

MEDIATION PRACTICES IN MALAYSIA

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Further to the presentation made earlier by the Honourable President of the Court of Appeal of Malaysia, I wish to expand on court annexed mediation presently undertaken by the Malaysian Judiciary.

By court annexed mediation, it means mediation undertaken after a case has been commenced in court. This is presently the only form of mediation undertaken by the Malaysian Judiciary.

The object of court annexed mediation is to resolve the case by way of mediation without the case having to undergo trial in the trial courts. In the Opening of the Legal Year 2024, our Chief Justice has opined as follows:

“By virtue of the current volume of cases commenced in the courts, there is the critical need to now intensify the usage of court annexed mediation. In other words, all judges at pre-trial case management must duly consider why each case should not be mediated. Unless absolutely unsuitable, the cases must undergo mediation. Additionally, judges must also be part of the mediation process sitting as the mediator. This is because they are in the best position to persuade parties to resolve their dispute amicably by means of facilitative and/or evaluative mediation. The Court Annexed Mediation Committee is tasked to oversee the implementation of the same.”

I am presently the chairman of that Committee which comprises of appellate judges, trial judges and court registrars.

The pre-trial court annexed mediations are carried out both in the subordinate courts as well as High Courts. In respect of the former, they are mainly running down cases as well as defamation and commercial cases. As to the latter, they comprise mostly family cases, medical negligence cases, commercial cases including construction and intellectual property cases.

These court annexed mediations are often initiated by the designated judge as required by the Rules of Court 2012 and sometimes at the request of the parties. The mediation is conducted in the court premises by a subordinate or High Court judge, as the case may be, on part time basis, or by court registrars on full time basis. Occasionally, these mediation cases are outsourced to external approved mediators such as Justices of the Peace in the state of Penang. All these court annexed mediations are free of charge.

The success rate of court annexed mediation in these courts is approximately 60%.

Besides the first instance subordinate or High Court mediations, court annexed mediation has in recent times also been undertaken in appropriate appeal cases of the Court of Appeal and even the Federal Court by a designated appellate court judge.

Pre-action Mediation

Besides court annexed mediation, the Court Annexed Mediation Committee is presently also exploring into implementing pre-action

mediation. By pre-action mediation, it means mediation mandatorily undertaken before the case can be instituted in court.

Also in the Opening of the Legal Year 2024, our Chief Justice has opined as follows:

“Unlike other countries such as in England and Wales, there is presently no requirement for parties to undergo mediation prior to commencing an action in the Malaysian Courts. The time has also arrived to consider the implementation of pre-action mediation through pre-action mediation protocols. Towards this end, the Court Annexed Mediation Committee is further tasked to study and revert on the same soonest possible. This should include requisite proposals on amendment to the relevant statute and/or rules”.

The Court Annexed Mediation Committee has identified the suitability of defamation and medical negligence cases to be in the pilot scheme of implementing mandatory pre-action mediation. Consultations will take place with the relevant stakeholders in due course.

Madani Mediation Centre

In recent times, the Minister in the Prime Minister’s Department in charge of Law and Institutional Reforms has alluded to the establishment of the Madani Mediation Centre. It is however presently unclear as to the exact role of the Madani Mediation Centre. Perhaps it may be to undertake pre action mediation or to have court annexed mediation of the Malaysian Judiciary wholly outsourced to it just like the Singapore Judiciary

outsourcing mediation solely to the Singapore Mediation Centre or some other mediation or conciliation arrangements.

Ad hoc mediation

Finally, there is also ad-hoc mediation which is mediation privately undertaken by disputant parties to resolve disputes that have arisen between them by a private mediator on their own initiative. This is facilitated by the Mediation Act 2012 but this ad-hoc mediation is entirely outside the parlance of the Malaysian Judiciary.