ESSENTIAL SKILLS IN MEDIATION

"meditate NOT litigate"

COUNCIL OF JUSTICES OF THE PEACE
STATE OF PENANG

Essential Skills in Mediation

Contents

Foreword

The Right Honourable Chief Minister of Penang

Having been informed that the Council of Justices of the Peace in Penang had taken the initiative to develop a trilingual training module entitled 'Essential Skills in Mediation', I am most delighted to share a few words here with the Council's members as well as future readers and users of this first 'Learn & Train' manual.

Given that our beloved Malaysia has just celebrated her 65th Independence Day, I believe it becomes ever more important that our Tanahair remains a bedrock of social harmony and a safe haven for our multi-racial communities for generations to come. While it is inevitable that differences do exist and occasional discords may arise, it certainly does not mean that every dispute can only be resolved within the four walls of a court. Instead, members of the society may consider building and preserving harmonious relations through community mediation practices. In this regard, community leaders should be empowered to play a proactive role as mediators in reaching a solution that is a win-win for all, a middle ground that does not dictate who is right or wrong, and a cost-effective platform for parties involved. By having mediators within these communities, they are also empowering their leaders to manage their interests and well-being from within, apart from maintaining peace.

I must congratulate both the Council of Justices of the Peace in Penang and the author(s) for their effort to make mediation learning and training easily accessible with minimal cost. This publication could not have come at a better time as my administration strives to make Penang a state where every citizen participates to build a more inclusive and equitable society. I commend the Council of Justices of the Peace in Penang for their relentless effort in promoting community mediation, complementing the State Government's LovePENANG campaign as well as our Penang2030 vision.

I note that the 45-page module has been written in a simple yet comprehensive non-legalistic language covering essential topics for lay leaders without prior legal training to acquire the necessary knowledge and skills to serve as community mediators. I am also convinced that the publication of this well-presented module is a good shot in the arm for community mediation in Penang. In this regard, I wish to thank the Council of the Justices of the Peace in Penang for their commitment to distribute sufficient copies of the trilingual manual to the respective Majlis Pengurusan Komuniti Kampung (MPKK) while the community at large may download the free e-manual from the JP Mediation Bureau website (https://www.mediation.my).

YAB CHOW KON YEOW

Chief Minister of Penang

Preface

The Honorary Secretary, Council of Justices of the Peace, state of Penang

Mediation as a means to resolve disputes is not new. It originated as a mode to resolve communal disputes and has been practised in the ancient Greek and Roman civilizations. It was also commonly employed in Middle East, India, China and neighbouring Japan and Korea. Different words had been used to describe mediation and, in each area, local beliefs have had an influence on how it was carried out. In the East Asian region, for example, Confucianism had a strong influence.

Mediation was being used to resolve disputes in Peninsular Malaya prior to the introduction of laws and the judicial system by the British in 1807. Indeed, the Malays, Chinese and Indians who resided here have been practising it since at least the 15th century.

The Malays used sulh (which in Arabic means end of arguments or compromise, translated as conciliation). The mediators were local chiefs (imam, penghulu and ketua kampung), administrators of specific areas or jurisdictions. They were appointed by the local people and endorsed by the Sultan.

Panchayat, practised by the Indians, centred around a village council of elders (usually numbering five) who were acknowledged by the community as a governing body. Brought from India, the system facilitated decision-making with regard to the social issues confronted by the villagers.

As for the Chinese, tiao jie, which literally means mediation, was the primary mode of dispute settlement adopted by the early settlers. Used for thousands of years in traditional China, its theory and practice had been influenced by the Confucian philosophy. It was recorded in Penang, for example, MIN SIN SEAH, a century old social educational organisation had provided mediation services during its early incorporation.

The office of the Justices of the Peace (JP) in Penang, then a Straits Settlements state (1826-1948), was a British creation. Eminent persons of communities were appointed as JPs to assist the Crown in the preservation and maintenance of peace of their communities. Under the British administration prior to Independence, JPs were appointed to mitigate the shortage of magistrates then. In addition to their statutory roles, the JPs then also acted as mediators in community conflicts and disputes.

The Council of Justices of the Peace, state of Penang, was established in 1962 to provide a platform for Penang JPs to coordinate and pool their resources to serve the local community more effectively. It is a registered entity with the Registrar of Societies. With no new appointment since 1990, the membership stands at 53 comprising eminent community leaders including retired senior civil servants, industrialists, merchants, accountants, medical doctors, surveyors, planters, corporate directors and other trade practitioners.

Due to changes in certain statutes after Independence, the role of JPs in Penang has been greatly diminished. Although Sections 98 and 99 of the Subordinate Courts Act 1948 allowed for the appointment of JPs as “second class” magistrates, no JP has thus far been given the position. Recent developments in mediation, however, have raised the possibility of re-engaging these community

leaders, appointed by the state authorities, to act as mediators to resolve community disputes. They are ideal for the role. Penang JPs have been involved in mediation since the 19th century. One notable example was Foo Tye Sin JP who acted as mediator in local community conflicts and disputes during British rule.

Sometime in 2014, the JP Council received a paper entitled: "Transformation of the institution of Justices of the Peace of Penang" from High Court Judge Yang Arif Dato' Lim Chong Fong, then an advocate and solicitor in private practice. Inspired by the ideas outlined and convinced after meeting the writer in person, the Council, at its 2016 annual general meeting, resolved to transform the office of the JP to include mediators. This is besides continuing with its limited statutory roles and functions. Consequently, the Council's constitution was amended to include mediation as one of its objectives. As a mediation institution, JP mediators can be appointed as ad hoc mediators pursuant to Part III of the MA 2012.

Pursuant to Section 7(2)(a), MA 2012, a mediator shall "possess the relevant qualifications, special knowledge or experience in mediation through training or formal education". To secure recognition, competency and practical experience for its members, the Council approached Ir Harbans Singh (currently a panelist of the Asian International Arbitration Centre or AIAC). He in turn pitched the Council's proposal to the then Director of Kuala Lumpur Regional Centre for Arbitration (KLRCA), Professor Datuk Sundra Rajoo, for support and endorsement. KLRCA has been renamed AIAC. The first JP-KLRCA (AIAC) mediation skills course was held in August 2016. Our collaboration with AIAC to train community mediators continues till 2019.

In 2022, the Council collaborated with Asian Institute of Alternative Dispute Resolution (AIADR) to train the 5th batch of community mediators. Since 2016, the Council has trained 75 mediators, including 7 senior officials of the court. Of the 68 mediators, 30 are empaneled to serve when called upon.

In line with a broad community-based approach, trainees for community mediators are both JPs and non-JP community leaders from diverse background including those from sectors like medical, legal, engineering, construction, finance, trade, commerce and other industries. Apart from the ad hoc mediation, two JP mediators have also served in the Penang High Court annexed mediation in 2016.

As the mediation service involves non-JP mediators, the Council established a bureau to allow it to be semi-autonomously managed. With the tacit support of the state government, the JP Mediation Bureau was officially launched by His Excellency, the then Governor of the state of Penang, Tun Dato' Seri Utama (Dr) Haji Abdul Rahman Bin Haji Abbas, on 20 July 2017.

The Bureau has a rented office located at the Caring Society Complex and has a panel consisting 30 JP and non-JP mediators (local community leaders) representing different strata of the community. Currently, the Bureau provides pro bono pre-action mediation services to the local community. Pursuant to Court Practice Direction 4/2016 paragraph 5c, the Council has offered to assist the courts in alleviating the burden of pending cases, particularly those related to community disputes.

Training community leaders as mediators is the primary goal of the JP Council. Community mediation serves as an important means to keep a community harmonious. Community leaders are empowered to manage their interests and well-being from within, apart from maintaining peace. Having mediators within their communities, conflicts or disputes — no matter how petty — can be amicably resolved before they develop into full-blown cases that eventually ended up in the courts. The JP Council's idea of engaging local community leaders means that the people involved in the mediation processes are familiar with other on-the-ground issues that may help or hinder conflict resolution.

We are grateful to all the directors, past and present, of AIAC for their encouragement and support to train community mediators in Penang. The endorsement provided not only the necessary knowledge and skills but also a mark of recognition of their competency as mediators. We look forward to their continued support and bring the collaboration to the next level.

A Memorandum of Understanding was signed with AIADR on 6 August 2022. The objectives are multi-fold with emphasis on promoting community mediation as the preferred dispute resolution; professional advancement for community mediators with recognition as competent mediators and co-develop course modules for community mediation training.

This booklet is published as part of the JP Council's outreach to the general community. It is designed and developed as a 'self-guided' learners pack for individual learning and as a 'facilitation manual' for group training.

The JP Council places on record our appreciation to all those who have supported and contributed in one way or another to reach this milestone. Special mention goes to the Right Honorable Chief Minister Tuan Chow Kon Yeow for his unwavering support since inception.

Dato' Ong Seng Huat, JP
Honorary Secretary,
Council of Justices of the Peace, state of Penang.

1 Conflict, Approaches and Dispute Resolutions

LEARNING OUTCOMES

Upon completion of this topic, participants are expected to:

1. understand the meaning and causes of the various types of conflict
2. explain how conflict can be managed with the different approaches
3. apply the dispute resolution knowledge and modes to resolve conflicts

CONFLICT

The word 'conflict' is derived from two Latin words con (together) and fligere (to strike). The Concise Oxford English Dictionary defines conflict to mean a 'fight, struggle, collision'. Additionally, some of its synonyms include hostilities, clash, war, dissension, friction and dissent. In our daily lives, conflict occurs when there is clash of opinions, both individuals and groups inclusive. It also triggered when one party felt unjustly treated or receiving the unfair end of the bargain. In the social context, conflict emerges when there is perceived imbalance between individual rights and public interests and the list is not exhaustive.

Both cultural diversity and the rapid changes in the community environment have also contributed to the increase of conflicts. In organisations, the interdependence with differing perceptions and desired outcomes, adversely affect the relationship between individuals. Such conflicts not only disrupt the normal activities but also hinder the realisation of organisational goals and objectives. However, not all conflicts are bad or destructive. Instead, functional conflicts in organisations can bring positive results if detected, diffused and resolved early.

PERCEPTION

Perception in communication is all about how a message is organized, selected, processed, understood but interpreted differently by differently people. It is common knowledge that not everyone can see things in the same light. As people generally do not know the reasons behind the other person's action and behaviour, they become suspicious of what the other person's motives and intentions are.

Eventually, a breakdown in communication occurs and both parties start building their own defence mechanism to counter possible if not imaginary threats. Thus, conflict can be simply sparked by a disagreement through which either or both parties involved perceived a threat to their needs, interests or concerns.

Therefore, conflict is a fact of life we have to live with. It goes to show that individuals, organisations and even nations are uniquely different due to ideology, culture and personal values and faiths. Added to these are external factors, including economic and environmental interests of the diverse strata of the society. While conflict is inevitable, disputes can still be negated.

Disputes occur when the disputants are unable to mitigate or manage their conflict during the early stage. The human natural responses are to challenge, compete or force a solution, usually of the win-lose scenario in the battle fields of the respective sectors which ultimately ended up in the courts of law.

In most circumstances, compromise may be struck it both disputing parties are prepared to compromise and acknowledge the difference or the dispute referred to a third party to mediate with a chance take win-win solution. Thus, conflict need not be narrowly construed as certain conflict do have positive consequences too.

Functional Conflict

Conflicts having positive consequences are known as functional conflict or constructive conflict can have positive effects on both individuals and groups within an organisation. Such conflict is not only common but also useful to solve problems that are related to individuals and groups in organisations. Functional conflict is an unavoidable component in work process for desired performance as it helps to not only energize people but stimulates one at one's best in times of conflict. It brings out the best in them to realise their capabilities.

On the other hand, dysfunctional conflict or the destructive conflict, if not resolved immediately, is likely to be detrimental and disastrous. The negative effect of such conflict affects the morale of the working individuals and groups across all levels within the organisations. The consequences might hurt group cohesion, aggravating interpersonal hostilities and creating unconducive work environment.

Generally, conflict can be harnessed into positive outcome if detected early and managed properly. If mismanaged or ignored, it can lead to negative consequences, destructive to relationships, work systems and institutional governance. Therefore, it is in the interest of nations, organisations and associations that aspire to be well managed to develop systems and processes for conflict resolution. Institutionalised or structured, today such processes commonly involve negotiation, conciliation, mediation, adjudication and arbitration. Being alternatives to litigation in the courts, it is commonly called 'alternative dispute resolution' or abbreviated as 'ADR'.

Workplace conflict

Conflicts between employer/ employees are common in the workplace. The settings may include between co-workers and between subordinates and superiors. It is common for employers to establish Industrial Relations Department to maintain a harmonious work environment. Among the issues that turned to conflicts between employers and employees are, but not limited to the following:

-Claims of unfair dismissals
-Discrimination in discipline issues
-Enforcement of Collective Agreements

Family or Domestic conflict

Disagreement between spouses and family members are common, though the relationship may not come to an end. If not properly managed or resolved, the conflict may incur financial and emotional costs to every member in the dispute. Examples of family disputes include but not limited to the following:

-Divorce
-Custody of child
-Inheritance of property

Community conflict

Living in a safe and harmonious neighborhood is occupant's wish. In some communities, there exist self-organized associations to manage and promote happy atmosphere within the community. However, realities show that the stakes and challenges are not that simple. Among the most common conflicts may summed up, though not exhaustive, as below:

-Nuisance
-Invasion of privacy
-Rights to common areas

Commercial conflict

Commercial disputes, which every enterprise tries to avoid, stem from a variety of situations, from poorly drafted agreements to relationships turned sour between the contractual parties. To avoid huge cost and time taken, court proceedings will be the last resort if alternative dispute resolutions are available. Examples of commercial include but not limited to the following:

-Contract interpretation
-Intellectual property rights
-Implied terms

Industry conflict

The following industry sectors are examples of those industries that have their own establishments and mechanism to resolve conflicts within their own sectors. They are:

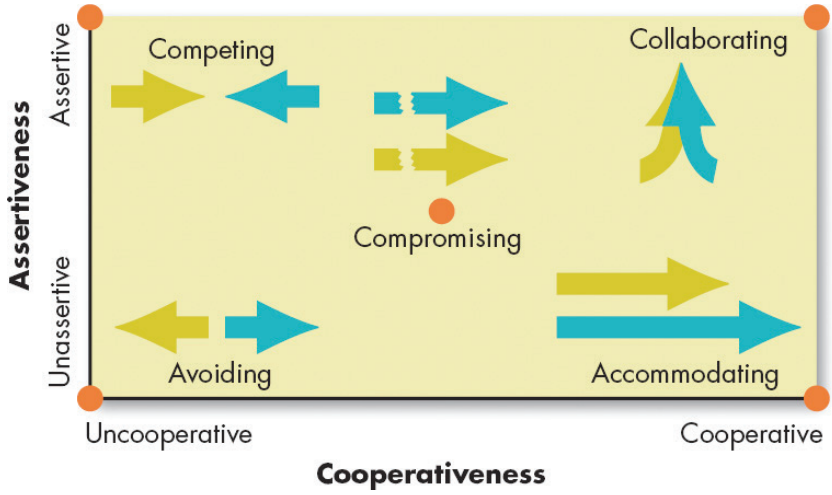
-Construction
-Banking
-Securities

CONFLICT APPROACHES

The Thomas-Kilmann conflict model, which was developed in the 1970s, derived its name after researchers Kenneth Thomas and Ralph Kilmann. According to this model, there are five major styles of conflict management, avoiding, competing, accommodating, collaborating and compromising. As there is no right or wrong style, each approach has its own benefits.

It is a fact that interpersonal conflict is unavoidable. Tt happens at home, at work and within the living community. While it is a fact of life, not all conflicts are bad for the human kind as it can also be a basis for transformational change for a better society generally.

The Thomas-Kilmann model acknowledges that everyone thinks and handles conflict differently and manages conflict. The five different approaches allow individuals to understand their own conflict styles and to appreciate other options. It guides them to focus and build their own strengths.



Source: 2017 Pearson Education – Organisational Behaviour 17th edition

Avoid

Characteristics: Those who choose this approach belong to be unassertive and uncooperative. The simple approach is diplomatically sidestepping an issue or stay clear from a threatening situation.

This approach is chosen when:

-There is no chance of satisfying the concerns or against a policy.

-The issue is trivial or when there are more important pressing issues.

-The potential damage of confronting a conflict outweighs the advantages of an immediate decision.

Collaborate

Characteristics: A combination of being assertive and cooperative, attempt to satisfy everyone's concerns.

This approach is preferred when:
-The goal is to seek commitment of the opposing party into a consensual decision.
-The objective is to appreciate opposing views and to merge insights from different perspectives on a problem.
-The need to work through personal feelings which have been interfering with the relationship.

Compete

Characteristics: Assertive and uncooperative, willing to pursue one's own goals at expense of the other.

This approach is appropriate when:
-Vital issues relating to law and safety requires immediate and decisive actions.
-The need to protect oneself against others who take advantage of one's non-competitive behavior.
-The action is required to enforce discipline and implement unpopular rules.

Accommodate

Characteristics: Opposite of competing, element of self-sacrifice when accommodating to satisfy others.

This approach is taken when:
-Continued competition would risk damaging the original cause.
-Preserving harmony is especially important and to use the goodwill for later issues which are more important.
-The issue is more important to the opposing party and by accommodating the party's needs as good gesture to maintain cooperation.

Compromise

Characteristics: Seeks to find mutually agreeable solutions that satisfy, albeit partially, both parties while maintaining some assertiveness and cooperativeness.

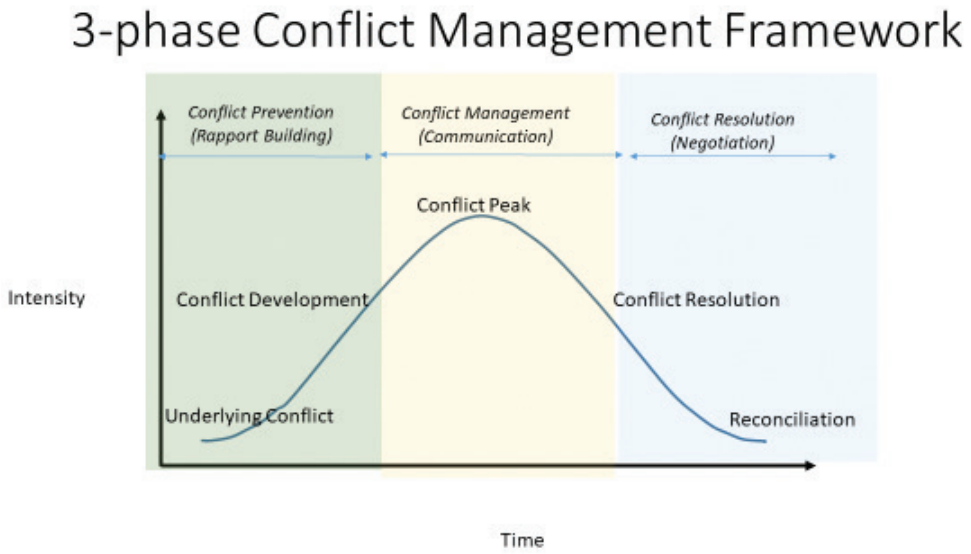
This approach is popular when:
-Competition and collaboration fails, a good back-up.
-Under time pressure to accept expedient solutions.
-Opposing party having equal power and strong commitment to mutually exclusive goals.

CONFLICT MANAGEMENT

The 3-phase conflict management framework

Conflict is a natural phenomenon in every ongoing relationship. As it is unavoidable, we not only have to live with it but also learn to manage it. On a positive note, it is a sign of need for change with opportunities for advancement.

The following framework is designed to improve relationship with the practice of different sets of communication at different phases of the relationship.



Source: JP Mediation Bureau

Building Rapport

Rapport is getting on well with another individual or group of individuals. Building rapport is to create a harmonious understanding with the identified individual or group that enables greater and easier communication. Acknowledging the presence of common goals, it also helps to build trust, respect, understanding and cooperation in a relationship.

Rapport helps to release unwanted tension and anxiety, feeling of being listened and be heard as well as respecting and caring for the one another. Rapport makes the communication process much easier and usually more effective.

Communication

Communication is the process by which information is exchanged by words, symbols, signs and body language. Communication skills require better understanding of the communication mode and process.

To be complete and effective, the message needs to be clear and concise, successfully conveyed and acknowledged, that is heard and correctly understood by the receiver.

To be an effective communicator, be prepared to appreciate the other's point of view, provide feedback based on facts and not opinion or emotion.

Negotiation

A negotiation is a strategic exchange that seek solution to an issue in a way that acceptable to both parties find acceptable. Negotiation will be difficult if not impossible, without the right skills and competencies.

In a conflict, when both parties try to get everything they want, the necessity for negotiation arises. Thus, all parties try to avoid arguing but agree to reach some form of compromise.

Acknowledging that concessions unavoidable, each party in the negotiation is required to willingly accept and adopt an attitude of preparedness that what they must get is also acceptable to the other as the best deal possible. The types of negotiations include human relations, business transactions and conflict resolutions.

Human Relations

Human relations or interpersonal relations deals with how people get along with other people both at work and socially. In short, it deals with getting along better with everyone.

It is not only about how to get along more effectively and harmoniously but being sensitive to the other person first and always. Developing 'people skills' is vital to establish long lasting harmony.

People skills are a combination of social and communication skills. Character and other personality traits, attitudes, mindsets, work attributes, emotional intelligence, among others, enable people to navigate their environment. Exceptional good human relations help to not only get along well with others, but collectively perform better by complementing each other to achieve goals with ease.

CONFLICT RESOLUTION

Conflict resolution is defined as a means for the disputing two or more parties to find an acceptable and peaceful settlement to the dispute between them. Alternative Dispute Resolution or ADR refers to the methods available to the disputing parties to settle their disputes without resorting to litigation in courts. For the ADR to succeed, the parties to the dispute must recognize that a problem exist and are desirous to address and settle the issue quickly and amicably with or without a third party intervention.

ADR by comparison is more flexible in its approach that can be both emotionally and financially advantageous to the disputants, in addition to facilitating an early settlement of disputes. The benefit of ADR is extended to mean that an existing relationship remains unchanged, and avoid the ruptured of relationship by the trauma of litigation.

The common ADR methods are negotiation, conciliation, arbitration, and mediation.

Negotiation

When a conflict arises, the first option and best course of action is negotiation to resolve the disagreement. However, negotiation will be difficult if not impossible, without the right skills and competencies. Negotiations involve some exchanges, which may end up with one party coming out having more out of the negotiation while the other may end up less without conceding it as a total loss, even though the concession is considerably nominal.

Either way, both would come to the negotiation table with their positions, Best Alternative to a Negotiated Agreement or BATNA. The term BATNA was first introduced in 1981 by Roger Fisher and William Ury in their book 'Getting to YES: Negotiating Without Giving In.'

The term BATNA suggests that it is the best alternative that a negotiating party can have when negotiation failed to reach the desired settlement. This technique is popular as a negotiation tool and should always be acknowledged before commencement of the negotiation. The golden rule is to know one's 'Best Alternative' before entering into a negotiation.

Conciliation

Conciliation is an interest based process and is less formal. The parties seek to reach an amiable dispute settlement with the assistance of a third party intervener. As a mode of Alternative Dispute Resolution, conciliation process differs from mediation.

The Conciliator assumes the role of an intermediary or liaison whose primary task is to communicate with each disputant, relay settlement options and sometimes offer non-binding solution in an effort to influence both sides to reach an agreement.

Arbitration

Arbitration is a private and judicial determination of a dispute regulated by the Arbitration Act 2005. The appointment of an independent third party known as Arbitrator is provided for in section 13 AA 2005.

In arbitration, the proceeding is similar to court where the Arbitrator acted like a Judge and will decide the dispute outcome. The difference is that the parties can decide on the arbitrator's appointment together with the rules and procedures of the arbitration.

As the arbitration proceedings do not come within the purview of the Legal Profession Act 1976, the contesting parties have the options to be represented by anyone other than the practicing legal professionals.

Mediation

In mediation process, the mediator guides the disputing parties in their negotiation to reach a settlement. Mediation as the preferred dispute resolution not only save time and money but it also eases the workload of the courts. Another significant advantage is that it is private and more often than not it maintains the existing relationship of the parties while the process is on-going. Other significant benefits of mediation include, but not limited to:

-Confidentiality
-Control
-Minimal Cost
-Faster outcome
-Preservation of relationship
-Neutral facilitator

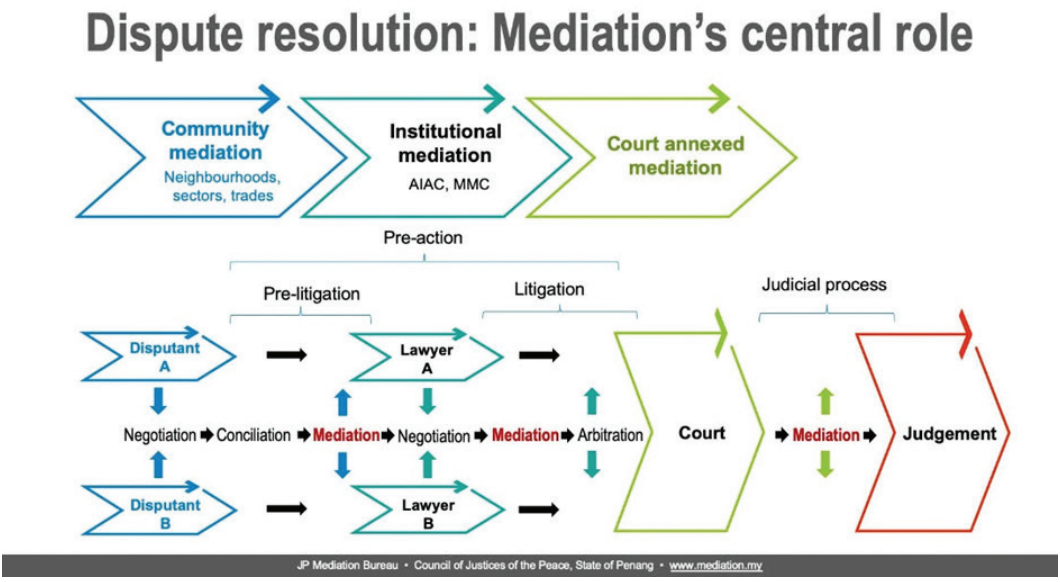
The 3 three common types of mediation approaches are:

Facilitative - Mediator assist the parties to reach acceptable solution based on interest and understanding. The mediator holds joint and separate sessions with all parties to allow them to present their cases and encourages them to explore options for themselves so that in the end, the parties can take ownership of whatever decision reached.

Evaluative - Mediator guides the parties in reaching a settlement by providing an assessment of the strengths and weaknesses of their cases, and what would be the likely outcome of a court of law if the alternative path is not chosen. Upon request, an evaluative mediator might make recommendations to the disputing parties.

Transformative – Settlement focused mediation offers immediate solution to the dispute and provides no guarantee that it will not arise again. In transformative mediation the approach is people centric and not the immediate conflict. The benefit for transformative mediation is that their relationships may be transformed towards the end of the mediation.

The following chart illustrates the central role of mediation in the dispute resolution process.



Source: JP Mediation Bureau

As illustrated in the flow chart, mediation in Malaysia is no longer interpreted as an informal alternative dispute resolution process that is not binding by law. It is now enshrined as one of the processes of dispute resolutions in the Malaysian Legal System.

SUMMARY

Conflict involves a perceived threat to one's goals, needs, concerns or values. It is an ongoing impact and is generally experienced at both the interpersonal and internal personal levels as in thoughts and feelings. The common triggers include but not limited to misunderstanding, disagreement, bargaining power, personal factors and external influence.

Conflict is inevitable and pervasive. When properly recognized at early stage and well managed, conflicts can be minimized if not resolved. It is subjective and is rooted in perceptions, interpretations, expressions, intentions and feelings.

Most if not all, situations are not based on absolute truth. Often the way one behaves or reacts to conflict is in direct relations to their emotions and the impact of these which include the established patterns that are both conscious and unconscious.

Any conflict or dispute, no matter how petty, is to be speedily resolved before it develops into full blown cases that eventually end up in courts. Apart from negotiation, conciliation and mediations modes are not only cost effective but will also seek to maintain existing relationship of the disputing parties if successfully carried out.

The available Alternative Dispute Resolutions (ADR) available include Negotiation, Conciliation, Adjudication and Arbitration.

CASE STUDY

Scenario 1

Background

In year 2016, a private limited company (known as "Company ABC") had taken delivery of vacant possession for a commercial shop house in a mixed development project. The commercial shop house is unique in the sense that right above the shop house is the residential condos. After 4 years (In year 2020), Company ABC discovers water seepage in its unit and thereafter lodged a complaint against the Developer and to the Joint Management Body (JMB) pertaining to the water seepage.

The Developer refused to entertain Company ABC due to the defect liability period (DLP) has ended in year 2019. Left with no option, Company ABC has to pursue against Mr. A (the Owner of the residential condo right above Company ABC's shop house).

Issues

Mr. A refuted Company ABC's allegations that it is his duty and obligation to rectify the water seepage flow from his balcony to the unit below, instead it should be of the Developer. Mr. A argued that it is due to the initial flaws that the Developer had failed to provide waterproofing to the balcony of his unit and as such the inadvertent water seepage is not attributed to Mr. A.

Mr. A also challenges Company ABC to initiate an action against the Developer first before the duty and obligation of Mr. A arises. In any event, Mr. A will not pay to rectify the water seepage caused to Company ABC's shop house.

Self-test

Q1. Could the above disputes be avoided?

.....

Q2. Would you agree that the court is the right place to settle such complex matter?

.....

Q3. Which conflict approach would you take if you are in Mr. A's position?

.....

Q4. As one of the occupants in the same condominium, what are your views?

.....

Q5. If you are a lawyer representing one of the parties, what would be your advice?

.....

Reference for case study

Strata Management Act 2013
Mediation Act 2012
Rukun Tetangga Act 2012

2 Mediation, Types and Mediation Process

LEARNING OUTCOMES

Upon completion of this topic, participants are expected to:

1. understand the philosophy of mediation as a peferred resolution mode
2. explain and distinguish the different types of mediation
3. apply the tools and techniques for a fair and effective mediation

MEDIATION

In mediation, a neutral third party assist the disputing parties in the negotiation process. It focuses not only on the law and facts but also the underlying interest of the disputing parties such as personal, family, community, social and commercial interests. The goal of mediation is to seek mutually acceptable settlement amicably that satisfy the needs, desires and interests of the parties. Though it is the neutral third party facilitating the parties' communication and negotiation, it is the disputing parties themselves who retain control over the outcome of the process ultimately.

It is voluntary and the right of self-determination is an essential element of the process. The parties retain the right to decide for themselves whether to settle the dispute or to accept the terms of settlement. In addition, any party may withdraw from the proceeding at any stage without giving any reason.

The neutral third party, called mediator, remains independent, impartial and objective throughout the whole process. The mediator is trained with specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties to break barriers, identify common grounds and interests so that mutually agreeable solutions are available.

Being a private process, mediation is not open to the public. It is also confidential in nature as the statements made during mediation are marked 'without prejudice'. Therefore, mediation proceedings cannot be disclosed elsewhere or in civil proceeding, that is, any admission or concession made during mediation cannot be quoted in subsequent litigation if mediation fails. At the end of the process, all written notes are destroyed in the presence of the parties to maintain confidentiality of the process.

TYPES OF MEDIATION

Facilitative

Also known as 'interest-based', facilitative mediation encourages the parties to put forth their needs and interests. As a result, will provide more options for collaborative problem-solving and a wider range of amicable solutions. In facilitative meditation, the mediator guides the parties to assess their own situation and allowing them to mutually come up with their choice decisions.

The Interest-based mediation is guided by the following:

-A neutral third party facilitates, promotes understanding and assist the parties to focus on their interests.

-The mediator does not make recommendations to the parties nor predict as to the outcome of the case if it goes to court.

-The process encourages the disputing parties to evaluate their own position.

-The facilitator is only assisting in the process, while the parties take ownership of the outcome.

-Parties are guided to seek creative problem solving and solution outside the legal box to resolve their disputes.

-At an impasse, the parties may uncover several possible solutions to their conflict, and may also discover possible compatible or shared interests.

-Finality is to achieve a win-win settlement as a result of the self-determination of the parties assisted by a neutral third party.

Evaluative

In evaluative mediation, the mediator may provide an assessment of the strengths and weaknesses of the parties' disputes, including a prediction of the possible outcome of the case in the local court of law according to the mediator's profession and experience. Based on the mediator's expertise, the evaluative process draws on local law and industry norm. In addition, other authoritative sources also provide direction to the participants on the realistic grounds for an agreement. The more experience the mediator has, the stronger will be impact and influence.

Unlike 'interest-based' mediation which focus primarily on the underlying interests of the parties involved, evaluative mediators are more likely to be guided by the legal merits to assist parties of their arguments before deciding on the pragmatic approaches.

Evaluative mediation is generally used in court-annexed mediation, where the goals of such mediation are best achieved. Similarly, court annexed mediation is a process where a neutral third party would offer an evaluation of the legal merits of the case in dispute. In the local practice, the mediators are the Judicial Officials of the Court.

Transformative

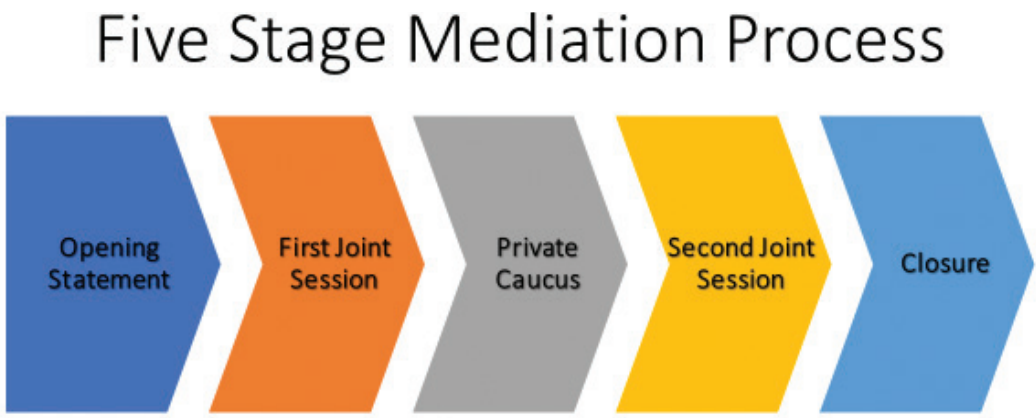
Settlement directed mediation offers short-term solution to any conflict as new conflicts will inevitably arise in the future. Transformative mediation focuses on the parties as opposed to the issues of the conflict. Thus, the approach is people centric instead of the immediate problem.

It also seeks the empowerment and mutual recognition of the disputing parties, thereby enable them to approach their current problem with a stronger and open view. The empowerment provides the disputing parties a better understanding of their goals and gain clarity about their needs, resources and options. The parties then work with the mediator to determine the appropriate resolution process for their conflict.

As parties to family conflict are not only seeking a resolution but also everlasting peace and harmony, transformative approach mediation is ideal for family disputes in particular.

MEDIATION PROCESS

5-Stage Model



Source: JP Mediation Bureau

Opening Statement

The mediation process begins with an opening statement by the Mediator. Akin to calling the meeting to order, the opening serves a number of useful purposes. It marks the mediator's authority to conduct the mediation process, instils confidence to the disputing parties present, who may otherwise feel intimidated or unnerved at the outset, to feel comfortable. It will also assist the mediator in establishing a positive environment to commence the mediation.

Confidence displayed by the mediator not only builds rapport with the parties, together, it also enhances the trust, ability and credibility of the mediator. In the process, it reinforces the mediator's role to take charge, to explain ground rules to the parties and encourages the parties to obtain information and seek clarification. Briefly, the opening statement will cover the following points:

-Introduce self, explain role of mediator and brief parties of the process

-Check whether agreement to mediate signed and the parties' authority to settle

-Establish ground rules, parties' availability to proceed with mediation

-Outline the stages of mediation process and stress on parties' ownership of outcome

To be effective, the statement shall be brief and stated in simple language yet comprehensive and explicit. Avoid referring to script, unfamiliar jargons, long monologue and never be apologetic for any issue especially the lack of experience or seeking parties for approval.

End with a transition statement to make an explicit connection between sessions or stages in the process with emphasis on the purpose of mediation. Transition statement refers to words, phrases or sentences that connect the order of business or agenda to a negotiation in a smooth way. In mediation, transition statements connect the stages of the process together. Scripted orderly, it provides the parties a clear itinerary of the session and reminder of what to do next. It can also be used with respectful interruption to keep the mediation process on track. To maintain control, the mediator should stick to the process to assist the parties towards a mutually acceptable resolution.

An effective statement is one that provides clear transition from one phase of the mediation process to the next with clear instructions to the parties about what they have to do and what outcome to achieve.

1st Joint session

Disputing parties will be invited to present their case in the 1st Joint Session. This is recorded as their opening statements. The mediator will determine who will start or ask 'who wish to start?'. The mediator encourages brief statement or chronology of the dispute from the individual party's point of view, highlighting issues or concerns that they seek to resolve. There should be no probing at this stage. The mediator's immediate role here is to help the disputing parties to hear each other and to acknowledge early the area of concern. It will also help to promote empathy and rapport. It is common that the parties tend to focus on what they want, that is their rights and positions. An experienced mediator would move them away to the underlying concerns particularly the actual needs and wants by identifying issues that touch common grounds and interest, that is the ultimate goals the parties can agree in principle.

Apart from exploring of issues, the parties would not only able to discuss and comment on each other's opening presentations but also seek clarification on the issues and facts presented before them. The mediator who controls the session would create an atmosphere to allow them to express their thoughts and feelings in a comfortable environment. The aim is to allow them to understand each other's underlying concerns and interests not previously known.

The skilled mediator is skilled in facilitating constructive communication and bridge the parties on their needs and interests by occasionally intercepting use of questions, re-framing and summarizing.

The combined list of issues brought up by both parties would be written down immediately after their presentation for all to view, preferably on a flip chart or white board. Before the mediator establish an agenda to proceed with the mediation, all parties would have agreed on the issues with the identified concerns, needs, positions and interest for discussion. The issues should be framed in positive, neutral language and be mutualized by the parties. The listed issues should not be numbered to give equal importance to each and only prioritized strictly for the purpose of deciding the order for the issues to be discussed.

The mediator then summarizes each identified issue with an established agenda designed to keep everyone on right track and guide parties to focus on agreed issues. The agreed agenda enhances the confidence of the disputing parties and it also assures the parties that the mediator has been listening actively. After the mediator summarises the parties opening statements into an agenda, end with a transition statement and stress on confidentiality of the process.

Private Caucus

A private caucus is meeting between the mediator and parties separately. Confidentiality is maintained throughout the mediation process, including whatever said or discussed in the private caucus. The mediator shall remind the parties of the same. The mediator is not to divulge anything discussed during the private caucus unless specifically with permission by the affected party to do so.

By holding separate caucus with each party, the mediator allows more open communication between mediator and party individually. It also provides opportunity for discussion of additional topics and information which may be deemed to be confidential to discuss during joint session. The private meeting allows full expression of feelings and emotions and signal a clearer and better understanding of the needs and interests of the parties.

Being private, it is less tense and defensive. The more flexible private caucus opens option to explore more in-depth for evaluating issues and encourages creativity to generate new ideas and solutions. As an assisted negotiating phase, the mediator will use the caucus sessions during this phase to explore and generate options and introduce reality-tests for these options. These approaches are used in anticipation of possible impasses in the negotiations with the finality to secure an agreement.

Reality testing in mediation is a technique to get the parties to adjust their perceptions of the claim. It is common that either party may overestimate the likelihood of success on the merits or the other's side ability or willingness to give in (pay). Examples of reality testing options are:

-Best alternative to a negotiated agreement (BATNA)
-Worst alternative to negotiated agreement (WATNA)
-Most likely alternative to negotiated agreement (MLATNA)

To be effective, the mediator would foster an open, creative and conducive atmosphere, encourages the parties to be non-judgemental before analysing or criticizing either's options or compulsion in making a commitment towards the end. Once the options are generated and known, the mediator would immediately get the parties to consider the available solutions and possible effects of these options available, that is, whether they can be implemented and are pragmatic and sustainable. The mediator would further encourage the parties to consider accepting the settlement 'in principle' to keep the negotiation moving.

The making of offers from both parties and any further or final bargain would be brought to the 2nd Joint session that follows as per agenda. To end with a transition statement and continue to assure on confidentiality of the private caucus.

2nd Joint session

From the previous phase, the parties would bring in their respective options or offer for a finality in the 2nd joint session or 4th stage of the mediation process. During this session, the parties will be asked to repeat any offer they are prepared to make directly to each other or through the mediator as agreed during the private caucus sessions. There may be further bargains or counter offers from either side, not discounting additional terms as part of the settlement agreement. The mediator's role at this stage is to continue to guide the parties to formulate their offers based on the selected options mentioned in the private caucus.

IMPASSE

At certain stage, the negotiation may come to a standstill or reached a deadlock. In mediation, this is termed as an impasse. Mediators need to anticipate for such possibility, the likely causes and be prepared with strategies for dealing with such when it arises. Before it turns into a full blown impasse, quickly act on the following:

-Focus on resolution, summarize positive achievements thus far

-Revisit their needs (parties' ultimate goals), interest (parties underlying concern, actual needs and wants) and common ground (matters of mutual concern to the parties)

-Regenerate and evaluate new range of settlement options

-Fine tune the reality tests and final settlement terms

-In a situation of an impasse, consider another private caucus or adjourn to keep room open

-Invite the parties to decide who to start

An impasse is a situation in which no progress is possible due failure to reach an agreement in negotiation, that is a standoff or deadlock. During a mediation, impasse occurs when parties are adamant in their position and leave no room for further negotiation. An impasse may occur at any stage of the mediation process, from the introduction to the closing. It is very common in when dealing with difficult negotiators.

With necessary experience and competency in communication skills, the role of the mediator is to break the impasse. To start with, identify the underlying cause or categorize the impasse. Approaching the different types of impasse call for different approaches and skills.

Common types of Impasse

Emotional impasse

Either party is emotional affected caused by mistrust, false pride, fear of losing face or personal animosity.

Substantial Impasse

Factors include monetary interest, lack of knowledge of facts and law, influenced by third parties, strong personalities and ignorance of realities if not clinging strongly on principles.

Procedural impasse

The causes of procedural impasses include the following; perception of either or both parties that the mediation process is unfair, presence of mistrust and power imbalance.

Breaking the impasse

-Take a break, adjourn the negotiation for a short recess in case of emotional impasse.

-Reminding each of the parties the reasons for being in the meeting, recap the benefits of mediation.

-Restate all the areas they have agreed to thus far.

-Apply role reversal technique.

-Questioning techniques, ask diagnostic open ended questions in case of procedural impasse to clear their doubts.

Additional approaches include, but not limited to, the following:

-Initiate a brainstorm session to create new options in case of a deadlock.

-Recommend a change of representative if the cause is due to the lack of authority of one party.

-Propose another private caucus if both parties are agreeable to reset their terms.

-Adjourn the mediation to another day, time and venue subject to their consent.

-Revisit reality testing for 'Best Alternative to a Negotiated Agreement' (BATNA), 'Worst Alternative to a Negotiated agreement' (WATNA) and 'Most Likely Alternative to a Negotiated Agreement' (MLATNA). if both parties are looking for a 'face saving' compromise. What will happen if this goes to court?

REALITY TESTING

It is not uncommon, that most parties are likely to overestimate their chances of success based on their perceived merits, or the other side's perceived weakness and their willingness to give in or compensate. Either party may have an unrealistic assessment of his or her own alternatives to a settlement. Seen as an assisted evaluative process, reality testing is a technique of getting both parties to test their individual perceptions of their positions in the dispute.

The reality test is to analyze the alternatives available according to the chosen negotiation path, for example interest-based or position-based. If the disputants seem to be able to reach an interest-based resolution with little resistance, the mediator need not choose to introduce reality testing in the process. The reason to consider whether or not to introduce reality testing at this stage is that, the analysis can be seen as interfering into a negotiation that is proceeding smoothly.

However, the mediator should use this tool to ground the parties if an impasse is imminent. Acknowledging that the disputing parties may differ in views and values, couple with different risk tolerance in approaching decision making, explain to them how the analysis can assist both in choosing if a particular option suits their best interests or not. Knowledge of these interests will in turn help the parties to continue with the negotiation based on the better understanding of their interests and the expectation they placed upon them. Towards the end, it is the disputing parties who will be taking ownership of their choices after having considered the probable alternative outcomes from the analysis.

BATNA/WATNA Reality Testing Template

Reality Testing Interest-based Approach

Reality Testing in Facilitative Mediation
Interest-based Approach

Party	BATNA	Costs	WATNA	MLATNA
A	Expectations Probability %	- Pecuniary - Others	Probability %	Win-Win
B	Expectations Probability %	- Pecuniary - Others	Probability %	Win-Win

Source: JP Mediation Bureau

Reality Testing Alternative Path Approach

Reality Testing in Evaluative Mediation
Alternative Path Approach

Party	BATNA	Costs	External Factors	WATNA
Claimant	Expectations Probability %	Pecuniary Non Pecuniary	Counter-claim Others	Probability % Win-Lose ?
Respondent	Expectations Probability %	Pecuniary Non Pecuniary	Judicial Process Others	Probability % Lose-Lose ?

Source: JP Mediation Bureau

Closure

The concluding phase may end with or without reaching a final agreement. In the Mediator's closing statement, regardless of the outcome of the process, courtesy dictates that the mediator should end the mediation in a warm, friendly and positive manner, similar to the atmosphere in the beginning of the mediation. If an agreement is reached, commend the disputing parties for choosing the preferred mode and their conduct in going through the process. Remember to reassure the disputing parties regarding the confidentiality and act on the following:

-Prepare a settlement agreement
-Destroy all written notes
-Close with a handshake

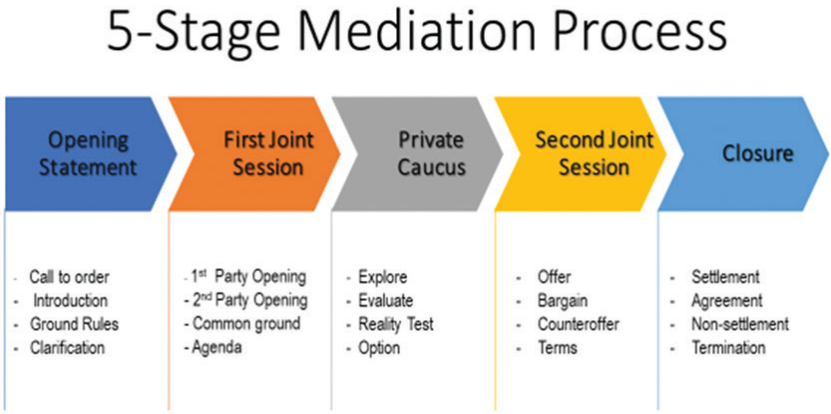
If no settlement is reached, also commend the disputing parties for their efforts and encourage another process. Mediator to end the meeting with a positive note.

POST MEDIATION

Subject to the administrative policy of the mediation institution, post mediation work may involve the following:

-Guiding the settlement agreement and its implementation
-Filing any necessary paperwork or report summary
-Conducting follow up reviews or to correct any issue
-Returning of funds once outstanding obligation has been fulfilled
-If no settlement is reached, leave the offer open for the parties to consider returning to mediation table
-At personal level, the mediator is encouraged to review, reflect and relearn from the experience.

SUMMARY *5- Stage Mediation Process*



Source: JP Mediation Bureau

5-stage process in Facilitative Mediation

Facilitative mediation process goes through five stages. They are:

Stage 1 – The Opening Statement

The mediator explains the mediation process, ground rules and ensure the parties have signed the Agreement to Mediate. The parties may seek clarification of the ground rules and mediation process for assurance that the mediation will be conducted fairly and professionally.

Stage 2 - 1st Joint Session

Each party has equal time and opportunity and take turn to present his or her side of the dispute in question, how he or she has been affected by it and the resolution seek. When one party speaks, the other is encouraged to pay attention to pick up issues or recognize where misunderstandings may have originally occurred. It is also a chance for parties to share each and others' perspective and to feel heard. The mediator assists the parties to identify the issues to address in the mediation which will then be translated into an agenda for the mediation to proceed.

Stage 3 - Private Caucus

The parties take turn to present individually his or her case not previously disclosed during the 1st joint session. Here, the mediator encourages the individual party to identify and discuss the underlying reasons underlying reasons of the dispute and explore available options to reach a solution. When parties begin to talk about their needs and interests, the option begins to open for collaboration in solving problem with a wider range of possibilities. Upon identifying the concerns, the parties are encouraged to generate options for resolution. After exhausting

all possibilities for options, the parties would consider and evaluate each of them to determine which one is most preferred or desired. Each party will then present his or her own option at the2nd Joint session for settlement or further negotiation.

Stage 4 - 2nd Joint Session

If the options presented are acceptable by both disputing parties, the mediator will record the agreement as they are made subject to any condition or term attached to it. On the other hand, if the either party chooses not to agree wholly, then further negotiation continues at this session until they come to a mutual agreement. This flexibility provided either party to make trade-offs or to tweak certain conditions to meet their personal needs. In the event that no settlement is reached, the mediator may offer the parties for another round of private caucus or adjourn to another meeting if agreeable by both parties.

Stage 5 - The Closure

If the parties have accepted and resolved all the issues, the mediator drafts the settlement agreement for the parties' signatures. In the event of no agreement reached, the mediator shall sign off as 'No settlement' without having to give reasons. Courtesy dictates a warm parting handshake with everyone present.

CASE STUDY

Scenario 2

-Audio visual presentation of case study scenario 2 (30 minutes)
-https://youtu.be/gDnGrjbNIWk
-Participants to watch (compulsory)
-Trainer to lead the discussion

Background

Isabelle and Chan signed the agreement on September 20th, 2019. The agreement was for Isabelle to complete the work of this renovation on April 20th, 2020 but the renovation work unexpectedly faced a massive delay.
The Movement Control Order (MCO) began on 18 March 2020 until the end of May 2020, and not able to start work on 1st of June as the foreign workers had to go through the covid-19 test which means a further delay of another 14 days. In addition, there is a delay by suppliers for the raw materials. Finally, Isabelle managed to complete the job in early August.

At the start of the agreement Chan had already paid Isabelle RM200,000 out of the total agreed work valued at RM270,000. However, now Chan was not prepared to

release the balance because of the delay in the completion. Isabelle claimed to have completed 80% to 90% of the job, as per their understanding she could pass Chan the keys so that he could start to use the office immediately and would complete the remaining works after receiving the balance payment.

While Chan would not deny with the payment arrangement and the unfortunate delay due to the MCO. However, he noticed that there was a lot of discrepancy of what was promised and what Isabelle delivered, in particular, one of Chan's personal cabinet that he specifically requested for that specific measurement to accommodate his treasured trophies.

The delay also caused Chan to continue paying the rental of his old premise. The rental had to be continued because the equipment cannot move to the new office. That itself had already cost him RM10,500.00 being rental of RM3,500 per month for 3 months.

In addition, Chan claimed that his renovation deposit of RM5,000 had been forfeited because Isabelle failed to submit the renovation drawings to the management of which Isabelle countered that the responsibility should be on the owner to do so.

Issues

1.Isabelle was looking for the balance of payment of RM70,000 due.

2.Outstanding work to be completed was between 10% to 20%

3.Isabelle would complete that upon receiving the balance.

4.Chan wanted Isabelle to fix some of the defects too.

5.As a result of the delay, Chan had to continue to rent the old premises for 3 months at RM3,500 per month, in total is RM10,500 for 3 months.

6.Chan also disputed the responsibility of the deposit of RM5,000 which was forfeited by the management.

7.Chan persisted that the cabinet for his prized trophies was made not made according to given specification.

Self-test

Watch and discuss your observation in the following topics:

Topic 1. Opening statement

.....

.....

Topic 2. 1st joint session

.....

.....

Topic 3. Private caucus

.....

.....

Topic 4. 2nd joint session

.....

.....

Topic 5. Closure

.....

.....

3 Mediator, Attributes and Communication in Mediation

LEARNING OUTCOMES

Upon completion of this topic, participants are expected to:

1. understand the role and responsibilites of a mediator in mediation
2. explain the different essential skills necessary for effective communication
3. apply the communication techniques to facilitate the negotiation between the disputing parties in mediation

MEDIATOR

Act 749 states that mediation is a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute, and a mediator means the 'mediator' appointed by the parties. Being a voluntary process, the disputing parties will jointly appoint a person or persons as mediator or co-mediators for the proposed mediation. As individuals who command respect, they discharge their duty professionally and to remain independent and impartial at all times. During mediation, a mediator shall facilitate the process and assist the parties to achieve a amiable settlement of the dispute and may also advise on the available options if called upon.

Traits

Mediator's credibility gains instant respect. Punctuality and preparedness are hallmarks of creditability in mediation. Casting doubt in the first impression will be a major barrier for effective communication process.

The mediator must have the patience to build rapport with the parties and not seen to be pushing for a quick solution. In addition, a close and harmonious relationship will eventually win over the impatient parties and seen to be putting the interests of the parties before self. When there is an understanding of each other's feelings and ideas, communication flow smoothly.

Rapport makes it more comfortable to interact with someone. It builds a sense of trust and overcomes resistance to communication and helps understanding of others perspectives. Rapport makes it smoothens the path to reach an agreement. Be attentive to details and emotions express during the mediation will help eliminate falsehood and encourages the parties to genuinely recognize issues and working towards a common solution. Quick to adapt with difficult personalities and cultural diversities attract instant cooperation and confidence of the parties.

Individual differences

Acknowledging individual differences is showing respect to the parties. It is a vital part of establishing trust in the mediator. Respect both individual and cultural differences, especially regarding gender and appropriate behavior, for example, is it appropriate to shake hands, look someone in the eye, and use first name?

People have a right to make decisions based on their particular set of values, preferences and beliefs and should not be ignored in mediation. Preventing others to do so means holding the rights of others. Do ask parties to speak up and explain what they would like to achieve in mediation.

Awareness of cultural diversity is a prerequisite for an effective mediator. Approaches in mediation need to be flexible

if not adjusted to accommodate the cultural differences or sensitivities. Cultural diversity or multi culturalism refers to the different cultural perspective in a society. The term encompasses race, ethnicity, social groupings, language, belief and faith. Thus, being sensitive to the community diversity is a critical trait for a mediator in assuring the parties to feel comfortable. Building trust in the process, it smoothens work towards an acceptable settlement. In this instance, the mediator own awareness of how his or her own behavior can affect parties' interaction in mediation is paramount. The mediator needs to be aware of the phrases that need to be avoided, the words to use and to seek advice or clarification when in doubt.

Show empathy and acknowledge feelings. Establish and uphold ground rules to prevent verbal abuse, coercive behavior and disrespect for the process. Careful not to embarrass or humiliate parties. For sensitive issues, use private sessions for clarifications or questions so that the parties will not lose dignity. Accepting differences is a fundamental element of maintaining a non-judgmental approach

Non-Judgmental

Being judgmental can be a bias and seen as favoring one party over the other. It can be intimidating for those who lacks confidence. It inhibits exploration of options and It can invalidate a person's legitimate point of view. Extra care to be taken when making comments that is directed in a personal way about someone's behavior, life choice, attitudes and so on.

Do not compare and avoid personal agreement or disagreement 'I think …', citing vague authorities to agree or disagree 'it is said', etc. Also refrain from evaluations like 'should' and 'must' as that will be seen as imposing the mediator's values on others, for example, pushing for benefits of an agreement in mediation over 'alternatives' like 'Best Alternative to a Negotiated Agreement' (BATNA) in a Reality Test.

Sympathy is strictly a 'no-no' for example avoid saying 'I'm so sorry', instead use empathy to acknowledge feelings for example, 'it looks like you're still feeling upset about that'. Do not assume, Instead, use clarifying questions and summaries to check your understanding and encourage the parties to do the same, for example, clarify words like 'you said…', it sounds like….'

Skills

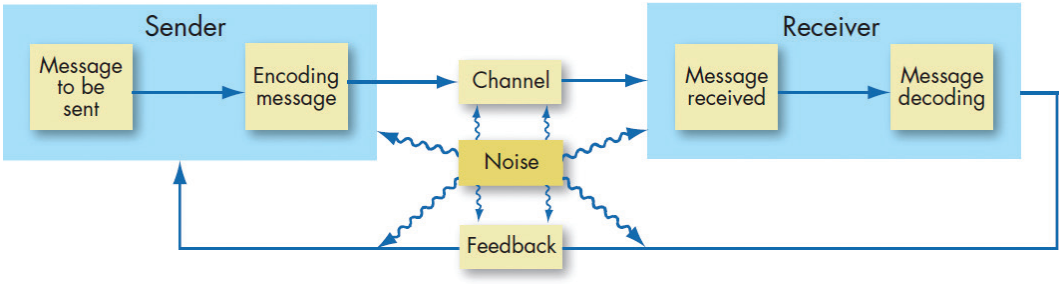
Effective mediators are those who possess exceptional communication skills, apart from being approachable, passionate and respectful. They appreciate, understand and manage emotions. Specially trained for the purpose, they discharged their duties professionally and are genuinely concerned with the matters before them.

COMMUNICATION

Communication is the act of conveying information from one person to another and it is considered complete when the receiver responds with a feedback. A feedback represents a response but not necessarily an agreement with the message received or what the sender expect due to poor transmission, wrong channel used, unidentified barriers or simply miscommunication.

As suggested by Wilbur Schramm who developed the interactional communication model in 1954, communication is a two-way process between two communicators who alternate positions as sender and receiver to send and receive messages. The shuttling process reinforces that communication is an on-going process. The Wilbur Schramm Interactional Model of communication illustrate the process of a communication or exchange of messages between two parties via a medium, example written or orally.

The message sent is encoded, for example using gestures or body language, by the sender and the receiver has to decode, to interpret the information, to understand the intention of the message. Along the way, noise or barrier, example cultural differences, may distort the meaning of the message transmitted.



Source: 2017 Pearson Education - Organisational Behaviour 17th edition

Similar to interactional communication process, the mediation setting involves two parties negotiating for their interests and positions before the mediator, a neutral third party, acting as facilitator.

During the negotiation process, messages are also encoded with multiple meaning. Information exchanged is of no use unless it is carefully decoded and understood by the receiving party. The role of

the mediator is to facilitate both the encoding and decoding process in addition to circumvent the noise or barrier.

The environment setting and medium of transmission add to the factors contributing to effective completion of the process. A well facilitated communication is the core of the successful mediation. Communication in mediation is about more than exchanging information. It is about understanding the emotion and intention behind the messages during the negotiations.

Emotions

Emotions are biological states associated with all the nerve systems brought on by neurophysiological changes variously associated with thoughts, feelings, and behavioral responses. Currently, there is no scientific consensus on a definition. With a degree of pleasure and displeasure, it is often linked with personality, temperament, disposition, creativity, mood and motivation, emotions cannot be separated from conflict.

It is inevitable that the mediator has to deal with not only his own emotions but also the emotions of the disputing parties. The ability to acknowledge and address the emotional state of the parties, will smoothen the mediation process. At the same time, when parties feel their emotions have been recognized they can confidently move forward.

Recognizing Emotions

Recognizing emotions involves understanding the emotions the mediator perceives the party or parties to be experiencing. Until and unless emotions are given its place in the mediation process, parties may not open up and remain skeptical to any proposals presented before them.

Moods and emotions are related words that are used interchangeably but do not mean the same thing. The difference between mood and emotion are seen in the expression. For example, if a person is sad, he or she cannot express it to anyone, whereas, if he or she is angry, he or she expresses his or her emotion towards someone.

Emotion is a barrier to be acknowledged and removed for a resolution to be achieved. Recognizing emotions does not necessarily mean agreeing with or sympathizing with a particular party's emotion or trying to "fix" a party's feelings. The experienced mediator should be able to recognize the emotions of the parties and not allow it to be prejudiced. Examples of acknowledgement of emotion include:

-Mediator's personal mood and emotion
-Distinguish between mood and emotions
-Competent Emotional Quotient skills

EMOTIONAL QUOTIENT

Emotional Quotient also known as Emotional Intelligence is defined as the ability to recognize own emotions and those of others; understand what they are telling you, and realise how your emotions affect people around you. Emotional intelligence also takes into account how you perceive the others, understand how they feel and allowing you to understand and manage the information more effectively.

Daniel Coleman, an American psychologist suggested that there are five key elements to Emotional Intelligence, namely Self-awareness, Self-regulation, Empathy, Social Skills and Motivation.

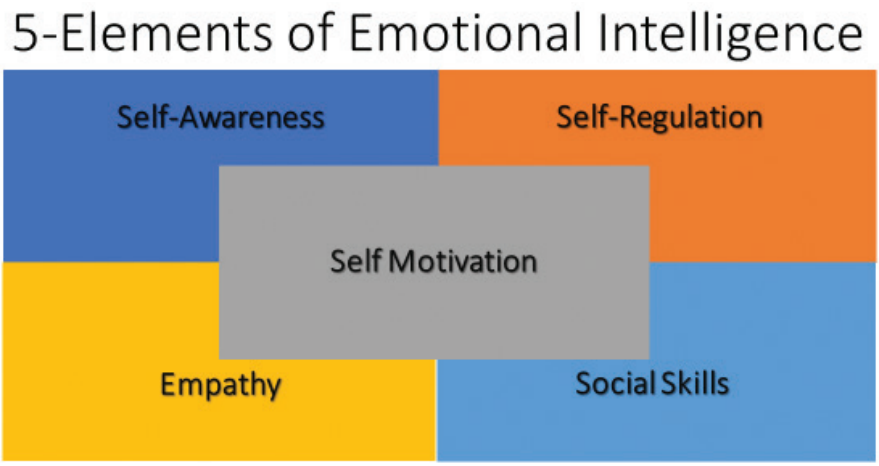


Illustration: Daniel Coleman's Five Elements of Emotional Intelligence

Self-awareness

-Those with high emotional intelligence are usually comfortable with their own thoughts and emotions.

-Being self-aware means knowing one's own state of emotions and how one's action and feelings can affect others.

-Understanding and acknowledging the way one feels is often the initial step to manage it.

Self-regulation

-Acting rashly can not only lead to mistakes but often damage relationship with those around.

-Self-regulation is one's ability to regulate and manage one's own emotions and impulses.

-People who regulate themselves effectively rarely stereotype others, make emotional decisions, or compromise one's values.

Empathy

-Empathy is the ability to understand how others are feeling and putting oneself in someone else's situation, identify with and understand their wants, needs, and views.

-Being empathetic means actively listening to those in need and giving constructive feedback.

-Appropriate response can resolve issues and go a long way to develop relationship.

Social skills

-People with social skills are usually easy to talk to and likeable. A sign of high emotional intelligence.

-Social skills are vital element of effective communication, to manage change and resolve conflicts.

-Social skills are more than just being able to interact with others as they create a healthy personal relationship beyond managing conflict.

Self-motivation

-Self-motivated people usually have a high degree of emotional intelligence.

-Self-motivation, a prerequisite to achieve goals, is having a passion to fulfill own inner needs.

-People who are self-motivated are most likely to set higher standards for the quality of their work.

Negotiation in mediation is a complex process that involves more than just cognitive and behavioral aspects of the disputing parties, but also the underlying emotional factors. The parties' uneasiness, whether due to apprehension, anger or other emotional factor needs to be comforted or managed as soon as mediation process commences.

With the acquired Emotional Quotient skills, the mediator can use it to 'manage' the behavior and 'build' relationships, particularly empathy and trust, with the parties during the mediation process. The relationship is not only essential for the collaboration during mediation, but also strengthens the rapport should the mediation be extended to another day or session.

QUESTIONING TECHNIQUES

Questioning serves many functions in mediation, but not limited to:

-seek or gather more information, for example documents, sample and references.

-clarify a point or understanding, for example a new subject matter.

-refocusing a wandering speaker for example when a party brings in irrelevant issue.

-stimulating the parties' thinking, for example open up a new idea or taking a new position

-close in or reinforce a decision, for example when both parties are moving towards common ground.

Open questions

Are used to help gather information, and trigger a party to open up. Examples of open questions and statements as follows:

Q."Please tell me more about this . . ."
Q."Explain how does this affect you?"
Q."What was your interpretation of the situation?"
Q."Please describe in detail . . ."

Open-ended questions/statements are used in the early stage of the mediation to obtain an understanding of the conflict and to allow the parties to clarify or build rapport.

Closed questions

Are used to get a quick response, check details, direct a party back to the key issue and to stay focus. Often the questions seek a "yes", or a "no" answer. Some of the examples are:

Q.Did you tell him . . .?
Q.Did you call her . . .?
Q.Where were you when it happens . . .?

In summary, closed questions are important to re-focusing a wandering speaker, direct the party to the issue, to check for details and to get an immediate response.

ESSENTIAL SKILLS IN COMMUNICATION

Body Language

It is the unspoken part of communication that reveals one's true feelings which gives impact to the message. When gauging the emotional climate of the mediation process, look out for body language cues that reveal parties' emotional state. Nonverbal cues such as posture, gestures and tone of voice form part of a complete message in communication. The ability to read the signs provides better understanding of the message conveyed. Similarly, the mediator must be conscious with the ability to adjust accordingly his or her own body language to appear positive, approachable and engaging during mediation.

Empathy

It is also an important part of building rapport. Empathy means the ability to understand and share the feelings of another. In mediation, the mediator put themselves into the disputing parties' positions and see things from their perspective, to able to listen to each individual's views and understand their feelings or stand on the dispute. Apart from building understanding, empathy is an essential element of effective interpersonal communication. The opposite of empathy is disdain, indifference, misunderstanding and unfeeling.

Active listening

An essential component of effective communication, active listening involves paying full attention to the conversation without interruption, and taking time to understand what has transpired. When one hears, he or she takes in sound. Listening is to hear what is not said. It processes the information received. The listening element include observing the non-verbal messages. In mediation, the mediator as an active listener avoids interrupting at all costs, summarizes and assures the speaker what has been heard and understood by repeating back with affirmation techniques. Active listening shows attention, respect and empathy.

Mirroring

A simple form of reflecting and involves repeating almost exactly what the negotiating party said. It assures the speaker that the mediator heard and tried to understand what has been said. It also encourages the speaker to continue speaking without interruption by getting in rhythm with another person, coordinating verbal and non-verbal behavior. Postural mirroring means matching the tone of their body language and to use the same key word unless they are inflammatory.

Reflecting

Reflecting combines the content and feeling of the speaker to reflect the meaning of what was said. A skilled mediator will be able to reflect the speaker's feeling and emotional state from the speaker's body language, verbal message and tone of voice. After identifying the core issue to be explored in the process, an agenda is thus set for a possible resolution in the mediation.

Reframing

Reframing involves taking a statement or concern, then focusing on the specific behaviors for choices to be negotiated. It is a technique of changing the way one looks at something, for example, a negative event to be viewed in a positive way. In mediation, reframing is useful to acknowledge issues need to be resolved and identify common ground or concerns. In reframing, the mediator needs to ensure the reframe assists to clarify their perspective and identify the issue to be resolved.

Paraphrasing

It is an essential component of effective communication and helps parties to improve the flexibility of the communication process. Paraphrasing involves using other words to reflect what the speaker has said. It also assures the speaker that the mediator is paying attention and understood what has been said. It is important that the mediator stays impartial and non-judgemental in what has been heard.

Neutralizing

When parties are upset or agitated, they might use inflammatory language. During mediation, the mediator must repeatedly remind the parties to refrain from using angry, blaming, adversarial or vulgar words and to control their emotions. Such behaviour should be predetermined in the ground rules before the commencement of mediation. When such toxic behaviour becomes unavoidable, the mediator is tasked with the job of neutralising the unsavoury words or exchanges. Neutralizing involves going around the unpleasant words to reach the feelings or reasons behind them. The mediator's neutralizing language allows the parties to move uninterrupted to a negotiable issue, including how each party would like to be treated.

Clarifying

It is a necessary element of clearing up misunderstanding. Unless the messages and facts are understood no sustainable agreement can be reached. Admit if do not understand and ask questions to seek clarification. Do encourage the use of information sources for example, documents or other 'evidence' when objective facts are being dispute. Clarification is not interrogation. Be careful with the tone and choice of words.

Summarizing

When parties are upset or agitated, they might use inflammatory language. During mediation, the mediator must repeatedly remind the parties to refrain from using angry, blaming, adversarial or vulgar words and to control their emotions. Such behaviour should be predetermined in the ground rules before the commencement of mediation. When such toxic behaviour becomes unavoidable, the mediator is tasked with the job of neutralising the unsavoury words or exchanges. Neutralizing involves going around the unpleasant words to reach the feelings or reasons behind them. The mediator's neutralizing language allows the parties to move uninterrupted to a negotiable issue, including how each party would like to be treated.

SUMMARY

Effective mediators need to approach communication as a field worthy of analysis and practice. Having strong communication skills helps to understand a dispute connected to the parties. In addition, communication skills are essential to connect the parties in engaging a constructive exchange. In fact, poor facilitation of communication between the parties may aggravate the conflict.

Rapport helps to understand others' perspective. It builds a sense of trust and overcomes resistance to communication, that is, closing the gap for a harmonious relationship where the people or groups concerned are 'in sync' with each other. Translated to mean understanding each other's feelings or ideas and consequently communicate smoothly. Establishing rapport makes it more comfortable to interact with someone. It makes asking difficult questions, without feeling like interrogation, possible. Ultimately strong rapport makes it easier to reach an agreement.

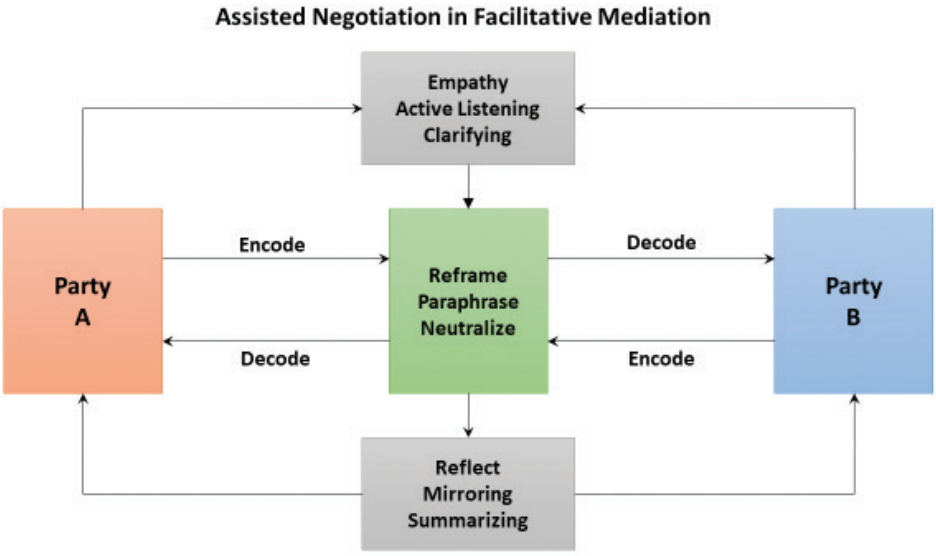
The measure of the effectiveness of communication is the response. Often the disputing parties may not understand what is heard and most likely they are not saying it out. Thus, it is important to use familiar language to build trust and rapport. Unless the parties fully understand what is going on, the mediation may end up a tedious process. It is tactically wise to use simple, clear and unambiguous language minus unnecessary jargons.

Effective communication means the transmission of a message calibrates with response received. To ensure understanding, always check or ask for the parties' response. Encourage the use of visuals and other aids. For example, pictures can transmit concepts, processes and other sequential or difficult to understand or remember information very effectively. Beware of cultural diversity and sensitivity in communication process.

In mediation, negotiation is continuous shuttling process between two parties and consist of 3 major elements, namely the sender, message and receiver. To circumvent the noise or barriers, it is important to consider the time, place and logistics of the meeting.

Assisted Negotiation in Mediation Process

Facilitative mediation is an assisted negotiation between disputing parties by a neutral third party.



Source: JP Mediation Bureau

CASE STUDY

Scenario 3

-Audio visual presentation of case study scenario 3 (30 minutes)
-https://youtu.be/BTrLb-p6z6E
-Participants to watch (compulsory)
-Trainer to lead the discussion

Background

Mr. Yeap bought a property from Ms. Lee's company Pulau Tikus Sdn. Bhd. The property is three-story shophouse in Bukit Jambul. Mr. Yeap bought it as an investment because the purchase price of RM1.6 million was really cheap to him. He paid RM160,00.00 being the 10% deposit.

After Mr. Yeap signed the Sales & Purchase agreement, he found out the that the shopshouse was built by another developer which had since gone bankrupt. Ms. Lee who represented Pulau Tikus Sdn. Bhd. explained that they took over from the previous company known as Pulau Kuching Sdn. Bhd. which got into some legal problem and was wound up by the court in 2005.

When Mr. Yeap purchased the property, he did not know about the previous developer. Otherwise, he would not have bought it. He thought he had bought a cheap deal, until he received a call asking him to pay RM5000.00, being administration fee, to the liquidator.

The developer explained that they had appointed a liquidator, Mufasa Sdn. Bhd. All sales must have a consent from the liquidator. Apparently, there were some charges involved when doing this kind of liquidation process. One of them was to pay an administration charges of RM5,000 to the liquidator. Mr. Yeap is supposed to pay this RM5,000 for the unit he purchased.

Mr. Yeap was angry because the information was not disclosed at the time of signing the S & P. Ms. Lee claimed that the company too was not aware of condition otherwise they would have added it in the S & P. After lapse of a four months, Mr. Yeap finally gave in and paid the sum.
Later, Mr. Yeap was informed that his payment has late as the deadline of three months had expired and his 10% deposit had been forfeited as provided in the S & P.
In addition, Ms. Lee added that while they were discussing over the 2 matters, the company's accountant advised that all purchases are subjected to the new GST ruling. Thus, Mr. Yeap was to pay 6% on the sales price if he continued with the purchase.

Issues

-RM5,000 administration charges imposed by the liquidator ended up paying.

-Forfeited deposit of RM160,000.00.

-6% GST on purchase price

Questions

Observe and list down and explain 5 essential skills in the mediation

Answer 1:

.....

Answer 2:

.....

Answer 3:

.....

Answer 4:

.....

Answer 5:

.....

4 LAWS OF MALAYSIA ACT 749

MEDIATION ACT 2012

An Act to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.

Enacted by the parliament of Malaysia as follows:

Part I
PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the Mediation Act 2012.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the Gazette.

Non-application

2. This Act shall not apply to —

(a) any dispute regarding matters specified in the Schedule;

(b) any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court; and

(c) any mediation conducted by the Legal Aid Department.

Interpretation

3. In this Act, unless the context otherwise requires—

"non-party" means a person who participates in a mediation, other than a party or mediator, and includes counsels of each party, experts in the subject matter of a dispute and witnesses;

"institution" means a body or organisation that provides mediation services;

"mediation communication" means an oral or written statement made—
(a) during a mediation;
(b) in relation to a mediation; or
(c) for the purposes of considering, conducting, participating in, commencing, continuing, reconvening or concluding a mediation or retaining a mediator;

"Minister" means the Minister charged with the responsibility for legal affairs;

"mediator" means a mediator appointed by the parties under section 7;

"mediation" means a voluntary process in which a mediator facilitates communication and negotiation

between parties to assist the parties in reaching an agreement regarding a dispute;

"mediation agreement" means the agreement referred to in section 6;

"settlement agreement" means the agreement referred to in section 13;

"party" means a party to a mediation agreement and includes the Federal Government and a State Government;

"proceedings" means any proceedings of a civil nature and includes an application at any stage of proceedings.

Mediation does not prevent court action, arbitration, etc.

4. (1) Subject to section 2, any person may, before commencing any civil action in court or arbitration, initiate mediation.

(2) A mediation under this Act shall not prevent the commencement of any civil action in court or arbitration nor shall it act as a stay of, or extension of any proceedings, if the proceedings have been commenced.

Part II
COMMENCEMENT OF MEDIATION

Commencement of mediation

5. (1) A person may initiate mediation by sending to the person with whom he has a dispute, a written invitation regarding the mediation.

(2) The written invitation referred to in subsection (1) shall briefly specify the matters in dispute.

(3) Upon receipt of a written invitation sent by the person initiating the mediation under subsection (1), the person with whom he has a dispute may, in writing, accept the written invitation.

(4) A mediation shall be deemed to have been commenced upon the person initiating the mediation receiving the acceptance of the written invitation from the person with whom he has a dispute under subsection (3).

(5) An invitation regarding a mediation under subsection (1) shall be deemed to have been rejected if the person initiating the mediation does not receive a reply from the person with whom he has a dispute, within fourteen days from the date he sends the person the written invitation or within such other period of time specified in the written invitation.

Mediation agreement

6. (1) Upon the commencement of a mediation as specified under subsection 5(4), the parties shall enter into a mediation agreement.

(2) A mediation agreement shall be in writing and signed by the parties.

(3) A mediation agreement shall contain an agreement by the parties to submit to mediation disputes which have arisen or which may arise between them, the appointment of a mediator, the costs to be borne by the parties and other matters the parties deem appropriate.

Part III
MEDIATOR

Appointment of mediator

7. (1) The parties shall appoint a mediator to assist them in the mediation.

(2) A mediator appointed under this part shall—

(a) possess the relevant qualifications, special knowledge or experience in mediation through training or formal tertiary education; or

(b) satisfy the requirements of an institution in relation to a mediator.

(3) The parties may request for assistance from the institution to appoint a mediator or mediators on their behalf.

(4) The appointment of a mediator under subsection (1) shall be made by way of a mediation agreement under section 6 and there shall be one mediator for a mediation unless the parties agree otherwise.

(5) If there is more than one mediator, the mediators shall act jointly in the mediation.

(6) No appointment of any mediator shall be valid except with the prior written consent of the mediator.

(7) A mediator appointed under this part shall disclose, before accepting the appointment, any known facts that a reasonable person would consider likely to affect his impartiality as mediator, including a financial or personal interest in the outcome of the mediation.

(8) The mediator may be paid a fee or given any other consideration as agreed between the parties.

Termination of appointment of mediator

8. (1) If a mediator appointed under this part—

(a) no longer possesses the relevant qualifications, special knowledge or experience in mediation as required under paragraph 7(2)(a);

(b) no longer satisfies the requirement of an institution in relation to a mediator as required under paragraph 7(2)(b);

(c) is found to have financial or personal interest in the dispute;

(d) is found to have obtained his appointment by way of fraud; or

(e) is unable to serve as a mediator for the mediation, the parties may terminate the appointment of the mediator and appoint another mediator for the mediation or request the institution to appoint another mediator.

(2) Notwithstanding subsection (1), the parties may terminate the appointment of a mediator for any reason and shall inform the mediator the reason for the termination.

Part IV
MEDIATION PROCESS

Role of mediator

9. (1) A mediator shall facilitate a mediation and determine the manner in which the mediation is to be conducted.

(2) A mediator may assist the parties to reach a satisfactory resolution of the dispute and suggest options for the settlement of the dispute.

(3) For the purposes of subsection (1), the mediator shall act independently and impartially.

Submission of statements to mediator

10. (1) A mediator may request each party to submit a statement setting out the brief facts of the dispute, supplemented by any documents that the party deems appropriate to submit.

(2) At any stage of a mediation, a mediator may request any party to submit any additional information or document as the mediator deems appropriate.

Conduct of mediation

11. (1) A mediator shall ensure that a mediation is privately conducted and he may meet with the parties together or with each party separately.

(2) Notwithstanding subsection (1)—

(a) a non-party of any party's choice may participate in a mediation to assist the party, subject to the consent of the mediator; and

(b) a non-party of a mediator's choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.

(3) A mediator may end the mediation if, in his opinion, further efforts at mediation would not contribute to a satisfactory resolution of the dispute between the parties.

Part V
CONCLUSION OF MEDIATION

Conclusion of mediation

12. A mediation shall conclude —

(a) upon the signing of a settlement agreement by the parties under section 13;

(b) upon the issuance of a written declaration by a mediator to the parties stating that further efforts at mediation would not contribute to a satisfactory resolution of the dispute;

(c) upon the issuance of a written declaration by the parties to a mediator stating that the mediation is terminated; or

(d) unless otherwise provided by mediation agreement referred to in section 6 —

(i) upon the issuance of a written declaration by a party to the other party and the mediator stating that the mediation is terminated;

(ii) upon the withdrawal from a mediation by any party; or

(iii) upon the death of any party or incapacity of any party.

Settlement agreement

13. (1) Upon the conclusion of a mediation and the reaching of an agreement by the parties regarding a dispute, the parties shall enter into a settlement agreement.

(2) The settlement agreement under subsection (1) shall be in writing and signed by the parties.

(3) The mediator shall authenticate the settlement agreement and furnish a copy of the agreement to the parties.

Effect of settlement agreement

14. (1) A settlement agreement shall be binding on the parties.

(2) If proceedings have been commenced in court, the settlement agreement may be recorded before the court as a consent judgment or judgement of the court.

Part VI
CONFIDENTIALITY AND PRIVILEGE

Confidentiality

15. (1) No person shall disclose any mediation communication.

(2) Notwithstanding subsection (1), mediation communication may be disclosed if—

(a) the disclosure is made with the consent of the parties;

(b) the disclosure is made with the consent of the person who gives the mediation communication;

(c) the disclosure is required under this Act or for the purpose of any civil or criminal proceedings under any written law; or

(d) the disclosure is required under any other written law for the purposes of implementation or enforcement of a settlement agreement.

Privilege

16. (1) Any mediation communication is privileged and is not subject to discovery or be admissible in evidence in any proceedings.

(2) Notwithstanding subsection (1), the mediation communication is not privileged if—

(a) the privilege is expressly waived in writing by the parties, the mediator and the non-party;

(b) it is a public document by virtue of the Evidence Act 1950 [Act 56];

(c) it is a threat to inflict bodily injury or commit a crime;

(d) it is used or intended to be used to plan a crime, attempt to commit or commit a crime, or to conceal a crime or criminal activity or an ongoing crime or

ongoing criminal activity;

(e) it is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or

(f) it is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, non-party, or representative of a party based on their conduct during any mediation session.

Part VII
MISCELLANEOUS

Costs

17. (1) The costs of a mediation shall be borne equally by the parties.

(2) Notwithstanding subsection (1), the parties may agree on the amount of costs to be borne by each party.

Power to amend Schedule

18. The Minister may, by order published in the Gazette, amend the Schedule.

Liability of a mediator

19. A mediator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as a mediator unless the act or omission is proved to have been fraudulent or involves wilful misconduct.

Regulations

20. The Minister may make regulations for the better carrying out of the objects and purposes of this Act.

SCHEDULE
[Paragraph 2(a)]

NON-APPLICATION

1. Proceedings involving a question which arises as to the effect of any provision of the Federal Constitution.

2. Suits involving prerogative writs, as set out in the Schedule to the Courts of Judicature Act 1964 [Act 91].

3. Proceedings involving the remedy of temporary or permanent injunctions.

4. Election petitions under the Election Offences Act 1954 [Act 5].

5. Proceedings under the Land Acquisition Act 1960 [Act 486].

6. Proceedings involving the exercise of the original jurisdiction of the Federal Court under Article 128 of the Federal Constitution.

7. Judicial review.

8. Appeals.

9. Revision.

10. Any proceedings before a native court.

11. Any criminal matter.

ESSENTIAL SKILLS IN MEDIATION

Author Dato' Ong Seng Huat, JP

Published by **Council of Justices of The Peace, State of Penang, Malaysia.**

Email bureau@mediation.my

Website www.mediation.my

Translation Leong Kit Yeng
(Chinese & Bahasa Malaysia)

Design Siah Li Peng @ Heitu Design

Printed by **Super Sonic Printing Sdn Bhd**
67, Jalan Patani, 10150 Penang, Malaysia.

First Printing November 2022

ISBN 978-629-97545-0-3

ISBN 978-629-97545-0-3

ESSENTIAL SKILLS IN
MEDIATION