

## **“Mediation” as an Effective Framework for Debt Settlement in Malaysia**

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### **1. Introduction**

Claiming overdue payments could be an inconvenient process. For business owners, it may affect business relationships and at the same time the non-payment will impact business' cash flow and cause various impacts on the company's operations. Therefore,



one needs to opt for the best and most effective way of debt settlement. It is important to assess the situation, and the nature of the debt, among other things, before considering which method of resolution will be the best for the parties to achieve a common objective.

Mediation is a useful strategy to recover debts as it is a framework that is known to be one of the effective alternative dispute resolutions (“ADR”). Mediation is commonly considered when the parties wish to have an amicable settlement outside the court proceeding, and when they are willing, in good faith, to commit the effort to resolve the disputes. Despite being a less formal compared to other ADR such as arbitration, Mediation process is comprehensively guided under the law in Malaysia, in respect of among others, the confidentiality, the process, cost and others.

This article will provide an insight of the process of settlement of debt through mediation, the governing laws, the estimated timeline and the costs involved thereof.

### **2. The Law of Mediation in Malaysia**

### **What is Mediation?**

Clause 3 of the Mediation Act 2012 provides the definition of “Mediation” which 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. With the assistance of a neutral, trained and person expert in the subject matter of the dispute, parties will be able to discuss their problems through a mediator. In cases of debt, parties may discuss the best way to implement the settlement, based on each parties’ financial conditions.

In some events, Mediation could be implemented based on the Court’s recommendation. Although parties had commenced the litigation process, the Court, when in its opinion that Mediation could settle the matter, will recommend the parties to settle through Mediation. This process is called a court facilitated Mediation.

### **The law in Malaysia**

The primary legislation that governs the Mediation process in Malaysia is the Mediation Act 2019. The key provisions that provide the process of Mediation includes the following:

- **Section 5** where it provides that a person may only initiate the Mediation process by sending to the person with whom he has a dispute, a written invitation regarding the mediation which specify the matter in dispute. Thereafter, the Mediation process is considered commenced once the recipient responded to the said invitation with their agreement to use the said method to settle the matter.
- **Section 6** where it provides that parties in Mediation shall enter into a mediation agreement in writing, which terms and conditions include the agreement to submit the matter to Mediation, the appointment of the mediator, the cost to be borne by the parties and other terms which the parties deem appropriate.
- **Section 7** where it provides the requirements to appoint a mediator which include the having the relevant qualifications, special knowledge or experience in mediation, satisfy the rules of the mediation centre.
- **Section 11** where it provides the conduct of mediation where mediation must be privately conducted either with the parties together or separately. Further, parties may choose any non-party to participate to assist the party, subject to the consent of the mediator.

### **Mediation Centre (Rules and Regulations)**

In Malaysia, there is no specific set of rules to follow for Mediation to be done, unless otherwise agreed by the parties. When parties agreed to conduct the Mediation in a specified institution known as the Mediation centre, the respective Mediation centre's rules are to be followed.

The Mediation centres available in Malaysia are known as the Asian International Arbitration Centre (AIAC) which will use the AIAC Mediation Rules and the Malaysian Mediation Centre (MMC) that will use its own rules and regulations. MMC is a body established under the auspices of the Bar Council of Malaysia which is located in the capital city of Malaysia, Kuala Lumpur. MMC provides mediation services to settle disputes at national as well as international level. The MMC sets out the rules to mediate, which key provision are as follows:

- **Appointment of a Mediator** – in addition to the Mediation Act 2012, the Mediation that takes place in the MMC must follow the rules and regulations, and the codes of ethics set under the MMC (“MMC Rules”). Under the MMC Rules, the MMC will forward the list of Mediators on the panel and in the event the parties not having agreed upon a Mediator on MMC's panel within seven (7) days, the MMC shall appoint a person on MMC's panel to act as the Mediator.
- **Confidentiality** – all communication made in the Mediation, including information disclosed and views expressed, are made on a strictly “without prejudice” bases and shall not be used as a basis of arguments in any other proceedings.
- **No recording** – no audio stenographic record, no transcript or formal record. No audio-visual recording will be made of the proceedings.
- **Mediator's fees** – are prescribed by MMC from time to time and shall be borne equally by the parties unless they agree otherwise.

### **3. The process flow of Mediation**

To understand further how a Mediation process takes place, the following steps are the order on how Mediation should be conducted:

- **Step 1:** Parties to give their consent to submit to mediation. In a court facilitated mediation, to fill up a consent form to agree to Mediation.



- **Step 2:** The process is flexible and usually the session will start with an opening statement by the Mediator, followed by each party expressing their views and thereafter, consult the parties separately where each party will exchange their intended settlement terms.
- **Step 3:** the mediator will consider the settlement terms by each party and formulate the ideas and proposals to accommodate each party's interests. The mediator use the diplomacy talking to both parties separately back and forth with the ideas and proposals until an agreement is achieved.
- **Step 4:** once parties reach an agreement after the session, the mediator will write a summary at the end of the session and ask each side to sign it. Therefore, a settlement agreement is made and effective. If parties fail to reach an amicable and mutual agreement, the mediator will advice whether parties may proceed with another mediation to discuss or whether upcoming discussion in the future will be pointless.

#### 4. The Difference between Mediation vs Arbitration

**No issuance of order** – as opposed to Arbitration, there is no order to be issued by the mediator. Instead, the mediator's role is only to assists the parties to reach a settlement. In Arbitration, an order will be issued and it will bind the parties as if the Court's decision was granted.

**Mediator has no power to make decision** – mediator does not have the power to put forward his decision as the power lies on the parties to determine the outcome of the Mediation. In Arbitration, the Arbitrator has the power to make decision even without the consent from the parties.

**Informal session** – mediation is less formal and involves discussion at a more flexible setting. It is more friendly and more amicable since parties come with the same objective i.e. to reach a settlement. In Arbitration, the approach is formal and the arbitrators specify certain rules to decide on the matter.

#### 5. Conclusion

With the help of Mediation, parties can seek to discuss the best practical solution to settle their debts. Using the highly trained mediator's services, parties may consider to

implement the ideas or proposals suggested by the mediator which may include the repayment plans to be agreed in the settlement agreement. This is because the mediator is trained to provide the fair proposal for both parties.

Mediation is specifically recommended when you wish to preserve the business relationship. With the less formal and friendlier setting, Mediation is perceived as a mere discussion to resolve an issue, rather than to commence a “fight” such as in litigation. The other advantages like the flexibility, easy to arrange and can quickly be concluded, also makes Mediation to be more preferable.

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