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MEDIATION AS AN ALTERNATIVE SOLUTION OF RESOLVING CONFLICTS IN MALAYSIA: A WHITHER

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Abstract: *Basically, mediation is not counseling; neither is it an opportunity to get your "day in court". Rather, it is a process that provides a neutral environment for the parties to air their differences and reach a mutually agreeable resolution. Mediators are not judges too. Their role is only to manage the process through which parties resolve their conflict, not to decide how the conflict should be resolved. They do this by assuring the fairness of the mediation process, facilitating communication, and maintaining the balance of power between the parties. Recently, there are many efforts, as well as steps have been exerted in order to materialize the use of mediation as an alternative dispute resolution (ADR) rather than focusing to the judicial settlements solely. This scenario can be seen whereby many people are attempting to extend the application of mediation to resolve their disputing matters. Indeed, by virtue of the Arbitration Act, 1952 which substantially follows the UK Arbitration Act, 1950 that governs the laws and procedures relating to the application of arbitration and mediation in Malaysia, it clearly shows that mediation is justified to be among the solutions in order to resolve the disputes. Thus, this study is aimed at having a general overview of mediation as an alternative solution in resolving conflicts among the parties in Malaysia.*

Keywords: *mediation, amicable settlement, judicial settlement, justice*

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Introduction

Literally, the term mediation is originated from the verb of "mediate" which carries the meaning of 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. Besides, it also means to succeed in finding a solution to a disagreement between people or groups. Thus, a mediator can be regarded as a person or an organization that tries to get agreement between people or groups who disagree with each other. In the similar vein, in which the parties to a dispute engage the

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assistance of a neutral third party, namely a mediator who acts as a facilitator during the process of negotiation takes place. This appointed mediator will ensure that the parties are guided during the process of settlement is going with a view to resolve their disputes amicably. From the aspect of authoritative manner, mediation also denoted the idea of "assisted negotiation" which could be understood as "communications for agreement". Here, mediation could simply be upheld as "assisted communications for agreement".

Technically, by virtue of the preamble of the 2005 version to the Model Standard of Conduct for Mediators, mediation refers to a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute. On the other hand, in the eyes of legal jargon, mediation reflects a process which is molded in several stages; inter alia the mediator will identify the relevant issues, later develop any options and finally consider alternatives and endeavors to resolve such disputes.

Nature and Scope

In fact, mediation is a voluntary and confidential conference where the participants are encouraged to cooperate in good faith to resolve the dispute between them. In fact, a mediator assists the parties to discuss their dispute openly and put aside their strict legal rights for a moment and to focus on their relationship, their needs and their objectives. In this way, parties are encouraged to find common ground and from there, they will negotiate and eventually achieve a solution. Thus, it can be upheld that mediation is an informal proves where an impartial third party helps disputing parties to find mutually satisfactory solutions to their differences. Mediation can resolve disputes quickly and satisfactorily, without the expense and delay of formal investigation and lengthy period spent for litigation.

All negotiations and discussions during mediation are non-binding and confidential. The parties and the mediator are not allowed to reveal anything that transpires during the mediation without the permission of all the participants. This makes the mediation more effective because parties feel a sense of comfort and assurance that they can speak freely and openly with the mediator. Hence, the confidentiality of the process is an important ingredient in mediation.

Many disputants have a prior history of an amicable relationship. These relationships are often lost after the hostility of litigation arbitration. Indeed, mediation preserves these relationships rather than destroys them. The reason is, mediation is a product of amicable settlement which provides 'a room' for both parties in order to resolve their disagreement through peaceful and proper manner mutually.

Furthermore, it also can be emphasized that mediation is more 'user-friendly' than litigation or arbitration. In fact, privacy and confidentiality of both parties are totally secured by the mediator during the process takes place till the end. Moreover, play important role during the process.

As a matter of fact, mediation is cheaper as compared to other conventional form of dispute resolutions like arbitration and litigation and is certainly much faster. The concept of win-win situation is crystallized apparently whereby neither party wins in mediation while at the meantime, neither of the parties loses. Subsequently, there is no judgment and no award and certainly no appeal. Indeed, mediation provides a result to which both parties agree and so there is finality, relief and closure.

More amazingly, one of the best things about mediation is that, the parties can reach to an agreement that the parties are not necessarily follow the remedies which are available at the court. In this context, parties are free to create their own solutions in terms of including apologies and the promise of future work and business. It can even involve rewriting the contract upon which the dispute is based. All these are remedies which are impossible for the court to grant upon the parties.

It is undeniably true also that mediation has a proven success rate. It is informal and, if successful, it actually provides a cheaper and speedier means of settling disputes. Thus, having an amicable settlement through mediation basically could save time, cost and privacy of both parties entirely. According to the statistics, it shows that more than ninety percent of cases are settled before they reach court. Hence, it reflects that this kind of mode can enable settlement to occur even earlier. In this situation, such early settlement would reduce the stress inevitably involved in court proceedings particularly where a party may have to give evidence. Besides, it also could reduce any legal and other costs such as those involved if parties have to take time off work or from business.

On the other hand, another advantage of having mediation is; it could strengthen the relationship among the members of society. In this situation, once such disputes have been settled mutually by the parties, it would indirectly enhance the spirit of working together cooperatively between the parties due to the fact that they have reached at the satisfied solution altogether. Furthermore, through an amicable settlement aforesaid, it would indirectly inculcate the sense of mutual respect to be mushroomed constructively in terms of trust, confidence among them throughout the process.

Moreover, pertaining to the issues of voluntary involvement, everything comes from the parties themselves. It means that the parties may agree or not to mediate among themselves or offered by the judge. Thus, the function of a mediator is to facilitate the disputing parties throughout the process till the end. Consequently, the decision maker is not actually the mediator but lies in the hand of the parties respectively. The parties should not feel pressured to be or stay intact.

By resorting mediation, the relationship between parties could be strengthened in surviving their dispute due to the fact that it allows them to formulate their own mutually acceptable solutions. In this context, if the parties do not settle their dispute, they do clarify and narrow the issues at the mediation thereby reducing the time and expense of the hearing. Furthermore, at the very least, parties who have been through a mediation will have had an opportunity to discuss and clarify the disputed issues without being ‘forced’ to undergo formal procedure which eventually would lead to the failure of settling such disputes.

General Application for Mediation

Basically, mediation can be applied as a part and parcel of the juvenile system. Besides, in the cases of non-violent offenders, social workers can help to counsel and rehabilitate offenders by investigating the root causes of the crime. It can be observed clearly the fact that most of the young offenders often turn to commit crimes because of problems in the family. In this case, victim of the offence are often satisfied with restitution and an awareness that the troubled child is dealt with so that further crimes are prevented.

On the other hand, it also can be upheld that mediation can function as a tool in settling matrimonial cases, namely be part of family counselling for people who are getting divorced or even in the process of separation. In fact, mediation is a way for families who are splitting apart to reconcile or at least to learn to deal with the changes in roles, duties and responsibilities without engaging in hostilities that could permanently destroy relationships and scar both the adults and the children involved.

Application of Mediation in Malaysia: An Overview

Generally, mediation is not perhaps as widely used in Malaysia as it should be due to several reasons. Indeed, it can be observed that when Malaysian legal practitioners are advising their clients, they tend to resolve such matters through arbitration due to the fact that they incline to give priority to undergo formal court proceedings rather than choosing mediation as an option which immediately comes to mind. Perhaps, this scenario rampantly occurs due to the fact that legal practitioners in Malaysia have not warned to the idea of mediation although there is available an important role for them to play within the legal framework.

A. The Malaysian Standard Form Building Contract

Since 1969, the Malaysian building construction industry has had available for use a standard form contract devised with the assistance of the Malaysian Institute of Architects known locally as Persatuan Arkitek Malaysia (PAM) and the Institute of Surveyors of Malaysia (ISM). The PAM / ISM 1969 standard form contract provides for arbitration as the means of resolution of any disputes thereunder.

However, in 1998, standard form of was revised (PAM 1998 Form) and it also currently provides for mediation by reference to the PAM Mediation Rules should the disputing parties agree to use the process. The inclusion of Mediation was in recognition of the growing popularity of ADR, especially in the construction industry where court or arbitration proceeding can be long and complicated involving voluminous documentation and technical jargon.

The PAM 1998 Form does not exclude arbitration of the dispute nor does it oblige the parties to refer the dispute to mediation as a condition precedent to arbitration. It also expressly provides for the avoidance of doubt that the parties' right to refer the disputes to arbitration is not in any way prejudiced by a reference to mediation. As with most other mediation rules however, the PAM Mediation Rules do provide that the parties may not commence any judicial or arbitral proceedings during the course of the mediation unless necessary to preserve the party's rights.

It is envisaged that the revision in the PAM 1998 Form to include an option to mediate will be warmly received by the industry especially in Malaysia which has seen substantial growth in construct and disputes in relation thereto.

B. Insurance Mediation Bureau (IMB)

This institution was established in 1991 by more than 50 local and foreign insurance companies which are conducting their business in Malaysia.

Interestingly, this bureau is recognized to be the earliest example of effort taken by the private sectors, particularly by the insurance companies towards applying mediation settlement although this process under IMB cannot be termed as such accordingly. This institution is aimed at representing unprecedented support for the scheme albeit in circumstances where the Malaysian Central Bank has directed all insurance companies to adhere to Guidelines issued in 1995 which requires that all claimants to be informed of their rights to refer matters to mediation.

The structure of the IMB and how mediation is conducted under its favorable does not however adhere to the general principles of mediation. Firstly, it is not the parties who appoint the Mediator but the Council of the bureau. In addition, the Council also defines the Mediator's powers and duties and his terms of reference. The Mediator is required to adjudicate on the dispute before him although in doing so the Mediator is allowed to act independently without any interference from the Council.

Any decision by the mediator is binding upon the member insurance company in respect of awards not exceeding RM 100,000 but only constitutes a recommendation for awards above the RM 100,000 limit. In arriving at his decision, the mediator is required to conform to the rule of law and applicable judicial authority and market practice.

In fact, the structure and practice of the IMB cannot thus be termed as mediation in its true sense. However, the IMB has been successful in promoting the use of its alternative dispute resolution scheme and proving that it can be independent, cost effective, informal and just in addressing complaints by the public.

C. Kuala Lumpur Regional Centre for Arbitration (KLRCA)

In order to attract greater number of foreign investors, the Malaysian Government has established the Regional Centre for Arbitration at Kuala Lumpur in 1978. In fact, this centre was established due to the support by the African-Asian Legal Consultative (AALCC), by the Malaysian Government which provides assistance and full cooperation towards its development. Consequently, this institution mainly becomes such an independent body under the patronage of AALCC.

Basically, the application of mediation has been consistently supported by this institution as an alternative to arbitration. Thus, various steps have been taken by this institution in order to promote the emphasis in using mediation as a mode of amicable settlement rather than giving a priority to other alternative dispute settlements. This can be seen through organizing countless seminars and public talks relating to the concept of mediation, as well as due to its application.

D. Medical Negligence

In recent years, there have been recent calls in Malaysia to look to alternative dispute resolution procedures in medical negligence claims which have been on the rise rampantly. It can be observed that some of the problems faced in the medical negligence claims in Malaysia are slightly different from the medical cases of other countries in terms of the delay, as well due to the relatively high

legal costs to the amount of damages awarded. In fact, the court tends to waive any small claims brought before by the parties. On the other hand, other factors like delay and costs suffered by the parties for such hearing would also add pressure to the claims to be settled.

As compared to some jurisdictions around the world, for example United States of America (USA), the quantum of damages being awarded to the victims is prevalently high. Thus, the claimants would prefer to bring their case to be before the court in order to seek the sympathy of the jury, not by the judge himself. Conversely, by looking to the Malaysian position, it is the judge who will decide the case after hearing to the submission of the case before him. Thus, the possibility to get faster and higher quantum of damages in Malaysian courts is quite 'impractical'.

Indeed, it is a need for the aggrieved parties to explore other alternative resolutions rather than depending solely to the litigation process of the court proceedings. Thus, there is a strong incentive for the claimants to seek for faster, cheaper dispute resolution processes, and even bigger sum of damages to be awarded. On the other hand, the aspect of confidentiality also could be secured to those in the medical profession against whom a claim is made to safeguard their reputation, especially when unsubstantiated claims are initiated.

Nowadays, efforts have been taken and given full support in using ADR in countering medical claims by many countries globally, inter alia, United States, United Kingdom and New Zealand. Interestingly, the Medical Defence Union has approved the use of mediation to settle the claims brought forward.

E. Matrimonial Disputes

Being as the earliest means of dispute resolution, mediation is regarded to be the most suitable means to resolve disputes relating to the family affairs. This has been proved whereby most of the countries nowadays have implemented this practice in countering matrimonial matters, inter alia Japan which has promoted mediation as mandatory before filing suit in most family disputes. In this situation, the spouses must participate themselves in the mediation process before the divorce takes place. Here, the policy of the government stated that family disputes could only be conducted by the Japanese government to practice law. Thus, any efforts to go through private legal mediation services are limited due to the fact that most of the mediation services are operated by the government respectively. Thus, by looking at the scenario in Japan, it can be observed that they have given such a great emphasis towards the application of mediation to resolve family disputes, particularly pertaining to divorce cases whereby it has been reported that mediation has successfully settled the cases almost above ninety percent.

Similarly, by observing thoroughly to the China legal framework pertaining to matrimonial cases, the Marriage Law 1950 provides that it is mandatory for the couple to undergo mediation process held by the government. This only happens when one of the couples is filing for a divorce. In the similar vein, mediation is required to be attended when both of the couple has consensually agreed to get divorce but having disagreement in terms of the property's distribution. Later,

when the Marriage Law was reformed and newly legislated, the petition to divorce could still be granted to the claimants even though the process of mediation fails. Alas, even though the concept of mediation is applied for the purpose of "awarding" divorce upon the claimant, the contemporary situation recently shows that the government is now committed towards strengthening the family institution throughout mediation process. As a whole, it can be justified that the idea of having mediation process is no longer as integral part of having divorce but rather symbolizes as a "shield" towards settling the family disputes amicably.

In fact, the mediators are appointed among those are trained and accredited lawyers, who have been given training to be mediators, as well as professionals from other fields. Interestingly, the parties may withdraw themselves from the mediation process at any time of the stages if they feel that they are satisfied. Nevertheless, any decision reached at the end of the mediation process is binding based on the settlement agreement signed by them.

By referring to the application of *sulh* at the Syariah Court in Malaysia, for example, Section 87 of the Selangor Syariah Civil Procedure that both parties who seek for divorce are encourage to undergo sulh process to resolve their disagreements. This effort has been moved to operate in 2002. A Mediation Work Manual was introduced which provides guidelines and standard for the mediators regarding to the procedures to complied with by the sulh officers (mediators) in conducting the sulh process. As regards to the provisions under sections 23, 45 and 47 of the Islamic Family Law (State of Selangor) Enactment 2003, any cases which are brought under this section would be settled in short time period whereby the parties are present before the court to file their claims. Mediation process will start once both of them have agreed to do so. Consequently, the mediator would submit the agreement, if reached, to the judge to be issued an order of it.

Besides, within the ambit of matrimonial disputes under Law Reform (Marriage and Divorce) Act 1976, Section 55 (1) provides that prior to the divorce, the claimant must seek assistance and advice from another person or bodies which offers reconciliation. In the case of C v A (1998) CLJ 38, it was held that any attempts taken by the relatives to reconcile the parties would also be regarded as reconciliation which is aimed at settling the disputes between the couple.

Further, such Act also empowers the courts to adjourn the proceedings at any stage for divorce by virtue of Section 55 (2) for the purpose of enabling any attempt for reconciliation to resolve such matter.

More importantly, by referring to Section 106, the law says that this provision specifically refers to a "conciliatory body" which is against with the spirit of Section 55 which merely refers to the availabilities of persons or bodies to provide reconciliation. Indeed, this section basically prescribed that the person who petitions for divorce is required to refer the disputes to a conciliatory body except in the cases which involved the grounds of conversion (Section 51) and dissolution by mutual consent (Section 52).

Further, this relevant section also stipulated six exceptions which need not to comply with the requirement to undergo for mediation process; among others in the cases of desertion and whereabouts of spouses is unknown and when the respondent is residing abroad and unlikely to enter the jurisdiction within the next six months after the date of petition. Next, mediation is also not need to be complied with if the respondent has been imprisoned for a term of at least 5 years, as well as if the respondent is required to appear before a conciliatory body but wilfully refused to do so. Similarly, this kind of exception also applies to the cases whereby the petitioner alleges that the respondent is suffering from incurable mental disease like lunatic or permanent mental disorder. Finally, this section also has considered that exception should be given in certain exceptional circumstances.

Concluding Remarks

It is undeniably true that mediation is useful tool to be applied in the civil court system where parties to law suits are aided in settlement negotiations aimed at helping them discover their own best interest. Mediation can be used as a mechanism or even as a conflict avoidance, namely for of human resources management that aims to resolve conflict and improve communication within an organization and between the different members of the organization. In fact, mediation is undoubtedly offers a solution to the hardships faced by the aggrieved parties of litigation. In fact, it also creates mutual understanding between the parties in a peaceful manner. In addition, through mediation, it may restore good and friendly relationship uniting at the win-win situation excellently.

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