

EFFECTIVE DISPUTE RESOLUTION

MEDIATION AND ARBITRATION

EITHER OR BOTH?

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Developing international commercial mediation services and capabilities will ensure that commercial users of Singapore's dispute resolution services can choose from the full spectrum of processes ranging from facilitative mediation to binding arbitration.

The growth of trade and investment within Asia in recent years has significantly enhanced the need for dispute resolution services, especially for cross-border commercial disputes. Singaporeis uniquely well placed..... to provide the broad range of litigation, arbitration and mediation services increasingly required within the region.

International Commercial Mediation Working Group (ICMWG)
chaired by Edwin Glasgow QC

The Ministry of Law (MinLaw) welcomes recommendations made by the International Commercial Mediation Working Group (ICMWG) to develop Singapore into a centre for international commercial mediation.

This will add to Singapore's vibrant dispute resolution sector that has been growing on the back of a significant rise in commercial transactions in Asia and the corresponding increase in the number and complexity of cross-border disputes.

Singapore Ministry of Law Press Release 3 December 2013

- Arbitration and Mediation are fundamentally different but complimentary processes.
- Arbitration - essentially adversarial
- Mediation - essentially collaborative.
- Arbitration and Mediation are both very effective means of dispute resolution.
- Mediation and arbitration are not mutually exclusive – this misunderstands the nature of mediation.
- Mediation is not a “soft” option.
- Best lawyers can negotiate, mediate and fight.

ARBITRATION DEFINED

Arbitration is a process where the parties agree to submit their dispute for determination by an arbitrator. Arbitration provides for the resolution of disputes in a legally binding way by an independent tribunal (composed of one or more people) and is usually formal and adversarial. The decision of the tribunal is final and binding, subject to rights of appeal to the courts, although such rights are limited.

The parties to an arbitration may in large degree themselves determine the procedure to be followed and the powers the arbitrator is to have, as well as the constitution of the arbitral tribunal

MEDIATION DEFINED

“Mediation is a voluntary means of dispute resolution in which the parties to a dispute engage the assistance of an impartial third party (called the Mediator) to facilitate negotiations between them with a view to resolving their dispute privately and in an amicable manner.

The focus is not on who is right or wrong, nor on who has a stronger or weaker case in court. Rather it is on how the parties can move forward and put the dispute behind them. The Mediator helps the parties to adopt a problem-solving approach, move away from their respective positions and focus on their interests, needs and concerns.”

Mediation and Arbitration – How are they Different?

Arbitration

- A quasi judicial process. An independent decision maker imposes a decision on the parties whether they like it or not.

Mediation

- The parties arrive at their own decision. There is no decision imposed on them. The Mediator's function is to assist the parties to make their own decisions.

Mediation and Arbitration – Comparison of Processes

Are they Voluntary Processes?

Arbitration

- Most arbitrations take place under binding agreement to that effect.
- Once the dispute resolution mechanisms are triggered, the process becomes compulsory.

Mediation

- Usually voluntary - there is some compulsory mediation.
- No result can be imposed on parties without their mutual consent.

Mediation and Arbitration – How are they Different?

Flexibility

- Arbitration - the overall process is strictly controlled.
- Strict application of law relating to the arbitration itself, and the law applicable to the substance of the dispute.
- Arbitrations are regulated by rules of procedure agreed and adopted by the parties and the tribunal.
- Mediation is almost infinitely flexible. There is no set code of rules, procedures, or conventions which provide a standard form of how mediations are to be conducted.
- Mediation easily crosses borders – not jurisdiction-specific.

Mediation and Arbitration – How are they Different?

Confidentiality

- Both processes are both private and confidential if the parties so agree subject to:-
 - Arbitration – Usually secrecy cannot be completely maintained if the arbitration award or the process is appealed or challenged.
 - Mediation – enforcement of settlement agreements, waiver, unqualified admissions, tortious conduct, misleading or deceptive conduct in trade or commerce, to protect a child, to report the commission of or prevent a crime, or to disclose criminal or fraudulent conduct.

Mediation and Arbitration – How are they Different?

Speed

- Mediation is usually much faster than Arbitration – no evidence, witnesses, hearing.
- Arbitration – await Final Award then enforcement.
- Mediations - can be informal and take place before filing any process.
- Most mediations can be arranged and conducted in weeks at most (from planning to finality).
- The actual mediation usually takes one to several days.
- As soon as agreement is reached, the matter is over.

Mediation and Arbitration – How are they Different?

Cost

- Time is money - actual cost of mediation usually less than arbitration.
- Mediation has limited or no witness expenses, transcription costs.
- Mediation has lower collateral costs - damage to reputation, relationships, business interruption and other matters.

Risk

- Arbitration has winners and losers.
- In mediation, parties control process.
- Harmony and face saving is easier in mediation.

Mediation and Arbitration – How are they Different?

Flexibility

- Arbitration – parties' definition of issues determines the nature and extent of the battlefield.
- Decision is constrained by defined issues and applicable law.
- Mediation – resolution can involve a holistic look at the entire relationship of parties.
- Parties can reach any result they chose by whatever legal means they chose.

When Arbitration or Mediation may be Inappropriate

Arbitration – consider alternatives if:-

- Relationship issues, potential cost issues, or real solution may not be capable of becoming an arbitral award.

Mediation – unsuitable if:-

- Fundamental legal rights must be determined or case is a test case (not relevant to arbitration).
- Complete breakdown of trust between the parties.

Sometimes settlements still come from impossible situations - the war in Aceh, cases involving sexual abuse of children in churches and schools.

Enforceability Issues

- Enforceability is not the be-all and end-all.
- Arbitration awards are enforceable through New York Convention.
- Enforcement in New York Convention country does not guarantee success.
- No order or award made by the mediator.
- A mediated agreement may be enforceable as a judgment whether mediation is court annexed or court ordered.
- Sometimes matters the subject of agreement between the parties at mediation will not be enforceable.

Hybrid Processes

- Contracts can provide for filter or multi-tiered process i.e. contractual recognition that mediation can take place prior to arbitration or after its commencement.

Relevant Options:-

- Mediation followed by an arbitration (“med–arb”).
- An arbitration followed by mediation (“arb-med”).
- Arbitration to Mediation and then Arbitration (“arb–med–arb”).
- Hybrid processes try to strike balance between party autonomy and finality.
- Some disputes suited to one particular formulation of a hybrid process but not another.

Specific considerations – Hybrid Processes

- Should the same person act as both an arbitrator and mediator in the same dispute?
- Is choice of arbitrator/mediator dependent on whether it is arb-med or med-arb?

Specific Arb-med Issues:-

- If the dispute settles in mediation, much will have already been spent in terms of time and money;
- Suggestions made by the mediator may be construed as a hint regarding final award - thus inappropriate and manipulative.

Hybrid Processes – Making them Work

- Choose an Arbitrator who is experienced and skilled Mediator
- Object is to ensure a settlement reached during the mediation becomes an effective arbitration award.
- If possible, structure dispute resolution mechanism so that a mediated agreement becomes arbitral award.
- Arbitration must commence while there is a genuine dispute.
- Mediation should take place within Arbitration.
- Rules provide that settlement agreement be in writing and becomes binding and enforceable Award.
 - UNCITRAL Model Rules 2010 Rule 36
 - BANI Rules and Procedures Article 20

Case Studies – Mining, Professional Liability, Banking and Financial Disputes



Case Study #1 - Mining Projects

- Extremely profitable long-term relationships
- Cost of equipment, infrastructure, labour.
- Cost of delay.
- Dealing with national and regional governments.
- Powerful local interests and local people's wishes.
- Reputation damage is important – e.g. Lapindo, Churchill Mining

Case Study #2 - Professional Negligence Actions

- Extreme emotional issues, multiple factual, legal and medical difficulties.
- Legal costs often entirely disproportionate to verdict.
- Personal cost to all parties emotionally.
- Damage to reputations of doctor, hospital or other professional.
- Reduction in the quality of medical and professional services - high risk practice areas.
- Intense personal feelings of anger and resentment.

Case Study #3 - Banking and Financial Disputes

- Emotional issues, multiple factual and legal difficulties.
- Damage to reputations of banks and financial institutions.
- Time consuming disputes destroy long term relationships.
- Damage bank's and customer's business reputation.
- Government recognition of mediation as appropriate to banking and financial disputes.
 - Bank Indonesia Regulation Number: 8/5/PBI/2006
 - Farm Debt Mediations (Australia)



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