

ALTERNATIVE DISPUTE RESOLUTION

Law & Practice



Edited by

Adnan Yaakob

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CLJ Publication

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ALTERNATIVE DISPUTE RESOLUTION

Law & Practice

Alternative Dispute Resolution: Law and Practice is divided into 44 chapters which cover alternative dispute resolution (ADR) mechanisms in all their varieties, including negotiation, mediation, conciliation, ombudsman, arbitration, and court adjudication. These ADR mechanisms can be used alongside existing court systems and have gained widespread acceptance because of its speedy resolution of disputes and outcomes that preserve and sometimes even improve relationships.

The primary objective of this book is to enhance reader's understanding of the various regulatory framework governing ADR on diverse issues at both national and international levels. This includes the application of ADR to fintech, Islamic banking and finance, labour, and construction disputes among others. Online dispute resolution, Singapore Mediation Convention, and university arbitration are also featured in this book.

All those concerned, both the legal and non-legal community such as legal practitioners, arbitrators, mediators, academicians, and students, will find this book as a valuable aid for a good understanding of matters pertaining to ADR without having to refer to several other sources.



CHAPTER 18

MEDIATION INSTITUTIONS*

Introduction

Mediation has recently become popular alongside the other means of alternative dispute resolution (ADR) mechanisms. The interest in mediation is universal, and the rise of mediation is global. In Malaysia, mediation is still at the beginning phase, and is still not a widely-acknowledged ADR means, both in private mediation or court-based mediation. Nonetheless, efforts have been made by the judiciary as well as the Bar Council to endorse parties in disputes to choose mediation.¹ The process to increase awareness for mediation has been mooted by the Malaysian government, judicial and legal fraternity, of which was realised through the passing of the Mediation Act 2012. Parties are not obliged to mediate before litigation and arbitration, which is also an attractive element for consideration. Established professional mediation institutions in Malaysia provide mediation services to the public. This includes the Financial Mediation Bureau ('FMB'), the Malaysian Mediation Centre ('MMC'), the Asian International Arbitration Centre ('AIAC') and the Legal Aid Bureau ('LAB'). Mediation services operated by the courts are known as court-annexed mediation or judge-led mediation. Sessions are mediated by the High Court Judges, Sessions Court Judges, Magistrates and their Registrars. This chapter deliberates the background, roles, jurisdiction and relevant procedures of mediation institutions in Malaysia.

* This chapter is contributed by Mohammad Naqib Ishan Jan, Mahyuddin Daud and Muhamad Hassan Ahmad.

¹ W Hughes, R Champion, JMurdoch *Construction Contracts: Law and Management* (2015) pp. 379-414.

Financial Mediation Bureau (FMB)

Before the establishment of the FMB, there were two authorities such as the Insurance Mediation Bureau and the Banking Mediation Bureau. Later, Bank Negara Malaysia ('BNM') decided in merging both Bureaus under one umbrella with the view to create a one-stop centre to 'look for formal redress as an option in contrast to litigation against the institution of finance'. Therefore, the creation of the FMB was initiated in 2004 and launched formally on 25 January 2005. The FMB is mandated to settle disputes between the complainants or clients and insurance agencies or financial establishments in Malaysia. The FMB is bestowed with the authority to mediate and arbitrate complaints, disputes or claims that contain financial loss not exceeding the following limits:

- (1) Banking/Financial related: RM100,000 (except for fraud cases involving payments instruments, credit cards, charge cards, ATM cards and cheques for which the limit is not more than RM25,000).
- (2) Insurance/Takaful related: RM200,000 (Motor and Fire Insurance/Takaful); RM100,000 (others); RM5,000 (3rd Party Property Damage).²

Although the FMB is one of the avenues for lodging complaints, it is not easily accessible as an initial phase to achieve justice. The complainant needs to pursue the procedural part of his complaints by not underrating the significance of settling the issue with the financial servers before submitting the case to the FMB. The initial step that ought to be taken by the complainant in the event of any dispute concerning his financial

² Nurah Sabahiah Mohamed 'Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of Its Application in Malaysia' (Ph.D Thesis, University of Malaya 2013) pp. 127-128.

service provider, is to notify them about the issue he is facing. Only when the financial service provider is unable to provide a satisfactory service, the complainant will be able to lodge an official complaint to the complaint unit of the same establishment. Every single financial service provider, under the control of the BNM, has set up a complaint unit as a legitimate platform for the customers to express their official complaints.³ Generally, financial institutions take two weeks to reply to a complainant. Nevertheless, if more complex issues are involved in the matter, that financial institution may at times take over two weeks so as to declare their decision and the customer will be notified accordingly.

At this juncture, if the decision of the complaint unit of that specific financial institution is not satisfactory, the complainant may take the matter to the FMB. Nonetheless, the complainant should ensure that his complaint is lodged with the FMB within six months after getting the institution's ultimate decision on the issue. The complaint may be lodged to the FMB either by going there personally, by a written letter, or by an e-mail giving all the essential specifics, i.e., details of the complaint; copy of the letter of the complainant's financial services provider stating their final decision; and copies of other relevant documents.

Additionally, a consent form has to be completed by the complainant which permits the financial services provider to provide any other necessary confidential information which relates to the complaint to the FMB. An inquiry will then be made by a mediator while both complainant and the senior management of the financial institution are present. The process of mediation will involve both parties and the mediator will only be present to aid with the process of mediation. If the claim involves smaller amounts of money, in the absence of the complainant and the representative of the financial services provider,

³ For further detailed explanations about the Complaint Unit, see Bank Negara Malaysia under 'Complaint & Redress' at <http://www.bnm.gov.my> (accessed 25 April 2019).

a decision may be made by the mediator with the sole use of the documents provided. If the parties figure out a harmonious agreement while in the course of negotiation, the mediator's task is simply to assist them in resolving the dispute. However, in a case where the parties do not reach an agreement, the position of the mediator then changes into an 'Ombudsman'. In such cases, the mediator will decide the case by conducting an investigation with reference to industry regulations, practices and relevant law.⁴

In the event that the choice has been made by the FMB, it will be binding on the financial services provider. In any case, the complainant is given two alternatives, either to acknowledge the decision of the FMB or dismiss it. In case the complainant acknowledges the FMB's award, he may lose the right to continue with legal action. If the complainant is not content with the decision, he may continue with the legal action and the FMB's ruling or any part of it will not be unveiled to any resulting court procedures or arbitration⁵ as the intercessions mediated are considered to be proceedings 'without prejudice'.⁶

Malaysian Mediation Centre (MMC)

On 5 November 1999, the MMC was established under governance of the Malaysian Bar Council, Construction Industry Development Board (CIDB), the Malaysian Institute of Architects (Pertubuhan Akitek Malaysia (PAM)) and the Kuala Lumpur Regional Centre for Arbitration (KLRCA (now AIAC)) with the view to encourage mediation

4 For further details, see N Segara 'Mediation and Financial Mediation Bureau (FMB)' in *Mediation and Arbitration in Asia-Pacific* (eds Syed Khalid Rashid, Syed Ahmad Idid (IIUM Press, 2009) pp. 149-158.

5 See the official brochure of the FMB.

6 For further explanation on the expression 'without prejudice' see Evidence Act 1950, s. 23; Hamid Ibrahim, Maimoonah Hamid *Law of Evidence* (1993) pp. 86-87.

as a means of alternative dispute resolution. The services offered in the MMC are: 'mediation services; assistance and guidance on how to get the opposing side to settle for mediation if one side is interested; and providing mediation teaching for individuals who have an interest to become mediators and accreditations and has a board of mediators.' Currently, the MMC takes on civil, commercial and matrimonial cases and has an aim of widening the range to other matters.⁷

The MMC conducts mediation under the purview of its Mediation Rules which clearly state the mandate of a mediator as having no power to force an agreement on the parties but to help them get to a suitable resolution for their disputes⁸ unless the parties involved, request the mediator to provide a finding or ruling. In the absence of any express provision, parties to a dispute may voluntarily submit the case to the MMC and it may be at any stage, i.e., pre-trial stage, at commencement of legal proceedings and during the proceedings.⁹ The MMC also ensures the preservation of the confidentiality and provides the following elements of confidentiality:

15.1 All communications made in the Mediation, including information disclosed and views expressed, are made on a strictly "without prejudice" basis and shall not be used in any proceedings.

15.2 All records, reports or other documents including anything electronically or any other information produced or received by a mediator while serving in that capacity shall be privileged.

7 Khutubul Zaman Bukhari 'Arbitration and Mediation in Malaysia' Asean Law Association (2011).

8 MMC Mediation Rules, r. 12.

9 Nurah Sabahiah Mohamed 'Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of Its Application in Malaysia' (Ph.D Thesis, University of Malaya, 2013) pp. 153-169.

15.3 The Mediator of the MMC (or any employee, officer or representative for or arising in relation to mediation) shall not be compelled to divulge such records or to testify as a witness, consultant, arbitrator or expert in regard to the mediation in any arbitral judicial or other proceedings.

15.4 The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceedings:

- (a) Views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
- (b) Admissions made by another party in the course of the mediation proceedings;
- (c) Proposal made or view expressed by the Mediator; or
- (d) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the Mediator.¹⁰

Furthermore, the MMC prohibits any kind of audio or video recording and leak of information from hearings.¹¹ The MMC has its own guidelines for the certification and accreditation of mediators. Anyone who wishes to become an MMC accredited mediator, must be a practicing member of the Malaysian Bar with a minimum of seven years standing, must have completed a minimum 40 hours of training conducted by the MMC and pass a practical evaluation led by the trainers.

The parties to a dispute can apply to the MMC either individually or jointly by making a non-refundable payment of RM100.¹² If it is an individual application, the pleading party has to provide the details of the other interested parties to the MMC in order to notify them.¹³ Then,

10 MMC Mediation Rules, r. 15.

11 MMC Mediation Rules, r.16.

12 MMC Mediation Rules, r. 3.

13 MMC Mediation Rules, r. 4.1.

the MMC will communicate with the parties involved in the dispute to arrange for an agreement to mediation within two weeks from the date it receives the request and notify all parties involved on whether or not mediation can proceed in three weeks.¹⁴ The MMC will provide a Mediation Kit which contains the mediation agreement, mediation rules, the list of mediators, the code of conduct for the mediators and the draft settlement agreement with the intention to assist the parties to comprehend the proceedings that they have opted for.¹⁵

Prior to the mediation process, the parties will have to agree upon the appointment of a mediator and the terms to be followed at the proceedings in their mediation agreement.¹⁶ Moreover, each party will have to provide a concise summary of the case not exceeding three pages explaining about the case and copies of every document mentioned in the summary as well as in the course of the mediation. At the end of the mediation process, each party or their representative agrees and gives a signature and only when the settlement shall be binding to either of the parties. Therefore, the documents to be submitted in the proceedings are either the 'Joint Submission' for mediation or the 'Request for Mediation' to initiate the proceedings; the 'Agreement to Mediate' before the start of the proceedings; and the 'Settlement Agreement' if there is any settlement reached between the parties.

In addition, the summary has to be drafted by the parties five days prior to proceedings at the centre and drafting the above documents will not be an additional burden on the disputing parties, as this information can be filled up in a standard form. As for the settlement agreement, the centre will draft it on the basis of agreed terms and parties are merely required to read and sign it.¹⁷

14 MMC Mediation Rules, r. 3.3.

15 Nurah Sabahiah Mohamed 'Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of Its Application in Malaysia' (Ph.D Thesis, University of Malaya, 2013) pp. 153-169.

16 MMC Mediation Rules, r. 7.

17 MMC Mediation Rules, r. 11.

Asian International Arbitration Centre (AIAC)

The Asian International Arbitration Centre (AIAC), formerly known as the Kuala Lumpur Regional Centre for Arbitration (KLRCA), was founded in 1978 in Kuala Lumpur to provide out-of-court settlement for the disputing parties. The AIAC offers an impartial system for dispute settlement, business and investment in the Asia Pacific region. It conducts mediation processes according to the AIAC Mediation Rules (formerly known as 'KLRCA Mediation Rules') which are a set of procedural rules containing different aspects of mediation in resolving international and domestic disputes. The AIAC Mediation Rules were revised in March 2018 to include mediation of investment-related disputes involving investors and States and/or State entities. The AIAC seeks to promote mediation as a desirable commercial option for parties in Malaysia.

The AIAC Mediation Rules will be applicable to mediation which takes place between the parties on a voluntary basis only when the parties agree that the AIAC Mediation Rules will be applicable to their mediation; or when the parties have authorised the mediator or another person or institution to conduct a mediation process and that particular mediator, person or institution adopts the AIAC Mediation Rules in whole or in part.¹⁸

The AIAC takes on the main characteristic of mediation. The duty of a mediator is to assist the disputing parties to reach an agreement without imposing its decision on the parties to the dispute. If the parties choose to have the mediation conducted under the AIAC in accordance with the AIAC Mediation Rules, any party or parties who wish/es to initiate the mediation, would have to submit the Request for Mediation.¹⁹ Upon receiving such notification, the AIAC will

18 AIAC Mediation Rules, r. 1.

19 AIAC Mediation Rules, r. 2 (1).

proceed with the mediation process. On the request of the parties, the mediator may propose a settlement to assist the conciliation among the parties but it has no binding effect on them. The AIAC Mediation Rules defines 'international mediation' as:

- (a) one of the parties to the mediation has its place of business in any State other than Malaysia; or
- (b) any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is in any state other than Malaysia; or
- (c) the parties have expressly agreed that the subject matter of the mediation relates to more than one State.

On the other hand, 'domestic mediation' is defined as:

any mediation which is not an "international mediation".²⁰

Under Rule 13, 'all mediation proceedings shall be private and confidential. All Parties and participants in the mediation shall execute a written undertaking [to] give effect to this requirement.' Under Rule 8, the mediator's role is to 'assist the parties in an independent and impartial manner to resolve their differences or disputes amicably and/or to reach a settlement agreement.' The mediator and/or co-mediator has to follow the principles of fairness, objectivity, independence and impartiality. The AIAC selects its mediators among retired judges, lawyers and professionals in various fields. All the mediators have long years of experience, or have been trained or possess the necessary mediation skills to be a mediator. Each mediator will be chosen on their expertise based on the nature of dispute before them.²¹

20 Guide to the AIAC Mediation Rules item 2.

21 William KH Lau 'The Role of KLRCA As A Regional Centre For Arbitration and Mediation' in *Mediation and Arbitration in Asia-Pacific* (eds Syed Khalid Rashid, Syed Ahmad Idid (IIUM Press, 2009) pp. 45-71.

There is also an option of a combination of mediation and arbitration called Mediation-Arbitration ('Med-Arb') allowing parties to initiate mediation before resorting to arbitration. If the parties are unable to resolve their dispute through mediation, they may then attempt to settle their dispute through arbitration. However, mediators here do not deliver a binding decision as in case of arbitration.

Legal Aid Bureau (LAB)

The Legal Aid Bureau (LAB) was set up under the Malaysian Legal Aid Department in 2006 by way of an amendment to the Legal Aid Act 1971. The matters conducted in mediation by the LAB are listed in the Third Schedule of the Act. It is also regulated under the Legal Aid (Mediation) Regulations 2006 which provides for the appointment of mediators, process and procedure of mediation, and matters that can or cannot be mediated.²² A code of ethics is also provided to regulate the conduct of accredited mediators. The following cases are usually settled at the Legal Aid Department pursuant to the Third Schedule of the Legal Aid Act 1971. In civil mediation, it resolves cases such as maintenance of wife and children; matrimonial assets; welfare of children; terms of dissolution of marriage under joint petition; motor vehicle accidents not involving the insurance company; and consumer claims. In *Syariah* mediation, it settles cases such as maintenance of wife and children; *Harta Sepencarian*; welfare of children and betrothal (damages).

Mediation under the LAB is expressly regulated under the Mediation Act 2012. Section 2 excludes its application to any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in the court, including any mediation conducted by the LAB. Matters that are excluded from mediation under the

²² See Legal Aid Act 1971, ss. 29B, 29C, 29D, 29E, 31B, Third Schedule; Legal Aid (Amendment) Act 2003; Legal Aid (Mediation) Regulations 2006.

LAB includes issues on the effect of any provisions of the Federal Constitution; suits involving prerogative writs, injunctions, election petitions under the Election Offences Act 1954; proceedings under the Land Acquisition Act 1960; proceedings under the original jurisdiction of the Federal Court under art. 128 of the Federal Constitution; judicial review; appeals; revision; proceedings before a native court; and any criminal matters.

Section 5 sets out procedures to commence mediation and it could be initiated by a person sending to the other disputing person, a written invitation to mediate.²³ Section 6 makes it compulsory for the parties to enter into a mediation agreement which has to be in writing and signed by them. The agreement includes the subject matter in dispute, the appointment of mediators and costs.²⁴

The requirements to become qualified mediators under the Mediation Act 2012 are laid down under s. 7. It provides for the relevant qualifications, knowledge of mediation and educational credentials.²⁵ Mediators can satisfy the requirements of an institution as well.²⁶ 'Institution' is defined under the Act to mean a body or organisation that provides mediation services.²⁷ The parties may request for assistance from an institution to appoint suitable mediators for the parties.²⁸ A mediator should disclose any facts that may affect his impartiality as a mediator prior to any appointment. Termination of the mediator falls under the purview of s. 8 that allows for immediate termination upon service of notice to the mediator.

23 Mediation Act 2012, s. 5(1).

24 Mediation Act 2012, s. 6(3).

25 Mediation Act 2012, s. 7(2)(a).

26 Mediation Act 2012, s. 7(2)(b).

27 Mediation Act 2012, s. 3.

28 Mediation Act 2012, s. 7(3).

Mediators' roles are mainly facilitative under the Act.²⁹ The privately-conducted mediation does not allow for any mediation communications to be disclosed and is not subject to discovery.³⁰ Caucus hearings are also conducted during the mediation.³¹ If a mediator requires assistance of another mediator, then the consent of the parties must first be obtained.³² Mediators have the discretion to end the mediation process if no benefit could be derived out of it for each party.³³ However, if it is a success and a settlement agreement is reached,³⁴ it must be authenticated by the mediator.³⁵ Such settlements are binding and enforceable in a court of law.³⁶

Conclusion

In a nutshell, mediation institutions play a vital role in setting up a legal framework for alternative dispute resolution in Malaysia. Despite the growing number of mediation institutions, one must reflect whether the establishments have actually resolved disputes in a more efficient way than that of the courts. As seen in the discussion in this chapter, engaging professional mediators may require disputing parties to incur significant amount of fees. Another issue that may be contemplated is whether the fees paid commensurate the chances of resolving the disputes faster, as commonly mooted by proponents of mediation. In moving forward, one must be cautious of applying alternative dispute resolution for the best interests of the clients and to ensure that justice prevails.

29 Mediation Act 2012, s. 9.

30 Mediation Act 2012, ss 15, 16.

31 Mediation Act 2012, s. 11(1).

32 Mediation Act 2012, s. 11(2)(b).

33 Mediation Act 2012, s.11(3).

34 Mediation Act 2012, s. 13(1).

35 Mediation Act 2012, s. 13(2), (3).

36 Mediation Act 2012, s. 14.