



**MEDIATION AND ARBITRATION
IN**

ASIA - PACIFIC

SYED KHALID RASHID
SYED AHMAD IDID



IIUM Press



MEDIATION & ARBITRATION IN ASIA PACIFIC

Conference Proceedings

Edited by
Syed Khalid Rashid
Syed Ahmad Idid



IIUM Press

Published by:
IIUM Press
International Islamic University Malaysia

First Edition, 2009
©IIUM Press, IIUM

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without any prior written permission of the publisher.

Perpustakaan Negara Malaysia

Cataloguing-in-Publication Data

Mediation and Arbitration in Asia-Pacific/edited by, Syed Khalid Rashid,
Syed Ahmad Idid
ISBN 978-983-3855-77-3

ISBN: 978-983-3855-77-3

CONTENTS

List of Abbreviations	xi
Glossary	xiii
Table of Cases	xvii
Preface	xix

PART – A

I. Mohammad Manzoor Alam, The System of Qada and Ifta in India	1
1. Introduction	1
2. Historical Background	2
3. Present Status of <i>Darul Qada</i> and <i>Darul Ifta</i>	2
4. Concluding Remarks	3
II. Dr. Dale Bagshaw, When East Meets West: Developing Culturally Relevant Models for Mediation Education, Training and Practice	7
1. Dispute Resolution: Some Introductory Remarks	7
2. Mediation: Traditional and Modern	8
3. Mediation in the Asia-Pacific	9
4. Mediation: Dominant and Sub-ordinate Knowledge	12
5. Mediation, Culture and Knowledge	13
6. Implications for Mediation Education	16
III. Breda Annesley, The Accreditation of Mediators - Option or Obligation?	25
1. Introduction	25
2. The “call” for Accreditation	28
3. <i>The Benefits of Accreditation</i>	28
3.1. Consumer Protection	29
3.2. Benefits to Mediators	30
4. The Risks of Accreditation	31
5. Different Approaches to Accreditation	34
6. Conclusion	34
IV. Dutuk Su Geok Yiam, Court-Annexed Mediation	37
1. The Background	37
2. Court-Annexed Mediation at High Court 3 Penang	38
3. How Does High Court 3 Penang Promote Court-Annexed Mediation?	39
4. How Court-Annexed Mediation Works?	40
5. What the Future Holds?	41
6. Conclusion	42

V. <i>Datuk Willi'am K.H. Lau, The Role of KLRCA As A Regional Centre for Arbitration and Mediation</i>	45
1. Introduction	45
2. Principal Functions of KLRCA	46
3. UNICITRAL & KLRCA	46
4. <i>KLRCA – The Neutral Forum</i>	46
The Motto of KLRCA	49
Delineation of Boundary	49
Differences between Ad hoc and Institutional Arbitration	50
KLRCA Rules and UNICITRAL Rules	51
Autonomy of the Parties	53
Use of KLRCA As the Appointing Authority	54
Who are the Arbitrators on KLRCA Panel?	55
Facilities of KLRCA	55
Effect of the 2005 Act on KLRCA	56
KLRCA and Proposed Reforms	56
KLRCA Conciliation Rules	57
5. <i>Procedures under KLRCA Rules</i>	57
Who are Mediators with KLRCA?	58
Scheduling a Mediation	58
Agreement to Mediate	58
Submission to Mediation	59
Selection of Mediator	59
Conduct of Conciliation	60
Mediation Conference	61
Disclosure of Information	61
Confidentiality	62
Admissibility of Evidence	63
Termination of Proceedings	63
The Settlement	64
Resort to Arbitrator or Judicial Proceedings	64
Liability of Conciliator	65
Administrative Fees	65
6. Looking Forward: Challenges	65
7. Conclusion	67
Appendix – I	69
Appendix – II	70
Appendix – III	71
VI. <i>Le Hong Hanh, Commercial Arbitration in Vietnam: Achievements and Challenges</i>	73
1. Development of Arbitration in Vietnam	73
2. The Arbitration Ordinance 2003	74
2.1. The Ordinance and Freedom to Choose a Mode of Dispute Resolution	75
2.2. The Arbitration Ordinance Aims at International Economic Cooperation	75
3. <i>Certain Challenges Facing Commercial Arbitration in Vietnam</i>	77
Inherent Obstacles	77

Choice of Law	77
Arbitration Clause	77
Validity of Contract	78
Interim Measures	79
Annulment of Arbitration Clause by the Courts	79
Difficulty in Defining 'Foreign Element'	79
4. <i>Obstacles in the Way of Commercial Arbitration</i>	79
Under-Developed Human Resources	79
Problems with Arbitration Centres	80
Business Community & Arbitration	80
5. Conclusions	81
 VII. <i>Mohanadass Kanagasabai & Lam Ko Luen, The Act 2005 Arbitration Act of Malaysia</i>	83
1. Introduction	83
2. Provision for 'Opt In' & Opt Out'	84
3. Process of Appointment of Arbitrator	85
4. Interim Measures	86
5. Recognition & Enforcement of Award	87
Rule 6. Registration in H/Court	88
6. <i>Other Interesting Provisions</i>	88
Arbitration Agreement	90
Stay of Court Proceeding	90
Competence of Tribunal to Rule on its Own Jurisdiction	91
Question of Law	91
Challenge of Arbitral Tribunal	92
Setting Aside of Award	93
7. <i>Possible Problem Areas</i>	93
7.1. Enforcement of Award	95
7.2. Repeal of New York Convention Act	95
8. Conclusion	96
 VIII. <i>Masaharu Onuki, International Commercial Arbitration and ADR in Japan</i>	97
1. Commercial Arbitration and ADR in Japan: An Overview	97
2. <i>International Commercial Arbitration in Japan</i>	98
2.1. National Arbitration Law	98
2.2. International Convention and Treaties	98
2.3. ICSID Convention	98
2.4. <i>Commercial Arbitration under New Arbitration Law in Japan</i>	98
2.4.1. Scope of Application of New Arbitration Law	98
2.4.2. Extent of Court Intervention	98
2.4.3. Arbitration Agreement	99
2.4.4. Consumer and Labour Relation Agreements	99
2.4.5. Arbitrator	100
2.4.6. Jurisdiction of Arbitral Tribunal	100
2.4.7. Interim Measures	100
2.4.8. Commencement of Arbitral Proceedings	101

2.4.9. Settlement (Arb-Med)	101
2.4.10. Governing Law and Award	101
2.4.11. Enforcement of Award	101
2.4.12. Simplified Procedure	102
2.4.13. Cost Arbitration	102
3. JCAA Arbitration	102
3.1. Overview	102
3.2. JCAA Arbitration in Practice	103
3.2.1. Arbitration Agreement	103
3.2.2. <i>Choosing an Arbitrator</i>	104
a) JCAA List of Arbitrators	104
b) Appointment of Arbitrators	104
c) Impartiality & Independent	104
d) Challenge of Arbitrators	105
e) Competence of Arbitral Tribunal	105
3.2.3. <i>Arbitral Proceedings</i>	105
a) Examination Proceedings	105
b) Written Statement	106
c) Interim Measures	106
d) Expedited Procedures	106
3.2.4. <i>Arbitral Award</i>	106
a) Time of Award	106
b) Arbitral Award	106
c) Applicable Substantive Law	107
3.2.5. Confidentiality of Proceeding	107
3.2.6. Arbitration Fee	107
4. <i>Mediation in Japan</i>	107
4.1. Court Attached Civil Mediation	107
4.2. Mediation by Private ADR Bodies	108
4.3. ADR Promotion Law	109
4.4. Accreditation System	109
4.5. JCAA Mediation	109
4.6. Future Mediation	109

IX. *Salvador P. Castro Jr.*, **Mediation in Philippines: Contemporary Trends and Prospects**

1. Introduction	111
2. Mediation in Courts	112
3. Mediation of Construction Disputes	113
4. Mediation of Commercial Disputes	114
5. Legal Framework of Mediation	115
6. Voluntary Mediation under ADR Law	115
7. ADR and Other Forms of ADR Program Initiated by Supreme Court	117
8. Mediation of Construction Dispute under CIAC	117
9. Mediation under PDRCI	118
10. <i>Contemporary Trends</i>	118
10.1. Mediation Trends under the Courts	119

10.1.1.	Court Annexed Mediation (CAM) Project	119
10.1.2.	Philippine Mediation Centre	120
10.1.3.	Appeals Court Mediation (ACM) Project	122
10.1.4.	Justice Reform Initiative Support (JURIS) Project	123
11.	Trends in Mediation in Construction Industry under CIAC	125
12.	Trends in Mediation in Commercial Disputes with other Institutions	125
13.	Prospects of Mediation in Philippines	126
13.1.	Court Innovation	127
13.2.	Emerging ADR Trends in Construction Industry	127
13.3.	Emerging ADR Trends in Business Community	128
13.4.	Court-CIAC-PDRCI Co-operation	128
13.5.	Emergence of Other ADR Organizations	128
13.6.	Reciprocal Recognition of ADR Practitioners	129
13.7.	Enhancing ADR Capabilities	129
13.8.	National Centre for Mediation	129
14.	Conclusion	130
X.	<i>Loong Seng Onn, Non-Court Annexed Mediation in Singapore</i>	133
1.	Introduction	133
2.	Mediation in Singapore	133
	Court-connected Mediation	134
	Mediation in Tribunals	134
3.	Background of SMC	135
4.	Cases for Mediation	135
5.	Panel of Principal Mediators	136
6.	The Mediation Process	137
7.	Factors Affecting Mediation Process	140
8.	<i>Future of Commercial Mediation in Singapore</i>	140
	Developing a Culture-Based Model for Asia	141
	Training and Education	141
8.2.1	Mediator Training	141
8.2.2	Negotiation and Conflict Resolution Education	141
9.	Conclusion	142
XI	<i>Irena Vanenkova, Promoting Mediation in Russia: Overviewing the Cultural Hurdles</i>	145
1.	Introduction	145
2.	Difference in Style	145
3.	Mediation Really Works	147
4.	Changing the Mind-Set	148
XII.	<i>Datin N. Segara, Mediation at the Financial Mediation Bureau (FMB)</i>	149
1.	Background	149
2.	Financial Mediation Bureau	150
3.	Legal Basis of FMB	150
4.	Membership of Bureau	151
5.	Functions of the Bureau	151

6. Management of the Bureau	152
7. Jurisdiction of the Bureau	153
8. What Happens When a Complaint is Received?	154
Mediation Session	155
Role of the Mediator	156
9. Nature of Mediation at FMB	156
10. Method of Referring Disputes	156
 XIII. Faizan Mustafa, Amicable Settlement of Disputes in Indian Universities: with Special Reference to the Aligarh Muslim University	 159
1. Introduction	159
2. University Education in India	161
3. <i>Amicable Settlement of Disputes Under Laws Governing Indian Universities</i>	162
Universities versus Employees Disputes: Arbitration	162
Arbitration in Disputes between Affiliated Colleges & Universities	163
Use of Arbitration in Student's Indiscipline Matters	163
Disputes between University Bodies & their Settlement	164
Settlement through Appeal to the Executive Council	164
Settlement through Appeal to the Vice-Chancellor	164
4. Indian Judiciary's Response	165
5. <i>Aligarh Muslim University and Amicable Settlement of Disputes</i>	167
Historical Retrospect	167
Provisions of Amicable Settlement of Disputes in the AMU Act, 1920	168
Arbitration as a Dispute Settlement Mechanism	168
Arbitration Provisions for Resolving Student Disputes	169
Arbitration between Executive Council and Academic Council	170
Arbitration between University and Third Parties	171
Arbitration Ends in Litigation	172
Establishment – cum – Grievance Committee	172
6. Conclusion and Suggestions	174
 XIV. Tuan Haji Zaini bin Haji Abd. Rahman, How Industrial Court Arbitrate and “Mediate” Trade Disputes in Malaysia?	 181
1. Introduction	181
2. Arbitration of Trade Disputes	181
3. <i>'Mediation' in Industrial Court</i>	183
3.1. Unofficial Rules for Mediation	183
3.2. An Actual Case in which Mediation was Used	185
3.3. Case Studies	188
4. Conclusion	189
 XV. Faridah binti Ibrahim, Mediation: The BBG Experience in Malaysia	 191
1. Objectives of BBG	191
2. Law Governing BBG	191
3. <i>Jurisdiction of BBG</i>	191
3.1. Section 10: Criminal Proceedings	192
3.2. Section 12: Civil Proceedings	192

4. The Means Test	192
5. Usefulness of Mediation in Legal Aid Cases	193
6. Implementation of Mediation in BBG	194
7. Mediation Proceedings	194
8. Mediation Termination	194
9. Code of Ethics	195
10. Mediator Breaches the Code	195
XVI. Robin S. Peard, Recent Developments in Hong Kong Arbitration and Mediation	197
1. <i>Developments in Arbitration</i>	197
1.1. Arbitration Law Reform	197
1.2. Right of Appeal on Point of Law	198
1.3. Statistics	199
1.4. Enforcement between Hong Kong and China	199
2. Mediation	200
2.1. Organizations in Mediation	200
2.2. Mediations Initiatives	200
2.3. Civil Justice Reform	201
2.4. Initiatives of HKMC	201
3. The Future	202
 PART – B: Conference Proceedings	
Speech – I : Welcome Speech by <i>Dato' Prof. Dr. Syed Arabi Idid</i>	203
Speech – II : Keynote Address by <i>Rt. Hon. Tun Dato' Sri Ahmad Fairuz bin Dato Sheikh Abdul Halim</i>	207
Speech – III : Inaugural Speech by <i>YB Datuk M Kayveas</i>	213
Speech – IV : Closing Speech by <i>Dato' Syed Ahmad Idid</i>	215
List of Participants in the 2006 Conference	219

PART – C: Appendices

Appendix – 1 : The Arbitration Act 2005 (of Malaysia)	225
Appendix – 2 : Memorandum of Association and Articles of Association, Financial Mediation Bureau of Malaysia	251
Brief CV of the Authors	277