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An Analysis of Mediation: The Malaysian Perspective

13 June 2023: The role of mediation in resolving legal disputes
By Dr Chin Chin Sia (Taylor's University)

1

1



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Overview of Presentation

- Introduction
- Mediation Centers/Bodies in Malaysia
- Mediation of Disputes
- Effectiveness of Mediation of Dispute
- Challenges

The role of mediation in resolving legal disputes 13/06/2023

Dr Chin Chin Sia 2

2

2



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Introduction

- Mediation is a form of alternative dispute resolution which is confidential and voluntary, whereby parties in a dispute appoints an impartial third party to facilitate discussions between the parties.
- The impartial third party, which is called the Mediator would then listen to the grievances of each party and the Mediator would then make suggestions and recommendations to guide the parties to achieve an amicable solution.



3



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Mediation Centers/Bodies in Malaysia

- Generally, mediation in Malaysia is governed by the **Mediation Act 2012** which came into force on 01.08.2012.
- For mediating disputes, 8 centres/bodies are currently available:
 - (1) Malaysian International Mediation Centre (MIMC)
 - (2) Asian International Arbitration Centre (AIAC)
 - (3) Malaysia-China Business Mediation Centre (MCBMC)
 - (4) Kuala Lumpur Court Mediation Centre (KLCMC)
 - (5) Legal Aid Bureau for Family Mediation

4

Mediation Centers/Bodies in Malaysia

- (6) Banking Mediation Bureau (currently via Ombudsman For Financial Services)
- (7) Insurance Mediation Bureau (currently via Ombudsman For Financial Services)
- (8) Syariah Court of Selangor and Federal Territories for Family Mediation

During the Covid-19 pandemic, a temporary Covid-19 Mediation Centre (PMC-19) was set up for contractual disputes below RM500,000.00*

**Effective from 23.10.2022, Covid-19 Mediation Centre no longer accepts mediation applications in line with the closing date of the Act on Temporary Measures to Reduce the Effects of the 2019 Coronavirus Disease (Covid-19) 2020 [Act 829]*

5

Mediation Centers/Bodies in Malaysia

Different centres/ bodies may have different rules governing the process. As an example, the normal mediation process of the Malaysian Mediation Centre is divided into 6 stages:

- 1) To establish the process of mediation, and the Mediator and the parties agree to number of guidelines to be followed in the mediation. This usually includes only one person is allowed to speak at a time, treating all parties with respect, and emphasizing on the confidentiality of the process.
- 2) To explore positions and interests where the parties usually make their initial statements regarding their disagreements and define what they hope to resolve at the mediation.
- 3) A joint session where the parties would discuss their interests and possible solutions to resolve their disagreements. During this stage, parties are encouraged to speak up and express their concerns and disagreements as it would allow the parties to understand each other's views and explore possible settlement options.

6



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Mediation Centers/Bodies in Malaysia

- 4) Subsequently, the Mediator may hold private and confidential sessions with each party to assist in determining further interest and/or discussing possible solutions. This stage is important as it provides the parties with the opportunity to disclose to the Mediator sensitive and confidential issues that the party may not be comfortable to disclose during the joint session. This would allow the Mediator to understand the root of the issues, and better facilitate the mediation.
- 5) The Mediator would craft a resolution that would be mutually agreeable to both parties.
- 6) Lastly, if the parties are agreeable to the resolution and its terms, the settlement would then be recorded in a written agreement.



7



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Mediation of Dispute

- In practice, there seems to be a rise in the uptake of mediation when it is ordered or suggested by the Judge to the parties.
- Based on **Practice Direction No. 4 of 2016** on Mediation, the then Chief Justice of Malaysia has directed that all judges of the High Court, Sessions Court and Magistrates, as well as their Deputy and Assistant Registrars, should encourage parties to arrive at an amicable settlement if possible without undergoing a trial or appeal.



8



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Mediation of Disputes: Exceptions

- Everything can be mediated
- **Exceptions:**
 - (1) Constitutional disputes;
 - (2) Prerogative writs (Courts of Judicature Act 1964)
 - (3) Temporary/permanent injunctions
 - (4) Election petitions under Election Offences Act 1954
 - (5) Proceedings under the Land Acquisition Act 1960
 - (6) Judicial review
 - (7) Appeals
 - (8) Revision
 - (9) Native Court
 - (10) Criminal matters



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9



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Mediation of Disputes

Advantages:

- is quick, efficient and easy; most mediations can be concluded within a working day;
- is inexpensive and costs less than litigation or arbitration;
- provides a safe environment for resolution as the process is confidential, conducted in private and matters disclosed in mediation may not be raised or revisited in other proceedings;
- acknowledges, addresses and deals with real and practical concerns of parties which may otherwise be considered irrelevant;
- enables parties to “mend fences”;
- restores and/or preserves amicable relationships;
- empowers parties to reach a mutually satisfactory resolution of their disputes;
- enables resolutions which are in the best interest of the respective parties.

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10



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Mediation of Disputes

Mediators' Rules & Code of Ethics:

- Confidentiality and Privacy;
- Impartiality;
- Disclosure of Conflict of Interests, if any;
- Accredited Mediators



11



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Effectiveness of Mediation of Dispute

In the construction industry, mediation is commonly used.

In fact, most construction clients in Malaysia would want to attempt an amicable settlement whenever possible so as to allow the company to continue with its ongoing construction projects, as opposed to being stressed by ongoing litigation or arbitral proceedings.

The option of resolving a dispute using mediation is also included in various standard construction contracts. For example, the Standard Agreement and Conditions of PAM Contract 2018 (Without Quantities) has provided that with the agreement of the Employer and Contractor, mediation may be attempted to resolve any construction disputes between the Employer and Contractor, and mediation is also provided in the Construction Industry Development Board (CIDB) Standard Conditions of Contract for Building Works (2000) where the parties must first attempt mediation before being able to commence an arbitration.



12



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Effectiveness of Mediation of Dispute

In the Syariah Court, family mediation process can lead to settlement with just one meeting, depending on the abilities of the mediator and/or the nature of the dispute. Some mediators hold a minimum of two meetings, the first being the discussion and negotiation of the dispute, and the second being the signing of the agreement reached. This allows space for the disputants to deliberate or give further thought on the agreement reached, before signing it.



13

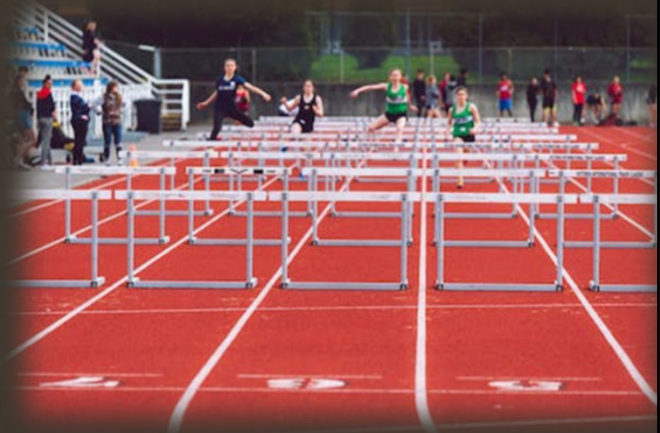


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Challenges of Mediation of Dispute

- (1) Lack of Uniformity of Mediator's Training
- (2) Lack of Awareness of Mediation by the community
- (3) Language barrier by communities from ethnic minorities



14



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Question?



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15



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Keep in touch!



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The role of mediation in resolving legal disputes 13/06/2023

Dr Chin Chin Sia 16

16