation Procedure* at para 8.1, "No settlement reached in the mediation will be binding until it has been reduced to writing and signed by or on behalf of the parties", online: Singapore Mediation Centre <http://www.mediation.com.sg/assets/downloads/commercial-mediation/7-Mediation-Procedure-15-May-15.pdf>.

51 [2008] SGHC 156. The plaintiff had initially sued the defendants over an agreement in which she was to make a capital investment in the defendant company. A settlement agreement was reached before trial for a certain number of shares to be sold to the plaintiff. It was argued by the latter that she had mistakenly believed that her monies had been paid into the company and invested, and that there would be a satisfactory due diligence exercise carried out on the company. Lai Siu Chiu J did not accept that there was unilateral mistake as the alleged misapprehension did not relate to the terms of the contract; the plaintiff had unilaterally thought that the transfer was conditional on the due diligence exercise, but that condition did not affect the transfer of the shares to her.

52 [1991] 1 SLR(R) 757 at paras 43, 44 (HC). No mistake was found here as there was no evidence showing that the mistaken assumption had been communicated to the other party and the argument of common mistake was thus summarily dismissed.

53 [2014] 2 SLR 573 at paras 99, 100 (HC). The clause prohibited the plaintiff from making a complaint to the Professional Engineers Board about the defendant's professional conduct. Lionel Yee JC found that this prohibition ran counter to the need to uphold professional accountability envisaged by the *Professional Engineers Act* (Cap 253, 1992 Rev Ed Sing). Nonetheless, the court was reluctant to find that the entire settlement agreement was void as the offending portion could be severed from the rest of the agreement.

54 [2005] 4 SLR(R) 30 (HC).

55 *Ibid* at para 33. The court was not satisfied that the defendant's director, a "shrewd businessman, perfectly capable of looking after his... interests" had shown how the purported misrepresentation had effectively induced his company to enter into the compromise arrangements.

Ltd v Secretary of State for the Environment, Food and Rural Affairs[56] recognised the need to protect party autonomy when it gave an order compelling the mediator to testify concerning allegations of illegitimate pressure being exerted by the defendant on the plaintiff. The readiness to compel the mediator to be witness attests to the serious weight the court accorded to the potential existence of economic duress.

In two reported Singapore decisions, *Real Estate Consortium*[57] and *E C Investment Holding Ptd Ltd v Ridout Residence Pte Ltd*,[58] duress was alleged also without success. Andrew Ang J in the former case did not accept the defendants' argument that they had entered into a settlement agreement for payment of a convertible bond agreement under economic duress in the form of the plaintiff's threat of commencing legal proceedings. The threat of legal proceedings was not an unlawful or wrongful threat amounting to illegitimate pressure.[59] Furthermore, the defendants had the benefit of independent legal advice throughout the negotiation process. The court also expressed disapproval of the defendant's attempt to revive the same issues that were the subject of the compromise agreement, highlighting that there was much public interest in the final resolution of disputes and in holding parties to their compromised bargain to ensure commercial certainty.[60]

In *E C Investment Holding*, another businessman, who was the first defendant's director, had entered into a settlement agreement for sale of a property at a price substantially below market value. Economic duress was alleged. The court again rejected the argument, finding that there was no compulsion of the director's will or illegitimate pressure that had vitiated his will. It found that while he was desperate for funds, he was a seasoned businessman who had received legal advice and did not protest even when asked whether he was sure about what he was doing.[61]

If indeed one party in a mediation has been affected by duress, it seems insurmountable to prove in the Singapore courts that the settlement should be set aside. It is difficult to convince the court of duress if the party has access to legal advice or is deemed seasoned enough to make one's own decision in the face of commercial pressure. Similar difficulties are likely to be faced when the defence of undue influence is being advanced.

There are more complications if the mediator has allegedly exerted the illegitimate pressure. The number of these allegations has been mounting in the US courts. One commentator noted that many of the complaints concerning undue influence and duress were unsuccessful in the main because the court assumes that parties are sufficiently protected when they are legally represented.[62]

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56 [2009] All ER (D) 228 (Jun) (TCC) [*Farm Assist*]. In this dispute concerning the work performed by the plaintiff on behalf of the defendant, it was argued that there was economic duress in the way the defendant valued the plaintiff's account and in the bad faith shown in their conduct at mediation. There was unfortunately no opportunity to analyse the court's decision as the legal proceedings were eventually discontinued.

57 *Real Estate Consortium*, *supra* note 15.

58 [2011] 2 SLR 232 (HC) [*E C Investment Holding*].

59 *Real Estate Consortium*, *supra* note 15 at para 51.

60 *Ibid* at para 59.

61 *E C Investment Holding*, *supra* note 58 at paras 56-59.

62 Penny Brooker, *Mediation Law: Journey through Institutionalism to Juridification* (Oxfordshire: Routledge, 2013) at 103.

By way of illustration, the California court in *Olam v Congress Mortgage Company*[63] did not find undue influence in a mediation in which a 65-year old woman went through a mediation stretching from the morning to one am, and it was not disputed that the party suffered from high blood pressure, intestinal pain and headaches at times. While the Magistrate acknowledged that the situation was inherently stressful, he found the party's allegations of acute distress unreliable, and concluded that the facts fell short as a matter of law of establishing undue susceptibility that was needed to establish undue influence according to California law.[64] In another case, *Vela v Hope Lumber & Supply Co*,[65] the plaintiff alleged that she was under economic duress because her attorney had allowed the mediator to "bully"[66] her. She claimed that the mediator had warned her about liability for insurance fraud and she had cried for an hour without the mediator offering her a tissue. The Oklahoma Court of Appeal did not disturb the finding in the first instance that there was no basis for the plaintiff's speculation of conspiracies and threats, deciding that it was clear that she had freely signed the agreement with understanding of the implications of the settlement. Evidently, the courts are not readily convinced of wrongful coercion or threats merely because of stressful situations occurring within mediation. The parties in these two cases had, in any event, failed to persuade the court of the veracity of their evidence.

In situations when the party has alleged duress or undue influence because of the mediator's court predictions, the courts are also generally reluctant to overturn the settlement agreement. The mediation process may at times involve 'reality testing' of any of the parties' assumption that his or her case will succeed at trial. The US courts appear to recognise that this is a normal part of the mediation process, not amounting to duress when a party has independent legal advice. Thus, in *Chitkara v New York Telephone Company*,[67] the US Court of Appeals for the Second Circuit decided that the mediator's statement about chances of success at trial could have been readily verified by the party, whose counsel was present at the time the statement was made. In a similar vein, the High Court in *Real Estate Consortium*[68] rejected the argument that a threat of legal proceedings amounted to a wrongful threat.

In sum, both the US and Singapore courts appear to assume that parties who engage in arms-length negotiations ought to be able to withstand a certain degree of commercial pressure to be expected to arise from such dealings. The application of the principles of duress seems to tip the balance between sanctity of contract and possible unfairness in favour of the former.

1. *Is There a Clash Between the Contractual Approach and the Values Underlying Mediation?*

Some US commentators have observed that the courts' reluctance to disturb mediated settlements has resulted in a potential conflict between traditional

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63 68 F Supp 2d 1110 (ND Cal Dist Ct 1999) [*Olam*].
64 *Ibid* at 1144-1146.
65 966 P 2d 1196 (Okla Ct Civ App Div 1 1998).
66 *Ibid* at 1198.
67 45 Fed Appx 53 (2d Cir 2002).
68 *Real Estate Consortium*, *supra* note 15.

contractual principles favouring settlement and one of mediation's core values, self-determination. They have expressed concern over increasing allegations in the US courts of coercion by the mediator, and have called for the courts to recognise the potential conflicts among the policy goals of judicial economy, fairness and maintaining the integrity of the mediation process. In addition, they have highlighted the need for enforcement of mediated agreements "to be decided within a framework that recognises mediation's unique character".[69] With regard to the application of duress and undue influence principles, it has been argued that the traditional contractual analysis seems to require parties to withstand a certain tolerable degree of pressure, whereas any amount of coercion within mediation should not be condoned because it is a clear breach of an important tenet of the mediation process. It has also been pointed out that the courts have to take into account the mediator's power to extract, facilitate, influence or even coerce agreement.[70]

One other commentator, Nancy Welsh, has pointed out that the traditional contractual principles are premised on a manifestation of assent and cannot be easily adapted to the mediation process that is premised on self-determination. For example, while the parties in mediation should make decisions free from pressure and coercion, "traditional contract analysis tolerates a fair amount of 'bargaining pressure'"[71] before the courts decline to enforce an apparent agreement. Welsh has further suggested the modification of the presumption that everyone has a free will to enter mediated agreements. She proposes that a party should only need to show a "probable cause standard"[72] for coercion and evidence of the mediator's negative evaluation or strong support for a particular way of settling, and the burden of proof should then pass to the mediator to prove no coercive conduct on his part.[73] Furthermore, she argues that the vitiating factor of undue influence is a more suitable defence as the relationship between the mediator and the parties is often a relationship akin to a fiduciary one.[74]

I have highlighted earlier that in balancing the norm of sanctity of contract with fairness, the Singapore courts are usually inclined to intervene in agreements only on very exceptional grounds of unfairness. It is submitted that the approach of upholding the sanctity of mediated agreements in most uncontroversial situations is a sensible one. The courts' general stance of holding parties to their compromised bargain ensures certainty and final resolution, as articulated by the High Court in *Real Estate Consortium*,[75] and is consonant with the underlying value of finality of mediation. It will be detrimental for mediating parties to be able to easily challenge

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69 James Alfini & Catherine G McCabe, "Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law" (2001-2002) 54 Ark L Rev 171 at 206.

70 Thompson, *supra* note 24 at 519, stating

> Some modification in the law relating to enforcing negotiated settlements must be implemented to account for the role and effective power the neutral has on the parties and the language of any agreement. The neutral may be a stranger, but the mediator is not a 'passive' observer and can have a dramatic influence on the shape and language of agreement.

71 Thompson, *supra* note 24 at 531.

72 Nancy A Welsh, "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?" (2001) 6 Harv Negot L Rev 1 at 83.

73 *Ibid*.

74 *Ibid* at 84-86. Welsh has also proposed rules to require a three-day cooling off period to protect parties who may have experienced highly pressurising mediations, at 87.

75 *Real Estate Consortium*, *supra* note 15.

and overturn their settlements. The nuanced balancing exercise between sanctity of contract and unfairness also gives room for the courts to deal with circumstances of unfairness that warrant the court's intervention to disallow enforcement of the mediated settlement.

2. *A Different Standard for Vitiating Factors in Mediated Settlements?*

The somewhat perplexing question is whether there should be a different benchmark from contract law for dealing with alleged coercion within a mediation setting. The negotiation process facilitated by the mediator is a unique one, distinguishable from bilateral, arms-length negotiation. Parties going through the mediation process often have to reflect on and challenge their existing assumptions, through the mediator's assistance. Regardless of the varying styles of mediation, it is not uncommon for a mediator to help each party to seriously consider the validity of the other party's perspective, and to honestly evaluate the benefits or disadvantages of a failure to settle. The experience may at times be slightly unsettling.

It is advisable for the courts to have a good understanding of these inherent nuances within the mediation process when evaluating allegations of coercion. There should be the recognition that the presence of the mediator may drastically affect the dynamics of negotiations between the parties, such that a party's consent may be substantially impaired through undue pressure exerted by the mediator. In such situations, the courts should not impose an unrealistically high threshold to establish duress or undue influence.

On the other hand, there ought to be awareness that moments of unease usually occur within mediation, which may not necessarily amount to illegitimate pressure leading to a vitiation of consent. Allegations of coercion are easily raised by parties who are attempting to belatedly renege on their agreements, and it is appropriate in such situations to view these allegations with circumspection. For instance, all the parties may have willingly mediated from morning till late night, but they may have given the mediator permission to continue. One party may subsequently claim that he was under duress or undue influence as he was exhausted. This was exactly the situation in the Californian case of *Olam*,[76] where the plaintiff alleged that she was physically unwell in the long mediation, and was not allowed to ask questions as to how long the mediation would last. The judge implicitly acknowledged that her version, if correct, would have satisfied one element of the doctrine of undue influence, namely undue susceptibility.[77] However, her testimony was not accepted as the judge found the defendant and mediator's testimony more probable, that they had constantly checked on her physical state and asked whether she wanted to continue, to which she had replied that she wanted to keep going.[78] The circumstances in this case illustrate how easy it is for a disgruntled party to raise unsubstantiated allegations of coercion, necessitating a detailed analysis by the judge.

Another example is a situation in which the mediator asks a party together with his or her counsel probing questions that help them consider the merits of their legal case. While the mediator is required by usual mediation rules and standards to do

[76] *Olam*, *supra* note 63.
[77] *Ibid* at 1144.
[78] *Ibid* at 1145.

this in a non-coercive way, it is certainly not a comfortable situation for the party as he or she may, upon further consideration, realise that bringing the case to court is not as easy as he initially thought. But this reality testing need not necessarily amount to undue influence or duress despite this discomfort. If the courts do not realise that it is normal to have such moments of unease in any mediation process, they may set aside mediated agreements too readily, without a substantiated basis. There is also good reason not to readily heed such allegations when parties have access to independent legal advice throughout the mediation or have time to consider their decisions.

I would thus respectfully disagree that the contractual principles for vitiating factors should be changed because of the purported clash with the value of self-determination. The existing contractual framework to deal with unfairness in the form of coercion or undue influence is sufficient for the courts to utilise, when coupled with an understanding of how the mediator's conduct and words may in certain situations be unacceptable. I should also point out that all three commentators' views above were made in relation to their observation of an increasing number of complaints of coercive behaviour in court-annexed mediation programmes, which were not heeded by the courts. This observation could have led to them to call for a remedy involving change in the law. There are, however, other ways to remedy this situation apart from changing the legal framework, including enhancing the court's oversight and monitoring of mediators or implementing a grievance system to deal with complaints about mediators.

There is one aspect though in which the contractual framework falls short. As the law now stands, it has a bilateral framework that does not account for the presence of the mediator, or a vitiating factor that emanates from the mediator. The threats or coercion must emanate from one of the contracting parties. However, in a mediation, the alleged threat may potentially emanate from the mediator and not from the other party. It is not uncommon for a mediator to have private meetings with each party. All discussions during such private meetings are kept in strict confidence, so that the opposing party may not be aware of any possible coercion exerted by the mediator. "Thus, a mediator may threaten improperly or manipulate a party's interests... yet there is no relief under traditional principles of duress unless the adverse party can be tied to the misconduct."[79]

The court in a Florida case faced a dilemma because of this restriction in the law. In *Vitakis-Valchine v Valchine*,[80] a dispute between a divorcing couple over the disposition of frozen embryos, the wife alleged that the mediator told her that the judge would order the embryos to be destroyed, and had at one point told her that

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[79] Thompson, *supra* note 24 at 533. In the US, if the wrongful threat amounting to duress comes from a third party, the agreement is not voidable if the other party to the transaction acted in good faith, had no reason to know of the coercive threats, and gave value to, or relied materially on the transaction. See USA *Restatement (Second) of Contracts* § 175(2) (1981). The US court in *Olam, supra* note 63 at 1144, evaluated the plaintiff's allegations generally to ascertain whether she was rendered "unduly susceptible by physical and emotional distress", this being one element to be proved for undue influence under Californian law. The court also went on to state that the plaintiff would fail as she had never contended that the mediator was the source of the undue pressure, and the existing law did not allow any such relief even though the mediator was indeed the source. On the facts, the defendants were also not found to have put any pressure on the plaintiff. In Singapore, the coercion of will that vitiates consent must also be a result of pressure exerted *by the other party—Pao On v Lau Yiu Long* [1980] AC 614 (PC), followed by the Court of Appeal in *Third World Development Ltd v Atang Latief* [1990] 1 SLR(R) 96 (CA).

[80] 793 So 2d 1094 (Fla Dist Ct App 2001).

he would report to the trial judge that the settlement failed because of her. The court acknowledged the constraints of existing law disallowing duress due to actions of a third party. Nonetheless, the court held that it could invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediated settlement that was obtained through violation of the judicially prescribed mediation procedures. The case was remanded to the trial court to determine whether the mediator substantially violated the rules for mediators.

It is understandable that the court invoked its inherent jurisdiction to disallow a settlement arising from any mediator misconduct within court-annexed mediations. It remains to be seen how the court would respond to a private mediation that is not associated with the courts. Evidently the contractual vitiating factors will not be available to the court. There may therefore have to be some modifications to deal with the limitations of current contractual vitiating factors.

IV. The Tension Between the Courts' Supervisory Role Over Settlements and the Parties' Private Considerations in Arriving at a Settlement

The second potential tension arising from the interface between mediation and litigation concerns the criteria to be used by the courts in considering whether a mediated settlement may be enforced. In many areas of law, the agreement of the parties is not automatically sanctioned as the court has the duty to ensure that the rights of parties have been properly protected through their agreement. This is the case in the division of matrimonial assets, maintenance of children,[81] custody of children,[82] guardianship of infants when the welfare of the child is paramount[83] and settlement of personal injury claims involving a person lacking capacity or under disability.[84] The list could be widened to include situations when the agreement infringes certain laws, appears unfair against an employee, or simply undermines public policy. Although the parties may have ostensibly exercised their right of self-determination and want their private agreement to be made final, the courts have to balance their private concerns with external policy considerations.

The dispute in *Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur*[85] raises a very interesting question in the context of division of matrimonial assets concerning how much the court should intervene when requested to enforce a mediated settlement. This was a dispute concerning post-divorce ancillary matters. The husband and wife had gone for a mediation session conducted by a private mediator, with their lawyers present. A handwritten settlement agreement with regard to maintenance and the division of matrimonial assets was drafted at the end of the mediation, and signed by the parties. One of the terms stated that the settlement was subject to the approval of the court. Following the mediation, the wife's lawyers sent a draft consent order incorporating the terms in the settlement agreement to the husband's

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81 *Women's Charter* (Cap 353, 2009 Rev Ed Sing), s 73 [*Women's Charter*].

82 *Ibid*, s 129.

83 *Guardianship of Infants Act* (Cap 122, 1985 Rev Ed Sing), s 3 [*Guardianship of Infants Act*].

84 *Rules of Court* (Cap 322, R 5, 2014 Rev Ed Sing), O 76 r 10, 11 [*Rules of Court*].

85 The High Court judgment is *Sita Jaswant Kaur v Surindar Singh s/o Jaswant Singh* [2013] 4 SLR 838 [*Surindar Singh HC*]. The Court of Appeal judgment is *Surindar Singh CA, supra* note 21.

lawyers. The latter responded by suggesting a specific date to fix liability for the outstanding overdraft for one property. The wife's lawyers did not agree to this date, and further proposed two new terms. They later indicated that the wife did not wish to be bound by the settlement agreement, prompting the husband to file a summons seeking the recording of the terms of the agreement in a consent order of court.

A. *The High Court's Decision*

This dispute was in respect of s 112(1) of the *Women's Charter*, which gives the court the power to order the division of matrimonial assets in such proportions as the court deems "just and equitable", having regard to all the circumstances of the case. Section 112(2) enumerates a list of non-exhaustive factors, including factor (e)—"any agreement between the parties with respect to the ownership and division of matrimonial assets made in contemplation of divorce".

Choo Han Teck J found that the parties were *ad idem* at the point when they signed the settlement agreement, and that the terms were certain. The failure to convert the agreement into a consent order, as envisaged in the settlement agreement, did not mean that it was not binding. However, Choo J declined to enforce the agreement as it stood, because the presence of an agreement was only one factor to be taken into account in determining a just and equitable division according to s 112(2) of the *Women's Charter*. Choo J expressed the view that the proposed division according to the agreement was not just, as it was disadvantageous to the wife (since she only received 32% of the assets), and hence he would not give the settlement agreement conclusive weight. The court proceeded to consider the issue of division of assets afresh, and decided on equal division of the assets.

It is noteworthy that the High Court stated that mediation was merely part of the context for an agreement made in contemplation of divorce. In the exercise of division of matrimonial assets under s 112(1) of the *Women's Charter*, the court was not merely enforcing an agreement but exercising its discretion to determine what a fair and equitable division is. Choo J stated that "[n]o special status is accorded to an agreement following mediation. Vague considerations of any public policy to promote alternative dispute resolution mechanisms cannot override the court's duty to ensure that the settlement was fair and equitable."[86]

In the interest of supporting mediated agreements, it is arguable that the parties' autonomy in deciding to settle in a certain manner should usually be respected and supported by the courts. Adopting such an approach will also ensure finality of mediated settlements. However, the relevant legislation in this case, the *Women's Charter*, expressly imposes on the court the duty to ensure that the division is just and equitable, taking into account any agreement reached and other circumstances. How then could the court simultaneously give due weight to the parties' autonomy and still discharge its duty under the *Women's Charter* to ensure fairness in the division of assets?

The High Court here manifested a strong aversion against being treated as a rubber stamp for the parties' agreement. Yet, in making a fresh determination of what was a fair division, the court had not taken into account the parties' agreement,

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[86] *Surindar Singh HC, ibid* at para 6.

dismissing it as having 'no special status' and also ignoring public policy considerations to promote ADR mechanisms. Such a holding would have potentially negative ramifications. A mediated settlement would be in danger of being replaced by the court's own view of a right outcome. Such an outcome would not promote finality of mediated agreements or give regard to the parties' exercise of autonomy in arriving at a compromise. This stance is also inconsistent with the general philosophy held by most common law jurisdictions in encouraging settlement.

B. *The Court of Appeal's Decision*

Such negative ramifications were fortunately avoided by the Court of Appeal's decision. It did not disturb the High Court's initial finding that the parties had entered into a valid agreement upon signing the written settlement agreement. There was, however, a more nuanced consideration of how the court should exercise its direction under the *Women's Charter* in the context of an existing settlement agreement.

Prakash J, on behalf of the court, opined that discretion given to the court under s 112(2) of the *Women's Charter* meant that if the facts warranted it, one or more factors listed therein for the courts' consideration may be given more weight than others. The court held the view that in the circumstances of this case, "the Settlement Agreement should have been given significant, if not conclusive, weight."[87] While it recognised that the weight to be allocated to a postnuptial separation agreement must ultimately depend on the precise circumstances of each case, the court found that:

> [W]here parties have properly and fairly come to a formal separation agreement with the benefit of legal advice, the court will generally attach significant weight to that agreement unless there are good and substantial grounds for concluding that to do so would effect injustice.[88]

It is significant that the Court of Appeal stressed the need to respect the exercise of the parties' autonomy in reaching a settlement. It acknowledged how the parties are the best ones to decide what was fair in their own assessment, and that the court, by contrast, is prevented by the limitations of the litigation process in reaching the same understanding. Hence a slight difference in views on the fairness of the agreement should not result in altering the parties' settlement:

> This approach is sensible because the *parties to a marriage are in the best position to determine what is a just and equitable division of the matrimonial assets based on their own assessment of each party's direct and indirect contributions to the marriage and their knowledge of the extent and value of the assets. Due to the inherent limitations of fact-finding in the litigation process, the court should not lightly depart from such a separation agreement*.
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> In this connection, there is judicial recognition that divorce is a very personal matter and *there may be private reasons as to why certain concessions were made in reaching a settlement agreement*. . .

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87 *Surindar Singh CA, supra* note 21 at para 49.

88 *Ibid* at para 54.

> *The grounds for disregarding such a separation agreement would have to be more substantial than a slight difference in opinion on the fairness of the distribution provided for by the agreement.*[89]

The caution issued by the court to be slow to depart from the separation agreement is consonant with the policies of upholding party autonomy and the finality of their settlement agreements. The Court of Appeal's decision still gave room for intervention under the *Women's Charter*, but in rather exceptional circumstances of substantial injustice or unfairness. On the facts of the case, it did not find such injustice as the parties had reached the agreement after a well-considered process, were represented by legal counsel, had many private sessions with the mediator, and had the opportunity to and in fact did make amendments to the settlement agreement.

C. *The Significance of this Decision*

While this decision was made specifically under the *Women's Charter*, it underscores significant principles concerning the ambit of the courts' intervention with mediated settlements. Although the court was empowered under s 112 to decide on a just and equitable division of assets, the Court of Appeal construed the concept of 'justice' narrowly when there was a private agreement between the parties. It chose not to intervene into the substantive justice of the outcome, but to give significant weight to the parties' agreement, thereby respecting the parties' personal choices in determining what was just and equitable in all the circumstances.

Court intervention was effectively limited only to elements of 'procedural justice', including whether the parties had the benefit of legal advice; whether they had freely and voluntarily agreed; whether the mediation process was properly followed; whether the parties participated in the mediation; and whether the court were satisfied that they had only decided after a well-considered process.[90] And these elements had to amount to good and substantial grounds for concluding that enforcement of the agreement would cause an injustice. Notably, the factors listed by the court are associated with an ethical principle within mediation known as 'informed consent'. Ethical codes often require the mediator to check whether the parties have an understanding of the mediation process and the full ramifications of a settlement before arriving at a settlement.[91] It has been argued that adhering to this principle is essential to bringing about fair and just outcomes.[92]

The considered decision to allow limited scope and a high threshold for intervention into a mediated settlement was linked to the policy of supporting mediation, as evident from the Court of Appeal's comments below:

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89 *Ibid* at paras 54-56 [emphasis added].

90 *Ibid* at paras 54, 56, 59.

91 See for instance JAMS, Inc's Mediator Ethic Guidelines at para 1: "A mediator should ensure that all parties are informed about the mediator's role and nature of the mediation process, and all parties understand the terms of settlement", online: <http://www.jamsadr.com/mediators-ethics/>.

92 Jacqueline M Nolan-Haley, "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking" (1998-1999) 74 Notre Dame L Rev 775 at 812.

> *We would like to emphasise the importance to our decision of the fact that the Settlement Agreement resulted from a mediation process during which the parties had independent advice.* Whilst the end of a marriage may be legally brought about by the issue of an interim judgment, the marriage will not end in truth until all outstanding matters are settled and the parties are free to walk away and rebuild their lives. This cannot happen as long as they are disputing the division of the assets and having to rebut each other's cases in relation to the same. That process often breeds contention and bitterness. *Thus, it would be in both parties' interests if they could come to a negotiated solution without resorting to determination by the courts which would resuscitate old complaints and acrimonious feelings. The process also takes time and can be costly. Such solutions can be facilitated by mediation.* Accordingly, if the mediation process is properly followed, as it was in this case, the parties having participated in the process and received advice thereon, and a settlement agreement results, the court will attach significant weight to the agreement unless there are good and substantial grounds for concluding that to do so would cause an injustice.[93]

This clear articulation of the policy of supporting mediated settlements is likely to guide future decisions concerning the enforcement of mediated settlements, particularly situations involving matrimonial law and custody or guardianship of children.

In commercial cases, it is likely that the courts will be much more stringent in their preference to uphold the settlement, subject to the contractual vitiating factor of illegality. This is particularly so in light of several observations made on the need to respect settlement negotiations in commercial transactions.[94] Furthermore, in many commercial disputes, there is no equally strong statutory exhortation as in the *Women's Charter* to ensure that the agreement is just and equitable. The closest concept to ensuring justice within contract law is probably that of unreasonableness, used to distinguish between liquidated damages (representing a genuine pre-estimate of loss) and penalties (that are *in terrorem*, extravagant or unconscionable in comparison with the greatest conceivable loss); and to preclude the enforceability of certain clauses limiting one's liability in negligence or in contract under the *Unfair Contract Terms Act*.[95] It is suggested that even if mediated settlements are arrived at concerning these areas and appear to be unreasonable according to substantive law, the court should still accord significant weight to the agreements, unless there are circumstances that connote substantial unreasonableness and injustice. Similar factors as set out in *Surindar Singh CA* could be considered, such as whether the parties were represented; whether they had opportunity and sufficient time to consider the agreement; and whether the agreement was voluntarily entered into.

To summarise, tension does arise when a mediated settlement contradicts the courts' sense of what is fair, just or reasonable according to existing legal principles. However, apart from settlements that clearly infringe public policy or laws (and are thus void under illegality), it is proposed that the court should give significant weight to mediated settlements, and limit its intervention to elements of 'procedural fairness'

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93 *Surindar Singh CA*, *supra* note 21 at para 60 [emphasis added].

94 *Gay Choon Ing, supra* note 13 at paras 54, 56; *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR(R) 8 at para 25 (HC); *Real Estate Consortium, supra* note 15 at para 61.

95 Cap 396, 1994 Rev Ed Sing.

that call into question how much the parties had informed consent before arriving at the settlement.

V. The Tension Between the Courts' Public Scrutiny and the Parties' Desire for Confidentiality of Mediation Negotiations

While the traditional contractual framework is useful, it frequently necessitates the examination of settlement negotiations and this invariably impinges on mediation confidentiality. It will be detrimental to the parties if mediation communications were to be scrutinised in court whenever they seek the courts' assistance in giving effect to a mediated settlement.

In Singapore, 'without prejudice' communications are protected by s 23 of the *Evidence Act*,[96] which does not allow an admission to be relevant if it is made either "upon an express condition that evidence of it is not to be given", or "under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given"—*Quek Kheng Leong Nicky*[97] and *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd*.[98] The High Court in *Teo Beng Ngoh and Others v Quek Kheng Leong Nicky*[99] also held specifically that the without prejudice rule applied to communications made between the parties with the assistance of a mediator, so that they were privileged.[100]

However, the Court of Appeal in *Quek Kheng Leong Nicky* and subsequently in *Ng Chee Weng v Lim Jit Ming Bryan*[101] decided that there is an exception to the without prejudice rule when they are needed to determine whether a compromise was reached, and what the terms of the compromise agreement were. This means that the court will lift the veil of confidentiality of mediation communications when the parties are asking the court to enforce a purported oral settlement agreement and the existence of the agreement or the terms contained therein. Or when no written settlement is recorded at the mediation, but the parties subsequently arrive at an agreement on terms that are disputed, the court is also likely to admit mediation communications to determine what the agreement was, as was done by the UK court in *Brown*.[102]

In the UK, additional exceptions to the without prejudice rule have been set out in *Unilever Plc v The Procter & Gamble Co*,[103] one of which permits the admissibility of evidence of negotiations to show that an agreement apparently concluded between the parties should be set aside on the ground of misrepresentation, fraud or undue influence. It is not clearly established within Singapore whether this exception applies. While the Court of Appeal in *Quek Kheng Leong Nicky* acknowledged that the without prejudice rule is subject to a number of exceptions listed in *Unilever*, the court only dealt with the first exception for the purpose of the appeal and did

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96 Cap 97, 1997 Rev Ed Sing [*Evidence Act*].
97 *Quek Kheng Leong Nicky, supra* note 18 at paras 22-24.
98 [2006] 4 SLR(R) 807 at paras 24-28 (CA).
99 [2008] SGHC 228.
100 *Ibid* at para 39.
101 [2012] 1 SLR 457 at paras 94-97 (CA).
102 *Brown*, *supra* note 33.
103 [2000] 1 WLR 2536 (CA) [*Unilever*].

not deal with the other categories.[104] Professor Pinsler has opined that it should not be assumed that the scope of the common law qualifications is firmly established in Singapore in relation to s 23 of our *Evidence Act*.[105] Be that as it may, it appears likely that the court may, when allegations arise as to potential vitiating factors within mediation, accept that there is an exception to the without prejudice rule and admit the relevant mediation communications. This will further undermine mediation confidentiality.

In addition, the parties themselves may waive the privilege protecting their without prejudice communications, but is there a privilege to be claimed by the mediator? The UK court in *Farm Assist*[106] decided that the privilege exists between the parties, and is not a privilege of the mediator. The court could still decide whether it was in the interest of justice for the mediator to be called as a witness.[107] As there were allegations of economic duress being exerted by one of the parties, the parties had waived their privilege and the mediator's evidence could shed light on the details of economic duress, the court found that this was a case in which the interest of justice lay strongly in favour of calling the mediator as witness. Such a decision was made despite the written agreement signed between mediator and the parties providing that none of the parties would call the mediator as witness in any litigation in relation to the dispute.

Absent any statutory provision concerning whether the mediator can be ordered by the court to testify, the situation in Singapore concerning when mediation communications may be admitted as evidence remains murky. The UK courts and academics, by comparison, are at a more advanced stage of considering whether a general privilege should exist for all mediation communications.[108] In one case, the judge directed that the judgment deciding whether a binding agreement was reached be appropriately anonymised due to the without prejudice nature of the communications and the need for confidentiality about the terms of settlement.[109] In stark contrast, the Singapore Court of Appeal in *Surindar Singh CA*, when deciding whether an alleged settlement agreement was binding, scrutinised the parties' correspondence post-mediation and reproduced paragraphs which recounted mediation communications.[110] Although it is arguable that the parties may have waived their privilege in this case, the court's approach may be reflective of a general lack of sensitivity in the Singapore courts to the need to preserve mediation confidentiality. This is understandable given the lack of clarity in the current law on such issues in relation to mediation.

In the US and other jurisdictions, statutes concerning mediation have been passed to provide greater clarity. It is apt that Singapore is currently planning to enact a Mediation Bill. The approach in the *US Uniform Mediation Act* concerning admissibility of mediation communications is worth considering. It provides for a general privilege of mediation communications subject to certain exceptions, including admitting terms of a signed settlement agreement and admitting communication that is a threat

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104 *Quek Kheng Leong Nicky*, *supra* note 18 at paras 23, 24.

105 Jeffrey Pinsler, *Evidence and the Litigation Process*, 4th ed (Singapore: LexisNexis, 2013) at para 15.011.

106 *Farm Assist*, *supra* note 56.

107 *Ibid* at para 44.

108 Justice Briggs, "Mediation Privilege? Procedure & Practice" (2009) 159 New LJ 506.

109 *AB v CD Limited* [2013] EWHC 1376 at para 35 (TCC).

110 *Surindar Singh CA*, *supra* note 21 at para 25.

or statement of a plan to inflict bodily injury. When there are court proceedings to advance a defence to avoid liability under the agreement under mediation, the Act prescribes a balancing test of whether the "need for the evidence... substantially outweighs the interest in protecting confidentiality".[111] This determination is to be made in a hearing *in camera*.[112]

It is submitted that a balancing test is preferable to the current common law exception to the without prejudice rule in *Unilever*. Allowing an exception to mediation confidentiality whenever vitiating factors are raised effectively wipes out any assurance of confidentiality whenever a purported mediated agreement is litigated. Such a result hardly encourages parties to use mediation because of its confidential nature. It has also been argued by one writer that blanket rules regarding mediation confidentiality "create incentives that are inconsistent with the goals of mediation":[113] completely disallowing mediation communications as evidence deprives deserving parties from being accorded contract defences, while a rule allowing mediation confidentiality to be pierced in all situations invades confidentiality. The balancing test is a more nuanced way to take into account "both the seriousness of the contract defence claim and the invasiveness of the threat to mediation confidentiality."[114] It is thus proposed that an approach that is customised to the circumstances of each case is arguably more preferable to a *carte blanche* permission to the court to admit mediation communications whenever there is a dispute over the settlement agreement.

Furthermore, practical measures to preserve mediation confidentiality, such as *in camera* hearings for the determination of admissibility of mediation communications and anonymising the names of parties in the grounds of decision, are very useful in preserving confidentiality as much as possible whenever there is a need for the court to scrutinise the settlement negotiations for legitimate reasons. These are similar to the practical guidance provided to the courts to protect confidentiality when reviewing arbitration awards under the Singapore *Arbitration Act* and *International Arbitration Act*.

VI. The Desirability of Statutory Intervention

In analysing the potential clashes arising from the litigation of mediated settlement agreements, I have argued that the current contractual framework may not be fully consonant with the underlying values of mediation in the following ways:

a. The vitiating factors that directly impinge on consent—namely duress and undue influence—need to accommodate situations when the source of coercion is the mediator;
b. While the Court of Appeal in *Surindar Singh CA* has clarified the courts' approach to post-nuptial settlement agreements, there remains uncertainty as to the exact scope of the court's oversight over mediated agreements in other situations; and

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111 *US Uniform Mediation Act*, *supra* note 5, s 6(b).

112 *Ibid*, ss 4, 6, 6(b).

113 Ellen E Deason, "Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality" (2001-2002) 35 UC Davis L Rev 33 at 89.

114 *Ibid*.

c. The current law on the admissibility of mediated communications is potentially too wide, allowing such evidence to be admitted whenever a dispute arises over the settlement.

This final section explores the possibility of remedying the above dissonance via statutory intervention.

A. *Taking a Leaf from the Arbitration Enforcement Framework?*

There have been principally two approaches used in statutory intervention—relying on the arbitration enforcement framework, or creating a new enforcement mechanism via legislation. The former approach gives a mediated settlement agreement the status of an arbitral award upon the fulfilment of certain conditions. Countries including Germany,[115] some American states[116] and India[117] have statutory provisions that grant a written settlement agreement the status of an arbitral award. Creative mechanisms such as arbitration-mediation-arbitration have also been designed to embed mediation within the arbitration process, so that settlement agreements are recorded as arbitral awards and given the enforceability protection made available through the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[118]

While the arbitration enforcement mechanism is attractive, adopting it for mediated settlements neglects the fundamental differences between the arbitration and mediation processes. Arbitration is almost akin to litigation, in that a decision is imposed by the adjudicator and has to accord with the seat of arbitration. Hence, the courts' decision to enforce an arbitral award is constrained by the possible breach of procedural rules relating to the fairness and propriety of the process, rules of natural justice and substantive law.[119] By comparison, a mediated settlement is not arrived at through a formal adjudicatory process, but hinges on the parties' consensual agreement. The outcome may not necessarily bear semblance to what a court would decide, for the parties often consider other needs that may not be accommodated by legal principles.[120]

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[115] Section 1053 of the German Zivilprozessordnung (Code of Civil Procedure) provides that a mediated settlement agreement may be directly enforced if it is recorded in an enforceable public instrument before a notary public.

[116] Cal Civ Proc Code § 1297.401 treats the conciliated settlement of an international commercial dispute as a final arbitral award when the agreement has been written and signed by the mediator, parties and their representatives. Tex Civ Prac & Rem Code Ann § 172.211 has a similar provision.

[117] Section 36 and 74 of India's *Arbitration and Conciliation Act 1996* (Act No 26 of 1996) ensures equal status and effect for these settlements as if it is an arbitral award on agreed terms of the substance of the dispute rendered by an arbitral tribunal and this award shall be enforced under *Code of Civil Procedure 1908* (Act No 5 of 1908) in the same manner as if it were a decree of a court.

[118] 10 June 1958, 330 UNTS 4739 [*New York Convention*]. The Singapore International Mediation Centre has introduced this arb-med-arb for mediation of international disputes; see *Arb-Med-Arb,* online: <http://simc.com.sg/arb-med-arb>. Fla Stat Ann § 684.0041(1) as well as NC Gen Stat § 1-567.60(b) provides that "[i]f, during arbitral proceedings, the parties settle their dispute, the arbitral tribunal shall. . . if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms."

[119] *International Arbitration Act*, *supra* note 11, ss 31(2), 31(4); *Arbitration Act, supra* note 11, ss 48, 49.

[120] Ellen E Deason, "Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide" (2004-2005) 80 Notre Dame L Rev 553, at 589, 590 [Deason, "Procedural Rules"]. Deason has succinctly described the difference as follows,

Given these differences, it is hardly appropriate for a mediated agreement to be subject to the grounds of resisting enforcement in the arbitration framework, such as validity under the existing law or the compliance with certain procedure. To do so will result in an outcome similar to how the High Court in *Surindar Singh HC* substituted the parties' agreement with the court's own opinion based on the law. Furthermore, the existing grounds to resist or set aside an arbitral award do not adequately provide for situations in which a party has not effectively consented to an agreement.[121] It is significant in this regard that a working group in Hong Kong declined to utilise the arbitration framework for enforcement in recognition of the unsuitability of the grounds of resisting enforcement of domestic and international awards.[122]

In a recent meeting by the United Nations Commission on International Trade Law ("UNCITRAL") working group exploring a possible convention for the enforcement of international mediated agreements, it was further highlighted that following the arbitral model in the *New York Convention* could blur the distinction that currently exists between arbitration and mediation by adding more formal requirements to mediation.[123] Subjecting a parties' mediated settlement to the subsequent scrutiny of legal principles will frustrate the parties' decision to use mediation as a clear alternative to litigation within court.

B. *Other Kinds of Statutory Enforcement Mechanisms*

Other jurisdictions that have eschewed the arbitration framework have devised special statutory mechanisms to allow the summary enforcement of written mediated agreements by the court. The European Union has called upon its member states to implement ways to ensure that parties to a written agreement resulting from mediation can have the contents enforceable, subject to certain limitations including declining to enforce the agreement when it is contrary to a state's law or when the obligation in the agreement is unenforceable by law.[124] The UK implemented this directive in the *Civil Procedure Rules 1998*[125] for cross-border disputes by allowing parties to apply to court for a mediation settlement enforcement order through showing evidence

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Both awards and agreements draw their authority from the consent of the parties, but with an important difference. With an award the parties consent to a process in which a neutral intervenes to make a decision, whereas with an agreement they consent directly to the outcome.

121 The closest ground for setting aside an arbitral award—when a party to the arbitration agreement was under some incapacity in s 31(2)(a) of the *International Arbitration Act* and s 48(1)(a)(i) of the *Arbitration Act*—does not fit these circumstances, as it applies only to incapacity to enter the arbitration agreement and not incapacity during the arbitration proceedings.

122 Hong Kong Department of Justice, "Report of the Working Group on Mediation" (Feb 2010) at para 7.190 [Hong Kong, "Report"].

123 United Nations Commission on International Trade Law, *Report of Working Group II (Arbitration and Conciliation) on the work of its 62nd Session*, UNCITRAL, 48th Sess, UN Doc A/CN 9/832, (2015), online: UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> at paras 25-31. See also Deason, "Procedural Rules", *supra* note 120 at 591, highlighting the incongruence of applying arbitration-like procedures to mediated agreements between parties "who have stepped outside 'the shadow of the law' ".

124 EC, Commission Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters, [2008] OJ, L 136/3 at para 19.

125 SI 1998/3132 [*Civil Procedure Rules 1998*].

that each party has given explicit consent to the application.[126] Ontario, Canada, has gone further to enact a *Commercial Mediation Act*[127] in 2010. Parties who agree to have their mediation governed by this Act may register a mediated settlement agreement with the court.[128]

A statutory summary enforcement mechanism brings about many advantages, the principal one being the convenience of enforcing an agreement without initiating litigation that may undermine both confidentiality and finality of mediated agreements. Nevertheless, because such a mechanism will bypass the existing protection provided by the vitiating factors in contract such as undue influence and duress, it may be potentially abused by sophisticated parties, to the detriment of weaker parties.[129] The Hong Kong Working Group on Mediation recommended no statutory mechanism because the inclusion of the grounds for non-enforcement would not offer much real advantage different from the current position.[130]

Is there any utility then in creating a statutory mechanism to enforce mediated settlements? If the principal 'defect' in the application of contract principles is the inability of vitiating factors to take into account coercion emanating from the mediator instead of the opposing party, it is doubtful whether statutory intervention may properly remedy it. The current contractual framework has inherent advantages that should not be readily jettisoned. The most important benefit it offers is the flexibility in taking into account the parties' intentions to agree and possible reasons of unfairness. The thoughtfully developed common law principles concerning the formation of an agreement and vitiating factors, refined over time with application to individual cases, are easily adaptable. It is a challenge to collectively embody this rich body of law in written legislation.

Several statutory attempts to do so seem to have fallen short. The Ontario *Commercial Mediation Act* narrowed down the grounds for non-enforcement to three grounds—a party not having signed the agreement or consented to the agreement; the presence of fraud; or the terms not accurately reflecting the parties' agreement.[131] However, questions may arise as to whether the concept of consent to the terms is wider or narrower than the common law principles in duress and undue influence. Ireland has formulated a draft Mediation Bill that is soon to be passed this year. It focuses on a few exceptions to enforceability, including when a party has been overborne or unduly influenced; and when the settlement does not adequately protect the rights of the parties and their dependants.[132] Again, there is uncertainty concerning whether to interpret the provisions of undue influence and

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126 *Ibid*, r 78.24.

127 RSO 2010, c 16 [*Commercial Mediation Act*].

128 *Ibid*, s 11.

129 Hong Kong, "Report", *supra* note 122 at para 7.187. See also Australia's National Alternative Dispute Resolution Advisory Council, "Legislating for alternative dispute resolution: a guide for government policy makers and legal drafters" (November 2006), at para 11.31.

130 *Ibid* at para 7.190, stating, "If the grounds for rescinding or terminating a contract. . . are included, the statutory mechanism would not offer much real advantage. . . since court proceedings. . . would remain necessary even if such a statutory mechanism is to be put in place."

131 *Commercial Mediation Act*, *supra* note 127, s 13(6).

132 Ireland Department of Justice, *Draft General Scheme of Mediation Bill 2012*, online: Department of Justice <http://www.justice.ie/en/JELR/MedBillGSFinal.pdf/Files/MedBillGSFinal.pdf>, s 11.

overbearing of will in the light of common law, or to apply the statutory provisions alone.

It is far too challenging to stipulate the grounds for non-enforceability succinctly and yet comprehensively within legislation, which explains why countries like Hong Kong and the UK have not done so. It is therefore proposed that the basic principles of contractual formation and vitiating factors remain untouched by legislation, but continue to be utilised with proper adaptation to the mediation context.

C. *A Potential Way Forward for Statutory Intervention*

1. *A Requirement of Writing for Expedited Enforcement*

Nevertheless, there could be a mechanism for expedited enforcement through registration with a court in undisputed circumstances, including showing a written agreement and written consent by each party to the enforcement.[133] This mechanism will grant a convenient way for undisputed and written settlement agreements, that do not breach public policy, to be enforced expeditiously. It will grant a substantial measure of convenience and finality for most mediated settlements, as well as encourage parties who undergo mediation to comply with the good practice of recording their agreements.

2. *Expedited Enforcement Should Be Subject to Public Policy Considerations*

An expedited enforcement mechanism must be subject to certain limits or it may risk relegating the court to a rubber stamp of private agreements. It should thus be made clear that the court will not enforce *any* agreement that has the consent of the parties. The current contractual framework subjects agreements to public policy via the vitiating factor of illegality. The decision in *Surindar Singh CA* has given further guidance on the scope of court intervention with respect to ensuring the equitable division of assets under s 112 of the *Women's Charter*. Statutory articulation of the parameters for court intervention could well provide clearer guidance. It is proposed that general principles such as whether an agreement is enforceable in law, and whether it contravenes public policy, are sufficient. This will give the court the discretion to apply the guidelines appropriately to each case. For instance, where the court is required by existing legislation (including the *Women's Charter*, O 76 of the *Rules of Court*, which protects settlement involving infants, and the *Guardianship of Infants Act*) to protect certain parties, it may more closely scrutinise the agreement to ensure that there is no substantive injustice. In commercial and arms-length transactions, the degree of scrutiny is likely to be less intense.

3. *Disputed Agreements Still Subject to Litigation and Application of Common Law*

Where there are disputes over the propriety or scope of the agreement, or where there is no written agreement, it is proposed that the usual method of litigating

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[133] Similar to r 78.24 of the *Civil Procedure Rules 1998*, *supra* note 125.

the matter in court be resorted to. It is further suggested that the court, through common law, be flexible enough to expand the scope of undue influence and duress to include situations when the threat or illegitimate coercion comes from the mediator. It is difficult to use a statutory instrument to make changes to these common law principles. It is most likely to result in perplexity as to how the common law contract principles interact with the new statutory provisions.

4. *More Rigorous Confidentiality Provisions*

Statutory intervention is most needed to minimise the invasion of mediation confidentiality. There ought to be greater clarity as to when mediation communications are admissible. The current without prejudice rule and the related s 23 of the *Evidence Act* strictly apply to admissions only, and will not protect all mediation communications. Moreover, not all the common law exceptions to the without prejudice rule in *Unilever* have been clearly endorsed by the Singapore courts. If they were to be accepted by Singapore courts in the future, there would be hardly any protection for mediation communications. There are therefore pressing reasons to enact specific provisions that will allow an analysis of mediation communications in a different way from the without prejudice rule.

Statutes in Hong Kong[134] and Ontario[135] have created provisions to provide for the general inadmissibility of mediation communications in legal proceedings, with exceptions. The *US Uniform Mediation Act* has expressly stated that there is a privilege for mediation communications, and this provision has been followed in the Malaysia *Mediation Act 2012*.[136] In the UK, several judgments and publications have argued for the creation of a distinct mediation privilege in the future,[137] but no positive ruling in this direction has occurred yet. While the Hong Kong Mediation Working Group called for the creation of both rules of confidentiality and privilege,[138] it is interesting that the recommendation was not fully translated into an express privilege in Hong Kong's *Mediation Ordinance*.

A statutory protection articulated as a privilege for mediation communications arguably signals the strongest protection accorded to mediation, as this puts it on equal footing with other established privileges like the legal professional privilege and litigation privilege. Once the protection is in the form of a privilege, it then can be waived by all parties involved in the mediation, including the mediator, whereas a general statutory prohibition against admissibility is strictly not waivable.

There are several common exceptions to the statutory protection in most jurisdictions, including threats to commit crimes and the admissibility of the written record of the parties' agreement. For the purpose of determining whether to enforce a mediated settlement, the issues raised usually concern whether a settlement was arrived at or whether there are any vitiating factors. Many countries such as Ontario allow an exception to inadmissibility when such arguments are advanced in court.

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134 Hong Kong, *Mediation Ordinance* (Cap 620), ss 9, 10 [*Mediation Ordinance*].
135 *Commercial Mediation Act*, *supra* note 127, s 9.
136 (Act 749, Malaysia), s 16.
137 Hong Kong, "Report", *supra* note 122 at paras 7.120, 7.121.
138 *Ibid* at para 7.140.

By contrast, the *US Uniform Mediation Act* does not automatically allow admissibility, but prescribes a balancing mechanism requiring the need for the evidence to substantially outweigh the interest in protecting confidentiality.[139]

It has been argued above that a balancing test should be incorporated before the court grants leave for admissibility.[140] A similar balancing mechanism should also be used in deciding whether a mediator should be compelled to testify, as there may well be situations when the mediator's evidence as a neutral party is necessary to decide on whether certain vitiating factors were at play.

In sum, statutory intervention should not be viewed as a panacea to the current difficulties of enforcing mediated settlements. In the area of admissibility of evidence, a statutory enactment with an in-built balancing mechanism will contribute to a more rigorous regime to protect mediation communications. With respect to creating an expedited enforcement mechanism, care must be exercised to ensure that the courts' role in exercising oversight in limited circumstances is not eradicated. Any enforcement mechanism also cannot trump protection of the parties, and should therefore not disallow parties from challenging a mediated agreement. The statutory mechanism is, however, inherently limited in setting out comprehensive grounds for resisting enforcement, and this area should continue to be governed by common law.

VII. Conclusion

This paper began with the observation that the law supports settlement agreements. Nevertheless, there is an uneasy interface between the law and settlements reached through mediation. For the values and goals of litigation differ vastly from mediation. Tensions thus emerge when such a radically different process requires the use of court proceedings to give effect to the mediated settlement.

It has been posited that the existing legal framework to analyse mediated settlement agreements does result in some measure of dissonance with the values underpinning mediation. A large part of the legal framework has, nevertheless, been adapted to the values of mediation in most decisions, though much more can potentially be done to better customise it to the unique dynamics between the parties and the mediator, and to protect mediation confidentiality. While statutory intervention may remedy some of the existing inadequacies, it is vital that mediation, which has started as an informal and flexible process, does not eventually become stultified by excessive court intervention or statutory regulation.

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[139] *US Uniform Mediation Act*, *supra* note 6, s 6(b)(1). The approach is not so clear in Hong Kong's *Mediation Ordinance*, *ibid*. Section 8(3) allows the disclosure of mediation communications for the purpose of challenging a mediated settlement agreement with the court's leave, while s 10(2) stipulates that the court has to consider whether it is in in the public interest or interest of administration of justice before granting leave.

[140] See Section V above.