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23. MEDIATION AND APPROPRIATE DISPUTE RESOLUTION

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I. Introduction

23.1 In 2021, there are a number of interesting cases to report. In this review, arbitration will not be dealt with unless it forms part of a mixed mode dispute resolution process, which has mediation as an element.[2] Negotiated settlement agreements will be considered on the same level as mediated settlement agreements, bearing in mind the observation by Andrew Phang Boon Leong JA in the Court of Appeal that "parties' negotiations with a view to a settlement also happen on platforms that 'effectively [take] the place of a mediation'".[3]

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2 See, *eg*, the SIAC–SIMC Arb-Med-Arb protocol at Singapore International Mediation centre, "Arb-Med-Arb" <http://simc.com.sg/dispute-resolution/arb-med-arb/> (accessed May 2022) and the Singapore Infrastructure Dispute Management Protocol at Singapore International Mediation Centre, "New Singapore Dispute Protocol Launched to Minimise Time and Cost Overruns in Infrastructure Projects" (23 October 2018) <http://simc.com.sg/blog/2018/10/23/new-singapore-dispute-protocol-launched-minimise-time-cost-overruns-infrastructure-projects> (accessed May 2022). See also *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [5].

3 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [28], citing *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd* [2011] VSC 287 at [25].

23.2 It bears note that the body of decided cases on subject matter related to mediation and appropriate dispute resolution ("ADR") in Singapore is expanding and evolving. Therefore, the authors reiterate that the categories of cases in this review may develop and vary year to year. For the 2021 Ann Rev, the authors offer a review of cases in four categories.

23.3 First, the authors will examine one noteworthy case from the General Division of the High Court ("High Court (General Division)"), which granted a claimant a stay of court proceedings pursuant to s 8 of the Mediation Act 2017,[4] enforcing a hybrid mediation-arbitration agreement. Secondly, four noteworthy cases on the enforcement of negotiated and/or (mediated) settlement agreements will be examined (including one which resolves a trade mark dispute between parties extraterritorially), with an additional focus on the reliance of dispute resolution clauses encapsulated in such settlement agreements by third parties. Thirdly, two cases which address issues in mediation and ADR practice and ethics will be reviewed: this includes one judgment from the Court of Appeal, sternly reprimanding counsel for not informing the court that a settlement agreement compromising the dispute on appeal was concluded and for not filing for the necessary orders (for example, a stay of proceedings, a withdrawal of proceedings, a discontinuance, or whichever relevant order which has been embodied in the compromise) in good time. Finally, one case dealing with disputes over the confidentiality of settlement agreement terms will be considered.

23.4 Some of these cases may be examined in other chapters of this Ann Rev as they may deal with legal issues beyond mediation. In this chapter, the focus is on mediation- and ADR-related issues only.

Category	Focus of review comments	Case
Enforcement of mediation clauses and mediation agreements	Stay of proceedings pursuant to s 8 of the Mediation Act 2017	*EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd*[5]

4 Act 1 of 2017.
5 [2021] SGHCR 9.

Category	Focus of review comments	Case
Recognition and enforcement of (mediated) settlement agreements	Enforcing (mediated) settlement agreements	*Digi International Inc v Teraoka Seiko Co, Ltd*[6] *Ye Huishi Rachel v Ng Ke Ming Jerry*[7] *UJM v UJL*[8]
	Dispute resolution clauses in (mediated) settlement agreements	*VKC v VJZ*[9]
Mediation, ADR practice and ethics	Duty to inform court that settlement agreement was reached before trial	*Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd*[10]
	Solicitor's negligence when negotiating compromise agreement over e-mail	*Gomez, Kevin Bennett v Bird & Bird ATMD LLP*[11]
Mediation, ADR and civil procedure	Confidentiality of variations to settlement agreement terms	*Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd*[12]

II. Enforcement of mediation clauses and mediation agreements

23.5 The enforcement of dispute resolution clauses in commercial disputes, especially provisions to proceed to ADR forums before litigation or arbitration, is normally an issue of procedural importance. Recently in *Haribo Asia Pacific Pte Ltd v Aquarius Corp*,[13] Lee Seiu Kin J observed in *obiter* that provisions which oblige parties to attempt mediating their disputes before commencing either arbitration or litigation are "relatively commonplace given the general shift towards cheaper, non-adversarial means of dispute resolution".[14] Here, the parties in dispute were a Singapore incorporated company (in the business of manufacturing and selling confectionaries) and a South Korea incorporated company (in the business of distributing food and beverage products in South Korea). In a distribution agreement, they had agreed to adhere to the following

6 [2021] SGHC 165.
7 [2021] SGHC 250.
8 [2021] 2 SLR 1467.
9 [2021] 2 SLR 753.
10 [2021] 1 SLR 1135
11 [2021] SGHC 230.
12 [2021] SGHC 1.
13 [2021] SGHC 278.
14 *Haribo Asia Pacific Pte Ltd v Aquarius Corp* [2021] SGHC 278 at [160].

ADR provisions before they could commence litigation proceedings in the Singapore High Court:[15]

> **§ 8 Miscellaneous Provisions**
>
> …
>
> 8.7 If any dispute arises out of or in connection with this Agreement, the respective rights and obligations hereunder and/or the relationship between the parties in general, which cannot be settled by the day-to-day management team of the parties, the following individuals shall communicate in a good faith effort to resolve the dispute and shall be deemed to have the authority to settle the dispute on behalf of the parties within ten (10) days of a written request from one party to the other:-
>
> > 8.7.1 on behalf of the Distributor: Eric Hahn and/or any President of the Distributor (whose identity and contact details shall be provided to the Distributor within one (1) week after his/her appointment); and
> >
> > 8.7.2 on behalf of the Principal: Martin Schlatter (or his successor in role).
>
> If the dispute is not wholly resolved within thirty (30) days of the written request, or within such further period as the parties may mutually agree in writing, the dispute may be submitted to the Singapore High Court. In this regard, the parties herein submit to the exclusive jurisdiction of the High Court of Singapore.

23.6 It is noteworthy that the provisions above were governed by German law.[16] The disputing parties had engaged experts on German law who interpreted these provisions differently.[17] The experts could not agree over whether the dispute resolution clause was a provision which set out what parties should do in the event of termination or impending litigation under German law. Lee J preferred reading the clause as a litigation avoidance mechanism rather than termination avoidance:[18]

> This, in my view, is a more coherent reading of the clause as a whole. The first half of cl 8.7 … empowers and obliges specified individuals to communicate in good faith to resolve disputes which cannot be settled by the parties' day-to-day management teams. The second half then states that *if* such disputes cannot be resolved within 30 days (or such other period as the parties agree in writing), their dispute may then be submitted to the Singapore High Court. [emphasis in original]

15 *Haribo Asia Pacific Pte Ltd v Aquarius Corp* [2021] SGHC 278 at [21].
16 *Haribo Asia Pacific Pte Ltd v Aquarius Corp* [2021] SGHC 278 at [2].
17 *Haribo Asia Pacific Pte Ltd v Aquarius Corp* [2021] SGHC 278 at [158]–[160].
18 *Haribo Asia Pacific Pte Ltd v Aquarius Corp* [2021] SGHC 278 at [159].

23.7 The common law will broadly be accommodating with the enforcement of adequately drafted mediation or other ADR provisions and agreements to proceed to mediation (referred to in this review as mediation agreements).[19] Furthermore, the enforcement of mediation agreements may be made pursuant to s 8 of the Mediation Act, which specifically provides the Singapore courts with powers to enforce mediation agreements. In *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd*,[20] the High Court (General Division) has recently applied this section to stay court proceedings in favour of mediation, enforcing a hybrid mediation-arbitration agreement. This case will be discussed in this part.

A. Stay of proceedings pursuant to section 8 of the Mediation Act

23.8 In *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd*, the disputants had concluded two related agreements in chronological order:

> (a) a quotation agreement which sets out the framework for the development of some fintech applications, called the Superwallet Platform and DEVO+, and does not contain any jurisdiction or dispute resolution agreement;[21]
>
> (b) a subsequent "Founders Shareholders' Agreement" which refers to the above-mentioned quotation agreement but sets out in greater detail what the parties have undertaken to do, and contains a multi-tiered dispute resolution provision.[22]

23.9 A dispute arose when the defendant, SQ2 Fintech Pte Ltd, could no longer support the plaintiff, EXXA Network Pte Ltd, on the development of DEVO+.[23] The plaintiff therefore filed a claim against the defendant in court. After a brief procedural detour, the plaintiff obtained leave of court to continue its suit against the defendant, to which the defendant responded by applying for a stay of court proceedings relying on the multi-tiered dispute resolution provision in the Founders Shareholders' Agreement. Reproduced, the dispute resolution clause provides:[24]

> 25.1 If any dispute or difference arises between any of the Parties hereto during the subsistence of this Agreement or thereafter, in connection with the validity, interpretation, implementation or alleged breach of any provision of

19 See *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130; *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871 at [25]; and *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC).
20 [2021] SGHCR 9.
21 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [3].
22 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [4]–[5].
23 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [6].
24 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [5].

> the Agreement or regarding any question, including the question as to whether the termination of the Agreement by any Party hereto has been legitimate, the Parties hereto shall endeavour to settle such dispute amicably. The attempt to bring about an amicable settlement is considered to have failed as soon as one of the Parties hereto, after reasonable attempts, which attempt shall continue for not less than thirty (30) days, gives a written notice thereof to the other Party in writing.
>
> 25.2 The Parties shall agree that all disputes, controversies or differences ('Disputes') arising out of or in connection with this Agreement, including any questions regarding its existence, validity or termination, shall first be referred to mediation to the Singapore International Mediation Centre ('SIMC') in Singapore, in accordance with the SIMC rules and proceedings for the time being in force.
>
> 25.3 In the event that the Disputes cannot be resolved in mediation within the time agreed by the Parties, each Shareholder may, at its option, refer and resolve the Disputes by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force, which rules are deemed to be incorporated by reference in this Clause. A Party seeking to commence arbitration under this Clause 25 shall first serve a written notice, specifying the matter or matters to be so submitted to arbitration, on the other Parties hereto.
>
> 25.4 The seat of such arbitration shall be in Singapore and all proceedings shall be conducted in the English language.

23.10 The defendant sought for a stay of court proceedings in favour of mediation at the Singapore International Mediation Centre or arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre.[25] For the purposes of discussion in this review, what was in dispute in the stay application proceedings was whether:

> (a) the dispute between the parties fell within the scope of the dispute resolution clause;
>
> (b) the dispute resolution clause encapsulated in the Founders Shareholders' Agreement could be relied on by the defendant in the event that it ceased becoming a shareholder; and
>
> (c) the court should exercise its discretion to refuse to stay the proceedings in favour of mediation or arbitration.

23.11 In his judgment, Assistant Registrar Justin Yeo set out the applicable legal principles for the enforcement of dispute resolution provisions. It was emphasised that the following considerations in the enforcement of arbitration agreements should apply with equal force to

25 1st Ed, 1 January 2017.

provisions which include conciliatory steps such as mediation.[26] Bearing this in mind, it must first be established that the dispute resolution clause is an enforceable agreement, directing the parties to the forum which they have deemed appropriate by agreement to resolve any disputes that *fall within the scope of that clause*.[27] It was set out by Assistant Registrar Yeo that "as a general rule, the Court undertakes a restrained review of the facts and circumstances in determining whether it appears on a *prima facie* basis that there is [a dispute resolution] clause and that the dispute falls within the ambit of that clause".[28] Additionally, the court will enforce the dispute resolution clause unless it is *clearly* invalid or inapplicable.[29]

23.12 Secondly, the courts will as far as possible uphold the parties' intentions to avoid dispute resolution in a court if there is a clause in their contractual agreement providing for it: "The principle underlying judicial non-intervention in such situations is the respect for the parties' agreement on how their disputes will be resolved; or, as succinctly observed in *Ling Kong Henry*, 'the premise of the court's intervention lies in the bargain struck between parties.'"[30] Assistant Registrar Yeo further observed that this principle is reflected in s 8 of the Mediation Act, where the court is provided the power to stay court proceedings to enforce mediation agreements,[31] giving effect to the parties' intentions to settle disputes out of court.

23.13 Thirdly, while there is some residual discretion for the court to refuse to grant parties a stay of proceedings in favour of the dispute resolution clause, Assistant Registrar Yeo opined that this discretion should be exercised sparingly and in a principled way.[32] It is submitted that *BWG v BWF*[33] may provide some guidance on how this discretion may be exercised: it was suggested (in the context of insolvency proceedings) that where a party relies on a dispute resolution clause in an abuse of court process to delay proceedings, the court may exercise

26 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [10], citing *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871 at [25].
27 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [8].
28 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [9].
29 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [9], citing *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [68].
30 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [8], citing *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871.
31 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [8].
32 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [9], citing and quoting from *Sim Chay Koon v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 at [7].
33 [2020] 1 SLR 1296.

its discretion to refuse to grant such a stay of proceedings to enforce the dispute resolution provision relied on.[34]

23.14 Applying the applicable legal principles set out above, Assistant Registrar Yeo found that the parties' substantive dispute fell under the scope of the multi-tiered dispute resolution provision.[35] Since the parties had agreed in cl 25.2 of the Founders Shareholders' Agreement in widely encompassing terms that "*all disputes*, controversies or differences … *arising out of or in connection with this Agreement* … shall first be referred to mediation" [emphasis added], it was not difficult for the court to come to the conclusion that a broad connection could be drawn between the parties' dispute over the defendant's work on the development of the DEVO+ application and that agreement.[36] In other words, the parties' dispute fell under the scope of the multi-tiered dispute resolution provision because that dispute was broadly in connection with the Founders Shareholders' Agreement. Therefore, that dispute should be referred to mediation by the courts.

23.15 However, the plaintiff argued that the dispute resolution provisions in the Founders Shareholders' Agreement did not apply to the defendant because they had transferred the entirety of their shares in the plaintiff to other shareholders[37] and should have henceforth been released from their obligations under that shareholder agreement. Assistant Registrar Yeo disagreed with the plaintiff's arguments, holding that the defendant could rely on the multi-tiered dispute resolution clause.[38] The court first noted that the dispute resolution clause was separable from the Founders Shareholders' Agreement: it would survive and its obligations would remain enforceable even if either party were to terminate it. Secondly, the parties had agreed in cl 25.1 of the Founders Shareholders' Agreement that the dispute resolution clause would apply to disputes "between any of the Parties hereto during the subsistence of this Agreement *or thereafter*" [emphasis added]. In other words, the parties had expressly agreed the clause would apply even after the defendant ceased to be a shareholder of the plaintiff under the agreement.[39]

23.16 Furthermore, Assistant Registrar Yeo found no basis to exercise his discretion to refuse to stay the proceedings in favour of mediation or arbitration.

34 *BWG v BWF* [2020] 1 SLR 1296 at [56].
35 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [15].
36 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [15].
37 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [16].
38 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [18].
39 *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [17].

23.17 In the context of mediation and ADR, this case is important because it is the first published judgment from the High Court (General Division) to have applied s 8 of the Mediation Act. This case sets out the applicable legal principles for the enforcement of mediation agreements under the Mediation Act, whilst cautiously suggesting that the courts would adopt similar considerations in the enforcement of arbitration agreements under s 6 of the Arbitration Act.[40] It is hoped that the courts in future will provide further clarification about how their residual discretion to refuse to grant parties a stay of proceedings in favour of a mediation agreement would be exercised. However, as suggested above, it is submitted that the principled considerations should be drawn closely from *BWG v BWF*:[41] the court's exercise of discretion to refuse to grant a stay of proceedings to enforce ADR provisions relied on should only arise in the event where a party relies on that clause to abuse the court's process to delay proceedings.

III. Recognition and enforcement of (mediated) settlement agreements

23.18 Even though it is understood that there are high compliance rates to dispute resolution outcomes arising out of mediation, a recent empirical study conducted by the Singapore International Dispute Resolution Academy on international dispute resolution[42] has demonstrated that lawyers remain concerned about enforceability issues in relation to mediated settlement agreements. It bears reiterating that the ability of disputants to secure recognition and enforcement relief from courts for a validly concluded (mediated) settlement agreement continues to be a critical consideration in dispute risk management.

23.19 In last year's Ann Rev, it was noted in the review of *Inngroup Pte Ltd v M Asset Pte Ltd*[43] that enforcement relief of mediated settlement agreements may manifest in the form of either specific performance of its obligations, or damages in lieu of it, at the election of the party seeking enforcement.[44] It should be further noted in this year's review that the Court of Appeal has affirmed the High Court judgment on all

40 Cap 10, 2002 Rev Ed. *EXXA Network Pte Ltd v SQ2 Fintech Pte Ltd* [2021] SGHCR 9 at [10], citing *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871 at [25].
41 See para 23.13 above.
42 Singapore International Dispute Resolution Academy, *SIDRA International Dispute Resolution Survey: Final Report 2020* at pp 47–48 and 50–51.
43 [2020] SGHC 197.
44 (2020) 21 SAL Ann Rev 724 at 740, para 23.41.

grounds except on a few technical points of costs, which is not relevant for discussion in this review.[45]

23.20 In this year's review, the authors will consider a case where the High Court (General Division) was asked to enforce a settlement agreement concluded in Germany over a trade mark dispute, a case where the High Court (General Division) refused to enforce a settlement agreement which was concluded in furtherance of a sham, a case where the Appellate Division of the High Court ("High Court (Appellate Division)") set out in the context of divorce proceedings the circumstances where parties are not bound by the terms of a comprehensively drafted settlement agreement they voluntarily entered into, and a case where the Court of Appeal rejected the High Court's reliance[46] on the provisions of the Contract (Rights of Third Parties) Act[47] ("CRTPA") to allow third parties to an international mediated settlement agreement ("iMSA") to enforce a jurisdiction clause contained inside it. Attention should be paid to the final case, where the Court of Appeal denied a third party to an iMSA from relying on some of its terms, specifically on a jurisdiction clause contained in the agreement.[48]

23.21 In this part, decisions dealing with settlement agreements resulting from mediation as well as those resulting from negotiation are examined as the jurisprudence on negotiated settlement agreements will be relevant to mediated settlement agreements.[49] This is the reason for the references to (mediated) settlement agreements throughout this review.

A. Enforcing (mediated) settlement agreements

23.22 The High Court (General Division) decision of *Digi International Inc v Teraoka Seiko Co, Ltd*[50] provides an illustration of the considerations which the Singapore courts would undertake when it is tasked to interpret and enforce an international (mediated) settlement agreement. This is a noteworthy case because the enforcement of an international settlement agreement here may be applied to demonstrate the element of consent, which is pivotal in the registration of a trade mark which conflicts with an earlier trade mark under s 8(9) of the Trade Marks Act.[51]

45 *M Asset Pte Ltd v Inngroup Pte Ltd* [2021] SGCA 54.
46 *VJZ v VKB* [2020] SGHCF 11.
47 Cap 53B, 2002 Rev Ed.
48 *VKC v VJZ* [2021] 2 SLR 753 at [72].
49 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [28].
50 [2021] SGHC 165.
51 Cap 332, 2005 Rev Ed; s 8(9) provides that "[t]he Registrar may, in his discretion, register a trade mark where the proprietor of the earlier trade mark or other earlier right consents to the registration".

The High Court (General Division) decision of *Ye Huishi Rachel v Ng Ke Ming Jerry*[52] provides an illustration of a sham (mediated) settlement agreement, which the courts will not assist the parties in enforcing. In *UJM v UJL*,[53] the High Court (Appellate Division) set out the relevant considerations which the court will undertake in the enforcement of settlement agreements concluded as a post-nuptial settlement agreement in contemplation of divorce.

(1) Interpreting an international settlement agreement resolving trade mark disputes

23.23 In *Digi International Inc v Teraoka Seiko Co, Ltd*, the disputing parties, Digi International Inc ("the Appellant") and Teraoka Seiko Co, Ltd ("the Respondent") were headquartered in the US and Japan respectively. The parties were engaged in several disputes across other jurisdictions prior to the current litigation in Singapore.[54] Most notably, the Respondent had filed a trade mark in Germany in 2002 which was opposed by the Appellant. The disputed mark the Respondent had filed in Germany was identical to their Singapore mark.[55] Subsequently, the parties entered into a settlement agreement ("the 2002 Agreement") to resolve the German trade mark dispute. Essentially, the parties had agreed to withdraw their dispute in Germany so long as they confined the use of their respective marks to an agreed and demarcated scope of goods and services set out in the 2002 Agreement.[56] In summary, the parties had come to the following compromise (cl 5 of the agreement):[57]

> (a) The Appellant agreed not to attack the existing or new registrations, renewals and/or use of the Respondent's marks so long as the use and registration of that mark were for goods and services similar to those embodied by the scope of the Respondent's two German trade marks;
>
> (b) The Respondent agreed not to attack existing or new registrations, renewals and/or use of the Appellant's marks so long as the use and registration of that mark (which should not refer to identical goods and services covered by the Respondent's two German trade marks) were for goods and services similar to those embodied by the Appellant's German trade mark (reference here was made *to the Appellant's old mark* in Germany).

52 [2021] SGHC 250.
53 [2021] 2 SLR 1467.
54 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [9].
55 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [9].
56 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [10].
57 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [10(a)], [10(b)] and [78].

23.24 The parties had specified in meticulous detail in the 2002 Agreement what each of their specified goods and services were.[58] Clause 9 of the settlement agreement provided that it would be governed by German law.[59] Clause 7 of the settlement agreement set out an entire agreement clause.[60] Clause 6 of the 2002 Agreement provided that it would apply in the following manner:[61]

> This agreement is valid for *existing trade marks* on a worldwide basis and is valid not only for [the Respondent] and [the Appellant] but also for their successors in law, affiliated companies and licensees. [emphasis added]

23.25 It bears additional note that the parties had concluded a separate settlement agreement in 2003 in Canada ("the 2003 Canadian Settlement Agreement"), elucidating and implementing the 2002 Agreement's terms in relation to some disputes over some trade marks in Canada.[62] Importantly, it was also accepted by the parties that the 2003 Canadian Settlement Agreement *did not apply on a worldwide basis*, unlike the 2002 Agreement.[63]

23.26 Subsequently, the Appellant had applied in Singapore to register a trade mark on its 30th anniversary in 2015. The mark was accepted for registration and published on 18 August 2017. On 17 October 2017, the Respondent filed a notice of opposition. An intellectual property adjudicator found that the grounds of opposition filed by the Respondent had succeeded and declined to register the mark. The Appellant appealed to the High Court, challenging the decision of the adjudicator. The only noteworthy part of the appeal in this review is with regard to the submission that the parties' settlement agreement from 2002 in Germany could be enforced to constitute consent for the purposes of registration of a trade mark which conflicted with an earlier mark under s 8(9) of the Trade Marks Act, which provides that "[t]he Registrar may, in his discretion, register a trade mark where the proprietor of the earlier trade mark or other earlier right consents to the registration".

23.27 Dedar Singh Gill J pivoted the enforcement issue on the interpretation of the terms of the 2002 Agreement. The court had to interpret the agreement to decide if it applied to the registration and/or use of trade marks which came into existence *after* the agreement was

58 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [10(c)] and [10(d)].
59 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [73].
60 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [77].
61 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [11].
62 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [42].
63 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [42] and [81].

concluded.[64] First, Gill J determined that German law would apply to govern the settlement agreement;[65] this was not disputed by the parties. However, as the Appellant did not submit evidence of German law relating to the interpretation of the settlement agreement, the court had to rely on the presumption of similarity of laws,[66] assuming that German law was the same as the *lex fori* (that is, the law of the forum, which was Singapore law).[67]

23.28 Whilst it was clear on plain reading of cl 6 of the 2002 Agreement that it was "valid for *existing trade marks* on a worldwide basis" [emphasis added], the Appellant sought to interpret the words "existing trade marks" as being inclusive of its close variations of the mark as well, arguing that the court's consideration of the terms under the 2003 Canadian Settlement Agreement would lend support to such a reading. Applying the *lex fori* (that is, Singapore law), Gill J noted that the entire agreement clause contained in cl 7 of the 2002 Agreement would indicate that "the parties intended to embody their entire agreement in the written contract, [and] the terms of the 2002 Agreement constitute *prima facie* proof of the parties' intentions and extrinsic evidence is inadmissible to contradict, vary, add to or subtract from these terms".[68] The court therefore rejected the Appellant's arguments in light of the treatment of entire agreement clauses under Singapore law.[69] Furthermore, since the 2003 Canadian Settlement Agreement did not apply on a worldwide basis but only in Canada,[70] unlike the 2002 Agreement, the court was unable to consider the former in the interpretation of the latter.

23.29 Interpreting the 2002 Agreement, the court opined that it was confined to settling disputes over disagreements between the parties over trade marks which were in existence at the time the agreement was concluded.[71] It did not cover trade marks which came into existence after the 2002 Agreement was concluded.[72] Since the disputed mark in Singapore was launched in 2015, the Appellant would be unable to demonstrate that the parties' settlement agreement from 2002 in

64 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [71].
65 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [73].
66 In short, the presumption of similarity of laws is a rule in the conflict of laws that if the parties plead foreign law but do not furnish proof of it (*eg*, expert evidence of that foreign law), the court will assume that the content of the foreign law pleaded would be the same as the *lex fori*.
67 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [74], citing *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 201 at [38].
68 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [77].
69 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [80].
70 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [81].
71 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [82].
72 *Digi International Inc v Teraoka Seiko Co, Ltd* [2021] SGHC 165 at [83].

Germany may be enforced to constitute consent between the parties for the purposes of registration of that disputed trade mark under s 8(9) of the Trade Marks Act.

23.30 In the context of mediation and ADR, this case provides an illustration of how the enforcement of an international settlement agreement may be applied to demonstrate the element of consent, which may be required in legislation: for instance, setting out the registration of a trade mark which conflicts with an earlier trade mark. Dispute resolution outcomes arising out of mediation or negotiation are essentially manifestations of party consent.

(2) Enforceability of sham settlement agreements

23.31 In *Ye Huishi Rachel v Ng Ke Ming Jerry*,[73] the High Court (General Division) was resolute that sham (mediated) settlement agreements will not be enforced. The finding that a settlement agreement is a sham is highly fact dependent, and the court meticulously set out and examined the facts of the case in judgment.[74] Essentially, this was a case of a high-risk investment procured by intermediaries which soured when all investors were unable to recover their principal investment.

23.32 The claimant, Rachel, pooled her own funds together with several of her contacts to invest S$1,225,900 in a high-risk product the court had referred to as "agarwood". It appears that she was persuaded to do so by the defendant, Jerry. Jerry was allegedly paid a commission for introducing investors (including Rachel) to Cedric, who became every party's point of contact in the agarwood investment. The parties were unable to get Cedric to testify in court, but it was established at trial that Rachel became acquainted with Cedric, having met him on 10 September 2018 and offering to read his fortune at that meeting.[75] Eventually, the investors who were led into the scheme by Rachel (including Rachel herself) realised that they would not be able to get any of their investment back. This compelled Rachel to relentlessly pursue Jerry for payments and an account of the investment: there was evidence tendered at trial that she had persistently phoned, texted and threatened him. As the *de facto* middleman in this investment, Jerry was caught in between Rachel's persistent pursuits and Cedric's inability to cough up the moneys invested.

73 [2021] SGHC 250.

74 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [5]–[75]. See para 23.22 above.

75 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [38].

23.33 Rachel was eventually able to get Jerry to sign a document which was purportedly a settlement agreement. Based on that purported settlement agreement, she filed a claim in the High Court, alleging that Jerry had promised under that settlement agreement to pay her S$1,225,000.[76] Essentially, this was an attempt by her to recover the pooled principal investment in agarwood from Jerry, a party in this bad investment whom she could readily and conveniently file a lawsuit against as she was in constant contact with him. In his defence, Jerry argued that the settlement agreement he signed was not valid and enforceable as it was a sham document where the parties had no intention to create legal relations with each other when the signatures were inked onto paper.[77]

23.34 Lai Siu Chiu SJ was inclined to find that the purported settlement agreement was a sham. First, Lai SJ found that there was evidence that Rachel had pressured Jerry into signing the purported settlement agreement, "by chasing him relentlessly coupled with threats of going to the police and/or procuring gangsters or debt collectors to pursue him".[78] This led to the likely inference that Jerry had not signed the settlement agreement willingly, supporting his argument that it was not a document that manifested an intention to create legal relations between him and Rachel.[79] The court's inference was reinforced by the finding that Rachel had tricked Jerry into signing the settlement agreement by lying to him that she would not enforce the terms inside and that it was only a piece of paper she would produce for her investors to appease them.[80] The court was also resolute in finding that there was no evidence that Jerry ever agreed in any of his conversations with Rachel to the contents of the settlement agreement:[81] there was no evidence that it was a product of negotiations or discussions between the parties.[82]

23.35 In her determination of whether the settlement agreement was a sham, Lai SJ applied the principles laid out recently by the Court of Appeal in *Toh Eng Tiah v Jiang Angelina*.[83] There, it was explained by Andrew Phang Boon Leong JCA that:[84]

> [T]he essential element of a sham is that the parties did not intend to create the legal relations that the acts done or documents executed give the impression of creating.

76 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [2].
77 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [99].
78 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [122].
79 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [122].
80 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [122], [129] and [130].
81 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [119] and [123].
82 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [119].
83 [2021] 1 SLR 1176.
84 *Toh Eng Tian v Jiang Angelina* [2021] 1 SLR 1176 at [74]–[77].

> …
>
> That being the case, where the allegation is that the agreement was a sham, this is a question that goes to the very existence of the contract – if proved, the existence of a sham means that the agreement was not intended to create enforceable legal obligations but was intended to deceive third parties. …

The court further observed that the definition of a "sham" may be drawn from a judgment by Diplock LJ in *Snook v London and West Riding Investments Ltd*:[85]

> I apprehend that, if [the term 'sham'] has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think is clear in legal principle, morality and the authorities …, that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. …

23.36 Based on the facts presented at trial, Lai SJ was persuaded to draw the inference – from the finding that Rachel deceived Jerry into signing the settlement agreement on the basis that she would not enforce the terms inside against him – that the settlement agreement was actually a sham document. The court specifically found that the purported settlement agreement was never meant to create enforceable legal obligations between the parties.[86] As a result, Rachel's claim against Jerry was dismissed.[87]

23.37 In the context of mediation and ADR, this case provides an illustration of a sham (mediated) settlement agreement, which the courts will not assist the parties in enforcing. It is clear that the courts will examine the facts of each case meticulously since the finding that a settlement agreement is a sham is a highly fact-dependent matter.

(3) Enforcing settlement agreements in contemplation of a divorce across borders

23.38 It is settled law that international (mediated) settlement agreements concluded to resolve *commercial* disputes are ordinarily enforceable if they are validly negotiated and concluded. The

85 [1967] 2 QB 786 at 802C–802E.
86 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [133].
87 *Ye Huishi Rachel v Ng Ke Ming Jerry* [2021] SGHC 250 at [134].

considerations are, however, different if the (mediated) settlement agreement was concluded as a post-nuptial settlement agreement in contemplation of divorce.[88] In *UJM v UJL*,[89] the High Court (Appellate Division) set out the relevant considerations which the court will undertake in the enforcement of such settlement agreements, as considerations under Ch 4A of Pt X of the Women's Charter[90] would provide an overriding layer of deliberation for the courts to ensure that the division of matrimonial assets would be carried out in a just and equitable manner.

23.39 In this case from the High Court (Appellate Division), only the relevant facts necessary in the consideration of enforcing a (mediated) settlement agreement internationally are set out, but in the context of divorce proceedings. The trial court ruled in favour of the wife and awarded her financial relief in the division of matrimonial assets as well as an increased award for maintenance for the children of the marriage. The husband appealed the trial court's decision on the division of matrimonial assets.

23.40 The husband had divorced the wife in Pakistan, and the divorce was made effective on 4 May 2016.[91] The parties' divorce was recognised as valid in Singapore, under Singapore law.[92] The parties had concluded a settlement agreement, dated 13 July 2015 and signed by both parties, in contemplation of a divorce.[93] It was also clear that the husband had complied with the settlement agreement.[94] However, the wife had applied to the Singapore courts for additional financial relief, exceeding what was contemplated under the 2015 settlement agreement, under s 112 of Ch 4A of Pt X of the Women's Charter. It should also be noted that the settlement agreement set out the division of a relatively small proportion of the Husband's assets (namely three pieces of real estate worth approximately S$370,000, referred to as "the Three Properties"), but leaving out others, such as one property in Pakistan and four in Singapore which were worth a combined (estimated) total of S$4.68m ("the Five Properties").[95]

23.41 The wife attempted to challenge the validity of the settlement agreement. At trial, she had attempted to contest the authenticity of her signature on the pages of the settlement agreement, but she was not

88 *UJM v UJL* [2021] 2 SLR 1467 at [14].
89 See para 23.22 above.
90 Cap 353, 2009 Rev Ed.
91 *UJM v UJL* [2021] 2 SLR 1467 at [1].
92 *UJM v UJL* [2021] 2 SLR 1467 at [8].
93 *UJM v UJL* [2021] 2 SLR 1467 at [9] and [18].
94 *UJM v UJL* [2021] 2 SLR 1467 at [9].
95 *UJM v UJL* [2021] 2 SLR 1467 at [27].

successful.[96] This was upheld on appeal. Even so, it was noted by the High Court (Appellate Division) that "there was no suggestion that [she] had had the benefit of legal advice on the terms of the Settlement Agreement. Indeed, the evidence suggested that she did not seek such advice".[97] Furthermore, the court noted that the wife had little time to read the settlement agreement (which she only read on the way to the office of a notary public), and there was little evidence of any negotiations between her and the husband of the terms.[98]

23.42 Delivering the judgment for the High Court (Appellate Division), Woo Bih Li JAD noted that while s 112(2) of the Women's Charter sets out the duty of the court to have regard to all circumstances including "any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce", the court may depart from such a settlement as s 112(1) provides the court with the power to order the division of matrimonial assets "in such proportions as the court thinks just and equitable".[99] What this means is that the court may decline to rule that the wife is held bound to the terms of the settlement agreement, where there are just and equitable reasons for not doing so, in the context of enforcing settlements concluded in contemplation of divorce proceedings.[100]

23.43 The High Court (Appellate Division) next considered the factors which are relevant in determining if such just and equitable reasons exist. Woo JAD opined that the law which was laid out by the Court of Appeal in *Surindar Singh s/o Jaswant Sing v Sita Jaswant Kaur*,[101] which considered the enforceability of post-nuptial separation agreements, is equally applicable in this context to post-nuptial settlement agreements concluded in contemplation of a divorce.[102] There, the Court of Appeal ruled:[103]

> Indeed, where parties have properly and fairly come to a formal separation agreement with the benefit of legal advice, the court will generally attach significant weight to that agreement unless there are good and substantial grounds for concluding that to do so would effect injustice. This approach is sensible because the parties to a marriage are in the best position to determine what is a just and equitable division of the matrimonial assets based on their

96 *UJM v UJL* [2021] 2 SLR 1467 at [12].
97 *UJM v UJL* [2021] 2 SLR 1467 at [19].
98 *UJM v UJL* [2021] 2 SLR 1467 at [19].
99 *UJM v UJL* [2021] 2 SLR 1467 at [15].
100 *UJM v UJL* [2021] 2 SLR 1467 at [16].
101 [2014] 3 SLR 1284.
102 *UJM v UJL* [2021] 2 SLR 1467 at [17].
103 *Surindar Singh s/o Jaswant Sing v Sita Jaswant Kaur* [2014] 3 SLR 1284 at [54] and [56].

> own assessment of each party's direct and indirect contributions to the marriage and their knowledge of the extent and value of the assets. Due to the inherent limitations of fact-finding in the litigation process, the court should not lightly depart from such a separation agreement.
>
> …
>
> We are of the view that giving significant weight to a separation agreement, unless there are good and substantial grounds for concluding that an injustice will be done, is not inconsistent either with the approach in *TQ v TR* ([20] *supra*) or with s 112 of the Charter. This does not mean that in every case significant weight will be given to such an agreement. Whilst the court may incline to give significant weight to a separation agreement which the parties have freely and voluntarily arrived at with the benefit of legal advice, the court will always (consistently with s 112(2)) examine the precise circumstances before it to determine whether in the instant case it would be unfair to do so. In determining whether such unfairness exists, the court will not accord great significance to the fact that it might have made a different distribution than that agreed to. The grounds for disregarding such a separation agreement would have to be more substantial than a slight difference of opinion on the fairness of the distribution provided for by the agreement.

It was also noted by the court that s 121F(2)(*d*) of the Women's Charter, which falls under Ch 4A, is also relevant: "[T]he court should have regard to any financial benefits which an applicant or a child of the marriage receives by virtue of any agreement before making an order for financial relief."[104]

23.44 Applying the law to the facts, Woo JAD first stressed that limited weight could be given to the settlement agreement. This was because the wife had not sought legal advice before she had signed it (nor was there any indication that she had the benefit of any legal advice at all) and there was little evidence that she had the opportunity to negotiate any of its terms, from which it was evident that she had only a little amount of time to read and digest.[105] More pertinently, the High Court (Appellate Division) was concerned that the settlement agreement did not take into account the Five Properties. These assets had a disparately substantial value compared to the Three Properties which were divided in the settlement agreement.[106] The court was therefore minded to conclude that the coverage of the settlement agreement, with respect to the division of matrimonial assets in contemplation of divorce, was not as comprehensive as the husband claimed in court.[107]

104 *UJM v UJL* [2021] 2 SLR 1467 at [15].
105 *UJM v UJL* [2021] 2 SLR 1467 at [19].
106 *UJM v UJL* [2021] 2 SLR 1467 at [27].
107 *UJM v UJL* [2021] 2 SLR 1467 at [27].

23.45 Consequently, the High Court (Appellate Division) ruled that it would be:[108]

> … clearly unjust in all the circumstances to hold the Wife to the terms of the Settlement Agreement. It was therefore appropriate … not to place too much weight on the Settlement Agreement and to grant the Wife financial relief after taking into account various factors set out in s 121F(2) [of the Women's Charter].

The court upheld the quantum of financial relief which the trial court awarded the wife.

23.46 In the context of mediation and ADR, this case provides an illustration of the complexities faced by the parties to an international (mediated) settlement agreement concluded in contemplation of divorce proceedings when that agreement is brought to court for enforcement. The High Court (Appellate Division) has emphasised that a settlement agreement in contemplation of divorce in Singapore is normally not conclusive and is subject to the "final say" of the courts, which have the power to decide the appropriate weight it should be given, pursuant to the provisions under Ch 4 of Pt X of the Women's Charter.[109] Where there are just and equitable reasons for doing so, the court may decline to rule that a party is held bound to the terms of the settlement agreement. The High Court (Appellate Division) in *UJM v UJL* has set out the relevant considerations which the Singapore courts will undertake in the enforcement of such settlement agreements to ensure that the division of matrimonial assets in Singapore will be carried out in a just and equitable manner.

B. Dispute resolution clauses in (mediated) settlement agreements

(1) Reliance of third parties to a mediated settlement agreement on its terms, particularly on jurisdiction clauses

23.47 *VKC v VJZ*[110] is an appeal of *VJZ v VKB*,[111] a judgment which was analysed in last year's Ann Rev.[112] Essentially, the parties were entangled in a complicated cross-border dispute over the administration of a deceased person's estate ("the Estate"). The precise facts of the dispute are not covered in this review due to space constraints.

108 *UJM v UJL* [2021] 2 SLR 1467 at [28].
109 *UJM v UJL* [2021] 2 SLR 1467 at [16].
110 [2021] 2 SLR 753.
111 [2020] SGHCF 11.
112 (2020) 21 SAL Ann Rev 724 at 743–745, paras 23.50–23.55. Please refer to the report in last year's Ann Rev for a succinct summary of the relevant facts of the case.

23.48 On 16 and 17 April 2018, the parties participated in mediation at the Singapore Mediation Centre.[113] They entered into an iMSA on 18 April 2018, in which they came to a compromise on all disputes in relation to the Estate in jurisdictions including but not limited to Singapore, Malaysia, Indonesia, Hong Kong and the People's Republic of China.[114] The iMSA established that the parties had agreed that VJZ and VKA ("the Administrators") would be administrators and/or executors of the Estate in all jurisdictions.[115] Moreover, the iMSA provided for the Parties' entitlements under the Estate. Clause 19 of the iMSA set out the following dispute resolution provision:[116]

> The Parties hereby submit to the exclusive jurisdiction of the Courts of Singapore. The Parties agree that in respect of all disputes, controversies, claims or disagreements arising out of or in connection with this Agreement, including but not limited to its existence, validity, breach and enforcement, shall be first submitted to mediation at the Singapore International Mediation Centre and the mediator shall be Mr [xxx] S.C. The Parties further agree that only if the Parties have in good faith carried out the mediation and they have not been able to resolve their dispute, controversy, claim and/or disagreement, then, and in that event only, the Parties shall commence legal proceedings in Singapore.

It bears note that the "Parties" referred to in the iMSA *did not* include the Administrators.[117]

23.49 VKC was dissatisfied with the way the Estate was administered as the Administrators were carrying out their duties in Indonesia.[118] VKC therefore commenced proceedings against the Administrators in the Central Jakarta District Court.[119] The Administrators filed for an injunction against VKC in Singapore. The High Court ruled that the Administrators were entitled to an anti-suit injunction against VKC.[120] One of the High Court's grounds for granting the anti-suit injunction lay on the basis that the Administrators, who were third parties to the iMSA, could apply the CRTPA, allowing them to enforce a jurisdiction clause contained inside it. Because there was a choice of court agreement favouring the Singapore courts in the iMSA, the Administrators were allowed to enforce that agreement with the grant of an anti-suit

113 *VJZ v VKB* [2020] SGHCF 11 at [5].
114 *VJZ v VKB* [2020] SGHCF 11 at [7].
115 *VJZ v VKB* [2020] SGHCF 11 at [5].
116 *VJZ v VKB* [2020] SGHCF 11 at [25].
117 *VJZ v VKB* [2020] SGHCF 11 at [26]: Tan Puay Boon JC, delivering the judgment of the trial court, was mindful to reiterate: "It was not disputed that the Administrators were not … parties to the Settlement Agreement."
118 *VJZ v VKB* [2020] SGHCF 11 at [11]–[12].
119 *VJZ v VKB* [2020] SGHCF 11 at [12].
120 *VKC v VJZ* [2021] 2 SLR 753 at [1].

injunction. The issue of whether the third-party Administrators could enforce the Singapore choice of court agreement above was on appeal.

23.50 The Court of Appeal first ruled that there was a sound alternative legal basis for the High Court to grant the anti-suit injunction.[121] The technical details of the alternative legal basis will not be covered in this review.[122] VKC's appeal against the granting of the anti-suit injunction was therefore dismissed on this basis. However, the Court of Appeal disagreed with the High Court's application of the CRTPA, which allowed the third-party Administrators to enforce an exclusive jurisdiction agreement in the disputed iMSA.[123]

23.51 Delivering the judgment of the Court of Appeal, Belinda Ang Saw Ean JAD doubted whether dispute resolution provisions, including exclusive jurisdiction clauses, came within the remit of the CRTPA:[124]

> In our view, the CRTPA does not permit a non-party to a contract to avail itself of the terms of an exclusive jurisdiction clause in that contract, unless the contract itself expressly provides to the contrary.

Considering the legislative objective of the CRTPA,[125] the Court of Appeal noted that its purpose was to give effect to the intention of contracting parties to confer *benefits* on third parties.[126] This was also evident from the provisions in s 2 of the CRTPA, which expressly refer to obligations which confer a *benefit* on third parties:

> 2.— (1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, enforce a term of the contract if —
>
> (*a*) the contract expressly provides that he may; or
>
> (*b*) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(*b*) shall not apply if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party.

121 *VKC v VJZ* [2021] 2 SLR 753 at [52].

122 This would be more appropriately discussed in a review which addresses the grant of anti-suit injunctions on the basis of vexatious and oppressive proceedings initiated in a foreign forum, which is the alternative from the basis founded on the enforcement of a jurisdiction clause in a contract between parties: *VKC v VJZ* [2021] 2 SLR 753 at [16]–[20].

123 *VKC v VJZ* [2021] 2 SLR 753 at [53].

124 *VKC v VJZ* [2021] 2 SLR 753 at [54].

125 *Singapore Parliamentary Debates, Official Report* (5 October 2001), vol 73 at col 2186 (S Jayakumar, Minister for Law).

126 *VKC v VJZ* [2021] 2 SLR 753 at [58].

The conferring of such *benefits* was viewed by the Court of Appeal as an issue of *substantive* rights in relation to the contract.[127] In contrast, jurisdiction and arbitration provisions address matters of *procedural* rights between the parties, which – in the court's opinion – are not covered by s 2 of the CRTPA.[128] This served as a reason for the drafters of the CRTPA to provide separately for the enforcement of an arbitration agreement (a procedural right) by third parties in s 9. The application of s 9 may be taken to be a procedural condition which undergirds enforceable substantive rights which third parties may possess, with respect to a contract that may be enforced under the CRTPA.[129]

23.52 Ang JAD noted that s 9 of the CRTPA provides for third parties to enforce a contractual term, where disputes over the contract are governed by an arbitration agreement: the third party may be in this instance regarded as a party to the arbitration agreement, and they may be bound to make any claim in relation to the disputed contract through arbitration proceedings.[130] However, it should be noted that arbitral proceedings may only be brought if the third parties have some substantive right to enforce to begin with: that substantive right must undergird the application of s 9 of the CRTPA before the procedural right is applied.[131] Where there is no substantive right to enforce by a third party to begin with, s 9 is inapplicable.[132] Applying the law to the facts, Ang JAD observed that even if the choice of court agreement in the iMSA were an arbitration agreement, the Administrators could not apply the CRTPA to rely on the dispute resolution provisions because they did not have a substantive right to benefit from the iMSA to begin with.

23.53 Furthermore, because the CRTPA is silent on whether it would apply to exclusive jurisdiction clauses (governing the parties procedural rights), the Court of Appeal thought of the statutory silence as a deliberate one, implying that Parliament had made a conscious determination to exclude exclusive jurisdiction clauses from the scope of s 2 of the CRTPA.[133] This is an application of a canon of statutory interpretation,

127 *VKC v VJZ* [2021] 2 SLR 753 at [60].
128 *VKC v VJZ* [2021] 2 SLR 753 at [60].
129 *VKC v VJZ* [2021] 2 SLR 753 at [64]; consider Toulson LJ's speech in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] 1 WLR 3466 at [42].
130 *VKC v VJZ* [2021] 2 SLR 753 at [59].
131 *VKC v VJZ* [2021] 2 SLR 753 at [64] and [65], applying *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] 1 WLR 3466.
132 *VKC v VJZ* [2021] 2 SLR 753 at [65].
133 *VKC v VJZ* [2021] 2 SLR 753 at [59].

expressio unius est exclusio alterius (the mention of one thing implies the exclusion of the other).[134]

23.54 Therefore, the Court of Appeal concluded that the CRTPA did not apply to jurisdiction agreements, having considered the legislative and policy intention behind its drafting.[135] The only way for the parties to an iMSA to allow third parties to enforce jurisdiction agreements contained within it would be to provide expressly for it, in accordance with s 2(1)(*a*) or 2(3)[136] of the CRTPA.[137] For instance, to apply s 2(3) of the CRTPA, the parties may additionally agree and articulate clearly in their contract that the dispute resolution provisions may be relied on by members of an identifiable class of third parties.

23.55 This is an interesting case which should be noted by cross-border mediation practitioners. It exemplifies how a third party to an iMSA may rely on its terms and apply to court seeking the necessary reliefs. Careful and meticulous drafting of the iMSA is important. If the applicable law of the iMSA is Singapore law, it appears that the Court of Appeal has by implication suggested that the CRTPA may be applied by third parties to enforce the benefits under the agreement if the s 2 criteria is satisfied. It was also established that only substantive rights may be enforceable by third parties: this would exclude provisions for choice of court (unless there are further express provisions made, pursuant to s 2(1)(*a*) or 2(3) by the parties). The issue of how third parties to an iMSA may apply to enforce it or rely on it in court remains a complex and controversial legal question which ultimately turns on which law governs the agreement. The decision in *VKC v VJZ* has made the *Singapore law* position a little clearer.

III. Mediation, appropriate dispute resolution practice and ethics

23.56 In this part, two cases are examined. First, a case heard by the Court of Appeal will be reviewed, where a five-judge *coram* raised its immense displeasure over how counsel had failed to promptly inform the court that a settlement agreement compromising the dispute on appeal had been reached, and sternly reprimanded the parties in their written judgment. Secondly, a case decided by the High Court (General

134 *VKC v VJZ* [2021] 2 SLR 753 at [59].

135 *VKC v VJZ* [2021] 2 SLR 753 at [72].

136 Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) s 2(3): "The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description, but need not be in existence when the contract is entered into."

137 *VKC v VJZ* [2021] 2 SLR 753 at [72].

Division) in relation to a solicitor's alleged negligence when negotiating a compromise agreement for their client over e-mail will be reviewed.

A. Appropriate dispute resolution practice: Duty to inform courts of settlement

(1) Duty to inform courts of settlement and to discontinue proceedings after settlement

23.57 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd*[138] is an important case to note for legal advisers who have persuaded their clients to settle disputes out of court before a scheduled court hearing. The Court of Appeal had expressed its "strong disapproval" over how the parties and their legal advisers had handled the case and wrote this judgment specifically to admonish all parties involved.[139]

23.58 When this appeal was heard on the morning of 20 January 2021, the Court of Appeal learned that the dispute between the parties was settled well before the hearing of the appeal (it was subsequently disclosed[140] to the court that the parties had reached a final settlement agreement on 28 November 2019).[141] The dispute which a five-judge panel on the Court of Appeal was constituted to hear was completely moot. Expressing the Court of Appeal's frustrations, Judith Prakash JCA said:[142]

> … Once the settlement was reached the appeal was rendered nugatory and should have been immediately discontinued. Instead the appeal proceeded thus engaging the court in a consideration of wholly hypothetical issues and arguments. The court's time was totally wasted, not only for the hearing itself, but also in relation to all the preparatory and procedural work that had been done from 20 October 2020 onwards.
>
> We could not understand how the Liquidators and counsel, who are all officers of the court, could have allowed, or perhaps worse still connived at, the existence of such an appalling situation. …

23.59 After delivering its admonishment of the parties in judgment, the Court of Appeal set out what it thought all parties to a dispute ought to do in future when a compromise is reached between themselves and that settlement agreement may have an impact on pending legal

138 [2021] 1 SLR 1135.
139 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [1].
140 See *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [39].
141 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [2] and [29].
142 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [29]–[30].

proceedings.[143] The court addressed two scenarios: (a) where the parties settle after proceedings have commenced but before the hearing of the dispute by the court; and (b) where the parties reach a settlement after the conclusion of the hearing but before a judgment has been delivered.[144]

23.60 In the first scenario, Prakash JCA was resolute in restating the position in Singapore law:[145]

> [T]he general principle is that the court will decline to hear cases or arguments that do not involve an issue that is 'live' between the parties. This arises from the essential duty of the court which is to determine disputes, not to render advice or comment upon hypothetical issues.

Furthermore:[146]

> It is … clear from the pronouncements of this court that in the absence of a live issue the court will decline to hear arguments either on the appeal generally or in relation to that issue in particular. There is some uncertainty whether the basis of the court's refusal to hear is because the absence of a *lis* deprives the court of its jurisdiction in the matter or whether the court is exercising a discretion to decline to exercise its jurisdiction. It is unnecessary for us to resolve the juridical basis of the refusal here and we do not do so as we have not heard arguments on the point. *What is unarguable is that when a dispute is settled before the hearing, all existing issues die a natural death and become moot.* [emphasis added]

23.61 The Court of Appeal noted the respective positions in English and Australian law. The lead case in England is *R v Secretary of State for the Home Department, ex parte Salem*[147] ("*Salem*"), where the House of Lords held that in litigation which involves "a public authority as to a question of public law", the English court has a discretion to entertain an appeal if "there is a good reason in the public interest for doing so", even if such an appeal would be academic and involve hypothetical questions.[148] This exception was extended to private law litigation, which raises issues of public law duties by the English Court of Appeal in *Bowman v Fels*,[149] and further extended to private litigation cases involving private law issues by the English Court of Appeal in *Gawler (Michael Victor) v*

143 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [61] *ff*.
144 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [61].
145 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [62].
146 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [69].
147 [1999] 1 AC 450.
148 *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 at 456G–457A, cited in *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [71].
149 [2005] 1 WLR 3083.

Raettig (Paul).[150] These cases were applied in another English Court of Appeal decision, in which Lord Neuberger (sitting in the English Court of Appeal) observed:[151]

> Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.

23.62 However, Prakash JCA cautioned[152] that the correctness of Lord Neuberger's judgment (specifically on the issue of whether the exception in *Salem* may be extended to private law cases) was doubted by the English High Court in *dicta* in *A Local Authority v AG (No 2)*.[153] Nonetheless, Prakash JCA took pains to emphasise that the exceptions in English law are not a part of Singapore law.[154] Assuming that the Court of Appeal were to, in a future decision, import the English law exception into Singapore law, Prakash JCA emphasised that it would be "an exception that only comes into play if parties inform the court of the true position and apply for leave to continue the appeal nevertheless. Thus, to invoke the exception in [English law] requires as an absolute precondition full disclosure of the academic nature of the appeal".[155]

23.63 The Court of Appeal also considered the position in Australian law.[156] Due to space constraints, it suffices to note in this review that the court opined that the position in Australia appears broadly to be similar to England.[157]

23.64 In the second scenario, Prakash JCA stated that if a compromise agreement is reached between disputing parties after the conclusion of the hearing but before a judgment has been delivered, the court has a

150 [2007] EWCA Civ 1560.
151 *Hutcheson v Popdog Ltd* [2012] 1 WLR 782 at [15].
152 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [75].
153 [2020] 2 FLR 747 at [9] and [10].
154 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [76].
155 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [76].
156 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [77]–[80], considering *Hole v Insurance Commissioner* [1962] VR 394; *Burnie Port Corp Pty Ltd v Burnie City Council* [1999] TASSSC 72; and *Denham Constructions Project Co 810 Pty Ltd v Smithies (No 2)* [2015] ACTSC 30.
157 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [77].

discretion to issue its judgment.[158] It was noted by the Court of Appeal that they had recently exercised their discretion to issue judgment in *Bumi Armada Offshore Holdings Ltd v Tozzi Srl*,[159] because the parties in dispute did not object to the release of the judgment, and that the issues which were litigated and decided in that judgment were potentially of some significance to Singapore law.

23.65 The Court of Appeal noted the respective positions in English and Australian law. The English Court of Appeal ruled in *Barclays Bank plc v Nylon Capital LLP*[160] that the English court retains a discretion to proceed to issue judgment, and the following considerations would become relevant in their exercise of discretion: (a) if the case raises a point which it is in the public interest to ventilate in a judgment; (b) the progress of the judgment; and (c) the concerns of the parties to the litigation.[161] The Australian position may be discerned from *Harrington v Rich*,[162] which Prakash JCA had set out in summary:[163]

> The Federal Court of Australia held that the court should refuse to address an advisory opinion where there is no longer a controversy between the parties, although the court retains a discretion to continue to hear the appeal. This discretion is exercised based on non-exhaustive factors including (see *Harrington* at [21]–[22]):
>
> (a) whether it is in the public interest that the issue be resolved;
>
> (b) whether the appeal reflects adversely on one of the parties' reputation and the determination of which may serve to vindicate that party's reputation;
>
> (c) whether a finding of bad faith by the decision-maker has been made;
>
> (d) whether there is doubt over the correctness of the decision under appeal; and
>
> (e) the amount of judicial resources required to hear and determine the appeal.

158 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [81], citing *Bumi Armada Offshore Holdings Ltd v Tozzi Srl* [2019] 1 SLR 10 at [62].

159 [2019] 1 SLR 10.

160 [2012] 1 All ER (Comm) 912.

161 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [82], citing *Barclays Bank plc v Nylon Capital LLP* [2012] 1 All ER (Comm) 912 at [74]–[77].

162 [2008] FCAFC 61.

163 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [83].

23.66 Considering what the parties *should* have done when a settlement is reached during litigation, the Court of Appeal expressed its views on the behaviour of counsel:[164]

> Counsel in this case should have known that that is the law. Indeed, they actually did know that the result of any settlement reached would be that the appeal would be rendered academic. Yet they proceeded to conclude a settlement and thereafter allowed the appeal to continue as if the issue was still live. In taking this course, rather than apprise this court of the true state of affairs, the parties chose to deliberately mislead this court. Both counsel and the Liquidators were patently in serious breach of their duties to the court.

The Court of Appeal also sternly cautioned the liquidators of the professional consequences which they may encounter in future, if they are to be appointed liquidators by the court (the appointment of which is subject to the court's discretion):[165]

> As for the Liquidators, all of them are experienced in the field and have acted as insolvency professionals over many years, sometimes as liquidators and sometimes in other positions. It was plain that they were determined to have a go at persuading this court to take a different position from that of the Judge. The reluctance of the COI to fund this venture did not stop them and they took the opportunity granted by the settlement negotiations to contrive a situation in which their submissions would be proffered to this court without having to contend directly with those of a controverting party. They, in other words, attempted to stage a walkover in CA 146. The court does not sit simply because a party wants a legal question answered. The Liquidators must have known this, which is why they insisted on terms in the settlement agreement that ensured the true position was concealed. Their conduct was reprehensible.
>
> In a compulsory winding up like that of SEC, the appointment of a liquidator is always subject to the discretion of the court. The court in exercising its discretion on any proposed appointment is entitled to take into account the conduct or, more precisely, the misconduct in previous cases of the nominated liquidator.

23.67 This judgment is therefore an important cautionary case to note for legal advisers who have persuaded their clients to settle disputes out of court before a scheduled court hearing. When a settlement agreement which compromises a dispute at litigation is concluded, parties must be minded to inform the court expediently of the compromise and endeavour to file for the necessary orders (for example, a stay of proceedings, a withdrawal of proceedings, a discontinuance, or whichever relevant order which has been embodied in the compromise) in good time.

164 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [85].
165 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [88]–[89].

B. Appropriate dispute resolution practice: Solicitor's duties when negotiating settlement agreements

(1) Solicitor's duties when negotiating (and drafting) settlement agreements over e-mail

23.68 In *Gomez, Kevin Bennett v Bird & Bird ATMD LLP*,[166] the plaintiff sued his solicitor and law firm for negligence over the alleged mishandling of a judgment debt enforcement in Singapore and Australia. Amidst a number of allegations which the plaintiff directed at his solicitor in court, the focus will only be on the allegation that the solicitor was negligent in drafting an e-mail, which contained a compromise agreement, to the judgment debtor.

23.69 The facts relevant for consideration are as follows. The plaintiff succeeded in a litigation against a party named Kuhadas and sought to enforce the judgment debt of over S$1.2m against him.[167] Subsequently, the plaintiff instructed his solicitors to serve a statutory demand on Kuhadas, followed by the filing of a bankruptcy application.[168] A bankruptcy application against Kuhadas was filed on 30 August 2012. To avoid bankruptcy and financial ruin, Kuhadas wrote to the plaintiff's solicitors on 29 September 2012 with a view to getting them to withdraw the bankruptcy application. This led to a series of e-mail correspondences and discussions over how Kuhadas could satisfy the judgment debt, mainly through the sale of real estate held by him. By February 2013, Kuhadas and the solicitors had arrived at a compromise. A post-dated S$50,000 cheque was issued by Kuhadas' father as security for payment, and the younger Kuhadas was to make an upfront payment of S$25,000 on 1 March 2013, making an additional undertaking to pay a further S$25,000 upon the completion of the sale of a piece of real estate he held after 1 March 2013. These payments were to be made in exchange for the *withdrawal of the bankruptcy application*.[169]

23.70 To consolidate the terms which were negotiated and agreed upon, the Plaintiff's solicitor drafted and sent an e-mail to Kuhadas on 22 February 2013 ("the 22 February 2013 E-mail"):[170]

166 [2021] SGHC 230.
167 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [4].
168 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [5].
169 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [23].
170 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [25].

> Dear Sir,
>
> In response to your e-mail:
>
> > 1. The first tranche of S$25,000 shall be paid to us by no later than 1 March 2013 at 4 p.m.
> >
> > 2. The second tranche of S$25,000 shall be paid to us upon sale of of [*sic*] your unit in Ballota Park, with interest at the rate of 10% p.a. from 1 March 2013 until date of full payment.
> >
> > 3. We shall continue to retain your cheque of S$50,000 as security for the above payment.
> >
> > 4. You shall sign and return the properly and duly executed documents for the issuance of new Magnetron shares by today, 4 p.m.
>
> In consideration of the same, our client is agreeable to withdraw the bankruptcy application once items 1 and 4 have been done, and you have unequivocally given your agreement to item 3.

Kuhadas responded to the e-mail on the same day indicating his agreement.[171] After the first payment of S$25,000 was made by Kuhadas on 26 February 2013, the solicitors applied and were granted leave by the court to withdraw the bankruptcy application.

23.71 It subsequently transpired that Kuhadas misinterpreted the compromise agreement as bringing about an unconditional discharge of the entire judgment debt. The solicitors advised the plaintiff to write a reply to Kuhadas, asserting, *inter alia*, "I *never agreed* that the receipt of the upfront $25,000 and a further $25,000 (with interest at the rate of 10% p.a.) would be considered full and final settlement of the $1.2 million owed to me" [emphasis in original].[172]

23.72 The plaintiff subsequently took things into his own hands and proceeded to register the Singapore court judgment in the Supreme Court of New South Wales on 14 February 2014. In a bid to satisfy that judgment debt, he served a bankruptcy notice on Kuhadas, which the latter subsequently applied to set aside.[173] The Federal Circuit Court of Australia ("FCC") allowed the setting aside of the Australian bankruptcy notice, observing that Kuhadas had "raised an arguable case that the effect of [the 22 February 2013 E-mail] was to discharge Mr Kuhadas of his obligation to satisfy the [judgment debt]".[174] The FCC opined that the registration of the Singapore judgment in Australia was liable to

171 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [26].
172 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [34].
173 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [35].
174 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [36].

be set aside, because it interpreted the 22 February 2013 E-mail as an agreement that the plaintiff would withdraw the Singapore bankruptcy application "and thereby release [Kuhadas] from [his] obligation to pay the judgment on which the bankruptcy application is based" as soon as he complied with items 1, 3 and 4 of the 22 February 2013 E-mail.[175] It should be noted that the FCC arrived at this decision without referring to the e-mail correspondence between the solicitors and Kuhadas prior to 22 February 2013;[176] this was crucial as the correspondence demonstrated how Kuhadas himself had set out certain matters which would explain the rationale behind his agreement to the settlement terms leading to the withdrawal of the bankruptcy application in Singapore.[177] Unfortunately for the plaintiff, his application to admit the e-mail correspondence as evidence on appeal was rejected,[178] and his appeal to the Federal Court of Australia against the FCC's findings was dismissed.

23.73 The plaintiff instructed another solicitor to issue another statutory demand on Kuhadas in Singapore, and the new solicitors filed another bankruptcy application against Kuhadas on 7 August 2014.[179] That statutory demand was set aside by the High Court on 1 September 2014.[180] Aggrieved by this, the plaintiff filed a negligence suit against the original solicitors, alleging, amongst others, that they were negligent in drafting the 22 February 2013 E-mail, causing him to become unable to recover the judgment debts owed by Kuhadas in Australia and Singapore.

23.74 The High Court (General Division) ruled that the solicitor was not liable for professional negligence and dismissed the plaintiff's case.[181] Specifically, Mavis Chionh Sze Chyi J ruled that the solicitor did not breach his duty of care in the drafting of the 22 February 2013 E-mail.[182] The starting point of the court's assessment of whether the solicitor is professionally negligent was set out by V K Rajah JA in *Zhou Tong v Public Prosecutor*,[183] where the court acknowledged that solicitors were not expected to "get it right" every time:[184]

> The essential question is whether the solicitor had faithfully and diligently directed his mind to the facts of his client's case, and to the applicable law. If solicitors make the effort to conscientiously consider and evaluate all pertinent

175 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [36].
176 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [80].
177 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [80].
178 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [80].
179 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [39].
180 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [39].
181 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [64] and [109].
182 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [64].
183 [2010] 4 SLR 534.
184 *Zhou Tong v Public Prosecutor* [2010] 4 SLR 534 at [20].

> aspects of their client's cases, there is no need for undue concern even if the court determines that there is ultimately no merit in the case.

Putting it in another way, the court should note that it must refrain from evaluating the situation with the benefit of hindsight and appraise the solicitor's conduct in light of the circumstances at the time the allegedly negligent conduct took place.[185]

23.75 The plaintiff argued that the solicitors should have, on hindsight, "stated expressly that there was no full and final settlement of the entire judgment sum and that the Plaintiff's rights were reserved in respect of any unpaid balance".[186] Chionh J disagreed, noting that Singapore law at the time the settlement agreement (as applicable to the 22 February 2013 E-mail) was negotiated and concluded would not require such express stipulations to be set out,[187] because the law will accept – without the need for such an obvious articulation – that that settlement agreement would relate *only* to the withdrawal of the bankruptcy application:[188]

> [A]t the material time, the caselaw from the Singapore courts indicated that in considering whether an agreement amounted to a settlement agreement, the court would consider the substance of the agreement rather than its form; and in so doing, the court would consider the context in which the agreement was arrived at, including the preceding negotiations between the parties … [I]f a particular agreement between existing contractual parties is intended to encompass or embody a settlement or compromise, then the prudent thing for the parties to do would be to state this clearly in the contract itself …
>
> > *If that is not done*, the court will … construe the contract concerned objectively, having regard to the relevant terms in the *context* in which they were arrived at and the substance of the contract. In the final analysis, substance is more important than form.
>
> [emphasis in original]

23.76 Whilst ideally (and with the benefit of hindsight), the plaintiff's solicitors could have unambiguously articulated the fact that the 22 February 2013 E-mail was not intended to be a full and final settlement of the entire judgment debt, the court ruled that an omission of this express term in the e-mail's drafting did not entail a breach of their professional duties of care.

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185 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [69], citing *Tan & Au LLP v Goh Teh Lee* [2012] 4 SLR 1 at [63]–[68].

186 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [71].

187 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [73]–[75].

188 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [72], considering and quoting from *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663.

23.77 Furthermore, Chionh J sought to explain how the Australian FCC's setting aside of the Australian bankruptcy notice, as well as the setting aside of the statutory demand by the Singapore High Court on 1 September 2014, were not connected with the solicitor's failure to insert an express stipulation in the 22 February 2013 E-mail that it was not a full and final settlement of the entire judgment debt.[189] The court noted that the FCC set aside the Australian bankruptcy notice without referring to any e-mail correspondence between the solicitors and Kuhadas prior to 22 February 2013;[190] had the FCC considered and given weight to the correspondence, Chionh J was inclined to believe that the Australian court could have arrived at a different conclusion. With respect to the setting aside of the statutory demand by the Singapore High Court on 1 September 2014, Chionh J noted that "there was no evidence that the High Court made any finding to the effect that the 22 February 2013 Email constituted a full and final settlement of the entire judgment debt".[191] The court concluded that these two events did not demonstrate how "[the solicitor] was guilty of any error which no reasonably competent solicitor would have made".[192]

23.78 Finally, the court opined that the plaintiff was unable to prove that the solicitors' negligence caused his loss – even if the solicitors were found negligent, the plaintiff was unable to demonstrate that Kuhadas would have been able to satisfy the judgment debt anyway[193] – or show that he had taken steps to mitigate[194] his losses. Due to space constraints, it would not be within the ambit of this review to thoroughly discuss the matter of causation and mitigation.

23.79 This case serves as a cautionary illustration for legal advisers who negotiate, draft and/or consolidate the terms of settlement on behalf of their clients, where disputing parties endeavour to settle out of court and through a written (mediated) settlement agreement. Undoubtedly, drafters of (mediated) settlement agreements have to exercise some reasonable degree of conscientious effort in their work. However, a *highly meticulously drafted* settlement agreement setting out *all* possibilities and contingencies may sometimes be but an idealistic aspiration. The law accepts the realistic and reasonable possibility that drafters are

189 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [89] and [90].
190 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [80]: "[I]t is not disputed that the email correspondence … prior to 22 February 2013 was never put before the FCC."
191 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [90].
192 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [89].
193 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [97].
194 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [100].

not perfect,[195] and it is evident from this case that it does not impose negligent liability in every instance where the drafting is not crystal clear. However, legal advisers who negotiate, draft and/or consolidate the terms of settlement should note that they ought to keep a good record of the negotiations between parties, leading up to the conclusion of the settlement agreement. Records of such discussions would assist the courts in interpreting the settlement agreement produced, and they were of significant assistance to the solicitor accused of professional negligence in this case in vindicating himself. Finally, it bears emphasis that drafters of (mediated) settlement agreements *should be knowledgeable and fluent with the contract law that governs the settlement agreement*. In this case, the 22 February 2013 E-mail was governed by Singapore law, and the solicitor was able to rely on his knowledge of Singapore contract law to vindicate himself.[196]

IV. Mediation, appropriate dispute resolution and civil procedure

23.80 In this part, one case about the confidentiality of settlement agreement terms will be reviewed. In a dispute over a settlement agreement which was not complied with, a party alleged that a subsequent confidential settlement agreement was concluded, superseding some of the terms of the original settlement agreement.

A. Confidentiality of settlement agreement terms

(1) Confidentiality of settlement agreement terms that have subsequently been modified: Evidence to prove its existence

23.81 In *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd*,[197] the plaintiff applied for a summary judgment to enforce a settlement agreement to compel the defendants to pay a settlement sum of US$2,592,000. The defendants mounted an objectively flimsy case against the application,[198] and the court ruled resolutely in favour of the plaintiffs. Of interest to readers of this review would be with respect to an allegation by the defendants that they had concluded

195 *Zhou Tong v Public Prosecutor* [2010] 4 SLR 534 at [20].
196 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 at [71].
197 [2021] SGHC 1.
198 *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [1] and [62].

a subsequent confidential settlement agreement with the plaintiffs, superseding some of the terms of the original settlement agreement.[199]

23.82 In their defence of the non-compliance of their payment obligations under a settlement agreement, the defendants asserted that they had concluded a subsequent settlement agreement, compromising the payment of that debt.[200] When questioned by the High Court (General Division) about why no details of the alleged subsequent settlement agreement were disclosed, the defendants provided a convenient excuse, averring that the subsequent settlement agreement was confidential.[201] Unimpressed by the defendants' "strikingly self-serving" and "implausibly convenient" explanation,[202] Aedit Abdullah J ruled that the defence was "entirely incapable of belief".[203]

23.83 The court observed:[204]

> There was an utter dearth of particulars or specifics beyond a bland assertion that the debt had already been settled. Nothing in the Defendants' pleadings, arguments, or affidavits provides any details of this alleged settlement. Details as basic as the (a) date of the settlement, (b) quantum paid, (c) proof of payment, (d) date of payment, and (e) whether the settlement was oral or in writing were all not provided.
>
> There has been ample opportunity for the Defendants to have provided these particulars; indeed, they were granted the opportunity to amend their pleadings, but nonetheless conspicuously failed to provide any of the particulars concerning this alleged settlement. This concern had been repeatedly flagged to the Defendants …. Yet, absolutely nothing was done about it.

23.84 In the context of mediation and ADR, it bears emphasis that the shroud of confidentiality protecting mediation and the dispute resolution outcomes which flow from it will not be exploited for the purposes of mounting a convenient and untenable defence. If parties wish to rely on a settlement agreement in their defence, the court expects that basic details of the agreement should be disclosed, such as the (a) date

199 *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [51]–[55].
200 *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [51].
201 *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [54].
202 *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [54].
203 *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [52].
204 *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [52]–[53].

of the settlement; (b) quantum paid; (c) proof of payment; (d) date of payment; and (e) whether the settlement was oral or in writing. It is also expected that the disclosure of these basic details be made at the earliest opportunity. Thereafter, the parties relying on confidentiality would be provided ample opportunities by the court to apply to seal the case file, or to apply for the relevant court orders to maintain the confidentiality of the settlement agreement terms.[205]

205 *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [54].