The ADR Form in the Subordinate Courts:

Finding the APPROPRIATE Mode of Dispute Resolution

This article discusses Practice Direction No 2 of 2010 issued by the Subordinate Courts concerning the "ADR Form". It also reviews other jurisdictions' approaches towards encouraging the use of mediation.

Introduction

Mediation has been commonly defined as a process of facilitated negotiation in which the mediator assists disputing parties in understanding their underlying needs and in negotiating a possible agreement.[1] While this mode of settling disputes may well have derived its roots from the informal ways of settling disputes in Asian societies, it has been increasingly institutionalised and connected to the courts. The Chief Justice Chan Sek Keong in the Opening of Legal Year highlighted the growth of mediation in Singapore, stating that mediation is "[o]ne undisputed success story in the development of legal services in Singapore in the last decade".[2] Mediation has been incorporated into many sectors such as financial services (Financial Industries Dispute Resolution Centre), employment matters and consumer complaints (mediation services in Consumer Association of Singapore).

Considerable progress has also been made in the mediation of disputes commenced in court. The Singapore Mediation Centre has been providing mediation services since 1996. Since the 1990s, mediation has also been available in the Subordinate Courts for civil matters, family disputes and small claims. This article focuses on the Subordinate Courts' mediation services for civil disputes within the Subordinate Courts, and the recent introduction of the "ADR Form" to civil proceedings in the Subordinate Courts.

Mediation in the Primary Dispute Resolution Centre, Subordinate Courts

The growth of mediation in Singapore was substantially driven by the judiciary in the mid 1990s. In various key speeches, former Chief Justice Yong Pung How emphasised that Singapore was developing mediation as a non-confrontational way of resolving disputes and preserving relationships. The Subordinate Courts piloted a mediation programme in 1994, where selected settlement judges mediated a range of civil disputes. Upon the successful completion of the programme, the Primary Dispute Resolution Centre (PDRC) was formed.

Court mediation within the PDRC is currently conducted by district judges who are specially designated as "settlement judges". There are two main categories of cases that are dealt with by the PDRC:

1. Motor accident cases not involving injuries —
   Under para 151(3) of the Subordinate Courts' Practice Directions, all such cases are routinely referred to PDRC after a defence is filed. Neutral evaluation is typically used in such cases, ie, the settlement judge gives the solicitors an indication of the parties' likely liability at trial, and the solicitors proceed to negotiate using the indication as a basis.

2. Other civil matters —
   The parties may request for mediation in all other matters. All the parties concerned have to consent before filing a request for mediation.

Since 2009, lawyers have also been mediating in the PDRC under the Associate Mediator Programme. The programme, which is a collaboration between the Subordinate Courts, the Singapore Mediation Centre (SMC) and the Law Society Pro Bono Services Office, allows lawyers who have been accredited by the SMC and approved by the Subordinate Courts to volunteer as mediators within PDRC as well as accumulate "pro bono hours" with the Law Society. The SMC conducts regular mediation accreditation workshops for the public, and lawyers who have been accredited in these workshops may apply to be associate mediators of the Subordinate Courts. In addition, the Subordinate Courts and SMC have jointly held two training workshops for lawyers in December 2009 and April 2010. The accreditation fees were borne by the Subordinate Courts, and the successfully accredited lawyers have committed to 25 hours of volunteering as mediators in PDRC for a year. There are currently 15 Associate Mediators under this programme, and approximately 20 to 30 more who are undergoing training or assessment to qualify as Associate Mediators.

Mandatory Mediation – A Paradox?

The benefits of mediation have been well documented in many studies. The most apparent benefit lies in the saving of costs and time for the parties. Further, parties endorse mediation because of the opportunities to participate in the process, to tell their side of the story and to contribute in determining the outcome of the dispute. Lawyers have found that mediation has improved communication between the parties and the attorneys. In addition, majority of the studies show that mediated cases have a higher rate of settlement than non-mediation cases.[3] A number of studies also show a greater compliance rate for judgments resulting from mediation than judgments arrived through the litigation process.[4] While mediation may not be appropriate in every case – for instance, when a question

of law has to be determined, or when the parties want an objective decision to be made – the attendant benefits in mediation have led to greater usage and promotion of mediation services.

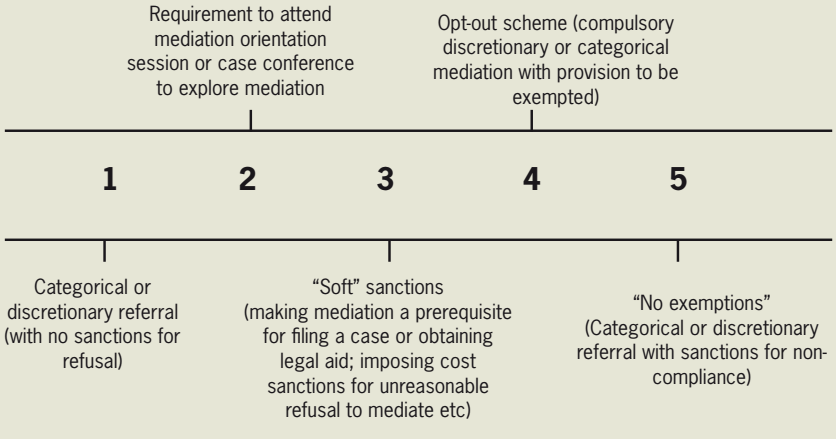
Nevertheless, mediation generally tends to be under-utilised because litigation is still perceived as the default mode of dispute resolution. Initiating mediation may also be viewed by the opposing party as a sign of weakness. The rates of voluntary usage of mediation have been low. For instance, in England's Central London Country Court scheme, in which mediation occurred only with the parties' consent, only 160 out of 4,500 cases were mediated. By contrast, after England introduced the Civil Procedure Rules empowering the courts to encourage the use of mediation with cost sanctions, the number of disputes referred for mediation increased dramatically by 141 per cent.[5] It would appear that the benefits of mediation are not fully reaped when parties are left to voluntarily participate in it.

Many courts in various jurisdictions have thus made mediation mandatory instead of allowing parties to voluntarily opt for it. The degree of compulsion in different jurisdictions varies, ranging from compulsory mediation for certain categories of cases to "softer" approaches. The continuum below illustrates the range of options used to make mediation compulsory:[6]

In the diagram below, categorical referral is used when certain categories of disputes are automatically referred for mediation. Discretionary referral occurs when a judge is given the authority to refer an appropriate case for mediation.[7]

Several Australian states adopt the highest degree of mandatoriness – referral to mediation buttressed by sanctions and with no exemptions. The courts in South Australia, Victoria and New South Wales, are empowered by legislation to refer parties to mediation with or without their consent.[8] On the other hand, there can be referral of cases without any sanctions for refusal to mediate. A prime illustration of this type of referral is the United Kingdom's ("UK") Automatic Referral to Mediation pilot scheme in Central London County Court, in 2004 to 2005. Although cases were automatically being referred by the courts for mediation, the disputing parties had the option to express their objections.[9] Somewhat on the middle of the continuum is the "opt out scheme" in Ontario, Canada. Under this scheme, all civil cases, except family cases, are referred to mediation, but the parties have the option of seeking exemption from mediation by way of motion.[10] The UK also offers an example of "soft sanctions" in the middle of the continuum. The UK courts encourage parties to attempt ADR, and they take into account the party's conduct – including any unreasonable refusal of ADR or uncooperativeness during the ADR process – in determining the proper costs order.[11]

Most recently, Hong Kong has introduced mandatory mediation on the highest degree of the above continuum. Since January this year, all parties involved in civil proceedings in the Hong Kong courts must attempt mediation before resorting to adjudication. A "mediation certificate" has to be filed together with Hong Kong's equivalent of the summons for directions, stating whether the parties are willing to attempt mediation. Both the solicitor and the client have to certify that the availability of mediation has been explained to the client, and a party who does not wish to attempt mediation has to explain why. Following the UK position, the Hong Kong court has been given the discretion to make an adverse cost order against any party who has unreasonably refused to undergo mediation.[12]



The Continuum of "Mandatoriness" in Mediation

Mandatory mediation may, however, pose considerable difficulties because it threatens to undermine the very essence of mediation - voluntariness. Mediation is frequently contrasted with litigation, the former being characterised by greater informality and parties' autonomy. Unlike a trial, a decision is not imposed on the disputing parties. Instead, they arrive at their own decision with the assistance of the neutral mediator. Voluntariness or autonomy is very much a touchstone of mediation. Mandating mediation process therefore seems inconsistent with, and even antithetical to, the fundamental tenets of the consensual mediation process. In this regard, some writers have contended that coercion into the mediation process invariably leads to coercion to settle within the mediation process, which leads to unfair outcomes.[13] Others, such as Professor Frank Sander are of the view that mandatory mediation is needed as a *temporary expedient* because individuals do not use mediation voluntarily and should be given the opportunity to experience the benefits of mediation.[14]

There is a palpable tension between mandating participation in mediation, and respecting the autonomy of the parties within the mediation process. Any mandatory mediation programme has to be designed with the utmost care and sensitivity. There is a danger that excessive compulsion *into* mediation may lead to the parties feeling that their autonomy *within* mediation has been severely impinged. A delicate balance has to be struck with respect to many features of the mandatory mediation programme – the standards of compliance the parties are held to have to be clear; the type of sanctions

for a breach of the courts' direction to mediate cannot be excessive; and there should not be arbitrary referral of cases for mediation without any provision for exemptions. It is, in short, a challenging task to ensure that mandatory mediation, as a merely temporary expedient, remains as an informal process that parties feel comfortable with.

Encouraging the Appropriate Usage of ADR

As in many other jurisdictions, it is not the practice in Singapore for disputing parties and their lawyers to routinely consider the possibility of ADR. Litigation is still treated as the default mode of dispute resolution instead of the last resort. This mindset is particularly detrimental for the parties in cases filed in the Subordinate Courts, as the cost of litigation tends to be grossly disproportionate to the relatively small quantum of claims.

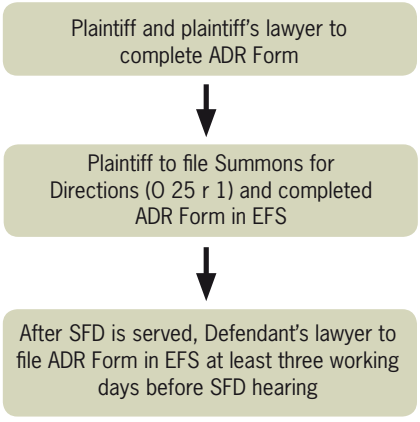
The Subordinate Courts face the same question confronting many other jurisdictions – whether mediation should be made compulsory in order to bring about a change in mindset. However, instead of mandating mediation and imposing sanctions, the Subordinate Courts are encouraging a paradigm shift and a culture change through the active encouragement of ADR and facilitating greater awareness of ADR. This approach is deemed more consonant with the voluntariness and informality that characterises mediation. It also averts many of the above challenges arising from mandatory mediation.

One step towards creating a culture change involves introducing the ADR Status Form at the Summons for Directions stage. This form was introduced through Practice Direction No 2 of 2010. Parties are now required to complete an ADR Status Form indicating whether the case is appropriate for ADR and whether they are willing to consider ADR. Using the information in the form, the court would then recommend the parties the most appropriate mode of dispute resolution. The parties would only proceed for ADR when all of them consent.

The Subordinate Courts are also raising the awareness of mediation amongst members of the Bar through the Associate Mediator Programme. This scheme, which was launched in 2009, encourages lawyers who have been trained by the Singapore Mediation Centre to volunteer as mediators in PDRC. A greater involvement of lawyers in court mediation would facilitate in-depth understanding of the mediation process and awareness of the availability and benefits of ADR. The current Associate Mediators come from a wide spectrum of law firms and backgrounds. With their diverse legal experience, they have been contributing substantially to each case being mediated at PDRC.

The ADR Form

The Subordinate Courts recently passed a practice direction introducing the ADR Form at the summons for directions stage. This practice direction will come into effect on 17 May 2010. The diagram below summarises the procedure for the submission of the ADR fom:



The ADR form has to be submitted together with a Summons for Directions ("SFD") filed under O 25 r 1 of the Rules of Court. The plaintiff's lawyer is to file it together with the SFD, while the defendant's lawyer has to file it at least three working days before the hearing date of the SFD.

There are two main features in the ADR Form:

1. Providing information concerning the suitability of a case for ADR — Lawyers will be directed in the form to indicate the salient characteristics about the case. These include the nature and value of the claim and the projected length of the trial.

2. Parties' awareness of ADR options — The parties must also certify on the form that their lawyers have explained to them the various ADR options, and their decision concerning ADR. The form includes basic information about mediation and arbitration for the parties' reference.

These features correspond with dual purposes underlying the form:

1. First, it encourages lawyers and their clients to obtain the relevant information concerning ADR and have a meaningful discussion concerning various ADR options.

2. Secondly, the information supplied by the lawyer will be used by the Deputy Registrar hearing the SFD to make appropriate recommendations for the case to proceed on one of three tracks, (i) court mediation; (ii) the Law Society Arbitration Scheme (LSAS) or (iii) adjudication in court. The parties' consent will be required before the case proceeds for options (ii) or (iii).

The ADR options: arbitration and mediation

Court mediation refers to mediation in the PDRC, Subordinate Courts. The LSAS is another option for dispute resolution. Arbitration may be more appropriate than mediation in certain cases where a neutral determination is required. The Law Society of Singapore has been providing the LSAS since 2007 for parties to resolve their dispute through arbitration in a speedy and cost-effective way. Under this scheme, the parties can expect the arbitration to be heard and an award published within 120 days from the commencement of arbitration. More information concerning fees and details of the scheme can be found at http://www.lawsociety.org.sg/lsas.

Conclusion

The ADR Form is but one step taken by the Subordinate Courts to encourage the disputants to consider all possible modes of dispute resolution before proceeding for trial in court. While it has been common in many other jurisdictions to make ADR compulsory, excessive compulsion coupled with sanctions may easily undermine the consensual basis of ADR. Consistent with the ethos underlying ADR, building an "ADR culture" has to be primarily a consensual process, with the joint collaboration between the judiciary, the Bar and other major players in the mediation scene.

Joyce Low
Dorcas Quek
District Judges
The Subordinate Courts

The Practice Direction can be accessed at the Subordinate Courts' website at http://www:subcourts.gov.sg, under the section "Legislation and Directions". More information concerning court mediation can also be found at the Subordinate Courts' website at http://www.subcourts.gov.sg under Quick Links - Court Dispute Resolution, or Civil Justice Division – Court Dispute Resolution.

The above section concerning mandatory mediation is more fully elaborated in Dorcas Quek, "Mandatory mediation: an oxymoron? Examining the feasibility of implementing a court-mandated mediation program", to be published in May 2010 in The Cardozo Journal of Conflict Resolution, volume 11.2 (Spring 2010).

Notes

1 See for instance Kimberly Kovach, "Mediation" in Michael L Moffitt & Robert C Bordone, *Handbook of Dispute Resolution* (Jossey-Bass, 2005), p 304, stating that mediation is commonly defined as a process in which a third party neutral assists disputing parties in reaching a mutually agreeable resolution, and that mediators normally aim to promote information exchange, promote understanding among the parties and encourage exploration of creative solutions. See also Laurence Boulle and Teh Hwee Hwee, *Mediation: Principles, Process, Practice* (Butterworths Asia, 2000), pp 3-6.

2 Paragraphs 13-14 of the Honourable Chief Justice's response at the Opening of Legal Year 2010, accessible at http://app.supremecourt.gov.sg/data/doc/ManageHighlights/2126/Opening%20of%20the%20Legal%20Year%202010%20-%20Response%20of%20Chief%20Justice%20Chan%20Sek%20Keong_19%20Jan%202010.pdf.

3 Roselle L. Wissler, "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research" (2002) 17 *Ohio St J on Disp Resol* 641 pp 690-694; Craig A McEwen, "Toward a Program-Based ADR Research Agenda" (1999) 15 *Negotiation J* 325, 331-33.

4 Craig A McEwen & Richard J Maiman, "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 *Maine L Rev* 237; McEwen & Maiman, "Mediation in Small Claims Court: Achieving Compliance Through Consent" (1984) 18 *Law & Soc'y Rev* 11; Neil Vidmar, "An Assessment of Mediation in a Small Claims Court" (1985) 41 *J of Soc Issues* 127, Craig A McEwen and Richard J Maiman, "The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance" (1986) 20 *Law & Soc'y Rev* 439; Neil Vidmar, "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance" (1987) 21 *Law & Soc'y Rev* 155.

5 "The Lord Chancellor Department: Alternative Dispute Resolution: A Discussion Paper" (November 1999), Annex B, available at http://www.dca.gov.uk/consult/civ-just/adr/annexbfr.htm.

6 This continuum is adapted and modified from T Sourdin, "Making People Mediate, Mandatory Mediations in Court-Connected Programmes" (unpublished paper, Australia, Oct 1993), reproduced in Spencer and Altobelli, *Dispute Resolution in Australia* (Lawboo Co, Australia, 2005).

7 Frank E A Sander, H William Allen & Debra Hensler, "Judicial (Mis) use of ADR? A Debate" (1996), 27 *U TOL L Rev* 885, at 886; Frank E A Sander, "Another View of Mandatory Mediation" (Winter 2007), *Disp Resol Mag* at 16.

8 See Supreme Court (General Civil Procedure) Rules 2005 (Victoria) r 50.07; New South Wales Supreme Court Act 1970 s 110K; South Australia Supreme Court Act 1935 s 65(1); and Queensland District Court Act 1967 s 97.

9 See Dame Hazel Genn, Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vancappa, "Twisting Arms: Court referred and court linked mediation under judicial pressure" available on the UK Ministry of Justice's website at http://www.justice.gov.uk/publications/research210507.htm.

10 Robert G Hann and Carl Baar, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months" 80 (2001).

11 Rule 1.4(e) of the UK Civil Procedure Rules state that "[a]ctive case management includes: … (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure." See also *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576; *Hurst v Leeming* [2002] EWHC 1051; *Dunnett v Railtrack* [2002] EWCA Civ 303; and *Hickman v Blake Lapthorn* [2006] EWHC 12.

12 Hong Kong Practice Direction No 31 on Mediation, accessible at the Hong Kong Civil Reform website, at http://www.civiljustice.gov.hk.

13 Roselle L Wissler, "The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts" 33 *Willamette L Rev* 565 at 565; Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale L J* 1545 at 1581; Lucy V Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?" (1993) 1 *J Disp Resol* 22-30 at 41; Susan Myers *et al*, "Divorce Mediation in The States: Institutionalization, Use and Assessment" (Fall 1988) 12 *State Ct J* 17 at 23.

14 "Judicial (Mis)use of ADR? A Debate" *supra* note v, at 886. In Sander, "Another view of mandatory mediation", Prof Sander repeats the point that compulsory mediation is a kind of temporary expedient a la affirmative action.