

ALTERNATIVE DISPUTE RESOLUTION SEMINAR

“Alternative Dispute Resolution in Practice”

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INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

“RESPONSE TO QUESTIONS FROM DELEGATES OF THE ADVENT OF ADR IN MALAYSIA OPEN FORUM”

- 1 Since the ADR process is mainly confidential (except in arbitration), it is very (difficult) to practice without any precedents. How can this "lacuna" be covered in order to achieve the purpose of ADR properly ?
- 2 In comparing Mediation/Conciliation with Arbitration, the latter has been taken up and made far and fast progress in Asia-Pacific area whereas mediation has not. One of the reasons is that there is no institution such as yours who is promoting mediation as an effective alternative to litigation. What do you propose according to your experience to resolve this problem?
- 3 For ADR students, it is clear that mediation is actually an effective process for the settlement of civil disputes. However, in the mind of the general public it is of no effect because it is not binding on the parties at the end of the day, influenced by the majority of the lawyers who are not favoring mediation due to the costs reason (not costly and hence not beneficial). Again, how can we reverse this miss-understanding and miss-undertaking ?

RESPONSES

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- 1 Since the ADR process is mainly confidential (except in arbitration), it is very (difficult) to practice without any precedents. How can this "lacuna" be covered in order to achieve the purpose of ADR properly ?

There are a number of problems with the assertion that there is a direct correlation between confidentiality and the role of precedent in ADR. Legal rights have a role to play in many forms of ADR. Where legal rights are not involved precedent is not relevant. There is no lacuna to fill.

- A) Arbitration is private and confidential. Any assertion to the contrary is ill-conceived. The private nature of arbitration is a significant reason why it is used. The proceedings only enter the public domain by default, in the event of an appeal to the courts.
- B) Both arbitration and rights based mediation draw on the law, including statutory rights and common law precedent rights, in order to reach a decision in the case of arbitration and in order to reach a negotiated settlement in mediation. Thus there is in fact no lacuna to fill.

The main difference between arbitration and the courts in this respect is that the arbitration produces no binding precedent – and since it is private no one would know in any case. After all the hall mark of precedent is that it must be known and followed which is impossible if the arbitration is not reported. Arbitration does not produce a body of law and accordingly is not governed by it. Arbitration is governed by the ordinary law of the land and common law precedent so the fact that there is no arbitration precedent has no impact on the decision making process. Admittedly the lack of precedent makes it difficult for students to study how arbitration operates without attending arbitral hearings as pupils by special invitation approved by the parties but that is an entirely different matter.

Clearly a negotiated settlement produces no legal precedent. Even if it did, it would be of no use if it is not reported and put in the public domain. However, mediated settlements can make a precedent of sorts to the extent that where like minded people find out that an organisation has settled a claim under a negotiation it can give them the encouragement to enter into a dispute with the same organisation in the knowledge that the organisation is prepared to make offers to settle disputes. Thus where it is common knowledge that an organisation is in dispute with someone the fact that the dispute has been settled and even the settlement figure is often published in newspapers. Common knowledge can occur where a court action has been commenced and a mediated out of court settlement is subsequently brokered. The issue of the original writ may well have featured in the press. Of course this is not a binding legal precedent, but note the similar effect that this has. This is why parties seek to keep all information about disputes and negotiations out of the public domain particularly where class actions are likely.

- C) Conciliation and interests only based mediation are generally conducted without regard to legal rights, so the negotiated settlement is based on the personal interests of the parties. There is no lacuna here because rights are not considered. Whether or not this achieves the proper purposes of ADR is a different question. It depends on what one considers to be the proper purpose of ADR. If the conclusion is that "all that matters is that the dispute achieves closure" then interests based mediation works and fulfils its proper purpose. NADR would not agree with this in respect of Commercial Mediation but there are disputes where it is a valid approach. For the purpose of clarity and distinction NADR would term this approach as conciliation not mediation but unfortunately many other organisations insist on calling such processes mediation. Remember that neither conciliation nor mediation are terms of art. There are no statutory or definitive definitions or classification of these terms. Different people use them in different ways.
- D) Conciliation involves interest based negotiated settlement and often the conciliator uses his power and prestige to gain a settlement. There is a valid role for conciliation where no rights are involved in the first place.

Consider the following

- i) Public International Disputes, which are often called mediations but which NADR would regard as third party assisted negotiations or conciliation sessions – such as the Gaza Strip – West Bank – Palestinian question – the Camp David Mediations and the Egyptian mediations conducted by Henry Kissinger, Presidents Carter and Clinton : The Bosnia-Hertzogovinia / Serbia Clinton Mediation : the Northern Ireland Question and the Senator Mitchell Mediation : or Anti-Nuclear Proliferation negotiations between the US and North Korea : Union / employer negotiations typified by ACAS conciliation processes.

In all of these there is really no definitive legal right that attaches to the negotiating parties. True each of them will point to various items of history or perceived societal needs and assert that these give rise to rights – but where is the universal legal authority for these assertions ? The assertion that something is only right or is well deserved does not directly lead to the creation of a legal right outside the jurisprudential realms of natural law Aristotle and Hobbes may have been a great guys, but every constitutional student knows that when push comes to shove the doctrine of Sovereignty of Parliament wins hands down every time. One cannot derive a legal “is” out of an asserted “ought”. The dictates of Kant and the search for “grundnorms” may be fine in the rarefied atmosphere of University Ivory Towers and the law school but they cut no ice in the real world. They contribute to the understanding of underlying social themes but provide no concrete results as the realists are quick to point out.

Secondly, in each of these negotiations the negotiators cannot guarantee third parties with an interest in the outcome will accept and abide by a settlement agreement. Thus Yasser Arafat could not guarantee that Hamas would accept any agreement that he might have reached with President Clinton. Slobandan Milosovich was not constrained by the Bosnia Settlement from taking aggressive action in Kosovo, since the displaced Serbs from Bosnia wanted somewhere to live and Kosovo and Montenegro provided a solution for them. Gerry Adams on behalf of Sin Fein cannot guarantee compliance by the IRA and Ulster Unionist terrorists and thugs have also flouted the September Agreement.

A third problem particularly where international law is involved is that there may be no relevant body of law in respect of the dispute or one of the parties may not be subject to the law. Thus, a United Nations resolution or treaty on non-proliferation cannot speak for non-members and suspended members. As a non member of the United Nations, North Korea has no legal duty to decommission nuclear installations since it is only membership that creates reciprocal international legal rights and duties. For the period of time that Colonel Gadaffi of Libya was outside the United Nations by suspension there was no legal duty for Libya to abide by any United Nations rulings. Similarly for as long as Saddam Hussein continues to be suspended there is no international legal duty for Irac to comply with any United Nations resolutions. The no-fly zone imposed over Northern and Southern Irac by the USA and the UK is not backed up by United Nations resolution and is a unilateral and arguably illegal sanction. The US and the UK would argue that it is a measure imposed by them to support general aims of the United Nations Charter to secure peace and security and is therefore quasi-legal. There is a scintilla of legitimacy in this argument since the United Nations did not demure in the Korean War or in the Somalia Campaign in Bosnia Hertzogovinia. However, regardless of this question, even if the US and the UK are correct, as long as Irac is suspended from the world community there is no submission by Irac to public international law. Such disputes are sometimes referred to arbitration. Some disputes lend themselves to arbitration and indeed The Hague has now acquired a Public International Law of the Sea Court. Boundary disputes have traditionally gone to the International Court or to its predecessor ad hoc Tribunals. There is some body of law to apply but even so there is a strong political element involved in drafting awards which will be “acceptable” to the parties or to influential parties.

From another perspective, since a trade union attempts to negotiate new terms to replace those in pre-existing contracts of employment no legal rights are involved. Instead they create negotiating power by threatening a withdrawal of labour by the work force if the employer will not put more money on the table. The negotiation is essentially political and will speak to interests on the basis of what is “do-able” or politically acceptable to the wider audience. To look to a binding precedent in any of these situations is to whistle in the wind. There are none.

- ii) A localised neighbourhood dispute about social behaviour. Consider the situation where there is a negotiated settlement involving one party promising not to call another names and not to be disparaging providing the other party agrees not to park their car in front of the neighbour's house. The agreement is hardly enforceable by a court and involves no rights. It is essentially political with a small "p".
- iii) Negotiations between local pressure groups and local businesses about noise, traffic congestion, pollution levels etc are the same. The community wants something that it might have no legal right to. The organisation may well settle to avoid bad publicity and to avoid damaging confrontations and disruption to its operations by protestors. Co-operation its neighbours and the goodwill of the local community benefits the organisation.

All of these involves disputes. It is good to resolve them but neither the public courts nor the private arbitral courts have anything to offer. Interests based conciliation provides a viable alternative to civil disobedience and social disruption.

2 In comparing Mediation/Conciliation with Arbitration, the latter has been taken up and made far and fast progress in Asia-Pacific area whereas mediation has not. One of the reasons is that there is no institution such as yours who is promoting mediation as an effective alternative to litigation. What do you propose according to your experience to resolve this problem?

Conciliation is well established world wide and has existed since time immemorial. However, since much of it is conducted by non ADR specialists it does not attract attention and we often ignore the fact that it is a species of ADR. In the UK ACAS spear headed formal conciliation as a method of ADR but this is a special case. Likewise the ICC at Paris has special formal conciliation rules and regulations. Public international intergovernmental conciliation is a well publicised reality.

NADR (M) Sdn Bhd is actively promoting ADR in Malaysia but since it is a new addition to the dispute resolution scene in Malaysia its impact cannot yet be measured. The fact that NADR is private rather than an institution is not significant. There is no reason why private promotion cannot be as effective or even more effective than institutional promotion. In fact, being a commercial organisation is the very key to non-promotion by the institutions. Advertising is viewed as vulgar and unbecoming by non-profit making institutions and there is a tendency for the institutions to frown upon the activities of private bodies as being merely profit orientated. The private ADR provider is regarded in some quarters as not having the best interests of ADR at heart and that the profit motive will undermine ADR. However, if impartiality and quality provision are central to confidence, it does not take more than a moment's reflection to realise that in a business which takes years to establish, and where there are no fast bucks to be made, a private ADR systems provider who does not genuinely care about quality and fails to maintain high ethical standards will soon go out of business.

Mediation has in fact received a lot of lip service from a variety of organisations in Hong Kong, Singapore and in Malaysia with the Bar and the CIArb undertaking a degree of training and public seminars and conferences on the subject. Whilst such organisations could do even more public seminars is not the real answer. The problem is that only ADR specialists attend. There is no point in preaching to the converted. The clients and users must be educated, but how many, if any would bother to attend public seminars ? This is why educating business and government ministries is essential and teaching ADR in Universities to the next generation of professionals and managers will achieve more than public seminars. Secondly, there is little need to publicise a good thing – it creates its own momentum and word soon gets around. The key to the spread of mediation will be to get a few prominent organisations to adopt it. If it proves successful for them others will quickly follow.

Thirdly, if legislation is introduced to implement court ordered mediation the take off of ADR would be assured. To achieve this the legislature needs to be educated to the benefits for the state and for society that ADR has to offer. Reducing the work load for the judiciary would save the government money and improve the access to justice for those who need to use the courts.

Resistance by the legal profession does pose a problem in this respect. As long as lawyers perceive that ADR takes money out of their pockets they are unlikely to support any meaningful legal reform. In the UK the influence of the Law Society and the Bar over the Chancellor's Office is minimal. In fact there is outright warfare between the profession and the Chancellor's Office. However, in many countries the Bar

wields enormous influence and can effectively safe guard its own interests. The problem here is that as long as the minds of the members of the bar are closed to any discussion of the benefits of ADR all the conferences and seminars imaginable will have no impact on those who pretend to listen but do not actually hear or comprehend. You can take a horse to water but you cannot make him drink.

The only way such lawyers will listen is if the clients vote with their feet. This is what occurred in the US. Once the business started to go away the lawyers suddenly started to actively promote the adoption of court ordered mediation especially when they realised that they could still represent clients at the mediations. Unfortunately, in the US the Bar then managed to impose rules whereby only state qualified lawyers are allowed to represent clients. Ironically, non-practicing lawyers can represent clients in any US State at mediation but a practising lawyer in New York cannot represent a client in California either in court or at a mediation without first being admitted to the Californian Bar.

3 For ADR students, it is clear that mediation is actually an effective process for the settlement of civil disputes. However, in the mind of the general public it is of no effect because it is not binding on the parties at the end of the day, influenced by the majority of the lawyers who are not favouring mediation due to the costs reason (not costly and hence not beneficial). Again, how can we reverse this miss-understanding and miss-undertaking ?

This is in some ways a continuation of the previous question but it draws in additional issues. There are several problems with the statement. It assumes that mediation is “an effective process for the settlement of civil disputes”, that it would be of interest to the general public but that the public is being misled by lawyers who are protecting their income stream and finally that it is not binding. These assertions are not necessarily correct in all situations.

Certainly different forms of mediation are effective for settling different types of disputes. The public often do not call certain forms of settlement process mediation but in reality they are and they use them all the time. Much family dispute settlement work is carried out under Shariah Law utilising a form of mediation. Even for those not under the Shariah Law peer groups often perform a similar function. This is common in the Chinese community and whilst the comparison may seem rather out of place the Italian Mafia movement settles disputes through the Conciliatori or Godfather made famous by Hollywood. Much tribal and village settlement has been based around settlement by Elders under the Sycamore or Banyan Tree. However, much of this is lost in urban society. Lawyers neither encourage nor discourage such activities. There is no money in it for them either way so they simply ignore it. Society can benefit significantly from the use of volunteer mediators for the settlement of local disputes and government programs to teach volunteer social groups the techniques of mediation would be useful. However this is not a vocation or calling. Many Law Schools in the US provide local mediation using students in the community. The students in return gain valuable insights in to human nature.

Commercial mediation is an effective process for settling disputes but far too much has been made out of its cheapness and value to the general public. In reality any settlement process which involves the services of professional ADR specialists is not cheap. A high quality mediation service is not really suitable for small consumer complaints. The answer here is to use fast track paper only adjudication or arbitration systems, with the cost covered by the seller or by insurance. Lawyers can help consumer clients to fill in claim forms so they are not cut out of the process. However, in reality how many lawyers want to take part in small consumer claims in the first place. The answer is not many. The lawyers cost too much so most consumers simply give up. Fast track paper only systems provide a solution where none really existed before and have little impact on the lawyer’s income stream.

The medium to large commercial dispute is where mediation comes into its own and it is here that a conflict occurs between the interests of clients and lawyers. Where lawyers advise clients on the terms of contracts and draft standard form contracts there is a danger that lawyers will advise at best on the adoption of an arbitration clause or at worst conveniently fail to discuss the matter at all ensuring that any problems that subsequently arise will go to court, thereby enhancing their bank balances. This is possible but is less of a problem than one might imagine. The truth is that lawyers do very little work advising on contracts. Business people do it themselves, either borrowing precedents from other people and businesses, from contract writing bodies such as INCO or from professional organisations such as PAM, CIOB, ICE etc or with the assistance of their own in-house legal team.

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NADR is quietly working away in the background, meeting government ministers, businessmen at Chambers of Commerce and privately at their offices talking to managers and the like. NADR is gradually getting its clauses into contracts throughout Europe, the Middle East and South East Asia. As disputes arise and they are seen to be settled effectively and efficiently with a minimum disruption to trading interests the commercial mediation market will become firmly established. It took 15 years to achieve in the US but now 45% of all commercial disputes in the Southern States go to mediation. In the US there are over 3.5 million people operating or working under NADR mediation schemes and systems.

NADR is confident that this type of success can be achieved globally. Business education is central to this. Remarkably, NADR is almost virtually alone in carrying out this form of educational promotion of commercial ADR outside the US where ADR is routinely taught to business students. Mediation is the future. Believe it !

Finally, the bland assertion that mediation is not binding is misleading and tells only half the story. The mediation process is indeed non-binding. An agreement to make an agreement, a contract to make a contract, can never be an enforceable contract. The parties can always pull out of the negotiation at any time. However, once an agreement is concluded there is nothing to prevent it from being an enforceable agreement assuming that basic legal requirements such as valuable consideration can be established. Remember basic contract law. If something different is provided, provided it is not merely a lower cash payment then it can amount to valuable consideration. The consideration need not be sufficient or adequate, simply valuable – as in a horse or hawk or robe. Even there this is absent a deed of settlement under seal can ensure enforcement. Alternatively, the method used to enforce out of court settlements can be used for mediation. Provided a claimant files a claim, the mediated settlement can be lodged with the court as a settlement of the claim, thereby turning the settlement agreement into a settlement judgement. A failure to comply then becomes contempt of court. Mediation settlements are eminently binding.

A clever trick that can be used with mediation settlements which cannot be achieved with a court judgement is for the agreement to be made subject to the law and jurisdiction of the state where the paying party has his or her money. A judgement against an Australian in a Malaysian Court may well be a mere empirical victory if the Australian fails to attend the court and his or her money is in Australia, but a settlement agreement made subject to Australian Law and Jurisdiction would be enforceable by the Australian Courts which would have the power to enforce payment. Not only is the mediation agreement binding but it is also more effective than the court judgement which can only be enforced abroad if the overseas country has entered into a reciprocal enforcement treaty. Such treaties are few and far between. In this way, by careful draftsmanship of the settlement agreement some of the benefits of international enforcement enjoyed by International Arbitration Awards under the New York Convention on the Enforcement of Arbitral Awards 1958 can be mirrored by the mediation process

Can there really be any doubt that as and when business starts to catch up with the benefits of ADR it will start to take off in Malaysia and South East Asia ? The important task is to make sure that business gets to hear the message and to understand how it can benefit. The problem to date has been that many ADR conferences have concentrated on telling anyone who will listen that ADR is wonderful. However, there has been little training to provide the ADR practitioners who will provide the service. Secondly, there has been little attempt to demonstrate to business how ADR works and beyond vague assertions that it is cheaper and quicker no attempt to prove that it is not a crude haggling device that ignores legal rights and can deliver genuine “justice” to the parties.

Finally, business should be told in clear and uncertain terms when mediation is not useful to them, so that they can then confidently adopt it for the types of dispute where it has something useful and valuable to offer. Every time that mediation is used for a dispute which does not lend itself to mediation the cause of mediation is damaged.

If mediation is to take off it needs to be carefully promoted and projected in the correct manner. Sadly we cannot count on everyone in the Bar to do this. So, everyone of us who understands the value of mediation and what it has to offer Malaysian society must co-operate together and work assiduously to protect and promote this valuable new service.

By Corbett Haselgrove-Spurin