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Piercing the veil of confidentiality in mediation to ensure good faith participation – An untenable position?

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PIERCING THE VEIL OF CONFIDENTIALITY IN MEDIATION TO ENSURE GOOD FAITH PARTICIPATION

An Untenable Position?

Confidentiality is a foundational characteristic of the mediation process, a key feature that distinguishes mediation from litigation. However, the veil of confidentiality has been lifted for several purposes, including the courts' assessment of the parties' conduct so as to ensure good faith participation in the mediation. This article discusses how mediation confidentiality and good faith participation may be concurrently promoted. It reviews the current approaches to upholding the general confidentiality and inadmissibility of mediation communications, and proposes ways to ensure that the veil of mediation confidentiality is pierced in highly circumscribed circumstances. It then examines the issue of whether to mandate good faith participation in mediation. This author proposes the articulation of a good faith obligation in order to send the correct signal about the expected conduct within mediation. However, the author also suggests that sanctions be imposed only for breaches of objective requirements, and the presence of highly egregious conduct within mediation. Otherwise, the veil of confidentiality would be readily lifted, to the overall detriment of the mediation process.

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I. Introduction

1 Confidentiality is the primary philosophical tenet[1] of the mediation process, a key feature that distinguishes mediation from litigation. The mediator's opening statement typically assures the parties about the private and confidential nature of the process, so as to encourage effective participation in mediation. There has been judicial affirmation of the need to give protection to the parties to negotiate freely about all issues without the fear of adverse consequences in future

1 Penny Brooker, *Mediation Law: Journal through Institutionalism to Juridification* (Routledge, 2013) at p 185.

litigation.[2] The protection of the mediator from being compelled to give evidence has also been deemed integral in preserving the neutral role of the mediator.[3]

2 Nevertheless, mediation confidentiality has never been absolute. Paradoxically, an opaque mediation that is immune from public scrutiny may run the risk of threatening the very integrity of the process. The veil of confidentiality has thus been lifted for several purposes, including the assessment of the parties' conduct so as to ensure good faith participation in the mediation. An increasing amount of mediation legislation has emerged across common law jurisdictions to empower the court to sanction conduct evincing bad faith participation. However, piercing the veil of mediation confidentiality in order to monitor mediation behaviour may inadvertently compromise the quintessential characteristic of the mediation process. How then should the legal infrastructure supporting mediation be properly structured to ensure meaningful participation while simultaneously protecting the confidentiality of mediation communications?

3 This article discusses the related issues of mediation confidentiality and good faith participation, with the overarching goal of examining how both aspects of mediation can be concurrently promoted. Part II[4] evaluates the common law and legislative approaches to upholding the general confidentiality and inadmissibility of mediation communications. It focuses, in particular, on the interaction between the Singapore Mediation Act[5] ("MA") and common law concepts that have conventionally been relied on to preserve mediation confidentiality. It also proposes ways to ensure that the veil of confidentiality is pierced in highly circumscribed situations. The next part[6] examines the controversial question of whether good faith participation within mediation should be mandated. It assesses the potential impact of such a duty on mediation confidentiality and other implications. It further discusses the type of mediation conduct that is expected by the Singapore courts and other professional conduct rules, as well as several common law jurisdictions. This author proposes the articulation of a good faith obligation in order to send the correct signal about the expected conduct within mediation. However, it is also proposed that sanctions be imposed only for breaches of objective

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2 See, *eg*, *Ofulue v Bossert* [2009] 2 All ER (D) 119 at [98] and *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 at 2437–2438.

3 Hilary Astor, "Mediator Neutrality: Making Sense of Theory and Practice" (2007) 16(2) S&LS 221, referred to in Andrew Agpiou & Bryan Clark, "The Practical Significance of Confidentiality in Mediation" (2018) 37(1) CJQ 74 at 76.

4 See paras 4–24 below.

5 Act 1 of 2017.

6 See paras 26–57 below.

requirements, and the presence of highly egregious conduct within mediation. Otherwise, the veil of confidentiality would be readily lifted, to the overall detriment of the mediation process.

II. Confidentiality in mediation

A. Confidentiality and competing interests

4 Confidentiality within mediation can be said to be a double-edged sword. Although it encourages candid negotiations, absolute confidentiality within mediation could also be a cloak for unfair treatment of vulnerable parties. Without judicial oversight, the parties' consensual agreement may also harm the interests of third parties. It has been further argued that the veil of confidentiality prevents challenges to the fairness of the mediation process, such as the breach of the mediator's ethical duties or the coercion of parties in reaching a settlement. The need to monitor the process is also much greater if parties' participation in mediation is mandated.

5 Furthermore, although mediation is deemed to be an out-of-court process that is free from legal formalities, this mode of dispute resolution requires the courts' assistance in order to flourish. Evidence of mediated settlement agreements may need to be disclosed for the enforcement of mediated settlement agreements. A party cannot, in the name of confidentiality, blatantly ignore its obligations under the mediated settlement.[7] In sum, the veil of confidentiality has to be pierced in limited circumstances to support the mediation process and affirm the effectiveness of mediation as a mode of settlement. Mediation confidentiality has to be balanced with the need to maintain the integrity and fairness of mediation.

6 Nevertheless, the interest in maintaining fairness within mediation has resulted in an ever-increasing list of circumstances justifying the lifting of the veil of confidentiality. There is the risk of the exception becoming the norm, and mediation being a porous process that is frequently subjected to public scrutiny. Many jurisdictions have grappled with balancing confidentiality with other competing interests, and Singapore is no exception. The next part proceeds to discuss Singapore's approach in ensuring that the veil of confidentiality is pierced only in limited and clearly defined circumstances.[8]

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7 Elle E Deason, "Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality" (2001–2002) 35 UC Davis L Rev 33 at 37.

8 See paras 7–24 below.

B. Pre-legislation approach to confidentiality and admissibility of mediation communications

7 Prior to the enactment of the Mediation Act in Singapore in 2017, the confidentiality of mediation communications was protected by a mixture of common law privileges and contractual protections, a situation which the Senior Minister of State for Law described as "thoroughly confusing to the individual mediation user".[9] In general, the law has largely relied on two overlapping concepts of confidentiality and admissibility. "Confidentiality" refers to the obligation of all the parties not to disclose mediation communications to any third party. Mediation confidentiality is premised on two sources – an express obligation of confidentiality in the mediation contract, and implied confidentiality.[10] The duty of confidentiality can only be breached when all the parties, including the mediator, collectively waive it. However, regardless of any waiver, the court may still order the disclosure of mediation communications when it is "in the interest of justice" to do so.[11] Hence, confidentiality *per se* does not preclude the mediation communications from being admissible in court. In this respect, English commentator Bartlett observed that contractual confidentiality "does not itself provide a shield against a witness summons [of the mediator] or determine the issue of admissibility".[12]

8 By contrast, the concept of admissibility is an evidential one, referring to situations when mediation communications may be properly admitted in court. Both the English and Singapore courts have relied heavily on the "without prejudice" rule to decide on admissibility. Under this principle, statements or documents used in the course of negotiations for settlement purposes are not admissible as evidence.[13] In the English Court of Appeal decision of *Aird v Prime Meridian Ltd*,[14] May LJ affirmed the application of the without prejudice privilege to mediation communications.[15]

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9 *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law).

10 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228.

11 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 at [29].

12 Michael Bartlet, "Mediation Secrets in the Shadow of the Law" (2015) 34 CJQ 112 at 113.

13 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, followed in Singapore by *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [24]–[28]; and *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [94]–[97].

14 [2006] EWCA Civ 1866.

15 *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866 at [5].

9 Although the without privilege rule provides greater protection to mediation communications than implied or contractual confidentiality, it is fraught with uncertainty and inadequacies. In Singapore, there is some ambivalence concerning the sources of the rule. It appears to be derived from both common law and s 23 of the Evidence Act,[16] which provides that:

> … no admission is 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.

This section applies the "without prejudice" rule only to the parties involved in the negotiations.[17] However, the Singapore Court of Appeal has acknowledged that common law also extends the rule to third parties.[18] As such, the scope of the applicability of the rule is not altogether clear.

10 In addition, the concurrent reliance on common law and the Evidence Act has resulted in uncertainty about whether the rule is synonymous with a privilege held by the parties. Pinsler has noted that s 23 is technically not a privilege because it only states that such admission is not relevant. Admissibility of relevant facts is determined by law and not subject to the party's intention, whereas the doctrine of privilege is concerned with a party's right to withhold information, a right he can maintain or abandon through consent or waiver. Nonetheless, Pinsler posits that the principle of waiver is still applicable in the context of communications for the purpose of settlement.[19] Furthermore, the Court of Appeal in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd*[20] expressly referred to a privilege while discussing the without prejudice rule.[21] It is therefore arguable that the Singapore courts have treated s 23 as equivalent to a common law privilege despite the dissonance between legislation and common law.

11 In the event that the rule indeed operates as a common law privilege, the privilege may still fall short of providing sufficient protection of mediation communications. It appears that only the

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16 Cap 97, 1997 Rev Ed.

17 The High Court in *Ng Chee Weng v Lim Jit Ming Bryan* [2010] SGHC 35 at [8]–[11] specifically held that the "without prejudice" rule in relation to s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) applied to communications made between the parties *with the assistance of a mediator*.

18 *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [28].

19 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) at para 15.011.

20 [2006] 4 SLR(R) 807.

21 *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [26].

parties, and not the mediator, may waive the privilege protecting their "without prejudice" communications.[22] It is not a privilege owned by the mediator. In *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)*[23] ("*Farm Assist*"), the court ordered the mediator to be a witness because the disputing parties had waived their privilege, and the court deemed the disclosure to be in the interest of justice. The parties had agreed in their mediation agreement not to call the mediator as a witness in any litigation and arbitration relating to the dispute. Despite this contractual clause, Ramsey J decided that the parties were entitled to and did waive their privilege. The mediator's right to rely on the confidentiality clause was also overridden by the interest of justice here. This ruling effectively means that a mediator may have to testify on "without prejudice" matters against his or her will, and despite the parties' prior agreement not to do so. Consequently, the parties' contractual agreement regarding inadmissibility and confidentiality of mediation communications would offer feeble protection of mediation privacy.

12 Unsurprisingly, this state of affairs has been criticised as being highly dissatisfactory and inconsistent with professional mediation practice.[24] Summarising the disconcerting impact of this legal position, Briggs LJ wrote that:[25]

> … [t]here is widespread concern that if the confidentiality which surrounds the mediation process is limited to that conferred by the without prejudice principle, and if attempts to widen it by contract are likely to be ineffective, then mediation will lose one of its main attractions as a dispute resolution process.

In a similar vein, Kirkham J in *Cumbria Waste Management v Baines Wilson*[26] expressed concern about the insufficient protection of mediation discussions, stating that "the court should support the mediation process by refusing, in the normal circumstances, to order disclosure of documents and communications within a mediation".[27] Other commentators have called for the creation of a mediation privilege that also belongs to the mediator.[28] They have noted the

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22 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 at [29].

23 [2009] EWHC 1102 (TCC); [2009] All ER (D) 228.

24 Michael Bartlet, "Mediation Secrets in the Shadow of the Law" (2015) 34 CJQ 112 at 125, referring to Sir Thomas Bingham's comment in *Re D (Minors)* [1993] Fam 231; [1993] 2 WLR 721 that it was undesirable in the mediation field that the law should drift very far away from the best professional practice.

25 Justice Briggs, "Mediation Privilege" (2009) 159 *New Law Journal* 506 at 507.

26 [2008] EWHC 786 (QB).

27 *Cumbria Waste Management v Baines Wilson* [2008] EWHC 786 (QB) at [30].

28 David Cornes, "Mediation Privilege and the EU Directive: An Opportunity?" (2008) 74(4) *Arbitration* 384; Justice Briggs, "Mediation Privilege" (2009) 159 *New*

(*cont'd on the next page*)

judicial recognition in matrimonial conciliation of a distinct privilege based on the public interest in the stability of marriages, and have asserted that the public interest in guaranteeing the integrity of mediation also warrants the introduction of a mediation privilege.[29] Such a statutory privilege has been enacted in the US Uniform Mediation Act[30] and within the European Union ("EU") Mediation Directive.[31] However, no positive ruling or legislative reform in this direction has taken place in either England or Singapore.[32]

13 Apart from the above difficulty with the without prejudice privilege, there is also inherent uncertainty with the application of the privilege due to the fluid and expanding number of exceptions. Robert Walker LJ in *Unilever plc v The Procter & Gamble Co*[33] ("*Unilever*") set out the following exceptions to the rule, and two new exceptions were later added in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*[34] ("*Oceanbulk*"):

> (a) evidence of settlement, where there is an issue as to whether an agreement has been concluded;
>
> (b) where evidence of the negotiations is admissible to show that an apparent agreement should be set aside on the ground of misrepresentation, fraud or undue influence;
>
> (c) where a clear statement made by one party and on which the other party is intended to act, and does so, may give rise to an estoppel;
>
> (d) where exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous" impropriety;
>
> (e) in order to explain delay or apparent acquiescence;
>
> (f) to prove that the claimant has satisfied a duty to mitigate his loss;

Law Journal 550 at 508; Michel Kallipetis, "Mediation Privilege and Confidentiality and the EU Directive" in *ADR in Business: Practice and Issues Across Countries and Cultures* vol II (Arnold Ingen-Housz ed) (Kluwer Law International, 2011); Anna K C Koo, "Confidentiality of Mediation Communications" (2011) 30(2) CJQ 192 at 201–202.

29 Justice Briggs, "Mediation Privilege" (2009) 159 *New Law Journal* 550.

30 Uniform Mediation Act (2003) (US) §§ 4 and 6.

31 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

32 Briggs LJ notes that the possible route to the recognition of a special privilege for mediation was touched upon in *Brown v Rice* [2007] EWHC 625 (Ch); [2007] All ER (D) 252, but was not pursued: Justice Briggs, "Mediation Privilege" (2009) 159 *New Law Journal* 550.

33 [2000] 1 WLR 2436 at 2444–2445.

34 [2010] UKSC 44; [2011] 1 AC 662; [2010] 4 All ER 1011.

(g) where there is an express or implied agreement that an offer is expressly made "without prejudice except as to costs";

(h) where there is a dispute as to the interpretation of the settlement (*Oceanbulk*); and

(i) where a party can rely on anything said to show that settlement should be rectified (*Oceanbulk*, in *dicta*).

14 Notably, Lord Neuberger, when commenting on the *Unilever* exceptions in a later case, remarked that it was inappropriate to create further exceptions for reasons of legal and practical certainty.[35] Nonetheless, the list has invariably been expanded over time. The UK Supreme Court in *Oceanbulk* noted that exception (i), which has been affirmed in Canada and New Zealand, is "scarcely distinguishable from the first exception". Lord Clarke, with whom the rest of the court concurred, further decided that there was no sensible line to be drawn between the first exception – admitting communications to resolve the issue of whether there was a concluded comprise agreement – and admitting them to resolve the issue of what the agreement was.[36] The "interpretation exception" was therefore held to be yet another recognised exception to the without prejudice rule (exception (h) above).[37]

15 The Singapore courts in *Ng Chee Weng v Lim Jit Ming Bryan*[38] and *Quek Kheng Leong Nicky v Teo Beng Ngoh*[39] ("*Quek Kheng Leong*") have thus far applied only the first *Unilever* exception – when using the relevant communications to determine whether a compromise was reached and the terms of the compromise agreement.[40] Most recently, the issue of the applicability of exception (d) – evidence showing unambiguous impropriety – arose before the Court of Appeal. However, the court declined to make a ruling on this issue, preferring to revisit in a future appropriate case with the benefit of fuller arguments.[41] Evidently, the number of exceptions to the without prejudice rule is not cast in stone because of the inherently flexible nature of common law. The lack of decisive rulings within Singapore case law about the status of the other *Unilever* and *Oceanbulk* exceptions further contributes to the

35 *Ofulue v Bossert* [2009] 2 All ER (D) 119 at [98].
36 [2010] UKSC 44; [2011] 1 AC 662; [2010] 4 All ER 1011 at [33].
37 [2010] UKSC 44; [2011] 1 AC 662; [2010] 4 All ER 1011 at [46].
38 [2012] 1 SLR 457.
39 [2009] 4 SLR(R) 181.
40 *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [95]–[97]; *Quek Kheng Leong Nicky v Teo Beng Ngoh* [2009] 4 SLR(R) 181 at [22]–[24].
41 *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA* [2018] 1 SLR 894 at [100].

ambivalence of the scope of protection of the without prejudice privilege.

C. Latest legislative approach in Singapore

16 Undoubtedly, the current state of the law is bewildering to mediation users (and probably mediators) and leaves much to be desired. It is therefore a welcome relief that the MA, which came into operation on 1 November 2017, has clarified the scope of confidentiality and inadmissibility of mediation communications. This author has previously commented on this piece of legislation,[42] and will therefore limit the following discussion to several noteworthy aspects of the statute.

(1) The overlap between confidentiality and admissibility

17 First, the MA has preserved the common law distinction between confidentiality and admissibility, while also codifying the overlapping aspects. Sections 9 and 10 state that mediation communications are confidential and inadmissible in legal proceedings, subject to stipulated exceptions. Mediation communications refer to anything said or done, document prepared or information provided for the purpose of the mediation, and includes the mediation agreement entered prior to the mediation and the mediated settlement agreement.[43] Because confidentiality is a precondition to inadmissibility, the Act provides for the following exceptions that are common to both confidentiality and inadmissibility:

> (a) where the communications are made for the purpose of enforcing or disputing a settlement agreement;
>
> (b) where communications are used for disciplinary proceedings for mediator or solicitor misconduct; and
>
> (c) where disclosure and/or admissibility is needed for the purpose of discovery.[44]

18 Exceptions (a) and (b) closely correspond with the first exception in *Unilever* and the fourth exception of "unambiguous impropriety" respectively. Exception (c) is more controversial, for it seems to imply that confidentiality and inadmissibility may be readily compromised whenever a party seeks discovery of the relevant communications. However, such a position has been heavily criticised.

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42 Dorcas Quek Anderson, "A Coming of Age for Mediation in Singapore? Mediation Act 2016" (2017) 29 SAcLJ 275.

43 Mediation Act 2017 (Act 1 of 2017) s 2(1).

44 Mediation Act 2017 (Act 1 of 2017) s 9(3).

In *Aird v Prime Meridian Ltd*, the English Court of Appeal held that joint statements of the parties' experts prepared for the purpose of trial, which were also revealed during the mediation, were not privileged because they were specifically prepared under the Civil Procedure Rules[45] pursuant to a court order.[46] English scholars have questioned the rationale of this decision, arguing that it is contrary to the public policy of encouraging candour in mediations to assert that documents used in mediation could subsequently be utilised in litigation.[47] As such, exception (c) in the MA is unlikely to be construed as a licence to use mediation communication for discovery purposes; the court's leave should first be obtained under s 10, based on public policy considerations referred to in s 11(2)(*b*).

(2) Confidentiality of mediation communications

19 Secondly, the scope of mediation confidentiality is no longer delineated solely by the parties' private agreement. Mediation communications are now accorded legislative protection, subject to the above three exceptions and ten other situations listed in s 9(2) of the MA. The exceptions are largely uncontroversial, for they largely relate to public interest such as protecting a person from harm and assisting in the investigation of criminal offences. This approach is consonant with the consideration of "the interest of justice" in *Farm Assist* and in *Unilever* in relation to the without prejudice privilege.[48] In all other situations that are not listed as exceptions, a person who wishes to breach mediation confidentiality must obtain the leave of the court or the arbitral tribunal. In deciding whether to grant leave, the court must again consider under s 11(2)(*b*) "whether it is in the public interest or interest of the administration of justice for disclosure to be made".

20 Thirdly, there is a slight aberration to the statutory regime on mediation confidentiality. The current English position maintains that confidentiality can be waived by all the disputing parties and the mediator, because this duty is drawn from their contractual agreement. The without prejudice privilege is held by the parties, and not the mediator. However, s 9(2)(*a*), together with s 2 of the MA, allows disclosure when all the parties give their consent. Curiously, the

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45 SI 1998 No 3132.

46 [2006] EWCA Civ 1866.

47 Andrew Agpiou & Bryan Clark, "The Practical Significance of Confidentiality in Mediation" (2018) 37(1) CJQ at 87; Editor, "Case Comment: Discussion between Experts and Mediation" (2007) 2 CPN 7 at 7; Hew R Dundas, "When Does Confidential Mean Confidential? An Important Development in the Law of Mediation and the Without Prejudice Rules" (2007) 73(3) *Arbitration* 335 at 337.

48 *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 at [29].

mediator's permission is not required. This author has earlier argued that it is perplexing that the mediator's consent is not needed before the parties decide to breach the sacrosanct duty of confidentiality.[49] This divergence from common law and common contractual arrangements could perhaps be rectified in future amendments of the statute.

(3) Inadmissibility of mediation communications

21 With regard to the framework for inadmissibility, the MA has stopped short of creating a statutory privilege that is congruent with the without prejudice privilege. Section 10 provides that the court's leave is a precondition for any exception to the duty of inadmissibility. By implication, the parties themselves may not waive the legislative protection of inadmissibility, although they may ostensibly waive confidentiality under s 9(2)(*a*). This is again a departure from the common law without prejudice regime, which recognises the parties' entitlement to waive their privilege.[50] In addition, the well-established exceptions to the privilege in English case law obviates the need for the parties to apply for leave prior to admitting the mediation communications as evidence. Notwithstanding these minor weaknesses, this author has earlier argued that this stricter regime is to be welcomed because it places the onus of application on the party seeking to default on the general rule of inadmissibility, and prevents the inadvertent admission of protected communications that is only rectified later.[51] It also deters parties from including mediation communications in the discovery process under s 9(3)(*c*), requiring them to first seek leave. Furthermore, it underscores the centrality of public interest in determining admissibility, which is consistent with the common law approach of balancing the interest in encouraging settlement against any other public interest.

22 Nonetheless, the MA has missed the opportunity to create a robust mediation privilege that exists in the US Uniform Mediation Act and the EU Mediation Directive. The former legislation has been implemented in more than ten states, while the latter has been

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49 Dorcas Quek Anderson, "A Coming of Age for Mediation in Singapore? Mediation Act 2016" (2017) 29 SAcLJ 275 at 282–283.

50 UK cases such as *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); [2009] All ER (D) 228 and *Cumbria Waste Management v Baines Wilson* [2008] EWHC 786 (QB) have referred to a without prejudice "privilege", though the privilege has been deemed to be owned only by the disputing parties.

51 Dorcas Quek Anderson, "A Coming of Age for Mediation in Singapore? Mediation Act 2016" (2017) 29 SAcLJ 275 at 284.

incorporated into domestic law in Germany, France, Austria and Italy.[52] The concept of mediation privilege has also been adopted in Malaysia's Mediation Act[53] and some Australian states.[54] A mediation privilege would have provided the greatest protection to mediation and yet provided sufficient flexibility by allowing automatic exceptions where the privilege has been waived, and allowing the courts to balance the relevant competing interests. As such, notwithstanding the helpful clarification given by the MA on mediation inadmissibility, the regime appears to have removed the parties' freedom to waiver protection of their mediation communications, and shied away from introducing a stronger framework that would give the strongest signal about the public interest in mediation.

(4) Dual regimes on confidentiality and inadmissibility of mediation communications

23 Finally, the MA's regime on confidentiality and inadmissibility does not apply to all mediations. Some mediations are presently subject to the common law framework. The MA currently excludes mediation sessions conducted by the court or taking place under the court's direction, and any mediation proceedings conducted under "any written law".[55] Accordingly, mediation sessions conducted by judges, staff or volunteers of the Family Justice Courts and the State Courts, and other statutory mediation programmes in the Community Mediation Centres[56] and the Small Claims Tribunals[57] will not benefit from the clarified framework. The exclusion of certain types of mediation is meant to avoid potential inconsistency of the MA with existing mediation frameworks that have their own established rules.[58] However, it is hoped that the incongruous situation of concurrent confidentiality regimes for mediations will be rationalised in the near future.

24 In summary, the enactment of the MA has substantially clarified the legal position on mediation confidentiality and inadmissibility. It has brought about greater certainty by stipulating the limited circumstances relating to public interest when the veil of confidentiality and

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52 Michael Bartlet, "Mediation Secrets in the Shadow of the Law" (2015) 34 CJQ 112 at 120–124.

53 Mediation Act 2012 (No 749 of 2012) (M'sia) s 16.

54 See, for instance, s 30 of the New South Wales Civil Procedure Act 2005, s 53 of the Queensland Civil Proceedings Act 2011 and s 10 of the Tasmanian Alternative Dispute Resolution Act 2001.

55 Mediation Act 2017 (Act 1 of 2017) ss 6(2)(*a*) and 6(2)(*b*).

56 Community Mediation Centres Act (Cap 49A, 1998 Rev Ed).

57 Small Claims Tribunals Act (Cap 308, 1998 Rev Ed).

58 *Singapore Parliamentary Debates, Official Report* (10 January 2017), vol 94 (Indranee Rajah SC, Senior Minister of State for Law).

inadmissibility can be pierced. In addition, it has expressly affirmed that the court should carefully balance confidentiality and inadmissibility with both public interest and the administration of justice in all other circumstances that have not been provided for in the statute. However, the regime could potentially be more robust by introducing a mediation privilege that belongs to all the parties and the mediator. The application of the Act to only certain types of mediations also reduces the effectiveness of the Act.

III. Good faith participation in mediation

A. Whither the need for good faith conduct within mediation?

25 The preceding part[59] examined the confidential nature of mediation. Being a consensual form of dispute resolution, the mediation process has to be insulated from subsequent court scrutiny in order to encourage candid negotiation. The communications within mediation also have to be shielded from public disclosure, save in very limited exceptions. Collectively, the assurance of confidentiality and inadmissibility is instrumental in preserving the attraction of mediation as a private, informal and non-adjudicative process that allows the parties to exercise self-determination.

26 This present part discusses the growing trend of regulating the parties' mediation conduct. The very notion of appraising and regulating mediation conduct seems to run counter to the private and non-adjudicative nature of mediation. As a counterpoint to the trial process, mediation is meant to provide a safe space for the parties to negotiate freely and arrive at a mutually acceptable agreement, without any decision being imposed on them. Why then does the need to regulate mediation conduct arise?

27 This question brings to the fore three dilemmas as mediation becomes increasingly institutionalised within many jurisdictions' legal landscapes.

(1) A clash of cultures between informal and formal justice

28 First, the institutionalisation of mediation within the court system has resulted in a less dichotomous distinction between public and private dispute resolution options. Mediation is no longer an out-of-court process akin to the early community mediation movements in the US and Australia, which involved the promotion of mediation as a way

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59 See paras 4–24 above.

to increase party autonomy without involving formal intervention by the courts. Instead, the State and the courts have increasingly incorporated mediation into the formal justice process, promoting it as one of many ways to achieve access to justice.[60] Despite the steady integration of mediation into the justice system, some dispute resolution commentators and courts have been reluctant to regulate mediation conduct because of the common perception of mediation being an informal process that should be unfettered by excessive legalisation.

29 One US commentator Thomson characterised this uneasy tension as a clash of two competing cultures. He observed how the superimposition of a private facilitative process into a public adversarial pretrial process has resulted in a "process dissonance". Thomson posed the following questions in this regard:[61]

> If self-determination and voluntary agreement are key mediation values, how can a court compel parties to mediate in good faith in circumstances when the parties do not want to settle? If confidentiality is a core value, how can a court police the mediation process and assure good faith participation without breaching the confidentiality of that process?

30 Similarly, other US scholars have stressed that the attempts to punish good faith may cause considerable collateral damage, including the inhibition of free expression without the fear of reprisal and major intrusion by the courts.[62] The imposition of good faith requirements within mediation has thus been perceived as an incursion on the fundamental mediation values of party autonomy and confidentiality.

31 On the other hand, the close association of mediation with access to justice necessitates some degree of regulation of the process in order to ensure that it remains a fair process. This point was alluded to above when discussing how confidentiality has to yield to the need to protect the parties involved in mediation and other third parties. Where the courts have encouraged or mandated the use of mediation, there is arguably a greater need to sanction unacceptable mediation conduct.

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60 See, *eg*, The Honourable the Chief Justice Sundaresh Menon, "Mediation and the Rule of Law", keynote address at the Law Society Mediation Forum (10 March 2017), stating at paras 19–23 that mediation helps to bridge access to justice gaps by offering efficiency, accessibility and flexibility.

61 Peter N Thompson, "Good Faith Mediation in the Federal Courts" (2011) 26 Ohio St J on Disp Resol 363 at 364–366.

62 Roger L Carter, "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resol 367 at 391–392; John Lande, "Why a Good-Faith Requirement Is a Bad Idea for Mediation" (2005) 23 Alt to High Cost of Lit 1 at 3; Penny Brooker, "Mediating in Good Faith in the English and Welsh Jurisdictions: Lessons from Other Common Law Countries" (2014) 43(2) CLWR 120.

The National Alternative Dispute Resolution Advisory Council ("NADRAC") in Australia underscored this point in its 2011 report, where it argued that the public interest in the administration of justice and the integrity of alternative dispute resolution ("ADR") is best served by expressly stipulating that participation in mandatory ADR should be undertaken in good faith. It further observed that where there are legislative or court requirements to attempt mediation, there is likely to be the implicit obligation for disputants to do so in good faith.[63] As such, a diffident approach to regulating mediation conduct in court-connected mediation programmes is gravely inconsistent with the courts' active encouragement of the use of mediation as a way to enhance access to justice.

32 Other commentators have similarly argued that the standing of the mediation profession has to be protected from potential abuse of the process, including using mediation as a fishing expedition for more information, engaging in intimidating or coercive conduct, making misrepresentations during mediation or using mediation to unduly delay the court process. Kovach and Weston have argued strenuously that a good faith requirement is necessary to prevent lawyers and their clients from simply going through "*pro forma* mediations" by perfunctorily clearing out one of their other hurdles in their pathway to trial but failing to participate meaningfully in the mediation. Others have suggested that imposing a good faith obligation helps to control the widespread tendency of lawyers and clients to approach mediation in an adversarial way.[64]

33 The above opposing views reflect the unresolved tension between the conflicting values underpinning public and private dispute resolution processes. The resolution to this dilemma probably lies in acknowledging the unavoidable tension that accompanies the growing institutionalisation of mediation into the legal infrastructure. Clearly, a process that is closely connected to the justice process requires the setting of standards on the expected conduct. However, excessive intervention runs the risk of distorting the distinctive nature of mediation. As with many legal questions, the challenge lies in devising a

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63 National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Process: From Principles to Practice through People* (February 2011) at p 34.

64 Kimberly K Kovach, "Good Faith in Mediation: Requested, Recommended, or Required – A New Ethic" (1997) 38 S Tex L Rev 575 at 595–596; Roger L Carter, "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resol 367 at 373; John Lande, "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L Rev 69 at 99–102.

properly calibrated approach to set out such standards and to enforce them.

(2) Alleged inconsistency between good faith conduct and the nature of negotiation

34 The second dilemma relates to a perceived conceptual difficulty with the notion of exercising good faith within negotiations. The mediation process essentially involves the facilitation of the disputants' negotiations. However, certain judicial pronouncements have suggested that good faith conduct is inherently incompatible with the nature of negotiation. A case in point is the House of Lords' decision in *Walford v Miles*[65] ("*Walford*") concerning the enforceability of a contractual term to negotiate in good faith. The respondents had entered into negotiations with the appellants to sell their business and premises. The appellants subsequently alleged that the respondents breached an oral agreement to negotiate in good faith with them, to the exclusion of other parties. The court decided that an agreement to negotiate in good faith for an unspecified period of time was unenforceable. In explaining this holding, Lord Ackner suggested that good faith was inconsistent with the parties' usual conduct in negotiations:[66]

> [T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen negotiations by offering him improved terms. Mr Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question – how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content.

35 Good faith conduct seems to have been associated with acting against self-interest and the fettering of one's freedom to withdraw from

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65 [1992] 2 AC 128.

66 *Walford v Miles* [1992] 2 AC 128 at 138.

negotiations "at any time and for any reason". Lee has characterised this basis for the decision in *Walford* as the "conceptual incongruity argument", which perceives a duty to negotiate in good faith as "diametrically opposed to the inherent adversarial nature of negotiations".[67] Other common law judgments have expressed the same unease with the notion of good faith, suggesting that it entails making concessions that prejudices one's interests. For instance, Giles J in the New South Wales case of *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*[68] noted that there was a "necessary tension between negotiation, in which a party is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith".[69]

36 There has been considerable criticism of this conceptualisation of negotiation behaviour. Lee described this view as stemming from an "impoverished view of what negotiation can be", a view that neglects the existence of amicable and collaborative styles of negotiation.[70] In addition, Berg argued that the *Walford* decision wrongly assumes that adversarial, competitive negotiation is the only type of negotiation, thus ignoring the existence of the problem-solving approach to negotiation. He proposed that an agreement to negotiate in good faith should therefore be construed as "an agreement to renounce purely adversarial negotiation".[71] Several Australian decisions have clarified that negotiation in good faith does not entail reaching a particular agreement, and is also not inconsistent with having regard to self-interest.[72] Furthermore, these courts asserted that a good faith obligation

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67 Joel Lee, "Agreements to Negotiate in Good Faith: *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*" [2013] SingJLS 212 at 215.

68 (1995) 36 NSWLR 709.

69 *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 716. In an earlier Australian case of *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206 and 209, Giles J associated an agreement to negotiate in good faith with an agreement to agree, finding that both types of agreements required the co-operation and consent of the parties – which could not logically be enforced – and obliged a party to act contrary to its interests.

70 Joel Lee, "Agreements to Negotiate in Good Faith: *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*" [2013] SingJLS 212 at 219.

71 Alan Berg, "Promises to Negotiate in Good Faith" (2003) 119 LQR 357 at 363. See also Alistair Mills & Rebecca Loveridge, "The Uncertain Future of Walford and Miles" (2011) 4 LMCLQ 528 at 531; Jim Mason, "Contracting in Good Faith – Giving the Parties What They Want" (2007) 23(6) *Construction Law Journal* 436 at 442; and Penny Brooker, "Mediating in Good Faith in the English and Welsh Jurisdictions: Lessons from Other Common Law Countries" (2014) 43(2) CLWR 120.

72 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] 153 FLR 236 at [82]–[84].

did not prevent a party from withdrawing from negotiations if appropriate.[73] Notably, the Singapore Court of Appeal, citing an Australian decision in approval, reiterated that parties who negotiate in good faith are not disentitled from having regard to their own commercial self-interests.[74]

37 Evidently, the resolution of the conceptual difficulty of good faith negotiation requires greater clarity concerning the nature of negotiation behaviour. In this regard, dispute resolution research has made substantial strides in unravelling the complexity of the negotiation process and the range of negotiation styles. Negotiation styles have conventionally been labelled as integrative or distributive in approach. Integrative bargaining, which has also been known as co-operative, problem-solving and value-creating negotiation, aims to maximise the overall value for all parties in the negotiation. Negotiators adopting this style typically focus on finding joint gains that will meet the interests of all the parties instead of merely their own interest. By contrast, the distributive approach, also known as value-claiming, adversarial and competitive negotiation, concentrates on obtaining the largest value for oneself instead of expanding the joint value created by all parties.

38 Significantly, the integrative style does not envisage the forgoing of personal interest. On the contrary, it seeks to maximise personal gains by "expanding the pie" for all the parties. As Ury put it, this approach acknowledges "the paradox that the best way to be competitive in the world is to be co-operative".[75] The benefits of the integrative approach have been verified by several studies. For example, Schneider's 2002 study showed that problem-solving behaviour that conforms to ethics, seeks to achieve a fair settlement, as well as meet both sides' interests, has been perceived as more effective than competitive negotiation.[76] Other studies have shown that when negotiators were given information that their counterpart had a co-operative reputation, the negotiation achieved an economically better outcome than other negotiations without such information on reputation.[77] Axelrod, who is best known for the "Prisoner's Dilemma", also found that starting with co-operative

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73 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] 153 FLR 236 at [82]–[84]; *United Group Rail Services Ltd v Rail Corp New South Wales* [2009] NSWCA 177 at [79].

74 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [39].

75 William Ury, *The Third Side* (Penguin Group, 1999).

76 Hal Abramson, "Fashioning an Effective Negotiation Style: Choosing among Good Practices, Tactics, and Tricks" in *The Negotiator's Desk Reference* (Andrea Kupfer Schneider & Chris Honeyman gen eds) (Minnesota: DRI Press, 2017) ch 5 at p 66.

77 *Catherine Tinsley, Jack J Cambria & Andrea Kupfer Schneider*, "Reputation in Negotiation" in *The Negotiator's Desk Reference* (Andrea Kupfer Schneider & Chris Honeyman gen eds) (Minnesota: DRI Press, 2017) ch 18 at pp 255–256.

moves and remaining co-operative as long as it was reciprocated was effective even when facing untrustworthy negotiation counterparts.[78]

39 The issue of good faith in negotiation is ultimately connected with the techniques employed in the different negotiation styles. In this regard, the integrative approach usually involves sharing information, being inquisitive about the other side's information, and building positive working relationships. By comparison, distributive bargaining has been commonly associated with hard bargaining techniques. However, it is important to recognise that there is a range of such techniques, and not all of them are regarded as patently unethical and objectionable. The strategies that are commonly regarded as counterproductive include making an extreme offer before following up with small concessions, misrepresenting facts or lying and using intimidating behaviour to pressurise rather than persuade the other party. Nevertheless, there are other distributive bargaining strategies that are regarded as acceptable and prudent techniques in certain situations, including articulating principled positions, controlling the negotiation agenda, asking probing questions to force counterparts to logically assess their positions and offering to split the difference.[79] As such, good faith negotiation may not be simply a matter of disavowing adversarial negotiation in totality. Rather, the focus should be on delineating acceptable and objectionable negotiation conduct, taking into account the wide range of negotiation strategies being used. The labels for negotiation styles *per se* do not fully explain the skills or techniques used[80] or offer complete guidance on the acceptable strategies.

40 Furthermore, the latest dispute resolution scholarship has argued that an effective negotiator may flexibly adopt techniques that are associated with both co-operative and competitive negotiations styles. Schneider suggested that an effective negotiator will be able to move along different styles in any one negotiation. Similarly, Mayer, reflecting on the paradox between co-operation and competition, pointed out that both elements are usually present in every negotiation communication.[81] Lax and Sebenius further argued that both integrative

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78 Bernard Mayer, *The Conflict Paradox: Seven Dilemmas at the Core of Disputes* (John Wiley & Sons, 2015) at p 45, referring to Robert Axelrod, *The Evolution of Cooperation* (Basic Books, Rev Ed, 2006).

79 Charles Craver, "Distributive Negotiation Techniques" in *The Negotiator's Desk Reference* (Andrea Kupfer Schneider & Chris Honeyman gen eds) (Minnesota: DRI Press, 2017) ch 6 at pp 75–88.

80 Andrea Kupfer Schneider, "Teaching a New Negotiation Skills Paradigm" (2012) 39 Wash U J L & Pol'y 13 at 23.

81 Bernard Mayer, *The Conflict Paradox: Seven Dilemmas at the Core of Disputes* (John Wiley & Sons, 2015) at pp 48–50.

and distributive strategies must be used for effective negotiation because each negotiation has both value-creating and value-claiming opportunities.[82] The upshot is that effective negotiation – be it integrative, distributive or an amalgamation of several styles – need not and does not sacrifice one's interests. It also does not preclude the use of value-claiming techniques that will help advance one's interests, although some of these strategies have been criticised as objectionable and unethical. Many of the techniques linked to the integrative approach have been shown to be more effective than extreme hard bargaining strategies in reaching optimal outcomes. Hence, the conceptual difficulty with good faith conduct is easily overcome with a deeper and more accurate understanding of the nuanced negotiation process.

(3) Is it practical to impose a duty of good faith in mediation?

41 The final dilemma concerns the feasibility of imposing a good faith obligation. Commentators have expressed reservations about defining good faith with certainty. Lande in particular takes the view that good faith is an uncertain and elusive concept. In his opinion, good faith negotiation cannot be equated with making reasonable offers because it is highly inappropriate for the courts to force parties to make offers or to second-guess whether the offers are reasonable.[83] Others have suggested an exclusionary approach. In other words, good faith can be understood by delineating forms of bad faith conduct, such as using the mediation process for discovery purposes, making misrepresentations and using threats.[84] Even if there were some degree of certainty in defining the concept, it is a tall order to require the courts to ascertain the parties' state of mind in order to understand their subjective intentions. In this respect, a few US commentators have argued that the assessment of negotiation conduct is context-specific and poses great difficulty to the courts' adoption of a consistent stance

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82 Rishi Batra, "Integrative & Distributive Bargaining" in *The Negotiator's Desk Reference* (Andrea Kupfer Schneider & Chris Honeyman gen eds) (Minnesota: DRI Press, 2017) ch 3 at p 40, referring to David A Lax & James Sebenius, *The Manager As Negotiator* (New York: Free Press, 1986) and Peter Adler, "The Protean Negotiator" in *The Negotiator's Desk Reference* (Andrea Kupfer Schneider & Chris Honeyman gen eds) (Minnesota: DRI Press, 2017) ch 8.

83 John Lande, "Why a Good-Faith Requirement is a Bad Idea for Mediation" (2005) 23 Alt to High Cost Litig 1 at 2.

84 Tania Sourdin, "Good Faith, Bad Faith: Making an Effort in Dispute Resolution" (2012) 2 DICTUM – Victoria L Sch J 19 at 24, referring to Elizabeth Peden, "The Meaning of Contractual 'Good Faith'" (2002) 22(3) *Australian Bar Review* 235 at 235; Nadja Alexander, "Good Faith As the Absence of Bad Faith: The Excluder Theory in Mediation" (2009) 11(4) ADR 75, referring to Robert Summers, "'Good Faith' in General Contract Law and the Sales Provision of the Uniform Commercial Code" (1968) 54 Va L Rev 195.

in enforcing good faith obligations.[85] Moreover, the above discussion on the latest dispute resolution studies underscores the difficulty in accurately understanding the nuances of a wide range of negotiation strategies. It has been further asserted that the imposition of a nebulous obligation potentially breeds distrust amongst the disputants within mediation and may result in satellite litigation.[86] Because of these reservations, the American Bar Association ("ABA") Section on Dispute Resolution strongly opposed the use of broad good faith requirements. It noted that imposing sanctions for subjective behaviour – including the failure to make a reasonable offer, and a failure for a representative to have sufficient authority – creates a grave risk of undermining core values of mediation and creating unintended problems. It further proposed imposing sanctions for the "violation of rules specifying objectively-determinable conduct", including the failure to attend the mediation and the failure to submit the requisite mediation statements.

42 Notwithstanding the concerns about the feasibility and prudence of imposing a good faith obligation, there appears to be agreement amongst commentators that some form of sanction is needed to deter egregious conduct within mediation. The disagreement relates to how widely such objectionable conduct is defined. The ABA suggested the penalisation of clearly identifiable and specific requirements and refraining from framing these requirements as broad good faith obligations. However, such an approach will fail to detect other egregious conduct that seeks to gain strategic advantage within mediation or impose hardship, such as using mediation as a fishing expedition.[87] The NADRAC in Australia thus took the view that the express stipulation of acceptable conduct would "make clear and remind ADR participants of the behaviour that is expected of them" and enhance the integrity of the mediation process. As such, the courts

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85 Peter N Thompson, "Good Faith Mediation in the Federal Courts" (2011) 26 Ohio St J on Disp Resol 363 at 364–366 and 374, referring to David S Winston, Notes and Comments, "Participation Standards in Mandatory Mediation Statutes: 'You Can Lead a Horse to Water'" (1996) 11 Ohio St J on Disp Resol 187 at 198 (noting that a good faith requirement forces courts to make subjective evaluations of the parties' motives rather than conduct and leads to "exhaustive investigations" that undercut judicial economy and efficiency); John Lande, "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L Rev 69 at 106.

86 Wayne Brazil, "Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts" (2002) 2 J Disp Resol 11 at 29; Peter N Thompson, "Good Faith Mediation in the Federal Courts" (2011) 26 Ohio St J on Disp Resol 363 at 374; John Lande, "Why a Good-Faith Requirement is a Bad Idea for Mediation" (2005) 23 Alt to High Cost Lit 1 at 4.

87 Roger L Carter, "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resol 367.

should not be completely barred from evaluating the parties' conduct in the totality of the circumstances.

43 This author suggests that a good faith obligation will, on balance, send a correct signal about the expected conduct within mediation. The expected behaviour of meaningful participation in mediation without the taking of strategic advantage should be articulated, particularly for court-connected or statutorily mandated mediation programmes. However, to ensure the feasibility of enforcing the obligation, it is proposed that sanctions be imposed only for breaches of objective requirements such as attendance at mediation and submission of documents, and the presence of highly egregious conduct such as making misrepresentations or threats and being clearly unengaged within mediation. This proposal will provide a sufficiently high threshold for sanctioning bad faith conduct and consequently avoid the uncertainty in the courts' evaluation of more ambiguous conduct such as making "unreasonable offers". In addition, the veil of confidentiality and inadmissibility should not be readily lifted to evaluate the parties' conduct. In this regard, NADRAC recommended that the leave of the court should be obtained before any evidence is admitted for the purpose of enforcing a conduct standard, and the court should carefully balance the public interest in confidentiality of ADR against the interest in the administration of justice before granting leave.[88] This is precisely the approach that the Singapore Mediation Act has adopted. The stance of lifting the veil of confidentiality in very limited and carefully considered circumstances will ensure that the good faith obligation is not abused.

B. Whether there is a good faith obligation in Singapore

(1) Good faith negotiation

44 Notwithstanding the advantages of mandating the need for good faith conduct, Singapore has yet to impose such a statutory or common law obligation. As alluded to earlier, there has been judicial discussion in the Singapore courts on whether a contractual term to negotiate in good faith is valid, and whether the approach in the English decision of *Walford* should be followed. In *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*,[89] the tenancy agreement between the two parties provided that the rent for each new term was to be determined by agreement according to a

88 National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Process: From Principles to Practice through People* (February 2011) at p 36.

89 [2012] 4 SLR 738.

stipulated rent review mechanism. The mechanism further stated that the parties "shall in good faith endeavour to agree on the prevailing market rental value of the Demised Premises". The respondent subsequently approached seven valuation firms unilaterally and did not disclose the existence of these valuations to the appellant. In deciding the overall issue of whether the respondent had breached the relevant good faith clause, the Court of Appeal considered the question of whether the clause was valid.

45 Significantly, the court departed from the position in *Walford*. V K Rajah JA, writing on behalf of the court, noted the existing criticism of *Walford* and stated that the decision did "not have the effect of invalidating an express term in a contract which employs the language of good faith". The court added that it was not contrary to public policy to uphold such a term, because good faith clauses were likely to promote Singapore's cultural value of resolving disputes consensually whenever possible. Furthermore, Rajah JA highlighted that the circumstances here were distinguishable from the facts in *Walford*. Unlike the pre-contractual negotiations in the latter case, the parties here agreed to negotiate as part of an overarching contractual framework to implement the contract. Negotiations in such a context need not necessarily be adversarial and hostile, but called for a more consensual approach.

46 The court further considered the common objection raised concerning the lack of certainty of a good faith obligation. Rajah JA stated that the concept of good faith entailed the subjective element of acting honestly, and the objective element of observing accepted commercial standards of fair dealing in performing the agreed obligation.[90] In the present circumstances, the obligation to "in good faith endeavour to agree" on the new rent required the parties to co-operate fully to facilitate the determination of the new rent. It was sufficiently certain and capable of being observed, as it was not difficult to ascertain what reasonable commercial standards required for this situation. Distinguishing *Walford* from the present case, the court pointed out that the issue here was not a broad one of whether the court could compel the parties to determine the rent in good faith, but a very specific question of whether the respondent, in unilaterally obtaining valuations of the market rental value, had breached its duty to "in good faith negotiate in good faith" on the rental. In addition, the court suggested that an obligation to negotiate in good faith, similar to an agreement to mediate and "best endeavour" clauses, did not mean that

90 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [45] and [47].

an agreement was guaranteed, but that the parties would try as far as reasonably possible to reach an agreement.[91]

47 Having concluded that the term was valid, the court went on to consider the content of the good faith obligation. Taking into account the specific context of the rent review mechanism, Rajah JA found that it envisaged a process of collaboration and joint action by requiring them to genuinely endeavour on the new rent under the first stage, and then requiring them to jointly appoint three valuers under the second stage. Faithfulness to their common purpose meant that the parties should not attempt to unfairly profit from the known ignorance of the other party. Accordingly, reasonable commercial standards of fair dealing necessarily dictated the disclosure of all material information which could have an impact on the negotiations, including the unilateral valuations commissioned by the respondent.

48 This case has several noteworthy implications in relation to the present discussion of good faith conduct in mediation. First, the Court of Appeal displayed receptivity to the possibility of enforcing a contractual obligation to negotiate in good faith. It relied heavily on the public policy of encouraging the consensual resolution of disputes in reaching this conclusion. It further commented that there was no difference between an agreement to mediate and agreement to negotiate in good faith, thus dispelling any doubt about the validity of mediation clauses and the integral role played by mediation in the legal landscape.[92] Given that the mediation process essentially involves facilitated negotiation, it is arguable that the Singapore courts may also be willing in the future to recognise a contractual agreement to participate in mediation in good faith. However, this could be a very faint possibility for a few reasons. Foremost of all is how the court took pains to highlight how this decision turned on the particular facts. It found the clause to be sufficiently certain because it was not a bare agreement to negotiate, but one that specified details of a review mechanism. The decision also was premised on the fact that the parties were in a contractual relationship that required co-operation, unlike the pre-contractual relationship between the parties in *Walford*.[93]

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91 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [43].

92 Joel Lee, "Agreements to Negotiate in Good Faith: *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*" [2013] SingJLS 212 at 221.

93 Joel Lee, "Agreements to Negotiate in Good Faith: *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*" [2013] SingJLS 212 at 218. Lee posed the question of what the court would have done if the clause in question merely stated that "the parties agree to negotiate in good faith the rent for the new rent period" without any specification of when Stage Two

(*cont'd on the next page*)

Furthermore, it is probably unlikely for a future case to involve a private agreement to mediate in good faith. Most commercial agreements will, at most, include an agreement to refer the matter for mediation, without further stipulating an obligation to act in good faith within the mediation process. In many jurisdictions, the good faith obligation to mediate has been imposed by legislation and not through mutual agreement. Hence, it remains uncertain whether Singapore case law will favour a good faith obligation within mediation.

49 However, this decision still bodes well for the future legal developments on good faith within mediation. It is pertinent that the court showed a sound understanding of negotiation conduct in the commercial setting. Citing the Australian decision of *Aiton Australia Pty Ltd v Transfield Pty Ltd*[94] with approval, it acknowledged that negotiation in good faith did not involve acting against one's self-interest. It also implicitly recognised that an obligation to negotiate in good faith was not equivalent to an agreement to agree, which is, of course, unenforceable. When discussing the objective element of fairness embedded within the concept of good faith, the court appeared to emphasise the need to make reasonable efforts to reach an agreement. Thus, Singapore's apex court appears to be analysing negotiation conduct in a realistic way that is consistent with current dispute resolution thought.

(2) Expected conduct within court-connected mediation in Singapore

50 Notwithstanding the absence of a good faith obligation within Singapore case law and legislation, there are clear indications of the expected conduct within court-connected mediation in the State Courts and Family Justice Courts. The State Courts Centre for Dispute Resolution provides both mediation, conciliation and neutral evaluation services for civil disputes below $250,000 in value, minor criminal offences, harassment claims and community disputes. The Family Justice Courts provide mediation and counselling services for family disputes. Family matters involving children are mediated in the Child

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of the rent review mechanism would kick in. This author submits that courts should adopt a practical and robust approach to this and imply a reasonable period of time (appropriate for the context and complexity of the negotiation in question) for the negotiations to be conducted. This would be supported by the court's statement that parties are obligated to "try as far as reasonably possible to reach an agreement". He also stated (at 219) that it is clear from the case that the Court of Appeal's ruling is limited to agreements to negotiate in the context of a pre-existing contractual relationship. In this regard, he argues that the validity of agreements to negotiate (as opposed to agreements to agree) should be equally valid where there is no pre-existing contractual relationship.

94 [1999] 153 FLR 236.

Focused Resolution Centre, while disputes involving divorcing couples and maintenance of children or spouses are mediated at the Family Resolution Chambers and Maintenance Mediation Chambers respectively.

51 Both courts have stipulated minimal standards that are objectively identifiable. The State Courts' Practice Directions[95] require each party to file an opening statement in the prescribed format at least two working days before the mediation session. It is also explicitly stated that all the parties and their conducting solicitors are to attend the mediation in person and be present throughout the session. Parties who are corporate bodies must send representatives possessing the authority to settle. In other words, the representative must be "the most knowledgeable about the case and is able to recommend a settlement to the representative's board or body".[96] Notably, the Practice Directions provide that the court may impose sanctions for absence from the mediation or lateness without any valid reason.[97] These sanctions include the dismissal of the action or defence under O 34A r 6 of the Rules of Court, and making adverse cost orders after a trial under O 59 r 5(*c*) to "take into account the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution". It is arguable that the courts may also make adverse costs orders under O 59 r 5 for blatant breaches of the requirements to file mediation opening statements and to send the most appropriate persons to attend the mediation. The relevant wording in this rule has been framed broadly to allow the court to consider any conduct "in relation to … mediation". However, there has yet to be any reported decision that has invoked this provision to impose sanctions for unacceptable conduct within the mediation process. It remains to be seen whether the court will also impose robust sanctions for other objectionable conduct such as abusing the mediation process for collateral purposes, or failing to participate meaningfully in the mediation.

52 The Family Justice Courts' requirements on conduct within court-connected mediation are largely similar to the State Courts' Practice Directions. These courts' practice directions also state that both parties and their lawyers must personally attend the mediation sessions. The lawyers are exempted from attending counselling sessions.[98]

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95 Effective 1 May 2019.

96 State Courts Practice Directions (effective 1 May 2019) para 41(6).

97 State Courts Practice Directions (effective 1 May 2019) paras 35(28) and 35(29).

98 Family Justice Courts Practice Directions (updated 10 May 2019) paras 11(12) and 11(13). See also Kevin Ng, Yarni Loi, Sophia Ang & Sylvia Tan, "Family Justice Courts – Innovations, Initiatives and Programmes, An Evolution over Time" (2018) 30 SAcLJ 617.

Additionally, parties are required to file a summary of mediation in the court's prescribed format, providing details on children's issues, division of matrimonial assets and maintenance.[99] For family disputes involving children, the court will convene a pre-mediation session termed a "Family Dispute Resolution Conference" in order to have a preliminary discussion of the issues affecting the children, crystallise the issues in contention, give directions on the filing of appropriate documents and direct the attendance of mediation or counselling.[100] The parties and their counsel are also expected to "come prepared to discuss all issues relating to or impacting the … children".[101] Although the Family Justice Courts have not expressly stated that the failure to adhere to these requirements will be sanctioned, it is highly likely that the courts are empowered to penalise the parties under r 10 of the Family Justice Rules 2014,[102] which allows the court to partially or wholly set aside the proceedings or make any other appropriate order, whenever there is failure to comply with the relevant rules.[103] Consequently, notwithstanding the absence of a reference to a "good faith" requirement, both the State Courts and Family Justice Courts have stipulated very specific standards on expected mediation conduct, with any breaches being potentially sanctioned by the court.

53 Apart from court-conducted mediation, the Singapore courts also refer matters to external mediation providers, notably the Singapore Mediation Centre ("SMC"). There is, naturally, less control over the parties' conduct in external mediation programmes compared to court-connected mediation, and, consequently, more limited standards that are stipulated by the relevant procedural rules. Since 1 January 2019, matrimonial proceedings with no contested child issues and involving assets worth $2m and above have been referred for private mediation conducted by SMC. The Family Justice Courts' Practice Directions[104] have imposed minimal standards on the expected participation in such mediations: the parties are merely given directions and timelines to agree on a mediation date and to exchange documents.[105] By comparison, there are no standards imposed by the High Court and

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99 Family Justice Courts Practice Directions (updated 10 May 2019) Form 191.

100 Family Justice Courts Practice Directions (updated 10 May 2019) paras 11(11) and 12(3).

101 Family Justice Courts Practice Directions (updated 10 May 2019) paras 12(3) and 12(4).

102 S 813/2014.

103 While r 10 of the Family Justice Rules 2014 (S 813/2014) relates to non-compliance of the Family Justice Rules, r 7 states that "[p]ractice directions may make additional provisions in relation to the requirements for any application in the Family Justice Courts". Arguably, the court can exercise its power under this rule for breaches of practice directions.

104 Updated 10 May 2019.

105 Family Justice Courts Practice Directions (updated 10 May 2019) para 11(4).

Court of Appeal in relation to civil cases that undergo external mediation. The courts' intervention is limited to encouraging the parties to consider attempting ADR at the earliest possible stage of the proceedings. Once all the parties indicate their willingness to attempt ADR, the court will adjourn the pending court proceedings and give timelines for the completion of the ADR process.[106]

(3) The focus on entry into mediation instead of conduct within mediation

54 It is evident that the Singapore courts focus principally on encouraging parties to attempt mediation, and have adopted a lighter touch in regulating conduct within the mediation process. Taking a leaf from the English approach, the Supreme Court and State Courts have stressed how any unreasonable refusal to attempt ADR may be taken into account by the courts in making post-trial costs orders. The courts have introduced several pretrial mechanisms to enable them to assess the parties' and their lawyers' decision to refuse the use of ADR. Under the Supreme Court pretrial process, a party may file an "ADR Offer" to the opposing party to propose the use of ADR. The other party is obliged to file a "Response to ADR Offer" within 14 days of being served the offer, stating its decision and giving reasons for declining the offer to attempt ADR. A failure to file a response will be deemed to evince an unwillingness to use ADR without providing any justification.[107] The State Courts have adopted a similar mechanism for civil cases of a lower value. All parties have to file an "ADR Form" at the pretrial stage to confirm that their lawyers have explained the available ADR options to them, and to indicate their decision as to ADR. Any refusal to use ADR also has to be explained. Both the Supreme Court and State Courts have provided information and guidelines to help the parties understand the different forms of ADR and to make an informed decision on attempting ADR.

55 Significantly, the courts have placed a duty on lawyers to explore ADR options with their clients. The Supreme Court and Family Justice Courts state in their respective practice directions that it is "the professional duty of advocates and solicitors to advise their clients about mediation".[108] The State Courts require the lawyers and their clients to certify in the ADR Form that they have discussed the benefits of using ADR. The Legal Profession (Professional Conduct) Rules[109] were also amended in 2017 to reiterate that a practitioner must evaluate with his

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106 Family Justice Courts Practice Directions (updated 10 May 2019) para 35C(4).
107 Family Justice Courts Practice Directions (updated 10 May 2019) para 35C.
108 Supreme Court Practice Directions effective 1 May 2019) para 35B(2); Family Justice Courts Practice Directions (updated 10 May 2019) para 11(1A).
109 S 706/2015.

or her client the use of ADR processes and evaluate whether the consequences of pursuing the matter justifies the attendant risks and expenses.[110] Hence, the overall legislative framework in Singapore concentrates on bringing appropriate disputes to the mediation table instead of regulating conduct within mediation. There is no explicit good faith duty that is imposed in relation to the decision to attempt or decline ADR. Nonetheless, the spectre of costs sanctions, coupled with potential disciplinary proceedings for professional misconduct, has resulted in the need for parties to persuade the court why a refusal to use ADR is a "reasonable" decision, a concept that is somewhat akin to "good faith".

C. Potential good faith requirements for lawyers and parties

56 The concept of good faith participation in mediation remains a fairly controversial one. The common law jurisdictions are divided in their views on whether imposing this requirement will be counter-productive for the overall integrity and confidentiality of the mediation process. Many of the objections stem from a recognition that legal mechanisms are blunt tools in bringing about meaningful participation in a consensual process. Both the US and Australian commentators have therefore recommended greater reliance on education, regulation of mediators and reform of the legal profession in order to encourage adherence to standards on mediation conduct. Likewise, this author proposes a multi-pronged approach which includes limited legislative regulation of mediation conduct. Any statutorily imposed legislation should also be confined to sanctioning very egregious conduct or the failure to observe objective requirements such as attending the mediation.

57 The case law, legislation and guidelines on legal professional conduct in Australia and the US are instructive in shedding light on the type of egregious mediation conduct that is deemed to evince bad faith. The two tables below list some examples. These types of conduct could potentially be instances in which bad faith conduct is sanctioned by the courts, in the event that a good faith duty is legislatively introduced.

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110 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) r 17(2)(*e*); Dorcas Quek Anderson, "Supreme Court Practice Directions (Amendment No 1 of 2016): A Significant Step in Further Incorporating ADR into the Civil Justice Process" *Singapore Law Gazette* (March 2016).

Table 1: General obligations of parties

Conduct deemed to be unacceptable	Examples
Failure to attend court-ordered mediation	*Seidel v Bradberry*:[111] Defendant did not attend mediation and refused to communicate with parties before and after mediation.
Blatant lateness for mediation	*Pitts v Francis*:[112] Defendant arrived several hours late for mandated mediation, wearing inappropriate attire.
Failure to produce pre-mediation memorandum	*Nick v Morgan's Foods Inc*:[113] Defendant refused to submit mediation memorandum, contending that it was a waste of time.
Representative who attends does not have authority to settle	*Francis v Women's Obstetrics & Gynaecology Group*:[114] Defendant initially requested court for different mediation date and stated that it did not know the scope of plaintiff's claim, then stated at mediation that there was no authority to settle because of unsettled insurance coverage issues. *G Heileman Brewing Co v Joseph Oat Corp*:[115] Company's representative who attended had no authority to make any offer.
Clear refusal to participate in mediation	*Texas Department of Transportation v Pirtle*:[116] Defendant refused to participate in mediation in court-ordered mediation and indicated to trial judge early on that he would not be participating.

111 1988 WL 386161 (ND Tex, 7 July 1998), described in Rachel Hutchings, "Defining Good Faith Participation in Mediation" (2007) 1 Am J Mediation 41 at 45.

112 2007 WL 4482168 (ND Fla, 19 Dec 2007), discussed in Peter N Thompson, "Good Faith Mediation in the Federal Courts" (2011) 26 Ohio St J on Disp Resol 363 at 413.

113 99 F Supp 2d 1056 (ED Mo, 2000), affirmed in 270 F 3d 590 (8th Cir, 2001), discussed in Roger L Carter, "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resol 367 at 388.

114 144 FRD 646 (WDNY, 1992), referred to in Roger L Carter, "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resol 367 at 389–390.

115 871 F 2d 648 (7th Cir, 1989), discussed in John Lande, "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L Rev 69 at 95.

116 977 SW 2d 657 (Tex App, 1998).

Using mediation to threaten opposing party	*Del Fuoco v Wells*:[117] Plaintiff used mediation to pressurise defendant to accept settlement demand of US$500,000 with legal costs, and made threat to disclose alleged campaign finance violations.
Clearly non-cooperative within mediation	*Outar v Greno Industries Inc*:[118] Plaintiff refused to negotiate or speak, or allow his attorney to speak on his behalf, although requested repeatedly. *Brooks v Lincoln National Life Insurance Co*:[119] Plaintiff refused to respond to defendant's initial offer and told mediator that they had five minutes to submit a serious offer or they would leave the mediation. *In re AT Reynolds & Sons Inc*:[120] Party repeatedly responded to inquiries by stating that they were not open to compromise that involved taking a single dollar out of its pocket, and made no offer until after being told that that the mediator would report them for bad faith mediation. *Aiton Australia v Transfield Pty Ltd*:[121] The court stated that mediating in good faith involves having an open mind in the sense of willingness to consider offers and consider putting forward options for resolution of the dispute.
Making misrepresentations that mislead the opposing party	*Legal Services Commissioner v Mullins*:[122] In a mediation involving personal injuries, the plaintiff failed to disclose to defendant that the plaintiff had been diagnosed with terminal cancer, leading to a settlement that was made based on inaccurate information.

117 2005 WL 2291720 (MD Fla, 20 September 2005), discussed in Rachel Hutchings, "Defining Good Faith Participation in Mediation" (2007) 1 Am J Mediation 41 at 44.

118 2005 WL 238840 (NDNY, 27 September 2005), discussed in Rachel Hutchings, "Defining Good Faith Participation in Mediation" (2007) 1 Am J Mediation 41 at 43.

119 2006 WL 2487937 (D Neb, 25 August 2006), discussed in Peter N Thompson, "Good Faith Mediation in the Federal Courts" (2011) 26 Ohio St J on Disp Resol 363 at 411.

120 424 BR 76 (Bankr SDNY, 2010), discussed in Peter N Thompson, "Good Faith Mediation in the Federal Courts" (2011) 26 Ohio St J on Disp Resol 363 at 410.

121 [1999] 153 FLR 236 at [156].

122 [2006] LPT 012, discussed in Bobette Wolski, "The Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in Mullins' Case" (2012) 36 Melb U L Rev 706.

Table 2: Lawyers' obligations in mediation

Conduct deemed to be unacceptable	Examples
Making misrepresentations	Rule 4.1 of the ABA Model Rules of Professional Conduct prohibits a lawyer from knowingly making a false statement of material fact to a third person; however, it is thought that certain statements that are akin to "puffing" or hyperbole will not offend this rule.[123] Law Council of Australia's Guidelines for Lawyers in Mediation[124] state that lawyers should never mislead and should be careful of puffing.
Failure to keep client informed, resulting in client's absence from mediation	*Roberts v Rose*:[125] Solicitor informed mediator of a conflict of the mediation date with his schedule but did not confirm whether the mediation was rescheduled, and failed to inform his client about the mediation until after the mediation date.
Clearly hostile and non-cooperative within mediation	*Graham v Baker*:[126] Solicitor was hostile to the mediator and the opposing party, refusing to co-operate or to give the opponent an opportunity to put forward a proposal, issued an ultimatum and became belligerent during mediation. Law Council of Australia's Guidelines for Lawyers in Mediation urges lawyers to be cautious about giving "final offers" or ultimatums which can damage credibility for future negotiations.[127]

123 John Sherrill, "Ethics for Lawyers Representing Clients in Mediations" (2012) 6 Am J Mediation 29 at 33, referring to comments to the Georgia ethical rules recognising that puffing is part of the negotiation process and is only disallowed when it materially misstates facts.

124 Updated August 2011.

125 37 SW 3d 31 (Tex App, 2000), referred to in Roger L Carter, "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resol 367 at 381.

126 447 NW 2d 397 (Iowa, 1989), referred to in Roger L Carter, "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resol 367 at 382 (note that the final court reversed the decision).

127 Law Council of Australia, Guidelines for Lawyers in Mediations (updated August 2011) at para 6.2.

Frustrating mediation by filing application right before mediation	*Fisher v SmithKline Beecham Corp*: Defendant's counsel filed summary judgment application on eve of mediation, then limited its mediation presentation to providing a copy of the summary judgment application and stating that it would not consider settlement unless the plaintiff could explain why the summary judgment application would fail.[128]

IV. Conclusion

58 With the passing of the Mediation Act and the institutionalisation of mediation in various sectors, mediation has matured as a dispute resolution process within Singapore. The incorporation of mediation within the formal justice system necessitates a closer examination of the legal regime that supports the growth of mediation. However, the creation of sound legal principles ultimately hinges on an accurate understanding and careful balancing of the competing values underlying the mediation process. This situation is best exemplified by the clash of mediation confidentiality and the public interest in ensuring meaningful participation. These two needs appear to be irreconcilable. They also raise difficult questions concerning the desired negotiation behaviour, the feasibility of mandating good faith conduct, the tension between informal and formal modes of dispute resolution and the appropriate scope of public intervention in a consensual and private process.

59 This author has sought to discuss the fundamental issues underlying the question of piercing the veil of confidentiality to enforce good faith conduct in mediation. It has been argued that good faith is consistent with strategic negotiation, and should also be highly encouraged to protect the integrity of the mediation process. To that end, it is recommended that a good faith participation obligation is articulated in appropriate legislation. At the same time, the threshold for the breach of this duty should be a high one so as to facilitate the enforcement of the duty and to prevent the unnecessary lifting of the veil of mediation confidentiality. The informal and private nature of the mediation process, which is placed within a formal justice system, has to be preserved. Yet the need to ensure access to justice also necessitates limited scrutiny of mediation communications. It is not an impossible

128 2008 WL 4501860 (WDNY, 29 September 2008), referred to in Peter N Thompson, "Good Faith Mediation in the Federal Courts" (2011) 26 Ohio St J on Disp Resol 363 at 411.

tension to resolve, but is one that will be more acute with the growing institutionalisation and maturing of mediation in the future.