

MEDIATION MATTERS IN A TIME OF CHANGE

by **Shanti Abraham**

INTRODUCTION

Economic uncertainty continues as we move into the second half of a perplexing 2020. All of us are grappling with the notion of a new normal. No one has been untouched. Meanwhile, the drum beat of emerging disputes are starting to surface. The shock of the Covid-19 crisis first inspired parties to negotiate in an attempt to quell their anticipated problems.

But as crunch time looms, the time for casual talk may be over.

The prospect of litigation almost seems foolish, and maybe even irresponsible, in a landscape mired with deeply cash-strapped parties and even uncertain continued employment for decision makers within the parties. The conversation seems to turn to the need for facilitating better conversations and coaching parties through their conflict rather than cudgelling their counterparties into submission.

Mediation has been skirting on the edges of problem-solving for more than 2 decades. Cloaked with an uncertain value proposition, mediation has been a welcomed concept in theory but not the first touchstone for most advisors given that there is no apparent reward for swift solutions, at least in this part of the world.

But now, as a consequence of the devastating ripple effects of the Covid-19 crisis taking root, the wisdom switch has flicked on for many.

The prospect of a swift, sensible cost-effective solution via Mediation has been pushed front and centre. The recurring questions remain – how and why does it work? This article endeavours to answer some of these basic questions and also tackle some of the thorny questions posed by those considering Mediation.

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A brief overview of the basics.

How does Mediation work:

Mediation, unlike Arbitration and Adjudication, is a facilitated discussion between disputants to identify the issues in dispute and to then explore solutions to resolve them.

Why does Mediation work:

The final decision belongs entirely to the parties and when a solution is reached, the parties would have come to accept (through the process of mediation) why the solution they are agreeing to is to be preferred over keeping the problem alive. This is why Mediation is a voluntary process and the main key to why it works.

One notable feature is that the rate of compliance of final mediated agreements is anecdotally high. This is despite nothing being imposed. This phenomenon happens for a few reasons, which is explained below.

The Mediation process is a flexible one and the Mediator is privileged to speak with parties privately as well as jointly. The entire process is protected by confidentiality and there is an additional layer of confidentiality for parties in private session(s) where they can be assured that what is shared in the private session remains confidential unless the party authorises the Mediator to disclose or communicate the same. There are of course, some limitations to confidentiality and these would include matters relating to any illegal activity e.g. admission to criminal conduct.

The Mediator uses various techniques to understand the facts which have brought the parties into dispute; to explore why earlier attempts to resolve were not successful (invariably parties would have tried to resolve the problems on their own) and to understand the issues that continue to affect the parties in dispute. The engagement between the Mediator and parties serves to build rapport and Mediators are trained to actively listen to what the real issues in dispute are.

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The next step would be to help the parties put the issues into context and to recognize their own key interests. This is where the real work of a Mediator is done. A Mediator has to remain the most positive and optimistic person in the mediation space with more patience and stamina than anyone else to plough through the invariable impasses that will be presented by the parties.

Mediators are most crucially, neutral option explorers. Mediators take the parties on the journey of how they got to the room, what the problem really is and where the parties want to head to.

One of the key challenges in the mediation landscape is the perception that Mediation is a soft and easy process. It is not. A good Mediator makes it look soft. But it is never easy.

Mediation requires the marshalling of every ounce of one's temperament, ability to deal with impasses, stamina, alertness, creativity and conflict management skills every single time one is invited to "hold the room". There is no break or letting up as all eyes and ears are on the Mediator for guidance and impasse-overcoming strategies.

The basics of Mediation are not complicated. The next questions relating to Mediation are more complex.

Why hasn't Mediation been used more?

Even though formal mediation has been a known process for the last 2 decades, it really has only surfaced as a utilized form of dispute resolution in the last decade.

One of the key reasons for this is that the usual gatekeepers of disputes (lawyers) previously were not given a respected place at the mediation table – especially by mediators who ostensibly mediate for free.

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Why some mediations succeed and some don't.

Parties must make the first choice to walk into the Mediation Chamber with their problem. It is entirely up to the parties if they choose to walk out of the Mediation Chamber with a solution. More precisely, a solution they can live with.

All parties have an idea of what they want and why they want it. A Mediator's role is to discover the "Why" and to respectfully explore alternatives.

Mediations which do not result in resolution may be a result of many reasons. In some cases, there is insufficient data for the parties to decide or the parties require more time to consider the issues. Alternatively, the parties may find themselves hemmed in by personal fears or rigid mandates or policies (which may make no sense from a time and cost expense perspective but are built on notions of "matter of principle"). In such situations, the parties are hopeful that the other side will bend or back off. If this does not happen, then an adversarial process needs to be used to break the impasse by calling out a winner and declaring a loser.

How is it that parties will voluntarily agree to something when negotiations have failed?

In a negotiation, parties argue passionately from their own self-interest (and fears). Facts, Law and Merits are used as weapons to demonstrate who is more right than the other. But no one is actually listening to the other side. Parties may be listening to prepare a rebuttal but not really listening to the root of the problem. A Mediator is trained to change the dynamics of unproductive posturing. Mediation helps parties consider options without pressure of penalty. This flexibility often leads parties into workable solutions.

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Why is there a generally high compliance rate with final mediated settlement agreements?

In an adversarial process, both parties are inflicted with an outcome which invariably ends with one declared the winner and the other, the loser. In these post Covid-19 times, the important question ought to be – and then what? Will there be compliance? Would the winning party simply be left with a paper judgement? Enforcement is always the consolation option but often parties have not done a cost-time analysis on the enforcement process involved.

In Mediation, the parties understand the larger context in which their problem lies. Solutions must be workable for both parties otherwise, it will not (cannot) be agreed upon. A skilled Mediator knows to test the durability of the proposed agreement and a back-up plan for continued mediation is often built-in to anticipate bumps on the road to compliance.

One organisation that uses Mediation effectively is the Securities Industries Dispute Resolution Centre (“SIDREC”). SIDREC can be proud that there has 100% compliance with the mediated settlement agreements the members and claimants have reached. The parties in each settled matter may have once upon a time failed at direct negotiation. However, during Mediation- with the guidance of a trained Mediator, they reached the point where they understood the value of a swift resolution to the problem they had and have chosen to agree to a course of action they can live with.

And what happens if the party reneges on the final mediated settlement agreement?

The true question is why it happened. With no known history of any of the parties reneging on the final mediated settlement agreements I have assisted with, my response is framed in theory.

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The answer may be found back in the Mediation itself (party felt bullied into submission or mediator strong-armed an unworkable solution onto the party) or may lie in original poor intentions of the parties (eg delay tactics, no intention to really resolve). Having said this, I would see this as a peril of free/volunteer mediation as parties would not have invested anything in the mediation process and therefore have no skin in the game. In that sense, one would be getting what one paid for.

In any event, it is prudent that all final mediated settlement agreements build in a future mediation clause should parties face any issues with compliance.

CONCLUSION

This is a watershed year for Mediation where we will hopefully see robust changes in our Malaysian Mediation Act 2012 and the relevant regulations, thereby strengthening this mode of problem solving. Mediation continues to be available as a pre-action option as we are one of the few countries in the world which has a Mediation Act.

Making Mediation the First Touchstone.

With the scourge of Covid-19 tipping lives upside down, parties will have to consider and prepare themselves for a possible tsunami of disputes. If so, pre-action Mediation would be an excellent place to start.

Are you a Nextliner?

Frontliners helped us survive the pandemic. Now Post Covid-19, lawyers and other advisors are going to be the Nextliners to help the community to pick up the pieces of economic carnage left behind. Perhaps, it is time for lawyers and advisors to top up their skills to include Mediation Advocacy and to be a first mover in influencing wise problem-solving in a crisis. Alternatively, for those who are keen to step up to train as Mediators, CIARB will be rolling out programmes in due course.

Shanti Abraham FCI Arb is a director of IGAB. She is on the CIARB Approved Training Faculty for Mediation. She is also an IMI and SIMI Certified Mediator with a public profile at <https://www.simi.org.sg/profile/mediator/Shanti--Abraham>