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## **MEDIATION: PRACTICE IN THE CORPORATE WORLD**

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### **ABSTRACT**

The relationship between parties in the corporate world is essential in order to address business disagreements which focus on the language of business contract per se. Despite solutions to various disputes and legal provisions on corporate, company and shareholder rights, all the parties concerned are still facing some challenges. The mediation method is one of the alternative dispute resolutions for those who seek justice without undergoing court proceedings. It is a swift and inexpensive form of dispute resolution. A mediator's role is to facilitate the disputing parties and utilize both joint and private sessions to assist them to achieve consensus. In view of the economic interest and with a vision to maintain their business relationships, a private settlement is preferred between them. This study used the doctrinal and the comparative research methods through which, this study compared the pertinent literature on the jurisdiction of the court and the mediation bodies in terms of corporate/company/

shareholders. The findings of this study are vital in describing the pros and cons of mediation practices and how they reflect justice among the Malaysian society.

**Keywords:** Mediation, AIAC, Mediation Act 2012, corporate.

## INTRODUCTION

The concept of mediation is as very old as it is new. It is old because in the early days the concept of mediation was practiced by our ancestors via their elders and penghulus (K. Lai & J. Chai, 2010). According to N. Chandran (2010) mediation is said to be a form of Alternative Dispute Resolution (ADR) in which the decision to resort to the same rests entirely on the parties.

The Bar Council set up by an Alternative Dispute Resolution (ADR) Committee with the aim of exploring the option of creating a Mediation Centre in Malaysia in 1995. The idea came into reality in 1999 when the Malaysian Mediation Centre of the Bar Council of Malaysia (MMC) was established with the objective of promoting mediation as a means of ADR and to provide a proper avenue for successful dispute resolution through mediation.

The fundamental objective of mediation is to explore possibilities for settlement and to assist negotiations to reach amicable settlements between the parties. It is a vital tool for the resolution of conflicts and for solutions that are invested by the parties to the mediation method (Ashgar Ali, 2018).

This paper focuses on mediation with the focus on corporate/company/shareholders. The relevant law and organizations that deal with it are identified and the mediation process is further explained. Also, the pros and cons of the selected mediation process are discussed.

## RELEVANT LAW AND ORGANIZATIONS

The Mediation Act 2012 is the governing statute for mediation in Malaysia. The purpose of the Mediation Act 2012 is to facilitate the process of mediation. Commonly, the parties are given an opportunity to appoint any person as their mediator (Mah Weng Kwai, 2016).

If the parties cannot come to an agreement, they may apply to the Malaysian Mediation Centre (MMC) to appoint a qualified mediator from its panel. Any agreement that is amended into a successful mediation will be in writing (Settlement Agreement) and signed by the parties. If the mediation is not successful, the parties may proceed with their respective rights in litigations or arbitrations.

Mediation can also take place in different forums according to the parties' agreement or intention. There is the court-directed mediation or the mediation in a forum of choice like at the Asian International Arbitration Centre (AIAC) or even at the Malaysian Mediation Centre (MMC). The different organizations which govern mediation that companies or corporate or shareholders can resort are identified and explained below.

### **Court-directed Mediation**

When a matter is brought before a court, the judge may give directions as he thinks fit, for the parties to settle the matter by way of mediation, thereby saving cost and time. The governing rules are the Practice Direction No. 4 of 2016 (Practice Direction on Mediation), Rules of Court 2012 and Rules for Court Assisted Mediation but not the Mediation Act 2012.

### **Practice Direction No. 4 of 2016 (Practice Direction on Mediation)**

Under the said Practice Direction, the Chief Justice of Malaya directs that all Judges of the Sessions Court and Magistrates and their Assistant Registrars, may, at the pre-trial case management stage as stipulated under Order 34 Rule 2 of the Rules of Court 2012 direct the parties to facilitate the settlement of their dispute before the court by way of mediation (Section 1 of Practice Direction No. 4 of 2016). Mediation can be suggested at any stage of the court proceeding even after trial has commenced or even at the appeal stage (Section 3 of Practice Direction No. 4 of 2016). Cases that fall under commercial or contractual disputes and even intellectual property cases are examples of cases that are easy to settle by mediation (Section 4 of Practice Direction No. 4 of 2016).

Under this Practice Direction, mediation can be conducted in three modes. The modes are judge-led mediation, Kuala Lumpur Regional

Centre for Arbitration (now AIAC), and by other mediators agreeable by both parties (Section 5.1 of Practice Direction No. 4 of 2016). When the parties agree on mediation, each party is to complete the mediation agreement provided in Form 1 of this Practice Direction (Section 6.1 of Practice Direction No. 4 of 2016). All communications during mediation are “without prejudice”, thus confidential unless expressly waived by the parties (Section 6.2 of Practice Direction No. 4 of 2016). The parties are also required to report the progress of the mediation or the outcome of the mediation to the court. If mediation fails the court shall give other direction upon its discretion (Section 6.3 of Practice Direction No. 4 of 2016).

### **Rules of Court 2012**

Order 34 rule 2(2) (a) provides that the Court may order or direct the parties to resort to mediation as a means of settling their dispute during pre-trial case management. Order 59 rule 8 (c) gives the court discretion to decide the costs by taking into account the conduct of the parties to settle the dispute amicably by others by way of mediation.

### **Rules for Court Assisted Mediation**

This rule, which was authored by a judicial officer in Sabah, serves as easy reference for all judicial officers who act as mediators, including those in Peninsular Malaysia (Ravinthran, 2011). The said rule acts to supplement the 2016 Practice Direction and the Rules of Court 2012. However, it is not widely observed in Peninsular Malaysia as in East Malaysia.

### **Asian International Arbitration Centre**

The Asian International Arbitration Centre (AIAC) is a not-for-profit, non-governmental international arbitral institution which has been accorded independence, certain privileges and immunities by the government of Malaysia for the purposes of executing its functions as an independent, international organization. AIAC aims to promote the settlement of disputes through arbitration and mediation. This centre also has its own mediation rules known as the AIAC Mediation Rules 2018. These rules are a set of procedural rules encompassing different aspects of the process of mediation to aid parties in resolving both international and domestic disputes.

## **AIAC Mediation Rules 2018**

The said rules are applicable for the mediation of any disputes or differences whether or not they arise out of a contract between parties (Section 1, “Guide to The AIAC Mediation Rules”, AIAC Mediation Rules, 2018). The AIAC mediation rules are only applicable when the parties have chosen these rules to govern their mediation before or after a dispute has arisen (Rule 1 of AIAC Mediation Rules 2018). Furthermore, the parties must jointly decide upon one independent mediator or, as the case may be, nominate more than one independent mediator (Rule 5 of AIAC Mediation Rules 2018). Under these rules, the mediators are to be guided by principles of fairness, objectivity, independence and impartiality (Rule 8 of AIAC Mediation Rules 2018). The duty of the parties choosing mediation under the AIAC rules is to participate in good faith (Rule 9 of AIAC Mediation Rules 2018). The mediation proceeding is confidential unless the party providing the information agrees to its disclosure (Rule 13 of AIAC Mediation Rules 2018). This confidentiality rules bind all parties including the mediator(s). Unless otherwise agreed by the parties, each party is to bear its own cost (Rule 15 of AIAC Mediation Rules 2018).

## **Malaysian Mediation Centre**

Malaysian Mediation Centre (MMC) handles any dispute except constitutional disputes and criminal matters, so long as the parties voluntarily seek mediation as a means of resolving their disputes. The law governing mediation at the MMC is the Mediation Act 2012. The mediators are guided by the Mediator Rules & Code of Ethics.

The MMC offers a detailed definition for mediation. It is described as an informal manner in which disputants are enabled to work together in goodwill and harmony to settle the disputed issues. The MMC is also associated with the Asian Mediation Association, otherwise known as the AMA, which was established in 2007. Its main headquarters is located in Kuala Lumpur along with the Bar Council.

## **Mediation Act 2012**

This act is not applicable to the mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has

been filed in court (Section 2 (b) of Mediation Act 2012). However, the judges and court officers who act as mediators take guidance from the Practice Direction 2016 and the Rules of Court 2012. Mediation under this Act commences when one party sends a written invitation to the other party of the dispute to undergo mediation and is accepted by the other party (Section 5 of Mediation Act 2012). Upon agreement, the parties sign a written mediation agreement (Section 6 of Mediation Act 2012). Unless agreed otherwise, the parties may choose one mediator (Section 7 of Mediation Act 2012). The appointed mediator is to act independently and impartially (Section 9 of Mediation Act 2012).

### **Securities Industries Dispute Resolution Centre**

The Securities Industries Dispute Resolution Centre (SIDREC) is an independent body established for the settlement of disputes between investors and its members such as banks, brokers, fund managers, unit trust management companies, and the Private Retirement Scheme (PRS) providers and distributors. It is a statute body set up under the Capital Markets and Services (Dispute Resolution) Regulations 2010 and SIDREC was formed under section 379 of the Capital Market and Services Act 2007. Section 2 of Capital Markets and Services (Dispute Resolution) Regulations 2010 interprets SIDREC as an approved corporate body by the Securities Commission. Being an alternative dispute resolution body, they handle disputes involving monetary claims relating to capital market products and services that an investor may have against capital market intermediaries. They also claim to resolve such claims in a fair, reasonable, timely, efficient and accessible manner (Section 3 (2) (a) of the Capital Markets and Services (Dispute Resolution) Regulations 2010).

### **THE PROCESS OF MEDIATION IN CORPORATE**

*'Within the corporate sphere, there is an ever-present tension between majority rule, where the majority shareholders are allowed to dominate the decision-making process, and the protection of minority shareholders. Where majority rule is abused and wielded in the majority's self-interest rather than the interest of the company, the minority shareholder may be able to seek court intervention for relief.'* (*Foss v Harbottle (1843) 67 ER 189*). This means that

in circumstances where the shareholders own different portions of the company, resolving disputes usually occurs with the majority shareholders deciding the final call.

On the contrary, differences in opinion between shareholders with a 50/50 split in a company can be a blockade to moving forward. When a disagreement arises, the initial point is the company's shareholders' agreement. In Malaysia, minority shareholders usually request a shareholders' agreement so that they can ensure that their rights are protected.

A dispute resolution clause in an agreement within a shareholders' agreement sets out the mechanism for the resolution of disputes between the shareholders. The scope of that agreement is determined in the drafting of the clause.

Legally, there are no restrictions on the matters or terms and conditions that shareholders can mutually agree on in a shareholders' agreement. Shareholders' agreements are more flexible documents than bylaws. In such agreements the shareholders feel more comfortable in regulating conditions for their business that they do not want to be in the public domain. They are also easier to update or amend since, unlike bylaws, their amendment does not require approval by any government office. The parties decide on the content of the shareholders' agreement. Basically, a shareholders' agreement sets out some clauses relating to the shareholders and the procedure for decision-making.

Shareholders' agreements include six purposes:

1. Focusing on the objectives of the business and its business plan.
2. Regulating the election of directors.
3. Defining the quorum or special majorities for certain decisions.
4. Creating specific obligations of certain members such as providing technical assistance, contributing trademarks, or contributing business for political influence.
5. Allocating provisions.
6. Any other provisions which may prejudice the minority shareholder's rights.

Many shareholders' agreements include a dispute resolution clause outlining the procedure for resolving a dispute. This usually requires

shareholders to pursue a form of alternative dispute resolution before pursuing any court proceedings. Otherwise, the dispute resolution clause may need one party to trade their shares to the other to resolve the dispute.

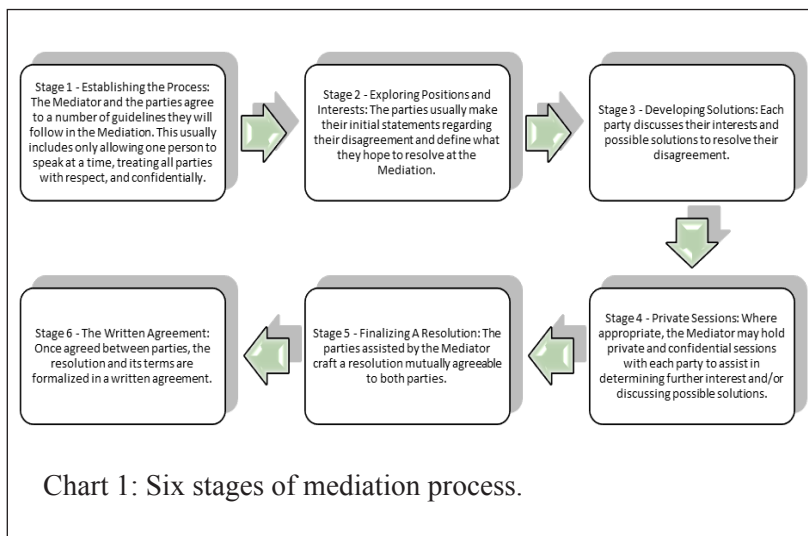
In Malaysia, it is admissible for a shareholders' agreement clause to refer a dispute resolution to the courts other than those of Malaysia and/or under a law other than that of Malaysia. The general position is that an agreement is governed by the domestic law chosen by the parties. Such choice must either be stated expressly or be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. In common law, where the parties have expressly stipulated that a contract is to be governed by a particular law, that law applies as long as the selection is made bona fide and legally does not contradict public policy. However, the courts have held that even though the parties agreed that foreign law would govern any dispute in an agreement, it did not oust the jurisdiction of the Malaysian courts to try an action arising out of the agreement if the breach took place in Malaysia. Parties are also free to have their dispute referred to courts or arbitral tribunals seated in other jurisdictions. Malaysian courts will enforce a foreign judgment if it is registered in the Malaysian courts (Section 4 Reciprocal Enforcement of Judgments Acts 1958 (Act 99)). It applies to judgments obtained in the United Kingdom, Hong Kong, New Zealand, India (excluding certain territories), Singapore, Sri Lanka and Brunei Darussalam (Schedule 1 of the Reciprocal Enforcement of Judgments Acts 1958 Act).

If a company has a shareholders' agreement, search for a dispute resolution clause to indicate how the dispute can be resolved. In this particular aspect, mediation is one of the alternative dispute resolutions that involve the shareholders to meet, try and resolve the dispute (Damis, 2007). The difference between negotiation and mediation is the attending of an impartial third party. In mediation, a neutral mediator is appointed to aid the parties in approaching a resolution. Parties can select to recommend a mediator in resolving boardroom and shareholding disputes in corporations. In resolving their disputes shareholders may be represented by lawyers who will guide them on the pertinent areas in company law including minority shareholder's rights, derivative actions, equitable winding up and constantly explore ways to achieve the best possible outcome of the mediation.



However, in a situation where a company does not have a shareholders' agreement or the shareholders are unable to resolve the dispute through negotiation or mediation, the parties pursue the courts to resolve the matter. Resolving a dispute in court can lead to a timely and costly process for all parties involved. If not involving the court to solve the problem is possible, this is an ideal solution for all shareholders (Koshy, 2010). If the parties indicate they want to continue with the court system, generally the outcome will be that the court orders one shareholder to buy out the other at a determined price or decides on the direction of the company, for example that the company will wind up. Primarily, all parties should be aware that the court's order is binding. This means that the parties must abide with whatever the court decides, even if this is not either party's anticipated outcome. In conclusion, the existence of a shareholders' agreement shows that all parties must follow the dispute resolution procedure stated in the agreement in order to solve the dispute. However, if there is no shareholders' agreement, the dispute needs to be solved by negotiating or mediating an outcome for the dispute.

For mediation under the Malaysian Mediation Centre the normal mediation process involves the parties and the mediator meeting together at the scheduled session(s) as determined by the parties. It is understood that most mediators follow a six-stage format as stated in Chart 1.



When settling the process, the mediator will usually confirm with the disputants that those with authority are present and that there is no one else who needs to be contacted before an agreement is reached.

Example of scenario:

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*A dispute between two organisations which involve a process for fundraising and the distribution of the funds raised. There are 2 people in the room. Each person represents his organisation in order to solve this dispute thru mediation.*

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The first task for a mediator is to describe his or her role to the disputants. The mediator will clarify that he or she is not a judge nor will not make any decision for the disputants. The role of the mediator is to facilitate the negotiation so that the disputants can explore whether there is a solution that is better for both of them than furthering with the dispute.

As far as possible (in Stage 2), the mediator will try to get the disputants to direct their statements / stories to each other rather than to the mediator even though they may feel more comfortable looking at the mediator than at each other. In this stage, the mediator will try to uncover the interests behind the particular dispute. 'Interests' here are defined as the disputants' wants, needs, desires and goals.

In Stage 3, which is 'Developing solutions', the mediator will encourage the disputants to focus and think about what they really want and why. People are reluctant to make concessions and a settlement is therefore, often illusory. The mediator will attempt to refocus the discussion on balancing the interests between the disputants and avoid having clashing positions between them.

Next is 'the private session'. Sometimes tensions rise between the disputants in which they are unable to focus clearly on solving the problem. Therefore, a break or a private session is often given to each disputant to express their frustration individually about the dispute or the disputant to the mediator.

When the disputants reach an agreement, it means that the mediation is over. There are three possibilities at the end of the mediation: the disputants do not reach an agreement; the disputants reach a partial agreement; the disputants reach a full agreement. In Stages 5 and 6, the mediator and the disputants will determine whether the issues being discussed are resolved or not. The mediator will work with the disputants to help them clarify the issues and agree on bringing the issues to a resolution. Once all the issues have been resolved, the mediator will confirm ( orally) with each disputant the terms of their agreement and reconfirm that they ( have the authority) agree with the settlement.

### **ADVANTAGES AND DISADVANTAGES OF MEDIATION PRACTICE IN THE CORPORATE WORLD**

Mediation practice in the corporate world is not something new in the business world. It is a common practice among corporations to insert a clause in the contracts that stipulates that any disputes arising will be settled through mediation or arbitration. Unless the parties in the dispute fail to achieve a consensus settlement, the matter will be settled by going to court. It must be noted that there are advantages and disadvantages of mediation practice in corporate disputes. This matter is discussed below:

#### **Advantages of Mediation Practice in the Corporate World**

The main advantage of settling a dispute by mediation is that the company can maintain their privacy and confidentiality of proceedings and end results. This is because disputes between the corporations normally involve thousands of ringgit and sometimes it goes beyond that where the result of court proceedings may tarnish the reputation of the company involved. Hence, when a company chooses to settle their dispute through mediation, the outcome of the settlement will remain private and the details of the dispute will not reach the media, thus it indirectly helps to maintain the reputation of the company as there are no records of when the mediation process was conducted (visually and orally), unlike in an open court trial. Records of the dispute or settlement will not be stored in the public domain. This can help maintain the reputation and trust of potential clients to invest in the companies involved.

Apart from that, mediation allows direct communication between the opposing parties where both parties are open to negotiate and get a clear understanding of each other's concerns and needs. This process helps to achieve the objective of a just, expeditious and economical disposal of the dispute as the parties involved in the decision can structure the settlement to their needs and practicality. Upon achieving a mutual agreement, there is an increased likelihood of the parties having greater fulfilment and compliance when compared with other involuntary processes.

Furthermore, mediation avoids a win or lose situation as mediation empowers the parties to give their own input and to create their own solutions rather than rely on the discretion of the court to decide. The parties can hold control over vital decisions affecting their cases where the solution achieved is responsive to the parties' needs and interests which will be more comprehensive than the legal cause of action sought. This is because in mediation the parties avoid expressing their anger and frustration (physically) towards each other as the nature of mediation is to settle matters by negotiation and discussion rather than proving which party is right. This process may help the corporation to preserve their on-going business relations where the contractual position is salvaged, and the parties involved can continue with their transaction. In addition, the settlement agreed by both parties is more convenient as the remedies available are much larger than traditional legal remedies as they can arrange and decide on the type of remedies that works for both companies.

Mediation also opens an opportunity to influence how the opposing side views the case as this process does not just involve negotiation and discussion, but also a ton of persuasion. It helps the company strategize their case in order to protect their interest. Therefore, mediation does not give the opportunity for a company to take advantage or intimidate the other party, especially when the parties involved are a big corporation and a small corporation. For example, due to disparity in the financial position, the small corporation may have no choice but to agree with whatever remedies are offered by the big corporation. Mediation prevents this from happening as it is not an adversarial process and often involves the parties directly instead of their advocates voicing out for them.

Lastly, a settlement decided through mediation leads to huge savings in terms of legal fees, court costs, parties' time, judicial time, and stress. Mediation is available at an earlier time compared to traditional litigation as the parties do not need to wait for months for their case to be heard in court. Instead, they can decide by themselves when to settle their disputes as well as the proportions of cost that each party has to bear.

### **Disadvantages of Mediation Practice in the Corporate World**

It cannot be denied that mediation also poses different challenges to the companies involved. This is because, even though the settlement reached is by achieving a consensus between both parties, sometimes the remedies offered by the opponent may not be adequate or just to the aggrieved party. The settlement offered may be a 'take it or leave it' choice to the aggrieved party especially when the dispute is between big corporations and small corporations. There is a risk for the small corporations to lose some of what is legally owed to them.

The worst case scenario in mediation is when the mediation process is unsuccessful. Much valuable time will be wasted and the cases will have to be set down for trial in a court. This situation does not just waste the money and time of the parties, but also causes more stress to the aggrieved company as their position or interest is still not recovered or restored.

It may also destroy the commercial relationship between the parties as there is a high likelihood for the parties to not have a future working business relationship as they failed to negotiate the matter peacefully. In addition, the failure to reach a settlement through mediation opens ways for the opposing party to expect the arguments put forth during mediation to be used during the trial as the parties involved in the mediation may have already used or disclosed their best evidence. This may also lead to a breach in confidentiality especially when the parties agreed to nondisclosure.

As the normal rules of evidence do not apply to mediation there is also no discovery process in mediation which may affect the outcome of the settlement. The aggrieved company may only rely on information from the opponent to assist and prove their claim. In fact, the disputes

settled through mediation may not be fully settled. At the same time if the parties reach an agreement, the other party may also resolve, at a later date, that they are not actually satisfied with the agreement and may file a lawsuit.

Furthermore, the nature of the process of mediation is said to be informal and laid back and this may pose an issue especially when both parties differ in terms of the level of maturity, understanding and thoughtfulness. One party may be quite unreasonable, or egoistical compared to the other and will not back down as they will want to stand their ground instead of capitulating to a consensus.

Lastly, the final decision that is produced via the mediation process is not concrete as it can still be challenged. Matters regarding the dispute can still be brought to court if it cannot be resolved via mediation and this is just an on-going cycle of dispute settlement for the parties as mediation proves to be a failure for them.

## **CONCLUSION**

Mediation assists parties to come together with a consensus. However, in a situation where the parties are unable to come up with a consensus or a mutually agreed decision in respect of the commercial issues, they might have to resort to the process of adjudication. Furthermore, the advantages of using mediation such as it being efficient, flexible, private, time and cost-effective, are much preferable by the individuals and corporate entities. It even helps both parties in disputes to reach a consensus, without loss on one side, but also finds a settlement which mutually benefits both parties. The Malaysia Mediation Centre is a platform for the mediation industry to take off successfully especially in assisting those who are less fortunate to settle their disputes.

The many advantages in mediation far outweigh the few disadvantages in corporate disputes. Mediation does not just allow the corporation to rule and decide upon their own solutions and remedies, but also helps in maintaining the company's reputation as well as the on-going business relationship between the corporations. It may also be deemed as an opportunity for the opponent to influence the outcome

and the claims by the aggrieved party as they may persuade the aggrieved party to view the case from the other side. However, there is still a risk if the corporation chooses to settle their case through mediation, especially if both parties failed to achieve a consensus agreement during the mediation where it would cause a lot more disadvantages in terms of time, money, stress and the outcome of the case for trial. One can only hope that the process of mediation will be utilized extensively and will cultivate a sense of appreciation, need to compromise within the society, and goodwill and harmony upon dispute settlement.

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