

Mediation: concord from discord

Made Barata, S.H. with assistance from Bobby Manurung, S.H. and Arkie Tumbelaka, S.H. of Mochtar Karuwin Komar gives an overview of mediation and tells why he believes that going forward, this avenue will become more popular (This article was originally published in Asia-Mena Counsel, vol. 13, issue 9).

Mediation has been in the spotlight recently, as authorities strive to streamline adjudication to foster a more efficient and cost-effective forum to settle commercial disputes. Unlike litigation, mediation strives to find a win-win solution to limit court fees as much as possible, and it allows the parties to resolve their disputes without a cumbersome court process. Unlike in commercial litigation, in mediation the parties are in control of the timing and flow of the whole process, and many formalities intrinsic to litigation are simply stripped away. In the past, the mediation process was regulated under SC Reg no. 1 of 2008 (Old SC Reg) and despite the positive aspects mentioned above, too many parties in dispute seem to regard it as just another bureaucratic hurdle to surmount and dispense with before actual court proceedings can be entered into. However, notwithstanding the foregoing, many regulators and practitioners around the world feel that going forward mediation is the way to go because it avoids the backlog in the courts and the cost and time-consuming nature of litigation, among other reasons. To better streamline and encourage effective mediation, a new Supreme Regulation (Supreme Court Regulation no. 1/2016 or New SC Reg) was recently issued which replaces and supersedes the Old SC Reg.

Mediation in a nutshell

In brief, mediation is a process which can be conducted in-court or out of court. Pusat Mediasi Nasional (PMN) is an Indonesian entity accredited by the Supreme Court of the Republic of Indonesia to hold mediation training, and it awards mediator certificates. PMN also has a list of certified mediators with their particular expertise or experience in various business fields, which parties can choose and agree on to use as mediators if they do not opt for judge mediators. Essentially, there are two types of court-annexed mediation. The first type is in court; the second type takes place outside the court. Any mediation conducted outside the court will need to use a certified mediator and not a judge mediator.

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The key difference between mediation conducted inside and outside of the court is the executorial standing of the mediation agreement. In mediation inside the court, the mediator can be a judge and as a result, the agreement reached will be ratified and approved by the judge. By doing so, the outcome of the mediation will be memorialised in the form of a determination of the judge, and it will be enforced by the court. However, in mediation outside the court, the agreement made during mediation will be in the form of a legal contract.

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According to the New SC Reg, the parties must attempt to settle their dispute via mediation before coming to trial. The parties must appoint a mediator within two days of being ordered to do so by the judge; they then have five days to submit a summary of the case at hand. The parties then have 30 days to resolve their dispute with the services of a mediator during which time they must display good faith. By force of the New SC Reg, failure to show good faith by any party will result in the offending party having to assume the fees for mediation. If after 30 days no agreement has been reached, an extension of 30 days can be granted or the case will then proceed to court.

The key to the whole process is of course the mediator; the mediator must be a judge or a certified mediator who is accredited through a programme run by the Supreme Court or another institution approved by the Supreme Court. The role of the mediator is to arrange the schedule with the parties and give them the opportunity to present their cases and assist them in drafting a settlement. They then must deliver a report to the judge on the outcome of the mediation session. It is also at their discretion to report any party which they feel has not acted in good faith during the course of the mediation proceedings. The choice of the mediator or mediators is at the discretion of the parties in dispute, and mediator fees vary widely, depending on the experience of the mediator, the time spent and the complexity of the issue at hand.

The parties are able to bring evidence and to invite expert witnesses to testify. However, the status of the evidence is not the same as in a courtroom setting. Even though there is evidence presented, the mediator is not a judge and does not pass judgment on any party. The evidence is presented simply as a matter of course and to better elucidate the case at hand.

Mediation process

Pre-mediation

After having explained the basics of mediation, the judge will instruct the parties in dispute to appoint a mediator, and then the mediator will set up a schedule for the mediation process to follow, the venue for mediation and deal with any other formalities. To save on costs, the court house can be used as the venue for mediation, and the judge can serve as mediator.



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Mediation

All parties must submit a summary of the case within five business days and then mediation begins. During the sessions, all parties must follow the 'good faith' principle. This means that they must personally attend mediation, not be absent without a legitimate reason, they must respond to the Case Resume from the other party and must sign the Settlement Agreement or give a reasonable explanation why if they refuse to do so.

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There are two possible outcomes to mediation:

1. A settlement is reached the parties in dispute and the mediator sign an agreement, and the mediator then has the obligation to give a report to the judge signaling that mediation was successful and present the settlement agreement;
2. No settlement can be reached the parties fail to reach a settlement, and the mediator must indicate this fact to the judge byway of a written report. Subsequently, the judge will issue an order to continue the litigation process.

Mediator duties

Mediators must carry out the following duties:

- Introduce the parties
- Explain the objective of the mediation
- Conduct meetings with the parties separately and together to determine the positions of the parties in dispute
- Help find the best solution
- Assist the parties in drafting a settlement agreement
- Give a report to the judge regarding the outcome of mediation
- Report any party who the mediator believes is not acting in good faith

The mediator himself is bound by a code of conduct which is set out in the Old SC Reg. In the New SC Reg there is no new code of conduct, which means that the old one still prevails. In general, the code of conduct stipulates the duties and obligations of mediators which are, among others, not to accept gifts or bribes that would influence their behaviour, avoid conflicts of interest, keep all information revealed during the course of mediation confidential and continually seek to improve their mediation skills through continuous learning, among others.



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Conclusion

We believe that mediation will continue to be the preferred avenue of dispute resolution going forward, though the low success rate is perhaps not connected to procedures and protocols, but to the fact that often one of the parties is acting in bad faith (i.e. never had any intention of honouring its obligations), and no amount of discussion will achieve the desired breakthrough. The efforts in the New SC Reg to punish any party that is not 'acting in good faith' by making them assume all fees is an interesting move, but not a perfect solution in itself. We will have to wait to see if the New SC Reg makes a positive difference in practice, but we are optimistic since the issuance of the New SC Reg in itself demonstrates the authorities' focus on streamlining the dispute process by creating a healthy environment in which to resolve differences.

Key highlights of the New SC Reg:

- * Obligation to show good faith by all parties in dispute
- * Shorter period to reach an agreement (30 days in the Old SC Reg to 30 days in the New SC Reg)
- * The parties themselves must personally appear (unlike in litigation where lawyers can be sent as proxies)
- * Shorter mediation time (30 days from the previous 40 days)

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Mediation is not only relevant in domestic disputes but also in international disputes, which international institutions, such as the Singapore International Mediation Centre (SIMC), are well-placed to handle. Benson Lim of Berwin Leighton Paisner LLP's Singapore office stated "In my experience as a mediator and mediation advocate, for mediation to be most effective as a dispute resolution option, parties should always consider the option of mediation at the start of any dispute and as part of an overall dispute resolution strategy. The effective use of mediation is even more important in international disputes where the financial stakes are usually higher and the clash of business cultures is more apparent."

A famous lawyer once said "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, and expenses, and waste of time." -Abraham Lincoln

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Informational article: Mediation across Borders

Guest contributors to the MKK Newsletter: Eunice Chua and Jolene Goh¹ of SIMC



A Fictional Example of a Cross-Border Dispute

Mr L is the director of InVisions, a large Indonesian manufacturer providing top-of-the-range camera components to MK Pte Ltd, a Korean-headquartered mobile phone manufacturer. Mr K, who is a native Korean, is the General Manager of the company's regional office based in Thailand and manages the deals involving InVisions. The business relationship is a lucrative one and both companies have had generally good relations since 2003. Annual profits for InVision arising from sales to MK amounted to US\$2.3 million last year while the sales of MK's mobile phones that are installed with InVision's cameras reaped them a profit of US\$3.5 million in the same period.

During discussions for a renewal of the supply contract in May 2012, cultural and other differences in opinion resulted in the beginnings of a dispute emerging. Mr L expected to continue to receive immediate payment of the goods upon receipt as per previous practice. Mr K proposed that payment be partially made within 30 days of the invoice date, and the remaining payment disbursed upon reaching an agreed annual sales target in December each year. The rationale for this change was because the financial situation of MK had deteriorated with increasing competition requiring more complicated products. MK now required a longer payment runway with all their suppliers. Mr K does not tell Mr L this as he felt it would weaken his negotiating position. The new proposal seemed risky for Mr L, and he preferred the original arrangement. but as MK has been a reliable and important client of InVisions, he agreed to it without raising too much concern.

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Unfortunately, MK's mobile phone sales did not meet the sales target in 2013 due to the launch of a competitor's product. Mr K exercised his right to withhold the remaining payment for the goods to minimise losses to his company. He further insisted that Mr L take back the unutilised stock of cameras and threatened to impose a stock storage fee of US\$10,000 per day. A dispute ensued, and both companies turned to their legal advisers.

To the reader, it might be easy to think that all of this could have been prevented if Mr K had asked for an instalment payment term at the start of the renewal negotiations and been upfront about MK's financial situation given that Mr L seems to be a loyal partner and would likely have agreed to a longer payment term. Conversely, one may also have thought that Mr L bears some responsibility for not having raised his concerns to Mr K during the negotiations.

We are able to discern all this because the article provides us critical information on the situations and considerations of both companies. In contrast, Mr L and Mr K are only aware of their own sides of the story and their respective companies are only aware of what is reported by Mr L and Mr K. When emotions run high at the start of the dispute, further communication or sharing of information becomes limited and guarded, since both parties now act through their legal advisers.

Cross-border disputes are multi-layered and complications can arise not only because of cultural and language barriers between individuals, but also because the companies themselves function in different legal systems, with different standard operating protocols, and complex internal dispute management structures.

Why Mediation for Cross-Border Disputes?

Disputes like InVision and MK's are increasingly common as the world becomes more connected. In a survey published by the Singapore Academy of Law in January 2016 of 500 commercial law practitioners and in-house counsels who deal with cross-border transactions in Singapore and the region, 74% of the respondents indicated that cross-border business in Asia has increased for them in recent years.² The complexity of disputes can also be expected to grow as more and more dimensions are introduced into the dispute.

Mediation offers parties an effective and quick opportunity to work out a mutually-beneficial solution to their dispute. Compared with arbitration and court hearings, a typical mediation takes a much shorter time of 1 or 2 days and this can translate to significant cost savings. Additionally, because mediation settlements are negotiated and signed on a voluntary basis, parties are able to factor in wider operational considerations and tailor specific remedies beyond financial compensation. This often achieves for parties a more lasting and sustainable outcome and spares the individuals from the anxieties and cost of further appeals against outcomes decided by third parties.

The Singapore International Mediation Centre ("SIMC") was created specifically to develop the space for international mediation and meet the needs of the market.

Launched in November 2014, SIMC offers services and products specifically designed for parties in cross-border disputes. A panel of over 65 international mediators from 14 countries gives the SIMC a unique competency to manage cultural differences and cross-jurisdictional disputes. Reinforcing the panel of mediators is a panel of over 70 technical experts covering diverse fields who can be engaged to advise on disputes involving complex technical issues. A professional secretariat helps to facilitate each mediation. Working together with the Singapore International Arbitration Centre ("SIAC"), the SIMC is also the first to offer the Arb-Med-Arb service which allows parties to attempt mediation after commencing arbitration.

² Singapore Academy of Law (2016), "Study on Governing Law and Jurisdictional Choices in Cross-Border Transactions", <http://www.sal.org.sg/Documents/SAL_Singapore_Law_Survey.pdf> (accessed 20 May 2016).

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Mediated settlement agreements obtained through the Arb-Med-Arb service can be enforced as awards under the New York Convention in over 150 countries. SIMC also has a close relationship with the Singapore International Commercial Court (“SICC”), such that cases before the SICC that are more appropriately dealt with through mediation will be referred to the SIMC.

These services address the need for an enforceable outcome that parties involved in cross-border disputes regard as the top-most factor influencing their choice of dispute resolution method as evident from the Singapore Academy of Law survey. Singapore enjoys a growing global reputation as a preferred centre for international dispute resolution by offering “proximity”, “efficiency” as well as “neutrality/fairness”.³ Mediation services at the SIMC complement arbitration at the SIAC and litigation at the SICC to provide users with a full suite of dispute resolution options.

In the fictional case above, SIMC’s services could be used at an early stage to assist the parties to enter into an agreement to mediate. All it takes is for either of Mr L or Mr K to be interested in attempting mediation and to file a mediation request at SIMC before SIMC can serve as a neutral and objective third party to propose mediation for the dispute and ensure that all the parties have an understanding of the mediation process. The SIMC Rules are based on international best practices and provide a framework for the conduct of the mediation.

Assuming Mr L and Mr K agree to attempt mediation, we can expect that both Mr L and Mr K may feel uncomfortable if the mediation is conducted in the “home” territory of either party. Singapore lies at the centre of major international travel routes and could serve as a neutral and convenient venue for the conduct of the mediation.

³ See Singapore Academy of Law (2016), “Study on Governing Law and Jurisdictional Choices in Cross-Border Transactions”, <http://www.sal.org.sg/Documents/SAL_Singapore_Law_Survey.pdf> (accessed 20 May 2016) where proximity, efficiency and neutrality/fairness were ranked as the top three reasons for choosing Singapore as a venue for dispute resolution.

SIMC would be able to arrange for mediations in Singapore to be conducted in Maxwell Chambers, a state-of-the-art dedicated dispute resolution facility where SIMC is based. In addition to having the logistics of the mediation arranged for them, by choosing SIMC, Mr L and Mr K would have access to SIMC's panel of mediators and panel of technical experts. Should Mr L and Mr K be unable to agree on who to serve as mediator, under the SIMC Rules, SIMC will serve as appointing authority to help the parties find the most suitable mediator for their dispute.

Mr L and Mr K would also have the full support from the SIMC Secretariat throughout the mediation process, which in addition to the above, includes proposing timelines and managing the progress of the mediation, arranging for any translation or interpretation services, as well as assisting the parties to break any impasse relating to the setting up of the mediation. Where requested, the SIMC can also assist in convening pre-mediation conferences which can help the parties define the agenda and attendance for the mediation and therein increase the chances of successful settlement.

Finally, if Mr L and Mr K are concerned that there may be a need to enforce the terms of the mediated settlement agreement, they could make use of the SIAC-SIMC Arb-Med-Arb service to give their mediated settlement agreement enforceability as an arbitral award in Indonesia, Korea or Thailand.

Future Trends

International mediation is set to rise, driven by the increase in complex cross-border trade and user demand. Free Trade Agreements such as the Trans-Pacific Partnership (TPP) would further facilitate such an increase, and in turn, lead to the increased need for dispute resolution facilities that are able to cope with international disputes.

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Differences would continue to play a big part in these disputes and would need to be managed as part and parcel of doing business – language differences, cultural differences, and business practice differences. A tool like mediation, by introducing a trusted and neutral third party to facilitate negotiations, is able to help parties overcome seemingly intractable challenges and broker creative solutions, that save cost and time that could be better deployed to grow their businesses and profits.

In an earlier study, 98% of Fortune 1000 Corporations reported using mediation as a dispute resolution tool.⁴ Mediation also ranked first amongst other Alternative Dispute Resolution (“ADR”) mechanisms such as arbitration and hybrid services such as mediation-arbitration or med-arb. Today, awareness of mediation and its benefits have grown.

In the Singapore instalment of the 2016-2017 Global Pound Conference (“GPC”) series, a survey of the audience showed that 33% of the respondents indicated that the future of dispute resolution would likely see a greater emphasis on collaborative instead of adversarial processes.⁵ Preferences for hybrid processes are also on the rise. 31% of respondents at the same GPC Singapore Conference indicated that the combination of adjudicative and non-adjudicative processes was the most effective dispute resolution process today in addressing their needs.

SIMC has seen its caseloads reflect these trends. Since its official launch in November 2014, SIMC has seen 9 cases filed with it as of 20 May 2016, 3 of which are Arb-Med-Arb cases filed in 2015, less than a year into SIMC’s operations. The progressive take-up rate of the service speaks to the ability of Arb-Med-Arb to meet the needs of the parties by providing an efficient and effective way of settling disputes without compromising enforceability.

⁴ 2013: Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations (Harvard Negotiation Law Review).

⁵ Global Pound Conference Survey Results (Singapore 2016):
 <<http://globalpoundconference.org/Documents/GPC%20Series%20Singapore%202016%20Voting%20Results.pdf>>
 (accessed 20 May 2016).

Of the 9 cases received by the SIMC, the sums in dispute ranged from SGD 1.5 million to more than SGD 600 million. These cases have included disputes in the sectors of construction, oil and gas, shipping, aviation and the sale/supply of goods and services. The parties involved in the disputes have included companies from Singapore, Cayman Islands, Germany, India, Korea, Laos, Macau, Malaysia, Myanmar, Taiwan, Thailand, the United States and Vietnam. These statistics demonstrate the wide appeal and relevance of mediation.

Conclusion

This is the beginning of the growth in the international mediation and ADR scene in Asia. Initiatives to further educate potential users of the benefits of mediation are also underway, including the GPC series which will make stops at 6 Asian cities in addition to Singapore, as well as the upcoming Asia Mediation Association Conference in Beijing in October 2016. As the needs of consumers change, so will the provision of mediation and ADR services in order to bring the best value and outcome to consumers. SIMC is committed to meet these needs and make a contribution to the development of mediation in Asia.



(Photo at the beginning of the article is of Eunice Chua and at the end is of Jolene Goh)

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