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MEDIATION IN MALAYSIA: IS IT FACILITATIVE, EVALUATIVE OR TRANSFORMATIVE?

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Abstract

Mediation is a part of the alternative dispute resolution (ADR) process which is an alternative to litigation in the court proceeding. It is both informal and flexible dispute resolution in which the parties are free to participate in the process and come out with an amicable settlement. Mediation is an option for the disputants to reach a mutual agreement before the matter is brought to the court. The mediation process is speedy and the limitation of mediation award depends on kinds of disputes. The objectives of mediation are to reach an agreement to the dispute according to the needs and interests of the parties, to prepare the participants to accept the consequence of their decision and to reduce of the anxiety and other negative effects by assisting the participants to reach a consensual agreement. Mediation also helps to improve the relationship between the parties and is effective if the parties have a continuing relationship such as neighbours, family or business people. There are certain rules that have been enacted to govern matters concerning mediation and certain bodies are responsible to provide mediation services. This paper will analyse the implementation of mediation in Malaysia. The discussion will also include the process of mediation as provided under the existing regulations.

Keywords: mediation, alternative dispute resolution (ADR), civil dispute.

INTRODUCTION

Mediation is not a new dispute resolution in Malaysia. In Malaysia, it can be seen that mediation has been developed and implemented in almost all kinds of civil disputes. Primarily, mediation is formally applied in banking disputes and insurance disputes. Later it extends to matrimonial disputes. To date, certain regulations have been enacted to provide mediation services in almost all kinds of civil dispute. The regulations also contain the process and the procedure to govern matters relating to mediation as well as mediator.

In the mediation process, the participants are free to settle their own dispute without bound by any rules or procedures of law. The participants have right to decide for themselves and they may ask assistance from a mediator to consider their needs and interests. Mediation also emphasises on a workable solution that meets the needs of participants rather than determine who is right or wrong.ⁱⁱⁱ Mediation is inexpensive since it is an informal process which can be conducted in private seating and the whole process is confidential. Mediation can be invoked anytime before a judicial decision is given. However, mediation can only succeed if both parties participate in the process and compromise in reaching an agreement. A mediator cannot force the parties to reach a settlement. If agreement is not reached, the dispute may be still referred to the court.

DEFINITION

Literally, mediate means "to try to end a disagreement between two or more people or groups by talking to them and trying to find things that everyone can agree on."^{iv} According to Osborn's Concise Law Dictionary, mediation is "a form of non-adversarial alternative dispute resolution... the parties in the dispute employ a neutral third party as a mediator who will seek to promote communication between the parties." However, the mediator has no power to decide for the dispute since a settlement of the dispute depends on the agreement of the parties.^v In Oxford Dictionary of Law, mediation is "a form of alternative dispute resolution in which an independent third party assists the parties involved in a dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict. The mediator, who may be a lawyer or a specially trained non-lawyer, has no decision-making powers and cannot force the parties to accept a settlement."^{vi}

Jay Folberg (1984) and Alison Taylor (1984) defined mediation as “a process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputes issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs”.^{vii} Susan Burnett Lutten (2009) defined mediation as a “ cooperative process in which the parties work together toward a resolution that tries to meet everyone’s interest, instead of working against each other where at least one party loses.”^{viii}

Section 2 of the Legal Aid Act 1971 provides that mediation “includes the undertaking of any activity for the purpose of promoting the discussion and settlement of disputes”. Section 3 of the Mediation Act 2012 stated that mediation is “a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute.”

ELEMENTS OF MEDIATION

Though there is no specific definition of mediation, there are certain elements to describe mediation.

1. There must be the presence of disputants.
2. There must be involvement of a neutral third party known as a mediator. The mediator must be accepted by the disputants and who will assist the parties to reach an amicable settlement at the end of the mediation process.
3. The mediator must assist the parties to find options which are mutually acceptable by the parties.
4. The mediator has to hold meeting. In the meeting, the mediator may seek with the other party permission to have a brief private session on some issues.
5. Once a mutual settlement is reached, a mediated settlement has to be signed by the parties to make the contract enforceable.^{ix}

ADVANTAGES OF MEDIATION

The researcher observed that in the mediation process, the participants are free to settle their own dispute without bound by any rules or procedures of law. The participants have right to decide for themselves and they may ask assistance from a mediator to consider their needs and interests. Mediation also emphasises on a workable solution that meets the needs of participants rather than determine who is right or wrong.^x Mediation is inexpensive since it is an informal process which can be conducted in private seating and the whole process is confidential. Mediation can be invoked anytime before a judicial decision is given. However, mediation can only succeed if both parties participate in the process and compromise in reaching an agreement. A mediator cannot force the parties to reach a settlement. If agreement is not reached, the dispute may be referred to the court.

MODELS OF MEDIATION

Models of mediation can be classified into facilitative mediation, evaluative mediation and transformative mediation. The role of mediator is determined by the models of mediation.

i) Facilitative mediation.

Facilitative mediation is a procedure in which a neutral party facilitates communication and negotiations among the parties to seek resolution of disputes between the parties. The mediator has no authority to evaluate, decide or offer judgment on the issues between the parties.^{xi} The process and the outcome of mediation are controlled by the parties. The parties are encouraged to communicate and compromise based on their needs and interest.

ii) Evaluative mediation

Evaluative mediation requires a mediator to facilitate negotiations between the parties and evaluate the merits of the dispute and provide suggestions for its resolution. The mediator may intervene during the mediation process by assessing the outcome as well as the legal and factual strengths and weaknesses of the problems.^{xii} The mediator may offer a recommendation to the parties based on merit of the case and the recommendation can be used in further proceedings. In evaluative mediation, the parties control mediation process but they have less control over the

outcome of mediation since the mediator may provide a recommendation and opinion based on the merit of the case.^{xiii} The evaluation is not binding but may influence the outcome of the mediation process.^{xiv}

ii) Transformative mediation

Transformative mediation encourages "the parties to deal with the underlying causes of their problems with a view to repairing their relationship through recognition and empowerment as a basis for resolution."^{xv} Transformative mediation focuses on the personal interaction between the parties with the primary goal is to improve the relationship between the parties.^{xvi} It is not necessary for the parties to reach an agreement. The transformative mediator does not offer a suggestion or opinion to the parties but is responsible to encourage the parties to communicate, discuss, exchange views and listen to each other.^{xvii}

THE IMPLEMENTATION OF MEDIATION IN MALAYSIA

MEDIATION IN INSURANCE DISPUTE

In 1991, the Central Bank of Malaysia had set up the Insurance Mediation Bureau and later was replaced by the Financial Mediation Bureau in 2005 to resolve disputes between consumers and financial service provider. The Financial Mediation Bureau has jurisdiction on insurance or takaful claims, banking disputes and credit card claims. The Bureau is responsible to resolve a dispute within a maximum period of three months after receipt of reference from the complainant. The award is limited up to RM200,000 for motor and fire policies and RM 100,000 for other types of insurance. The mediator has the power to decide for the parties if the parties are unable to reach a mutual settlement and the decision is binding the insurer only.^{xviii} The mediator is not bound by precedents but guided by the Central Bank's Guidelines on Claims Settlement Practices and Guidelines on Unfair Practices in Insurance Business.^{xix}

MEDIATION IN BANKING DISPUTE

In 1997, the Banking Mediation Bureau was set up to provide dispute resolution services regarding monetary loss arising from banking services provided by any bank. The Bureau has limited jurisdiction in which it provides mediation services for the benefit of customers. Upon receiving a complaint by a customer due to dissatisfied with the final decision of the management of the bank or recommended by the Complaints Unit of the Bank Negara Malaysia, the Bureau may bring the disputants to meet and discuss the dispute before a mediator appointed by the Bureau and to reach a mutual agreement. If no agreement has been reached, the mediator will make a decision or award according to the laws and banking practices. However, the amount of the award shall not exceed RM25, 000 and the award binds the bank.^{xx}

MEDIATION IN COMMUNITY DISPUTE

Mediation is also available to resolve community disputes. The National Unity and Integration Department is responsible to train community mediators in order to resolve conflicts in a multi-racial society, especially between families or within the same community, before the differences became a major issue.^{xxi} Based on the National Unity and Integration Department records it was reported that the community mediators have managed to resolve 123 cases from early 2012 till March 2012.^{xxii}

MEDIATION IN FAMILY DISPUTE

Family disputes may be resolved through the mediation process as regulated by the Legal Aid Act 1971^{xxiii} and the Legal Aid (Mediation) Regulations 2006. Section 29A of the Legal Aid Act 1971 allows the minister to

authorize the Director General of Legal Aid to provide mediation services to aided persons. The mediation agreement is binding on the parties once the agreement has been reduced into writing and signed by the parties.^{xxxiv}

Rule 99 of the Syariah Court Civil Procedure (Sulh) Federal Territory Rules 2004 provides that the parties of family disputes other than divorce at any stage of the proceedings, may hold Sulh (mediation) to settle their dispute. The Sulh officer acts as a mediator to the parties so that the parties decide the dispute in an amicable way. The sulh officer has no authority to make a judgment to the dispute.^{xxxv}

COURT ANNEXED MEDIATION

The Practice Direction No 5 of 2010 was issued by the Chief Justice of Malaysia to introduce mediation at the pre-trial case management stage in the court. The Practice Direction applies to the Judges of the High Court^{xxxvi} and of the Subordinate Courts.^{xxxvii} The disputes that can be mediated include matrimonial disputes, commercial disputes, contractual disputes, intellectual property disputes, contractual disputes, claims for defamation as well as personal injuries due to road accidents or any tortuous acts. The mediation process can be conducted by a judge or a mediator appointed by the parties.^{xxxviii} The judge may highlight the issues and suggests a solution to the dispute.^{xxxix}

In 2011, in line with the Practice Direction, the Kuala Lumpur Court Mediation Centre was set up to facilitate and encourage more judge led mediations. It is a pilot project for court-annexed mediation program and its service is free. A panel of mediators consists of volunteer High Court judges of the High Court and volunteer of session court judges and magistrates of the Subordinate Court. When the parties agreed to mediation, the trial judge will refer the case to the Court Mediation Centre. A mediation session shall be conducted within one month from the date the case is referred to the Court Mediation Centre and it shall be completed not more than three months from the date the case is referred.^{xxx} The procedure is flexible and there are no formal rules of evidence to be complied during the mediation. The process of mediation is determined by the parties.^{xxxi} If the parties reached the settlement, it will be transformed into the consent order and become the judgment of the court.

MEDIATION UNDER THE MEDIATION ACT 2012

Recently, the Mediation Act 2012 has been introduced to govern matters relating to mediation in civil cases including the process of mediation, the mediator, the mediation agreement, the principle of confidentiality and privilege. The Mediation Act 2012 was enacted to promote and encourage mediation as a method of dispute resolution specifically in civil cases. The Act is not applicable in criminal cases, any mediation conducted by judges and the Legal Aid Department.^{xxxii} Once a mediation agreement is reached by the parties, the agreement shall be reduced in writing and signed by the parties.^{xxxiii} The settlement agreement is a contract on the parties. The process is confidential and can only be disclosed if consented by the parties or required under the Act or any other law.^{xxxiv} The Act stated that a mediator shall facilitate the parties in the process to reach a satisfactory resolution and may suggest options for the settlement of the dispute.^{xxxv}

MEDIATION UNDER THE MALAYSIAN MEDIATION CENTRE

In 1999, the Malaysian Mediation Centre was set up by the Bar Council of Malaysia to promote mediation as a mean of alternative dispute resolution and to provide mediation services for all kinds of commercial and matrimonial disputes. Currently the jurisdiction of the Malaysian Mediation Centre has been extended to other kinds of civil disputes including medical negligence claim. The mediation process is conducted under the Mediation Rules.^{xxxvi} The Malaysian Mediation Centre also may resolve disputes which have been referred by the court.^{xxxvii} The parties have to reach a settlement on their own since the mediator's role is to facilitate the process of reaching that goal.^{xxxviii}

MEDIATION UNDER THE LEGAL AID BUREAU

The Legal Aid Bureau established in 1970 to provide legal aid and advice to facilitate legal representation in courts and to provide mediation services. The Legal Aid Bureau provides mediation services for all civil cases including matrimonial, employment, motor vehicle accidents, tenant, probate and consumer matters. Mediation service is governed by the Legal Aid (Amendment) Act 2003. The mediation settlement shall be reached within 30 days of the mediation sessions being held and the outcome of the agent arising from mediation process is binding as a contract once it is recorded in writing and signed by the parties.^{xxix}

CONCLUSION

Mediation is applicable in almost all kinds of civil disputes. Mediation is an option for the disputants to reach an amicable settlement before the matter is brought to the court. Mediation is the best option for the parties who concern of preserving the relationship especially where the disputes involve family and community. The mediation process is speedy and the limitation of mediation award depends on kinds of disputes. The mediation agreement is binding to the parties and if any of the parties breached the agreement, the aggrieved party may bring the dispute to the court.

There are specific rules to govern the mediation process and certain bodies that are responsible to provide mediation services. It can be seen that in certain cases the parties may apply for mediation before the court proceeding and the court also may refer the dispute to mediation if the court believes that the dispute can be resolved through mediation. The process of mediation and the role of mediator vary according to the nature of the disputes as governed by the regulation. Some provisions allow a mediator to evaluate the issues and suggests an option as a settlement of the dispute. There are certain provisions limit the power of a mediator to act as a facilitator without making any suggestion and decision to the parties.

In short, mediation in Malaysia can be facilitative, evaluative and transformative according to the circumstances. Generally, the parties involve in the process and the decision making while the mediator merely acts as a facilitator to facilitate the parties. In certain circumstances, the mediator is allowed to evaluate the issues and decide for them based on the laws and merit of the case. If the dispute involves persons related or known to the parties, it is advisable to preserve their relationship by communicating and listening to each other. Whether the parties have successfully reached an agreement or not is not important since if parties fail to reach a settlement in a mediation, parties are still entitled to bring the case to the court unlike arbitration, there is no judicial review in mediation.

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