

4TH ASIA PACIFIC MEDIATION FORUM CONFERENCE
MEDIATION IN ASIA PACIFIC: CONSTRAINTS AND CHALLENGES

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Officiating Speech
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Mr. Chairman, Distinguished Guests, Ladies and Gentlemen,

I thank the organizers of the 4th Asia Pacific Mediation Forum Conference for inviting me to speak at this conference.

While attending a conference in Abu Dhabi last March, the Rt. Hon. the Chief Justice of Singapore told me that the number of civil cases filed in the Singapore courts had significantly decreased in the last few years. Surprised, I asked him why? He replied: "Arbitration". When I mentioned it to someone later, he said that there could be another reason i.e. proceedings in Singapore courts are expensive because of the high fees imposed by the courts in Singapore, for example, if parties exceed the time allotted for the trial of a case, the parties would have to pay additional fees by the hour for the extra time taken.

I do not know whether the second reason is partly the reason for the decrease in the number of cases in Singapore courts. Even if it is, I have doubts whether that is something that we should follow. But, I am more interested in the reason given by the Chief Justice, which, I believe, includes mediation too.

Ladies and gentlemen,

It is often said that history repeats itself and that the world is round. You begin at one place and whichever direction you travel, you will end up at the same place. Mediation used to be the means of settling disputes in the early stages of human history. As human civilization progressed and disputes became more complex, it was found that mediation by friends, elders and village chiefs was no longer suitable to settle the disputes effectively. Courts were established. Laws were codified. Lawyers came into picture. From then on, lawyers represent the disputing parties in court. They present and argue their clients' cases. Judges decide the cases. The legal and judicial system developed. Judges then give reasoned written judgments. Lawyers read them, analyze them and use them in future cases. Academicians write books and articles about them. Jurisprudence becomes an important subject at universities. Publication of law books becomes a big industry. Law libraries mushroom. So are law schools producing

thousands of lawyers every year making the legal profession one of the largest professions in any developed country. “Justice” becomes the most popular word amongst the profession and, at times, abused. The legal profession claims to be the champion of justice. As a country develops, more and more cases go to court. As jurisprudence develops, law becomes more complex. Trials become protracted. On top of that, the defendant whose case is weak may try to delay the proceedings.

There are many ways of delaying a proceeding. One of them is to keep making interlocutory applications and appealing against every order made. While the proceedings in the interlocutory applications and the appeals are pending, they would make applications for a stay of proceedings. Those applications will have their own sets of appeals. The trial is stayed, even if temporarily, it means delay. The process continues even during the trial. After the main judgment is given there will be another round of appeals. Even while the main appeals are pending, at almost every stage, there will be new applications, for stay of proceedings, stay of execution etc. followed by their own set of appeals. Even when all the avenues for appeals have been exhausted, in the last few years, they have ingeniously resorted to the so-called “inherent jurisdiction” of the court to review its own decision as well as the decision of the Court of Appeal, where no further appeal is allowed by law. Even in review, when one application fails, they would try again, hoping that the new panel would somehow allow their applications. Of course, if that were to happen, it would be the other party’s turn to apply for a further review.

It is under such circumstances that the Federal Court, presided by me, came out with a few judgments recently, first to put a stop to “review” by the Federal Court where no appeal goes to the Federal Court as in a case that begins in the Sessions Court: see Abdul Ghaffar Bin Md. Amin v. Ibrahim Bin Yusoff & Anor. Federal Court Civil Application No. 08-149- 2007 (P), Sia Cheng Soon & Anor. V Tengku Ismail Bin Tengku Ibrahim & Anor. Federal Court Civil Application N0. 08 – 151 – 2007 (N) and Anantha Kiruisan P.S.R. & Anor. V. Teoh Chu Thong Federal Court Civil Application No. 08 – 89 – 2007 (W). In Sia Cheng Soon, we even overruled the case of Tan Sri Eric Chia Eng Hock v.P.P. (2007) 1 CLJ 565. Regarding the power of the Federal Court to review its own decision, while not closing the door completely, we restricted the grounds for it – see ASEAN Security Paper Mills Sdn. Bhd. v. Mitsui Sumitomo Insurance (Malaysia) Rayuan Civil No. 02 – 17 2006 (A). But, that does not help to reduce the number of fresh cases being filed in the courts, nor the interlocutory applications and appeals, nor the delay.

The legal and judicial system having developed that far and having such side-effects, we now realize that the system is not able to cope in disposing the ever-increasing cases within a reasonable time and costs, partly due to the system that we have so proudly developed itself: the procedure is too complex, legal fees are too expensive and the lawyers themselves contribute to the delay.

As we usually do, we then look backwards. And, as in a marathon race, the participants leading the race are the ones that make the U-turn first to head towards the starting

point. So, developed countries such as the United States, Canada, Australia, New Zealand, Singapore, Hong Kong and United Kingdom have adopted mediation as a method of settling disputes. We too have come to a stage that we may have to do the same.

As far as I am concerned, we do not have to look for historical or religious justifications to do so. If it helps to reduce our problems, why not? Furthermore, the methods employed then may not suit the kind of disputes that we now have. The surrounding circumstances are different too.

As stated by Dato' Cecil Abraham in a paper "Alternative Disputes in Malaysia" says that in Malaysia "the practice of mediation in its conceptualized form is still at its embryonic stages." However, we do have mediation facilitated by statutes under such as the Financial Mediation Bureau (FMB), the Banking Mediation Bureau (BMB), the Housing Buyers Tribunal (HBT) and the Consumer Claims Tribunal (CCT). In 1999, the Malaysian Bar Council too had set up the Malaysian Mediation Centre (MMC) which caters for all types of commercial and matrimonial disputes and open to all parties. There is no monetary limit on the claim that can come within its jurisdiction and the scope of its practice is unlimited.

Some forms of mediations under various names e.g. "inquiries", "arbitration", "conciliation" are found in the Workmen's Compensation Act 1952 (section 30), the Trade Unions Act 1959 (section 45), the Industrial Relations Act 1976 (section 18) and the Employment Act 1955 (section 69). Section 106 of the Law Reform (Marriage and Divorce) Act 1967 provides for parties to attend the reconciliation tribunal prior to filing divorce petition for dissolution of their marriage. Small Claims Court and Social Security Organization (SOCSO) should also be mentioned.

While some, like SOCSO, Tribunal for Consumer Claims, House Buyers Tribunal seem to work pretty well, others like the Small Claims Court does not. Even mediation established by the Bar Council does not seem to be popular. According to Dato' Cecil Abraham, as at 2007, the MMC had 135 registered mediators and a total of 131 cases had been referred to mediation, a case of more mediators than cases. We do not know what type of cases form the majority of the cases that went to MMC.

In my experience in the High Court, it appears that the Reconciliation Tribunal too does not achieve the desired objective. More often than not, parties, especially the respondents would just ignore the notice issued by the tribunal for them to attend. In my nine years in the High Court at Penang, as far as I can recollect, only two or three divorce petitions went on for full trial, even then only on division of matrimonial assets. More often than not, all that the parties want is a quick divorce. So, they file joint petitions. To them, mediation is a bother. They are not interested in mediation as they do not want reconciliation. I am told that "sulh" which is practiced by the Shariah Courts is more successful in reconciling marriages.

The Industrial Court was established to be a court of arbitration that was not required to pay too much attention to legal technicalities but to settle disputes speedily on broad principles of equity, good conscience having regard to public interest implications and its effects on the economy of the country. But, I see orders by the Minister to refer cases to the Industrial Court being challenged, forestalling the hearing by the Industrial Court. More often, I see the awards of the Industrial Court being challenged, not by appeals as there is no appeal provided by law, but through judicial review. While judicial review is a welcomed development of administrative law, its so-called development over the past twenty years has had adverse effects on the proceedings in the Industrial Court i.e. delaying the settlement of the disputes.

With that background, I accept this invitation hoping that something of practical importance will come out of this conference that will help to overcome the courts' problems.

In my view, in looking for the type of mediation to solve our problems, we will have to consider two factors. First, the main problem that we want to solve. Secondly, the present circumstances. Only then would we be able to choose methods that are suitable under the present circumstances that would hopefully solve, at least, part of our problems.

Our main problems in the courts are the ever-increasing number of cases being filed, backlog, protracted and expensive trials leading to delay in the disposal of cases.

So, first, we will have to look for the type of mediation that will divert the disputes to mediators from the courts. In this respect, it is important that we identify the type of cases that are really creating problems which may be diverted to mediators. Certainly not criminal cases (I am referring to the more serious ones) as they are offences against the State, not individual. Amongst civil claims handled by the Subordinate Courts, perhaps we should focus on running down cases. A significant percentage of civil cases in the Subordinate Courts are running down cases. They are quite stereotype. I remember about three decades ago, there was a suggestion to introduce the no-fault liability scheme. But the Bar was not in favor because lawyers who did mainly running down cases opposed it for obvious reasons. Now, I hear that the idea is being mooted again. I hope that the Bar will be more open to the suggestion this time.

Of more importance are the big commercial cases. These cases are complicated, the trials are protracted and the parties, or at least the Plaintiffs, want quick disposal. If they can be settled through arbitration or mediation it would certainly assist the courts in reducing the backlog. We have the Kuala Lumpur Regional Centre for Arbitration. But, I do not know whether they are fully made used of or whether they are a popular method of settling commercial disputes. At least, they do not seem to have the effect that they have in Singapore. Why? Are our businessmen, especially if they are at fault, more interested in finding ways to delay proceedings? Do we have too many lawyers in whose interest it would not be advantageous to have quick out-of-court settlement? Are our court fees too low that going to court is not prohibitive at all? And so on.

If these cases can be diverted from the courts, the courts would have more time to concentrate on other cases, especially criminal cases which are increasing at an alarming rate, partly due to the influx of illegal immigrants and the ever increasing number of drug addicts. These are the two main contributing factors that we do not seem to be able to control.

Subject to more information coming out of this conference, at this point of time, I am more interested in the off-the-court-mediation prior to the filing of the cases in court rather than mediation after the cases have been filed in court, especially by the Judges themselves. I do not favor the Judges themselves to be involved in mediation, especially in cases in their courts. More so when the mediation is made compulsory by law or by an order of the court.

Mediation is premised on the voluntariness of the parties to seek mediation, not forced by law or by an order of court. Indeed, forced mediation is a contradiction in terms. If parties do not agree to mediate, I do not know how mediation can proceed. The challenge is how to make them agree to submit themselves to mediation and come to a settlement. We see in the case of arbitration, even though the contract provides for arbitration, a party not wanting to go for arbitration would find all kinds of excuses to delay or abort it. However, there are cases which are settled through arbitration and do not come to court at all. Hopefully, the same would happen in the case of mediation. Even if 10% of the disputes are settled through mediation, at least those cases do not come to court and the court dockets would be less by 10%.

I welcome your suggestions as to how to establish the mediation process and/or how to encourage the parties to utilize the existing facilities and how to improve the facilities to attract the parties to make use of them. As I have indicated, I am more concerned about the complicated civil suits and commercial cases rather than small claims and matrimonial disputes because the former are the ones that take a lot of court's time. Secondly, the mediators should not come from the existing Judges. It is easy for Singapore to have one Judge to do the mediation and another to hear the case when mediation fails because all the Judges are in the same court complex. If we were to introduce that in Malaysia, the Judges would be spending more time on the road than in the courtroom, covering each other's cases. They should be sitting in the courts hearing cases registered in their respective courts. However, the Singapore model may be tried in Kuala Lumpur and a few other big towns.

Next, if we introduce post-filing mediation, even by outsiders (question: who are they?), I fear that it may cause further delay.

I would also like to be advised as to who these mediators are going to be? Who will select them? How are they going to be paid? By whom? Where are they going to sit? And other questions.

I hope that this conference will come out with some specific suggestions that can be implemented. I shall be very grateful if, when the conference is over, the Organizing Committee will send me your specific suggestions as to how to implement the mediation process in Malaysia. If something of practical importance does come out of this conference which can be implemented to help solve, or at least reduce the problems faced by the courts regarding backlog of cases, come October, I will retire a happy man and my successor too, whoever he may be, will be grateful to you all.

Ladies and gentlemen,

I now declare the 4th Asia Pacific Mediation Forum Conference officially open.

Thank you.