

Certification and Mediation Training for the Mediators in Malaysia

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ABSTRACT

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The certification and mediation training are very important to ensure that mediators are in the best position to be neutral third parties and can effectively exercise a significant amount of authority and power over disputants. The Malaysian Mediation Act 2012 is silent on mediation training and practice for the mediators. Mediation training is related to the issues of qualification and accreditation of mediators since good quality mediation training will reflect the general practice of mediation. This paper is a summary and analysis of the literature on mediation training and practice issues. Some models of mediation training are also highlighted. This research employs qualitative research methodology, which is based on the doctrinal approach. The information and contribution of this research will help the government to enhance the quality of mediation trainers and programme administrators as they seek to ensure that the training, they provide is of the highest quality possible so that a standardised certification for mediators can be implemented in Malaysia.

Contribution/Originality: This paper is only focusing on mediation, particularly on certification and mediation training for mediators in Malaysia. As of to date, there is no standard certification and mediation training for mediators, which are crucially important to ensure that the mediators are well trained and skilful enough to handle the disputes before them.

1. Introduction

Dispute resolution outside of courts is not new; societies the world over has long used non-judicial, indigenous methods to resolve conflicts (Goldberg et al, 2020). What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realise goals broader than the settlement

of specific disputes. ADR processes may have applications across many diverse areas, including commercial, legal, social, environmental, international and political settings (Sourdin, 2020). Disputes within the sphere of ADR processes may range from those within the judicial and administrative system or where a litigated solution is neither inappropriate, desired, or unavailable (Jan & Ali Mohamed, 2010). For this reason, it is said to be impossible to construct a concise definition of ADR processes that is accurate in respect of the range of processes available. The application of ADR in commercial, business and family matters are widely accepted and recognised worldwide. Settlement of disputes outside courts through ADR is an intelligent choice among disputants. There are many types of ADR, namely negotiation, mediation, conciliation, adjudication, med-arb, ombudsmen, and arbitration.

2. Literature Review

Mediation is an informal, private and non-binding process where disputes are resolved by an independent and impartial mediator assisting parties to reach an agreement. The method of mediation is a faster, more flexible and less expensive alternative to litigation. The parties involved in a dispute must consent to mediation, and the mediator to be used must be agreed upon by the parties or nominated by an independent body. Mediation can involve two or more individuals, groups, businesses or organisations who have disagreed and have been unable to resolve the issues between them. The parties meet with an independent or neutral third party who facilitates the discussions (Chartered Institute of Arbitrators, 2016). Mediation has come under the spotlight and watchful eye of many countries' legal systems for its ability to resolve conflicts between parties, reduce court caseloads and reduce overall legal costs. Many jurisdictions already have existing legal provisions that give their courts the authority to order parties in dispute to mediation when deemed appropriate. The same situation in Malaysia when the parliament passed the Mediation Act in 2012.

2.1. The Mediator(s)

A mediator plays important role in the context of modern mediation practice. One of these roles is as a process manager, where he manages the process and guides the parties to a settlement of their dispute (Goldberg et al., 2020; Sourdin 2020; Mohd Nasir et al, 2020). A separate but related role is the substantive one, where the mediator assists the parties in charting through the content of their dispute and to explore substantive solutions to their problem. According to Sourdin (2020) a mediator does not decide dispute between parties but serves only to facilitate and offer suggestions to allow the disputing parties to come to a common ground.

There is one issue on whether lawyers can be good mediators. Whilst a lawyer's traditional role as counsellor, advocate and advisor has been defined in one dimension, namely acting in their client's best interests, the role as the third party (mediator) imposes a new set of ethical dilemmas and obligations on lawyers which encompasses standards for impartiality (Lau & Ali Mohamed, 2020; Cukier, 2010). As expected, this role poses many new challenges for lawyers transitioning from an advocate for a single party to a neutral process manager (in facilitative mediation). Lawyers must be mindful of their own values, instincts, experiences, biases and education to assess which attributes they need to monitor or change to facilitate mediation (Cukier, 2010). It might be said that a mediator must ensure that he is always acting with a purpose in mind and that self-awareness is paramount to his ability to assist parties in resolving their dispute.

A mediator shall mediate only when he has the necessary competence to satisfy the parties' reasonable expectations ([American Arbitration Association, 2005](#)). Mediators need communication competence in the knowledge that their clients supply the interpretive framework necessary for determining appropriate interventions ([Bagshaw, 2008](#)). According to her, a mediator shall conduct a process of mediation in a manner that promotes diligence, timeliness, safety, the presence of the appropriate participants, and mutual respect among all participants. A good mediator must be impartial, whilst the parties involved must have the respect and trust of the mediator to evaluate their positions impartially ([Syed Khalid, 2000](#)). The mediator must be able to grasp and have a sound understanding of the subject matter. He must also possess good communication skills to foresee potential solutions. According to [Syed Khalid \(2000\)](#), the mediation process is confidential, where the parties referring a dispute to the mediation must be able to trust the mediator to keep confidences disclosed at the session and preserve the integrity of the proceedings.

A mediator's job starts long before the actual mediation. He must develop and maintain his self-awareness capacities, understand the impact of non-verbal communication on the process of conflict, and apply this knowledge to every aspect of the mediation process ([Rahman, 2012](#)). In fact, self-awareness and self-development are necessary orientations for the effective mediator. Further, these two orientations will be reconciled with core theories of mediation practice, including ideas of emotion, neutrality and spirituality. Australia is advanced in this matter because the importance of self-awareness for mediators has been sanctioned by the National Alternative Dispute Resolution Advisory Council (NADRAC) in its 2001 Discussion Paper on standards of practice. The paper identifies the importance of the development of self-awareness for practitioners, described in the paper as 'knowledge about self'.

The issue that has received increasing attention in recent years is whether a mediator should earn an accreditation before resuming the mediation tasks. It is a dominating opinion that accredited and certified mediators are preferred by consumers compared to the non-accredited mediators. Increasingly, certification and mediation training are made compulsory to enable a person to mediate in a particular setting. Currently, in Malaysia, there is no accreditation body to regulate the quality or standards of mediators. All institutions in Malaysia have developed their own mediation training, as they maintain a number of mediators on their respective panels ([Lau & Ali Mohamed, 2020](#)).

3. Methodology

The researchers conducted a doctrinal or library-based research methodology. The doctrinal or library-based analysis is "an enquiry into legal concepts, principles, and existing legal texts such as statutes, case laws, etc." ([Kharel, 2018](#)). This method allows the researchers to identify the issues and points regarding the certification and mediation training in Malaysia and provides a more profound understanding to the researchers on doctrinal content, especially laws and regulations, enforcement and administration. Under doctrinal or library-based research, the researchers analysed the Malaysian Mediation Act and other foreign legislations, textbooks, and journal articles.

4. Result and Discussion

4.1. The Position in Malaysia: Mediation Act 2012

The question which comes to our mind is; why do we need to legislate a statute on mediation? Mediation is a mechanism under a big umbrella of ADR, which is not compulsory and flexible in nature by referring to other commonwealth countries, namely Australia, New Zealand, Canada and Singapore (to name a few), which do not have comprehensive national mediation legislation. Most countries do not want to rigid the mediation process as it is based on the voluntary will of the disputing parties to refer their disputes to mediation rather than litigation. To them, a statute will impose unnecessary limits on the mediation process.

As for Malaysia, the government took a different view in this matter. A statute on mediation was passed to promote and create awareness among the general public, as well as to move along with the global trend (Lee, 2012). Other reasons for the legislation on mediation is to provide a predictable legal framework, to address on the issue of legitimisation, and to promote Malaysia as an international dispute resolution centre. Examples of some jurisdictions having legislations on mediation are, Mediation Act 2004 of Republic of Trinidad and Tobago, Mediation Act 2004 of Malta, Mediation Act 2004 of Bulgaria and International Conciliation and Arbitration Act 1993 of Bermuda.

The Malaysian Mediation Act 2012 (MMA 2012) was passed in House of Representatives on 2 April 2012 and in House of Senate on 7 May 2012. The royal assent was given on 18 June 2012, gazetted on 22 June 2012 and came into force on 1 August 2012. The long title of this Act is an Act to promote and encourage mediation as a method of ADR 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. There is a total of 20 sections and one schedule in this Act. There are 7 parts, including preliminary, commencement of mediation, mediator, mediation process, the conclusion of mediation, confidentiality and privilege, and miscellaneous.

Mediation is defined under the Act as a voluntary process in which a mediator facilitates communication and negotiation between parties to assist them in reaching an agreement. According to Lee (2012), among the objectives of the MMA 2012 are:

- (a) to promote, encourage and facilitate the fair, speedy and cost-effective resolution of disputes by mediation
- (b) to protect the confidential nature of mediation and also the privilege attached to communications made in the course of mediation
- (c) to allow rooms to be implemented and tested
- (d) not to restrain the flexibility of mediation

According to section 2 of MMA 2012, this Act is not applied 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.

Based on the above provisions, it can be argued that section 2 of MMA 2012 is not comprehensive and open for debate as it does not include the *Syariah* Courts and other institutions which have their own rules and regulations for mediation. It is submitted that paragraph (d) should be inserted into this section to cover 'any other institutions which have their own rules and regulations pertaining to mediation'.

Under section 4(2) of the MMA 2012, 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.

Section 19 is on the liability of a mediator. It says that 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 willful misconduct. In other words, a mediator must act in good faith, impartially and independently. An example can be seen in the case of *Topohe v. Lavemberg (II)* (2003) SC Vic. 410. After certain negotiations, this case did not go to trial and therefore, the issue of immunity of the mediator cannot be considered at all.

The settlement agreement shall be in writing and signed by the parties. The settlement agreement is to be enforced contractually. Under section 13 and 14 of the MMA 2012, if the proceedings have commenced in court, the settlement agreement may be recorded before the court as a consent judgment of the court. Although this Act is a good move for the mediation process in Malaysia, the flaws and shortcomings are inevitable. For the Malaysian Bar, this Act has been seen as merely a reproduction of existing procedural rules of certain professional mediation institutions. Besides all the flaws, it is hoped that the MMA 2012 will bring a paradigm shift and public awareness of the benefits of mediation.

4.2. Qualification and Appointment of Mediators

Stakeholders who are familiar with the mediation framework have long hoped for legislation to regulate the practice of mediation by mediators and the standardisation of competency requirements with minimum qualifications for mediators, whether or not through an accreditation system where authority is given the power to revoke or confer accreditation (Malaysian Bar). But the Act does not address these issues.

The relevant provision for the qualification of mediators is incorporated in section 7 of the Mediation Act 2012, 'Appointment of Mediator'. Section 7 states:

- (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.

Among the words used in section 7(2)(a) are 'relevant qualifications', 'special knowledge' or 'experience in mediation through training or formal tertiary education and section 7(2)(b) states 'satisfy the requirements of an institution about a mediator.

There is no standardisation in qualifications provided by the Mediation Act 2012 with regard to uniformity imposed by the established professional bodies. Hence, institutions which provide mediation services such as the Malaysian Mediation Centre (MMC), Asian International Arbitration Centre (AIAC), Chartered Institute of Arbitrators (CIArb) and other professional bodies have their own standards and requirements for appointing a mediator that varies from one institution to another (Lau & Ali Mohamed). For example, the Malaysian Mediation Centre (MMC), which was established by the Bar Council of Malaysia requires all of its mediators to have no less than 7 years of standing as practising

members of the Malaysian Bar. In addition, 40 hours of training under the MMC must have been completed, plus pass a practical assessment to be qualified as a mediator in MMC. More importantly, LEADR of Australia or Accord Group are the ones responsible for training the mediators of MMC (Bukhari, 2003). Whereas community mediators have some lesser requirements to qualify as a mediator. Community mediators are not acknowledged as professional mediators, unlike in other developed and developing countries. Admittedly, the qualifications needed to be a community mediator are that he must be a committee of *Rukun Tetangga* and have been trained by officers of the Department of National Unity. However, this requirement is not compulsory (Khan, 2014).

The debate among mediators about the assessment and accreditation of mediators has been fermenting for some time. The confidentiality of mediation and the fact that most consumers are ill-equipped to judge the good from the bad make it challenging to monitor mediation or its quality. The little available information indicates that there is cause for concern about the process and quality of some mediation services.

For a person to practice as a mediator, he needs to fulfil the requirements set up in the Act. In modern mediation, training and accreditation of mediators are necessary to fulfil the numerous expectations that come with the job. Mediators must be well trained and have received their qualifications from some recognised body (Syed Khalid, 2010). For instance, mediation institutes such as AIAC, MMC and other mediation institutes require a certificate of completion from a recognised training program before they can be attached to mediation services (Lau & Ali Mohamed, 2010).

However, in Malaysia, up until today, there is still no standard national system or law to standardise the qualification and accreditation of a mediator; hence, as a consequence, various mediation institutes have developed their own varying standards and criteria for a mediator. For example, mediation training which has been developed by the Chartered Institute of Arbitrators CI Arb, MMC and AIAC was done with their varying ideals of quality and standards of mediators in mind.

Undoubtedly, these institutions had adopted their criteria of conduct. Firstly, people who wish to be mediators would have to participate in a mediation workshop and are evaluated with the institution's standards, whether they are suitable or not for mediation at the end of the workshop. Next, those who have passed the evaluation will be certified and where appropriate, will join the training after being attached to the panel, for example, AIAC. Although there are differences in ideals such as MMC's mediators who have the legal background and AIAC's mediators who are experts in their field, the objective is the similar, that is, to encourage mediation as an alternative to litigation by increasing the confidence of the public by having mediators who are well trained from the recognised institutes.

The important question is which body should regulate the accreditation schemes. Some suggested that the government should allocate resources to promote a uniform standard by providing a legislative framework to help regulate and implement a national standard in mediation practice (Lau & Ali Mohamed, 2010). In addition, issues such as the method to evaluate the difference in quality and effectiveness of the models practised by these mediation institutions as mediators' field of work is broad, ranging from matrimonial, and commercial to specific types such as financial or consumer mediation were raised (Lau &

[Ali Mohamed, 2010](#)). Perhaps, this is one of the reasons why Mediation Act 2012 has been commented on the accreditation of mediators.

4.3. Accreditation and Mediation Training in Australia

4.3.1. The General Practice

In Australia, there are over 30 statutes which regulate matters such as nomination, accreditation and appointment of mediators, and mediation confidentiality ([Boulle & Nesic, 2001](#)). There are standard accreditation requirements and qualifications to become a mediator. Applicants need to meet threshold training, education and assessment requirements as described in the Approval Standards set out in the National Mediator Accreditation System (NMAS).

In general, mediators must pass some training modules to be authorised to conduct the mediation process. Some of the essential components of mediation training are communication skills, standards and ethics and conflict theories ([Boulle & Nesic, 2001](#)). In Australia, the National Mediator Accreditation System (NMAS) is a body established aiming to promote mediator competency. The NMAS requires mediators to complete certain hours of training and assessment. Their training assessments are based on the Practice Standards. The practice standards laid out by NMAS consist of important headings such as confidentiality, knowledge, skills and ethical principles, ethical conduct and professional relations, charging for services, procedural fairness and impartiality, power and safety, provision of information and promotion of services.

The accreditation process is standardised across Australia and is administered by Recognised Mediator Accreditation Bodies (RMABs). In order to be accredited, the mediator must have personal qualities and appropriate life, social and work experience to conduct the process independently and professionally. Upon approval of RMABs, a mediator is required to provide evidence of the mediator's competence by reference to education, training and experience. As a condition of ongoing approval, mediators must comply with the Practice Standards and seek re-approval by the Approval Standards. Meanwhile, the authoritative list of NMAS-accredited mediators was listed by The Register of Nationally Accredited Mediators (National Register). Next, The Mediator Standards Board (MSB) oversees the NMAS. Members of the MSB comprise RMABs; professionals, government, community and consumer organisations; and education and training providers. Lastly, the Australian Mediation Association (AMA) will diagnose the dispute and appoint a suitable mediator depending on the situation of the dispute. This will ensure the selection of a professional mediator to assist parties in successfully resolving their conflicts.

Family mediators in Australia are required to undergo some trainings and take 12 subjects which are related to family mediation in order to be registered as family mediators. Necessary qualifications to become a mediator in Australia is provided under section 10G of the FLA 1975 under the definition of 'family dispute resolution practitioner'. They must be on the Dispute Resolution Register of the Commonwealth Attorney-General Department. The requirements to qualify for registration are provided for under regulation 58 of the Family Law Regulations 1984.

The 2006 reforms of the Family Law Act 1975 also have placed increased emphasis that persons involved in a family, especially child-related dispute, must make a genuine effort

to resolve that dispute through family dispute resolution (Australian AG website, 2020). The Australian government announced its commitment to establish 65 Family Relationship Centres (FRCs) over the 2006-2008 period. It is highlighted that:

The new FRCs will overcome the limitations of the Committee's Families Tribunal proposal. The Tribunal would have provided an alternative to the courts for some parenting disputes, offering conciliation and less adversarial decision-making processes. However, it would have had the power to make decisions in only a relatively small proportion of cases, and there would have been a right of appeal to the courts. The proposed FRCs will help parents resolve their disputes much earlier in the separation (Australian Government, 2004).

Some of the trained mediators work in the FRCs. Training requirements for the FRC staff are set out in the Family Relationship Services Program approval requirements (Fehlberg & Behrens, 2008). These provide that the FRC staff must usually have an appropriate degree, diploma or other qualifications. It includes a mixture of legal and social science professionals who know the laws and children's development.

4.3.2. Mediation Training in Other Jurisdictions

Mediation is available privately from a range of practitioners with backgrounds in law, psychology, counselling and other professions. There are organisations of interested persons, such as the Arbitrators and Mediators Institute of New Zealand (AMINZ), the Association of Dispute Resolvers (LEADR) and the New Zealand Law Society (NZLS). The intake is between 16-20 people per session. Besides lawyers, some people undertake mediation for the employment authority, non-government organisations and other institutions which provide their in-house mediation.

In some cases, the courts will appoint mediators to conduct mediation. This process is called counsel-led mediation. A report back to the court should be made as soon as practicably possible after the mediation has been held. The report must be in detail about what understandings (if any) has been reached between the parties on the matters in issue.

The criteria required by NMAS practice standards are similar to the version in the United States proposed by Association for Conflict Resolution, which focuses on requirements relating to minimum traits, education, skills, training and demonstrated competencies as well as experience. There is a recommendation by the Society for Professionals Engaged in ADR (SDIR) that instead of assessing based on paper credentials, training should be assessed by performance. Good mediation training should also include clinical training. However, the nature of mediation which emphasises confidentiality and privacy, makes clinical not available since it requires learning through observation. It is also suggested that mediation training should be continued training as well as specialist training so that qualified mediators always perform at their best and are specifically competent on a particular problem.

For family mediation, mediators need to be aware of several important issues, namely domestic violence, child abuse and power imbalance. The National Family Mediation (NFM), a provider of family mediation in England and Wales; apart from providing training to assess suitability for mediation with clients, also give training on issues such as domestic abuse and safeguarding issues. The Family Mediators Association in the UK

emphasises certain issues in their family mediators' training which, among others are family dynamics, what would be the effect of separation and divorce on children as well as financial issues such as pensions and property. In other words, issues involved in family mediation are sensitive, which mediators must be aware of. The effort to improvise mediation training standards has been established for example, by Joint Mediation Forum, particularly in the UK. Commercial, family and community mediation institutions have participated together to achieve a better mediation training model (Boulle & Nesic, 2001).

4.3.3. Advantages of Having a Good Mediation Training

Good mediation training is an important and crucial requirement for mediators in order for them to be authorised as a mediator. Mediators came from various different fields and backgrounds. Some of them are from the judiciary whereas, some have backgrounds in psychology and counselling. Judge mediator tends to be more evaluative, whereas mediators from the psychological and counselling field tend to practice a facilitative approach (Boulle & Nesic, 2001).

Since there are many types and styles of disputes and parties are involved, mediators will have problem to solve issues which they are unfamiliar with due to their lack of knowledge and awareness of the particular dispute and parties. Without proper training, mediators might not be able to adapt to changes of situations effectively. Therefore, good mediation training could be a good platform for mediators to prepare themselves to face various situations that might happen in the future. In addition, it is important for mediators to practice neutrality during their practice. Therefore, by having good mediation training, mediators will be taught about the circumstances and situations where they cannot exercise their function as mediators. For example, suppose any solicitor or members of his firm have acted on behalf of any parties in the mediation. In that case, the solicitor can no longer exercise his function as a solicitor mediator in that case (Boulle & Nesic, 2001).

Another issue that could be resolved by having good mediation training is to gain clients' trust to go for mediation. The expectation of a good mediator with a good competency level could be fulfilled by having good mediation training. Since mediation is conducted in a private and confidential way, the accountability of mediation practitioners is questionable. However, good mediation training will ensure a higher standard of accountability will be observed among mediation practitioners.

Lastly, simulation training which is a part of the modules of mediation training is an advantage to the mediators as they can experience the feel of a real mediation process. Therefore, good mediation training can help mediation practitioners to perform well in their field.

5. Conclusion

The Mediation Act 2012 is silent on the certification and mediation training for the mediators. This has led to the development of numerous models of mediation training in various mediation institutions in Malaysia. The models used to train future mediators are made with their own varying ideals of quality and standards of mediators in mind; the purpose is the same, that is, to promote and encourage mediation as a method of ADR by boosting the confidence of the public by having mediators who are well trained from acknowledged institutions. With the increasing use of ADR, the need for some form of

standardised training, certification, and accreditation becomes increasingly important, especially in areas such as family law matters.

Training designs for mediators is essential to make sure that mediators are in a preeminent position to be impartial in assisting dispute resolution as the third party. By having a good training design, mediators can exert their full capabilities effectively in terms of power and authority over disputants. Thus, it can be seen that training designs are related to the accreditation and qualification of mediators; these training designs are developed to ensure the finest quality mediators are produced. An Accreditation Board for mediators should be set up, preferably under the Prime Minister's Department, as this department is generally in charge of matters relating to legal activities.

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