

SPEECH BY

THE RIGHT HONOURABLE

THE PRESIDENT OF THE COURT OF APPEAL

TAN SRI DATUK AMAR ABANG ISKANDAR BIN ABANG HASHIM

AT THE

SECOND INAUGURAL MEETING OF THE INTERNATIONAL JUDICIAL

DISPUTE RESOLUTION NETWORK (JDRN)

SESSION 3 – EXPERIENCE IN THE USE OF THE JUDICIAL DISPUTE

RESOLUTION PROCESS

MONDAY, 22 MAY 2023

Assalamualaikum, Good morning to all.

The Honourable Chief Judge Laura Taylor Swain, United States District Court for the Southern District of New York and Chief Justice Sundaresh Menon, Chief Justice of Singapore, Co-Chairs For the 2nd Judicial Dispute Resolution Network Meeting;

Head of Delegations and Founding Members of the JDRN

Distinguished Guests, Ladies and Gentlemen,

Introduction

- [1] It is with immense pleasure that the Malaysian Judiciary extends an opportunity to impart our insights and accumulated expertise in the application of the JDR mechanism within our legal domain. By delving into the nuances of JDR techniques, we endeavour to foster a comprehensive understanding of the intricate processes employed by our judicature in pursuit of equitable and expeditious resolution of conflicts, thereby upholding the highest standards of justice and fairness in our esteemed jurisdiction.

Judicial Dispute Resolution – The Malaysian Experience

(A) Court-Annexed Mediation

- [2] During the inaugural JDR meeting we have shared our experience concerning the JDR process adopted by the Malaysian Judiciary which is the Court-Annexed Mediation. In this year's JDRN meeting we are pleased to update the ongoing progress of the Court-Annexed Mediation in Malaysia.
- [3] As I had the privilege of reporting in the previous year, the procedural flexibility inherent to our Court-Annexed Mediation process allows for it to be conducted at various stages of the judicial proceedings, albeit prior to any formal adjudicative decision. Specifically, these stages encompass the case management phase preceding trial; during the process of interlocutory application; immediately prior to the full trial; during the full trial itself; post full trial but before a decision is reached; during the appeal stage; and at any other juncture or proceeding deemed appropriate by the presiding judicial authority. The adaptability of the process to these differing stages of proceedings exemplifies the versatility of the Court-Annexed Mediation mechanism within our judicial system.
- [4] In the context of Court-Annexed Mediation, pertinent reference can be drawn to Order 34 rule 1 of the Rules of Court 2012, which serves as the foundational legislative instrument enabling the constitution of Court-Annexed Mediation. As of now, Court-Annexed Mediation in Malaysia is

voluntary in nature except for running down cases which require mandatory reference to mediation as provided for in Order 34 Rule 1(1B) of the Rules of Court 2012. Practice Direction No. 2 of 2022, titled "Matters and Mediation Procedures for Cases in the High Courts and the Subordinate Courts" ("PD 2/2022"), has been operational since the 1st of April, 2022. In essence, PD 2/2022 governs mediation matters and procedures applicable to civil proceedings in both the High Courts and Subordinate Courts across the length and breadth of Malaysia.

- [5] Court-Annexed Mediation is presently conducted by the High Court Judges and Judicial Officers who have been certified as mediators at the High Courts and the Subordinate Courts (Sessions and Magistrate Courts).
- [6] To date, Mediation Centres in Malaysia are expanding to a total number of eighteen (18) Mediation Centres throughout Malaysia with a total of thirteen (13) judicial officers sitting as permanent mediators. The Mediation Centre offers a neutral and friendly atmosphere to remove the element of pressure on the parties to achieve a settlement.
- [7] Apart from the permanent mediators, there are seventeen (17) Sessions Court Judges who conduct mediation by rotation in locations without a Court Annexed Mediation Centre.
- [8] Currently, fifty-three (53) judicial officers from the Judicial and Legal Service scheme are accredited as mediators of which seven (7) of them are assigned to conduct mediation at the Mediation Centre.

- [9] Notwithstanding that, there are thirty-three (33) High Court Judges in Kuala Lumpur High Court and Shah Alam High Court, where eight (8) of them are accredited mediators, who conduct mediation voluntarily.
- [10] In this regard, the Mediation Department of the Office of the Chief Registrar, Federal Court of Malaysia which was established in 2016 was tasked to oversee the practice of Court-Annexed Mediation. This Mediation Department is responsible to –
- (a) to set up a Court-Annexed Mediation Centre in every state;
 - (b) to provide training, consultation, and advice regarding the administration of the Court-Annexed Mediation Centre;
 - (c) to supervise Court-Annexed Mediation Centre; and
 - (d) to be a centre for data and information collection for the mediation process in Malaysia.
- [11] In recognition of the enduring imperative to augment the knowledge base and hone the skills of those who may potentially be designated and accredited as certified mediators, the focus on training and capacity building initiatives has been brought to the forefront. This emphasis is predicated on the understanding that the crucial task of mediating disputes effectively should be entrusted only to those mediators who demonstrate the highest levels of competence. This strategic approach

underscores our commitment to maintaining a high standard of excellence within our mediation practice.

[12] Moving forward, we would like to share the statistics of Court-Annexed Mediation for the years 2021 and 2022 to project the growth of demand in mediation. In 2021, out of 15,038 cases filed for the court Mediation Centre, 12,813 cases were disposed of. The numbers slightly increased in 2022 whereby 16,884 cases were filed and 14,069 cases were disposed of whilst 2,815 are pending disposal. Those mediation cases were conducted in a physical and online manner.

[13] The adoption of JDR in Malaysia and its implementation is not without challenges. Among the challenges are:

a) Lack of awareness and understanding about the process

One of the primary challenges faced in implementing JDR in Malaysia is the lack of awareness and understanding about the process among the general public, as well as among legal practitioners. This can result in hesitancy to utilize JDR, as parties may be unsure of the benefits and outcomes of the process.

b) Voluntariness and willingness of parties to negotiate

For cases that are referred to the Mediation Centre under the court's direction, parties to mediation may not necessarily be willing to reach an amicable settlement as a lack of trust and good faith towards the other party is a major contributor to the unsuccessful mediation.

c) Cultural and Legal Barriers

There are also cultural and legal barriers to the widespread adoption of JDR in Malaysia. For example, there may be reluctance among parties to engage in open and honest dialogue during the JDR process, due to concerns about losing face or compromising their legal position. Additionally, the adversarial nature of traditional litigation may be deeply ingrained in the legal culture, making it difficult to shift towards a more collaborative and conciliatory approach.

d) Perception of Bias

The dual role of a judge in JDR and potential trial phases may lead to perceptions of bias. If a dispute doesn't reach a resolution in JDR and proceeds to trial, parties may feel uncomfortable having the same judge preside over the trial. To avoid this, the Malaysian judiciary has taken steps such as ensuring different judges handle the JDR and trial phases. However, this practice needs to be consistently applied and communicated to the parties involved to alleviate concerns of bias.

e) Parties are already at the stage of preparation for trial

When the parties are at the preparatory stage of a trial, they will have reached a stage where they are in an adversarial mode as opposed to a settlement mode. Mediation may not be attractive to them as the parties would probably be unwilling to compromise at this stage and they have spent a great deal of amount on their lawyers by then.

f) Legal complexity of the case

Certain cases involve statutes and other laws that might be too complicated for mediation. These types of cases may only be resolved through the usual court process.

g) Limited powers of mediators

Unlike arbitrators, the decision of the mediators in our jurisdiction is not binding on the parties. Thus, the parties can opt not to follow the mediators' opinions.

h) Part settlement of mediated cases

There are instances where not all disputed issues are resolved and this will be recorded as unsuccessful. However, this does not mean that the parties have completely failed to come to a settlement.

i) Non-appearance of parties

Some parties do not present themselves to the Mediation Centre when cases are referred to mediation. The Mediation Centre then records those cases as unsuccessful.

j) Limited cooperation of insurance companies in accident claims

Some insurance companies may delay the instruction to their counsel. This will result in cases where counsel does not have the

mandate. In extreme cases, some insurance companies do not give their mandate at all because they are more interested in going to trial.

k) A limited number of court officers who are professionally trained mediators

To date, there are very few mediators in the Court who have undergone professionally accredited mediation training. Although it is not a requirement under the law for a mediator in the Court-Annexed Mediation Centre to be accredited under the Mediation Act, the skill and art of mediation are the same as the private mediator, which needs requisite knowledge and skills, experience as well as extensive mediation training.

l) Legal Framework

The lack of a comprehensive legal framework for JDR is a major hurdle. While the Malaysian judiciary has integrated JDR into the dispute resolution system, it is crucial to develop clear legal guidelines that outline the process, role of the parties, and the judge's responsibilities. Such a framework would ensure consistency and predictability in the application of JDR. The Malaysian Mediation Centre's rules, while not specifically for JDR, provide a useful guide on structuring such a framework.

[14] When it comes to issues involving parties, the barriers may be lifted by educating them on the benefits of Court-Annexed Mediation and to what extent the mediation will assist them in settling their disputes. This would urge a need for the Mediation Centre to be promoted to the public and the litigants. Such promotion can be more effective with the assistance of the court officers and the lawyers. Through proper promotion and exposure, there will be a greater understanding of the role of the Mediation Centre in Malaysia. With regard to the other obstacles, we believe that practice in other jurisdictions could aid us in improving the implementation of mediation in our court system.

B. Early Neutral Evaluation

C. Apart from that, the Malaysian judiciary is cognisant of the fact that neutral evaluation mechanism as an alternative to dispute settlement is worth exploring. The Malaysian Judiciary has yet to introduce other JDR but we are amenable to any JDR mechanisms that would further enhance access to justice.

D. However, we wish to highlight that early neutral evaluation has been practised in the Industrial Court (an inferior tribunal) through Practice Note No. 3 of 2010 entitled 'Industrial Court Guidelines on Early Evaluation of Cases' which came into force on 11 October 2010 to expedite the disposal of cases by encouraging parties to settle them. It is a basis for providing an amicable settlement through discussions at the pre-hearing stage,

helping the parties to determine the strengths and weaknesses of their case and assisting them in narrowing down the factual and legal issues.

E. The parties may choose a Settlement Chairman or an Assistant Registrar who has been approved by the President of the Industrial Court as a neutral evaluator that will analyse the case. Any evaluation made by the neutral evaluator is not binding.

F. Further studies need to be conducted to evaluate the need for early neutral evaluation given the fact that judicial mediation has been exercised through the introduction of Court-Annexed Mediation. Additionally, it requires understanding among the legal fraternity for the early neutral evaluation (concerning the conduct and proper implementation of the early neutral evaluation) to be adopted in Malaysia.

Conclusion

G. The journey of implementing JDR in Malaysia is a testament to the nation's commitment to enhancing access to justice. The challenges that stand in the way – lack of awareness, need for training, perceptions of bias, and the requirement for a robust legal framework – are substantial but not insurmountable. Continued efforts in overcoming these hurdles, backed by relevant policy changes, could pave the way for JDR to become a widely accepted, trusted, and efficient method of dispute resolution in Malaysia.

Thank you.

