DOI: 10.52028/rbadr.v5i9.ART06

Introduction to Mediation in Malaysia

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Abstract: Mediation has been in Malaysia as a modern problem-solving mechanism for over twenty years. Mediation has found its way into many industries in Malaysia. Institutions have been established to train mediators and to also facilitate the registration of cases for mediation and appointment of mediators. Malaysia is one of the first in the region to have a Mediation Act and features interesting clauses including immunity for trained mediators. Apart from court-annexed mediation which often is carried out in the absence of lawyers, private *ad hoc* or institutional mediation is also part of the Malaysian mediation landscape and lawyers generally have a larger and more important role in first designing a mediation overture and then supporting their client to conclusion.

I The Concept of Mediation in Malaysia

The concept of mediation in Malaysia is captured in the Malaysian Mediation Act 2012[1] as a confidential and structured process in which an impartial and

[1] Mediation Act 2012 (Act 749) was gazetted on 22 June 2012. It was about 5 years in the making before being legislated. It is currently pending an update and potential revamp.

independent third party, known as a mediator, assists parties in a dispute to communicate and negotiate with each other with the aim of facilitating a mutually acceptable agreement. A mediator does not have the power to impose a solution on the parties and any settlement reached during the Mediation is binding only if a parties agree to it in writing.

II A Brief Look at the Statutory Provisions of the Malaysian Mediation Act 2012

The short title of the Act is that it is an Act to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle their disputes in a fair, speedy and cost-effective manner and to provide for related matters.

The Act describes mediation as a voluntary process[2] which means that in Malaysia a party is not required or mandated to participate in mediation and can withdraw from the process at any time. Party autonomy is recognized.

A mediator who enjoys the protection of the Act is required to have the relevant qualifications, special knowledge or experience in mediation through training or formal tertiary education or satisfy the requirements of a mediator as prescribed by an institution.[3]

A mediated settlement agreement must be authenticated by the attending mediator under the Act.[4] A settlement agreement is binding on the parties[5] and may be recorded before the court if court proceedings have been commenced.

III Statutory Protections and Enabling Features of the Act

The Malaysian Mediation Act 2012 provides several statutory protections and enabling features to mediation including:

1) *Confidentiality:* Mediation communication is statutorily recognized as confidential and it cannot be disclosed or used as evidence in any legal proceedings unless with the consent of the parties involved or if disclosure is required under the Act or under any written law for the purposes of implementation or enforcement of a settlement agreement.[6]

[2] Mediation Act 2012 section 3. The Act does not apply to mediations conducted by a judge or officer of the court pursuant to any civil action filed in court or the legal aid department.
[3] Mediation Act 2012 section 7.
[4] Mediation Act 2012 section 13(3).
[5] Mediation Act 2012 section 14 (1), 14(2).
[6] Mediation Act 2012 section 15(1), 15 (2).

2) *Privilege:* Mediation communication is statutorily recognized as privileged. Such communications cannot be subject to discovery or be admissible in evidence in any proceedings subject to exceptions including:

a) An express waiver of privilege in writing by the parties, the mediator and the non-party;

b) Any threat to inflict bodily injury or to commit a crime or to plan or attempt to commit a crime or to conceal a crime or criminal activity or an ongoing crime or criminal activity;

c) To prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or

d) To prove or disprove a claim or complaint of professional misconduct or malpractice against a party, non-party or representative of a party based on their conduct during any mediation session.[7]

3) *Impartiality and independence of mediators:* The Act requires mediators to act impartially and independently in the mediation process[8]

4) *Mediator's role:* The Act permits the mediator to assist the parties to reach a satisfactory resolution of the dispute and to suggest options for the settlement of the dispute[9]

5) *Immunity:* Mediators have immunity from civil liability for any act or omission done in good faith during the mediation process.[10]

6) *Agreement to mediate:* The commencement of a mediation must be signified by the parties entering into a mediation agreement which shall be in writing and signed by the parties. Key provisions in a mediation agreement include an express agreement of the parties to submit their dispute to mediation, the appointment of the mediator, issue of costs and other matters deemed appropriate by the parties.[11]

7) *Settlement agreement:* Any settlement agreement reached during the mediation process must be in writing and signed by the parties and is deemed binding on the parties.[12]

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7 Mediation Act 2012 section 16(1), 16(2). The exception to this provision, in theory, can be used in relation to even advisors whose conduct during the mediation session is unprofessional and/or deliberately disruptive to the mediation process.

8 Mediation Act 2012 Section 9 (3).

9 Mediation Act 2012 Section 9(2). This is strictly speaking not a pure facilitative mediation approach where mediators may pose a few options for consideration (if any). Mediators trained by the Malaysian International Mediation Centre are generally aware of this provision and are further trained to be mindful that parties must nevertheless have autonomy in the decision-making process and therefore option suggestion is to be exercised very carefully and only at the appropriate juncture.

10 Mediation Act 2012 section 19.

11 Mediation Act 2012 section 6(2).

12 Mediation Act 2012 section 13(2), 14.

8) *Mediation in context of legal action/arbitration:* Any person may initiate a mediation before considering any legal action or arbitration. However, a mediation commenced under the Act does not prevent the commencement of any legal action in court or in arbitration and does not act as a stay of proceedings.[13] Parties must be mindful of limitation issues in considering their preferred approach as there is no deemed suspension of the limitation period while parties endeavour to resolve their dispute through mediation. The general strategy would be to fix a period to mediate matters failing which legal action will be filed. Alternatively, legal actions are filed and then stayed for mediation to take place.
9) *Platform for communication:* The objectives of the protections provided in the Act are to encourage parties to engage in the mediation process as a first step by creating a safe and confidential environment where parties can in theory communicate freely and potentially negotiate a mutually acceptable agreement without fear that their statements or proposals may be used against them in subsequent court or arbitral proceedings.
10) Future revamps of the Mediation Act may contain provisions to convert mediated settlement agreements to court orders if carried out by registered mediators; and to implement the recognition and ratification of the Singapore Convention on Mediation.[14]

IV Mediation in Action in Malaysia

There are several hundred trained private mediators in Malaysia with different levels of experience and expertise.

Mediation in Capital Market Matters

Mediation for the capital markets industry in Malaysia is carried out by the Securities Industry Dispute Resolution Centre (SIDREC). The Securities Commission of Malaysia has established a mediation framework which sets out guidelines and procedures for mediation in capital market matters and disputes in Malaysia for financial institutions which are its members. The financial institutions that come under the purview of the Securities Commission are obliged to refer disputants to SIDREC which is an independent body established for the settlement of disputes

[13] Mediation Act 2012 section 4 (2).
[14] On the Singapore Convention and its benefits to Brazil see MASON, 2021. See also COMETTI; MOSCHEN, 2022.

between investors and such financial institutions, if they are unable to address a complainant's issues directly.

The mediation process for SIDREC typically involves the following steps:

1) *Request for mediation:* The parties involved in the dispute may request mediation by submitting a request in writing to SIDREC.
2) *Appointment of a mediator:* SIDREC will appoint a mediator from its panel of accredited mediators who has relevant experience both in mediation and capital market disputes.
3) *Agreement to mediate:* The parties will enter into a mediation agreement which outlines the scope of the dispute and emphasises the confidentiality of the process.
4) *Mediator as facilitator:* The mediator will conduct the mediation session with the parties involved, identifying the issues in dispute and facilitating communication between the parties with the aim of exploring possible solutions to the dispute.
5) *Monetary limit:* There is no monetary limit for claims to be brought to SIDREC.
6) *Mediation fee:* Mediation of dispute involving claims below RM250,000 (est. USD50,000) are available free of charge to investors however claims above RM250,000 are subject to fees to be paid to SIDREC.
7) *Legal representation:* Parties are not allowed to be represented by legal counsel for claims below RM250,000 but are allowed to be represented by legal counsel for claims above RM250,000.
8) *Settlement agreement:* Any settlement agreement reached by parties during the mediation process will be reduced to writing, signed and witnessed by the mediator.
9) *Mediation guidelines:* SIDREC's guidelines on mediation emphasize principles of confidentiality, impartiality and from the perspective of the investor – participation is voluntary. Financial institutions who are members of the Securities Commission are obliged to participate in any mediation brought about on account of a notice of mediation filed by an unhappy investor who meets SIDREC's eligibility criteria.

Mediation in Family matters

Mediation in Family[15] matters is common-place and takes place in both private and court settings.

[15] On mediation in family matters in Brazil see BRAGANÇA; NETTO, 2020.

Pre-divorce mediations and child inclusive mediations appear to be a growing trend as legal advisors and disputants recognize the value in early engagement as well as engaging children (who are old enough to weigh in on matters) to be part of the process.

Mediation in Construction Matters

The earliest mediators in Malaysia were trained in the context of mediation for the construction industry. The theory is that most construction related parties in Malaysia are open to an amicable attempt to resolve their disputes to allow the company to continue with its ongoing construction projects.

However, often unequal bargaining strengths lead to adjudication, litigation or arbitral proceedings being used as preferred weapons to thwart and demolish a financially weaker party.

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

In all circumstances, mediation can only take place with the consent of both parties, and a lot depends on their advisors as well. Often, an amicable settlement is not able to be achieved due to distrust having reached a tipping point or worse, financial imbalance between the parties puts one party on a clear course to financial failure which is taken advantage of by the commercially stronger party. Mediators with gravitas and creativity and who are also seen as independent and impartial can encourage parties to try to resolve the dispute and differences. The roles of the lawyers and legal representatives remain crucial as the parties will rely on wise counsel during mediation proceedings to structure solutions which are not only durable but commercially sensible in the long run.

Mediation in Commercial Matters

Transactional lawyers have been emerging as mediation advocates in commercial disputes as they appear to resonate with the ethos of solving problems quickly. This is diametrically opposite to traditional litigation lawyers whose reward structure appears to be tied to the long game where the litigator's continued rewards are tied to appeals and elaborate enforcement processes.

In an unreported resolution of a multi-million ringgit commercial and construction related dispute, a set of litigators who displayed "advisor hesitancy" in refusing to agree to a second mediation – eschewing its potential on account of one previous bad mediation session led by an arbitrator – were eventually side-lined by their client's transactional lawyer who stepped into the mediation arena and the assisted the client to reach a mediated settlement agreement within a much shorter period than it would have taken by arbitration or litigation.

Users in the future may benefit from the perspectives and skill sets of their transactional lawyers in commercial disputes particularly if litigators insist that litigation is the only way to solve a problem.

V Court-Annexed Mediation v. Private Mediations

Court mediation is carried out by registrars or judges. It is common knowledge that mediations carried out in the courts have the general nature of judicial settlement meetings as opposed to mediations where issues are identified, and parties underlying needs and interests are explored. The Malaysian Mediation Act does not apply to court mediators or mediation proceedings.[16]

At present, mediation is not a mandatory prelude to legal proceedings in Malaysia although it remains encouraged after matters have been filed in court. Several Practice Directions have been issued by the Courts to encourage court-annexed mediation but the response to court-annexed mediation has been arguably grudging as opposed to enthusiastic compliance.

Court-annexed mediation is available for free and more often than not, the registrars or judges exclude lawyers from being physically present when speaking to the parties. The exclusion of lawyers has been an unfortunate practice for many years and appears to imply that lawyers are obstructive to the cause of mediation as opposed to facilitative.

Behind closed doors and in the absence of the representing legal counsel, court registrars have been known to ask parties about their legal costs as a means to encourage the parties to resolve their matter and save on legal fees. This has created tension within the profession as mediation then is seen as a process that throws sand into the proverbial lawyer's "rice bowl".

Mediation in private settings tend to be resoundingly different as lawyers are not just welcomed but encouraged to participate in the mediation setting by professionally trained mediators. Mediation often takes a full day or half a day.

[16] Malaysian Mediation Act section 2 (b).

In professionally carried out mediations, counsel play an extremely vital role in preparing and guiding their clients prior to, during and after a mediation. Mediations in private settings are generally helmed by the partners in charge of the file who take on their role as mediation advocates in a meaningful manner.

The protocol for court annexed mediation in Malaysia also includes the possibility for courts to refer a case to private mediation. However, as there are private mediator costs to be borne by the parties, parties tend to elect free court mediation once they have filed their matter in court unless their counsel collectively agree that private mediation would be more appropriate for their case.

There is no sanction to obstructive conduct in thwarting mediation attempts (yet).

VI How Court or Legislation Mandated Mediations (If Any) Are Conducted in Malaysia

There is no court mandated or legislatively mandated mediation in general civil and commercial matters. Family matters and matters in the industrial court are routinely mediated as a natural (but not mandated) first step. In the Syariah Court which has jurisdiction over Muslim marriages and inheritance, a form of mediation called Sulh is practised.

In Malaysian civil courts, disputes are generally mediated by a judge who will not oversee the trial in the matter. In exceptional cases, parties can consent to the same judge, but this is not encouraged in the Rules of Court Mediation to prevent allegations of bias.

Generally, parties prefer a different judge to conduct their mediation as judges have been known to disclose their views about a matter as a means to encourage settlement consideration. As mentioned earlier, it is a source of tension that lawyers are often excluded from the mediation chamber as the registrar or judge wants to speak to parties in private. It remains a mystery what a registrar or judge needs to say to parties which cannot be confidently said in front of the party's lawyers.

This element of secrecy has created distrust and discomfort among some lawyers. Regrettably some registrars and/or judges (with their own security of income and pension plans) anecdotally point to reducing lawyer's fees as an incentive to resolve matters outside the earshot of the lawyers. The incidences of this which was more rampant about 10 years ago happens less so now but much of the damage has been done. In response, some lawyers who are genuinely supportive of mediation and who work hard to prepare parties for mediation, have

fee agreements that secure their income regardless of whether the matter is resolved by mediation or litigation.

The Rules for Court Assisted Mediation are found in the public domain.[17] In the absence of statutory provisions, these rules operate as guidelines for all judicial officers who act as mediators in court assisted mediation. The Rules do not act as a fetter upon the discretion of the mediator to help parties resolve disputes. However, mediators are urged to have regard to these rules so that the mediation process adheres to the principles of fairness and justice.

All judges and judicial officers involved in trial work are encouraged to mediate cases in an effort to save time and money for all parties involved. However, judges and judicial officers are strictly not permitted to mediate cases which are on their own trial list. This is to prevent judges from being unfairly accused of attempting to avoid hearing certain cases. Judges may only mediate cases which are on the trial list of other judges. Judges in stations where there is only one judge may make use of the video conferencing facility to exchange cases for mediation.

The Rules set out cases that are highly recommended for mediation. They suggest that Judges and judicial officers should automatically refer the following cases for mediation during case management hearings: (a) Personal injury cases (b) Family cases (c) Goods sold and delivered cases.

However, the referral to mediation can be revoked if the parties object to the mediation at the outset of the proceedings. It is recognized that other cases can be referred to mediation as well with the consent of the parties.

In court assisted mediation the role of a mediator is two-fold. In the first stage, the mediator is a neutral and impartial person who facilitates communication between parties so that they can resolve the dispute themselves. In the second stage, the judicial officer who acts as a mediator may often be called upon to suggest solutions or advice. Upon such request, the mediator should obtain consent of the other party before proceeding to give a neutral evaluation. The Rules stipulate that the additional duty of giving a neutral evaluation must be discharged with caution, tact and diplomacy so that the impartiality of mediator and the mediation process are not compromised.

The Rules also explain how judicial officers should conduct a mediation. Judicial officers are reminded that they should always bear in mind that the ends do not justify the means (paragraph 1.3 of the Rules). The rules include a reminder that a judicial officer who acts as a mediator should desist from taking cases where relatives or friends are involved, either directly or indirectly. Although a

[17] Available at: https://judiciary.kehakiman.gov.my/portals/media/others/Rules_for_Court_Assisted_Mediation.pdf.

mediator would not be making a decision, he may be open to the accusation that the mediation process was skewed in obtaining a favourable settlement for one side or the other if he has a personal interest in the case.

The Rules include provisions on confidentiality and note-takin The Rules in fact state that it is advisable to allow lawyers to be present during mediation proceedings as they may assist their clients to explore options to settle.[18] The reasons are: (a) In court assisted mediation, the dispute had already reached the litigation stage and the lawyers have already become stakeholders; (b) the presence of lawyers will give added credence to the voluntariness of the parties; and (c) the lawyers may also assist to draw up the consent judgment if the mediation is successful.

Unfortunately, there is also a provision in Rule 10.2 where the Rules state "where a lawyer appears to be part of the problem instead of the solution, the mediator in his discretion may limit the participation of the lawyer with the consent of the party". It is a common practice that lawyers are excluded suggesting in all those cases that the lawyer is perceived to be a "problem".

VII The Popularity of Mediation in Malaysia as a Dispute Resolution Process and the Obstacles to Parties Adopting Mediation as a Means to Resolve Their Disputes

Culturally, most disputants perceive that their dispute must be "fought" in court or through arbitration. This is the first hurdle advisors must overcome to secure the confidence of a client in mediation.

The perception of mediation is that it is a soft skill and does not take much effort. The perception of mediation having soft significance has changed over the last several years as high value mediations become known in the public domain and highly visible dispute disappear off the radar under the shroud of having been settled through mediation.

When China announced in 2015 that disputes involving Belt and Road projects would be mediated, a noticeable jump in professionals wanting mediation training was observed. This coupled with the Pound Conference Series in 2016/2017 and the Singapore Convention on Mediation has invariably raised the perception of mediation in Malaysia.

Not all clients are sophisticated or have the leadership measure to recognize that their investment into the dispute ahead of them may be better placed in

[18] Rule 10.

mediation where they may unlock cash more quickly, return to productive business swifter and/or salvage a profitable relationship.

One key obstacle to adopting mediation as a means to resolve their dispute remains the perception of lawyers that they cannot make a sustainable living by advocating mediation. Therefore, as a strategy, they file their suits or prepare the notices of arbitration to demonstrate their getting up and having done so, then position themselves for mediation. This has the advantage of having a next step ready if the mediation does not succeed.

Having said that, there is a growing segment of Malaysian lawyers and corporate organisations who recognize the wisdom of early effective resolutions and are able to draw clients who appreciate that skill and the rates of pre-action mediation have increased.

While, parties can opt for private mediation, the chances are that, if they were willing to pay for mediation, this may independently be organised by their counsel and potentially undertaken prior to the court process. After filing their matter in court and with the ostensible availability of free mediation by the registrars/judges, there is notably hesitation of parties when they have to pay for private mediation. However, in complex cases, there are parties who are agreeable to share costs, or one party bears the full costs of private mediation while court proceedings continue.

Apart from that, the common default mediator is the court mediator. Separate to the sense of displacement and diminished value that lawyers apparently feel in a court mediation setting, there is no clear value accorded to lawyers who prepare their clients for a mediation nor a recognized treatment for costs following a successful mediation.

The mistake lies in the narrative that the lawyers have done very little at the stage of mediation while ignoring that the lawyers may have done significant case preparation even before filing the suit.

The narrative encouraged by the local professional mediation institutions like the Malaysian International Mediation Centre (previously known as the Malaysian Mediation Centre) is for lawyers in a mediation to ensure clients recognize the significance of their getting up and preparation work. However, the challenge remains that many memories prevail where lawyers were apparently jostled for massive discounts by their clients in the early days of court mediation on the basis that all they “did” was show their client “where the court was located” (on account of being excluded from the main mediation process).

While International mediation exists in Malaysia, but statistics are not readily available as many are undertaken on an *ad hoc* basis and are largely unreported.

VIII The Extent of Development of the Mediation Ecosystem in Malaysia

A Local Mediation-Related Legislation

Malaysia is one of the earliest Asian nations to formulate a Mediation Act in 2012.

The early draft of the Mediation Act contained visionary components such as requiring mediation to precede any court action as well as the enforceability of mediated settlement agreements. Unfortunately, the other influencers to the drafting deleted those visionary provisions. At this point in time, it is hoped that the revamped Mediation Act is likely to feature those visionary provisions once again.

Other progress:[19] Despite Malaysia's arguably slow start in mainstreaming mediation, an impact was made when Malaysian mediators were part of a world first, through the Malaysian Government legislating that mediation would be used to assist parties who required assistance with Covid-19 related disputes and introduced a scheme to assist disputants in disputes related to the movement control order on account of Covid-19. One of the most notable aspects of the project was that the Malaysian Government paid experienced mediators to mediate the registered matters. The project crossed all parts of Malaysia including East Malaysia.

The disputes identified for assistance by the Covid-19 Mediation Centre include disputes between commercial landlords and tenants, tourism related disputes, pilgrimage package disputes, commercial contracts, construction related disputes and claims for professional services among others.

The ethos for this mediation programme came from professional thought leaders wanting to assist in the unlocking of cash at a time when all parties potentially faced crisis not caused by recalcitrance but by circumstances beyond their control. The project was the author's brainchild but could not have been done without the Malaysian Government's amazing vision and support as well as the Malaysian Bar Council who supported the programme.

Primary support also came from Datuk Kuthubul Zaman (the Chairperson of the Malaysian International Mediation Centre for over 20 years) whose vast knowledge of what worked and what did not in mediation was invaluable.

In a world-first, the Malaysian Government paid mediators respectably fees of between RM2000 (for 4 hours of mediation) up to RM8000 (for 2 days of mediation). [approximately USD500 – USD 2000] for each case. This helped to eschew the unfortunate perception that most mediators were in casual retirement

[19] Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020. section 9.

mode and were wealthy enough to work for free or conversely, mediators had nothing else meaningful to do or inherently have no or low value and therefore should be asked to volunteer their time for token fees. The competing comparison was that created by determined and professional arbitrators, adjudicators and judges, none of whom work for free or low or token fees.

Covid-19 Mediation Initiative was carried on for two years although it was initially slated for one year. In tandem with the Covid-19 Mediation Initiative, a Mediate First Policy was launched in the second year of the programme which drew 55 law firms which made a pledge to assist parties affected by Covid 19 to endeavour to mediate first.

B The Local Enforceability of Mediated Settlement Agreements and the Procedure for Enforcement

Currently mediated settlement agreements are enforced like any contract. Having said that, there are very few cases of mediated settlement agreement heading in the direction of court for enforcement.

The primary reason is that most mediated settlement agreements include a feature to return back to mediation if compliance encounters difficulties and most trained mediators are skilled at testing the proposed agreement for durability and practical compliance.

C Availability of Trained Local Mediators and Mediator Training Bodies

Mediators have been trained in Malaysia since the late 1990s.

The Malaysian International Mediation Centre is the leading mediation centre in Malaysia exclusively devoted to maintaining standards, training and mediation awareness building. It was set up in 1999 and comprise a panel of trained mediators who are required to be professionals and to ideally undertake refresher courses to remain on panel.

In the early days, the mediators were required to have at least 7 years post-qualification experience in order for the mediators to carry the appropriate gravitas in a mediation chamber. Over time mediators of all ages were trained.

A strong focus on Mediation Advocacy commenced in 2015 as there was a recognition that case creation required the recognition and respectful acknowledgement of lawyers who not only steer cases to mediation but prepare the parties and participate meaningfully in the mediation sessions. The somewhat low value proposition of mediation continues to impair mediation as most mediators

in Malaysia themselves did not steer their own court cases to mediation but like mediators around the world, tend to wait for appointments to be mediators.

Training & Accreditation

The Malaysian International Mediation Centre has trained over 600 mediators of whom approximate 250 mediators continue to apply to be empanelled. It encourages mediators to attend refresher courses to maintain standards of the mediators.

There are presently several hundred trained local mediators in Malaysia including IMI certified mediators and IMI qualified mediators. IMI qualification does not immediately qualify for registration as a mediator of the Malaysian International Mediation Centre and competency assessments are carried out prior to empanelment. Local trained mediators include mediators for municipality matters (DBKL mediators) and Shariah Courts.

Other notable organisations with Mediation focus on Malaysia is the Asian International Arbitration Centre (AIAC) which featured its first Mediation Rules in 2013 and then in 2018. The author was part of the project for the update of both sets of Mediation Rules including the AIAC Mediation Rules 2018 which features Med-Arb provisions.

One of the more successful mediation centres is the Securities Industry Dispute Resolution Centre (SIDREC) which was set up as an independent dispute resolution centre of the Securities Commission of Malaysia. Mediations are carried out by a mixture of in-house mediators and an external panel of specialist capital market mediators.

D Availability of Local Accreditation Bodies for Trained Mediators and How the Accreditation System Works

In Malaysia, the Malaysian International Mediation Centre accredits the trained mediators.

Trainers and assessors are similarly trained to train other mediators. Potential Mediators undergo an intensive 40-hour training course which culminates in a practical assessment.

Upon assessment – the assessors will assess whether a MMC trained mediator is capable of running a mediation without supervision.

All MMC mediators are encouraged to continue their training, participate as mediation advocates so that they can observe and learn from more experienced mediators and to volunteer as much as possible to be mediators in any matter that may come their way.

E Availability of Physical Infrastructure Conducive or Dedicated to the Conduct of Mediation

The Malaysian International Mediation Centre has excellent facilities for mediation as do most of the arbitral institutions. Such venues can accommodate large numbers of parties and host hybrid mediation as well.

Mediations also routinely take place in law firms and other neutral venues at the option of parties and their advisors.

The onset of Covid compelled mediators and parties to adapt and most mediators and parties became adept at online mediation.[20] Most online mediations take place on Zoom platforms or similar with mediators also being able to contact parties via WhatsApp calls or messages. The incredible dexterity that mediators have had to develop in light of upskilling to cater for online mediation has been staggering.

F Extent of Integration of Mediation with Other Local Dispute Resolution Institutions *i.e.* Courts/Arbitration Centres

In Malaysia, mediation remains very much a silo-ed practice although it is not uncommon to find references to multi-prong dispute resolution clauses which require parties to undergo mediation before considering arbitration which will be final and binding.

At the point of a dispute when the parties are the angriest and least co-operative, re-steering to mediation can sometimes be perceived as anti-climactic, so parties persist with arbitration proceedings.

Full integration between mediation and arbitration is discussed in theory but there are few anecdotes of true integration.

In Malaysian thought leadership, true integration of mediation and arbitration processes with a mediator and arbitrator sitting shoulder and shoulder together, earning the same fees and participating in accordance with their appropriate office has been discussed. However, this remains a theory as no institution has implemented a suitable structure for such an integrated process yet.

[20] For online dispute resolution see ELISAVETSKY; MARUN, 2020; FERREIRA *et al.*, 2022.

IX Foreseeable Developments in Mediation in the Near Future in Malaysia

The rebranding of Malaysian International Mediation Centre is a nod towards future developments in Malaysia.

Malaysia-China Mediation Initiatives exist and envisages that mediators for matters involving Chinese related projects can be housed in Malaysia.

Malaysia International Mediation Centre has entered into MOUs with various groups and continues to create awareness through their speaking and training programmes. The key challenge with any and all of these MOUs is that there is low or no outreach to users and a renewed focus on user engagement is on the pipeline.

Malaysia was part of the group of first signatories of the Singapore Convention on Mediation.

It was a delight to be in the room when the thunderous applause greeted the late Malaysian Minister VK Liew as he went up the stage to sign the Convention. He would later be instrumental to encouraging his department to set up the taskforce for the ratification of the Singapore Convention. This will take some time as the Malaysian Mediation Act also needs to be updated at the same time.

The first response to the publicity about the Singapore Convention was that all mediation training programmes filled up with waiting lists bursting at the seams. Corporate and transactional lawyers who are so pivotal to the early conversations about dispute resolution need to be made aware to continue to articulate mediation as a first or preferred dispute resolution approach in their agreements.

The main hurdles to Malaysia's use of the Convention remains the very practical aspect of whether advisors are sufficiently incentivised to use it. High moral paradigms do not work. Mediation work needs to be as sustainable as other problem -solving mechanisms. Mediators who themselves are unwilling mediation advocates are part of the problem. Mediation Advocacy may need to be reframed as speciality field instead of something of a tick box.

Tick box mediation advocacy should be frowned upon with cost sanctions. These are some of the reforms that may needed to elevate mediation in Malaysia as a sustainable practice area for lawyers and a beneficial mechanism for users and investors.

28 March 2023

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Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

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