ALTERNATIVE DISPUTE RESOLUTION FORUM

"The Advent of Alternative Dispute Resolution in Malaysia"

Wednesday 14th February 2001

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

Introducing
a paper on

"WHAT IS ADR

AND

WHAT HAS IT GOT TO DO WITH LAWYERS ?"

PAPER
&
PRESENTATION

by
Sharifah Mariam Syed Ibrahim
LL.B, Dip.CDR, FNADR US, FNADR Int

Managing Director

Nationwide Academy for Dispute Resolution
(Malaysia) Sdn Bhd

FORUM : THE ADVENT OF ADR IN MALAYSIA

Sharifah Mariam Syed Ibrahim

The paper "What is ADR and what has it got to do with lawyers ?" provides a little light reading on the growing impact and significance of ADR for lawyers, both here in Malaysia and globally. For the moment however, I wish to concentrate on a number of very important aspects concerning ADR which will go a long way to determining whether or not it will have any significant impact on commercial dispute resolution in Malaysia.

ADR has become one of the principal catchphrases of the 1990'ies. Everyone, particularly erstwhile lawyers such as yourselves, has heard of ADR but how many people know what is stands for ? Of course you all know that it is an anachronism for Alternative Dispute Resolution ! But, what is it an alternative to, and what is meant by dispute ? Furthermore, who cares ? Clearly, since you have all taken the time and trouble to assemble here today, you care, but is that enough ? Unless the potential users of ADR learn to value what it has to offer them and unless lawyers and the like chose to ensure that it is readily available then all the good wishes and intentions of earnest academics will be to no avail.

What does the "alternative" in ADR stand for ?

There are two exceedingly partisan and self serving schools of thought on this issue. It is either an alternative to third party adjudicatory processes, or an alternative to the court system. The first definition confines ADR to conciliation and mediation, the second extends its scope to include expert determination and valuation, private courts, arbitration and adjudication. Does it really matter which definition is applied to ADR ? After all the individual processes are a reality so who cares what bracket they are placed under ? In fact the distinctions are vital for a number of reasons.

First, if ADR is limited to conciliation and mediation, it deprives ADR training establishments of legitimacy if they seek to provide training in arbitration and adjudication. Any establishment that only provides mediation training can purport to provide comprehensive ADR training and accreditation. As ADR training enters the mainstream of education provision in Universities and Institutes around the world operating under such narrow parameters would have adverse implications for the enhancement and development of arbitration training and for the quality of future practitioners. Training would be left in the hands of the arbitration institutions, some (but unfortunately not all) of whom admittedly do sterling work. However, the primary focus is on basic proficiency. There is little vision or academic research conducted by the institutions. It is the Universities that will provide this assuming that they choose to embrace arbitration as part of their training remit. The academics are the wordsmith who care about analysis and original thought. The busy practitioner will pass on useful insights into daily practice in the journals but little more until enjoying the luxury of retirement. Secondly, ADR is conveniently limited to mediation to justify a certain mediation

methodology which concentrates on the interests, and in particular on the perceived benefit of settling the dispute at all costs, rather than on seeking to conclude a "just" settlement. This fits in well with the notion that justice is served through third party settlement. Hence, there is no need for mediation to produce justice. The parties chose to mediate and they are free to settle the dispute on any terms that they think fit. Legal skill and an understanding of the legal rights of the respective parties plays little or no part at all in such mediations. The effective mediator therefore is someone with a silken tongue who can persuade the parties to settle. No doubt various threats of the dire consequences of not settling in terms of high court costs and disruption to relationships will be made, coupled with insinuations of anti social behavior. The disputants will be advised that what is on offer is the best that they can expect. Assuming a settlement can be reached it is the most resilient and hard nosed of the two, who will emerge with the best deal at the expense of the other party. But none of this will matter since they are both "winners" simply because the dispute has been brought to an end. Many such settlements have subsequently been bitterly resented in the cold light of day. Any initial relief that the whole things is at last over is often short lived. However, because legal rights and interests are rarely, if ever, raised during the mediation there can be little or no question about professional legal misconduct. This has led to mediation being branded in some quarters as being unprofessional and unprincipled and not worthy of consideration for the settlement of significant disputes. It is fine for social and domestic tiffs but nothing more.

The concept of the natural born silken tongued mediator also has implications for the training of mediators. The assumption is that only experience and an innate aptitude to the calling count. The tactics and strategies of good mediation practice which Universities and Institutions can help to foster and develop are afforded scant recognition. In particular, it is not possible to develop any meaningful concept of jurisprudential thought or ethics in respect of this type of mediation process. Such mediators do not fear allegations of "Duress and Undue Influence" because the absence of recorded transcripts prevents subsequent review by the courts. Equally, there is nothing concrete for the academic to submit to empirical review. Whilst there is a plethora of quantitative material on the success rates of mediation there is little or no qualitative data available and empirical research is hampered by the private nature of the process.

Whilst the above has provided some lawyers with justification for scorning mediation other lawyers have embraced this form of mediation in order to keep the competition out. Since mediation has established a foothold in the dispute resolution market such lawyers have sought to broaden their practice to include client representation at mediation. By so doing they keep their clients who are not tempted to go elsewhere. Whether the mediation is successful or not is not important. If a bad deal is offered the lawyer recommends rejection insisting on very high returns. If the demands are met the client will be well pleased. If the demands are rejected the lawyer can then take the case to court.
Furthermore, since no rights or legal interests have been discussed at the mediation it has no adverse impact on the subsequent litigation work-load or on billable hours. If anything

the mediation has added another layer of work that can be filled. Unfortunately it does not take long before clients start to view mediation as increasing rather than decreasing legal costs, leading to client dissatisfaction with the process. If this happens the lawyers have won a valuable victory over the new competition and put it firmly in its place, all the while purporting to support and embrace it as a valuable addition to the dispute resolution process and client care.

The alternative to "Interests" based mediation is "Rights" based mediation. The distinction between the two lies in the fact that in the latter, the mediator concentrates on providing the parties with a risk analysis, thereby inviting the parties to settle at a point as near as possible to that which they could reasonable expect to arrive at by means of third party adjudication (ie at arbitration or in court) taking into account the risks attendant on litigation. Interests are not ignored and can be taken into account as part of the valuation of the projected outcome. Indeed wider interests often provide added value to boost potential litigation gains and losses. However, the mere fact of settlement alone is not deemed to be the sole objective or to have such an overriding value that it could possible justify a poor settlement.

Even where a rights based mediation fails to settle the whole of a dispute it is often possible for the parties to agree on a number of side issues and to commit them to writing. Any subsequent litigation is simplified and streamlined reducing the cost and time of the trial. Whilst the proceeds of the mediation cannot be used later in court, the work that a lawyer representing a client carries out in preparation for the failed mediation is not lost and can be recycled for use in the trial, so the failed rights based mediation will not have significantly increase the costs of the dispute resolution process. It is not possible to bolt on a follow on arbitration process or adjudication process to "Interests" based mediation since the mediator will not have explored the legal rights and duties of the parties. However, much time and expense can be saved by using the hybrid mediation/arbitration process following on from a rights based mediation.

In order to conduct a rights based mediation thorough training is required. The rights based mediator is a true professional, governed by identifiable and quantifiable ethical standards and codes of practice. This is a true professional vocation for trained lawyers which is worth aspiring to. Many rights based mediation service providers routinely conduct empirical research into outcomes. Parties complete questionnaires indicating satisfaction/dissatisfaction with the process and whether the settlement reached was within the range of what they considered acceptable. If both parties settle within their range the settlement is deemed to be a "Win-Win" outcome. Lawyers who embrace this form of mediation will enhance their practices, providing clients with a valuable additional dispute resolution resource. Ultimately this can lead to an enriched legal practice with a greatly expanded client base. In the US 50 % of the work load of many legal practices in the Southern States is now made up of mediation work.

What does the word "dispute" in alternative dispute resolution embrace ?

The answer is so obvious that it is hardly worth asking the question. Everyone knows what a dispute is. A dispute is an argument over something that two people cannot agree on. It is a disagreement. Whilst this is true, the dispute in ADR must in addition be a disagreement about some legal right or interest. Why so ? Because, if no legal right or interest is at stake, there is no need or requirement for a settlement or resolution.

The significance of this lies in that mediation is regarded in some quarters merely as a social tool for the settlement of tiffs and neighborhood quarrels. By excluding such disputes from the ambit of ADR and correctly placing them within the field of social counseling the true nature and significance of ADR is maintained.

A failure to understand this lead to a very embarrassing set back for the Lord Chancellor's Office in the UK. The government introduced a scheme for compulsory mediation for applicants for divorce. The government hoped that the mediation process would help to save many rocky marriages. The scheme failed. There was an acute shortage of trained mediators. The majority of couples attended the mediations but refused to cooperate. The attended only because the mediation was a prerequisite to a divorce hearing. It added a great deal to the cost of divorce and achieved virtually nothing. In reality it was compulsory marriage counseling. It was not mediation. The scheme was revised to deal only with the division of property and is now working after a fashion as a form of mediation but is likely to be abandoned altogether according to recent press reports. If this happens it will be a great pity since mediation has a lot to offer. Unfortunately, the mediation process in the UK may have been mortally damaged by the first disastrous scheme because the legislators simply did not appreciate the difference between counseling and mediation.

Will ADR be a success story in Malaysia or is it a passing fad ?

ADR has been clearly shown to work. In the US mediation plays a significant role in dispute resolution service provision. In the UK adjudication has transformed construction dispute settlement. Fast track paper only arbitration is gaining market share through internet service providers. The fact that ADR works however is not enough to ensure its future in Malaysia. For this to happen two important things must occur.

Firstly, unless Malaysia trains practitioners in the skills and arts of ADR there will be no one to provide the service. If ADR practice is left to unskilled amateurs client confidence in ADR will not materialize. ADR practice must be recognized as a profession, particularly by lawyers and needs to be embraced by practitioners as a valuable addition to craft. Whilst ADR should not be the sole preserve of lawyers, since expert knowledge of other trades provides ADR practitioners with a dimension lacking in the judiciary, nonetheless many of the ADR practitioners of the future will inevitably be drawn from the legal profession.

Secondly, lawyers will have to recognize and acknowledge the value of ADR services for

their clients. If lawyers cynically use ADR merely to prevent its growth and to protect their own legal practices, or propel clients towards litigation even where an ADR service would make eminently good sense for the client, then the growth and spread of ADR will be severely restricted.

Finally, even if Malaysia manages to develop a highly professional, efficient ADR Service base, still ADR will fail unless the potential users of ADR services are made aware of the availability of and advantages of them. The experience of arbitration makes this clear. Even after 400 years of development and refinement arbitration's share of the dispute resolution market is minimal. Why is this ? The courts are the first port of call for most disputants because they know about them. The courts are visible social landmarks. The newspapers carry reports of judicial proceedings. Arbitration takes place behind anonymous closed doors. The process remains private and is never published in the papers. Since privacy is central to the use of ADR this cannot change.

However, awareness of ADR is rarely taught in schools and universities. Today is an exception, but who is the targeted audience ? Is it the potential users of the services ? To solve this problem all business faculties and specialist schools teaching international trade, import export practice, construction practice and the like should include courses on dispute settlement with a particular emphasis on ADR. To reach out to today's managers there is a need for public lectures and seminars on ADR to be delivered to the business community.

Whether ADR establishes itself in Malaysia or not only time will tell. However, if it is to do so, we must all play a part. ADR truly embraces mediation, arbitration, adjudication, expert determination, dispute review systems and dispute review boards. The success of each model of ADR will reinforce the whole. Practitioners should seek to gain skill and expertise in the whole range of ADR services and to promote each and everyone of them with equal enthusiasm and vigor. Unfortunately up to date there has been a tendency for separate camps of lawyers, arbitrators and mediators to develop each of whom promotes their own special expertise. However, there is no single perfect method of dispute resolution. There is an optimum method of dispute resolution for each dispute and clients should be advised of the best system to deal with their dispute, not the system which their advisor prefers or is expert in. Therein lies self service rather than client care. The way forward is for the integration of ADR service provision. There may indeed be several integrated ADR service providers in the same market. Competition is healthy and will increase client awareness of the product, thereby increasing market share. A small part of a large cake is better than the whole of a small cake. I therefore urge everyone involved in specific areas of ADR practice to cooperate with colleagues in other areas of practice. Together, we can all ensure that ADR will one day proudly occupy a significant place in the hierarchy of dispute resolution services provision in Malaysia.