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When to turn to mediation in telco disputes

Straits Times, 2016, September 5

Dorcas Quek Anderson

The introduction of an alternative dispute resolution scheme to assist telcos and consumers in resolving their disputes was proposed by the Ministry of Communications and Information (MCI) last month.

The mediation process is likely to be used. Customers would pay a small fee to resolve their billing, contract, service quality and compensation disputes.

The proposal is part of several revisions the MCI wants to make to existing laws that govern telcos and media service providers.

However, in a commentary on Aug 10, The Straits Times' Technology Editor Irene Tham questioned whether mediation goes far enough to settle telco disputes.

Mediation has been increasingly relied on to resolve a wide variety of conflicts in Singapore - from harassment claims and community disputes, to healthcare matters and commercial tenancy.

While this is a positive trend, it begs the broader question about the appropriateness of mediation for all types of disputes. A sound understanding of this issue will lead to more effective policy decisions.

Mediation is a process of assisted negotiation. The mediator, a neutral party, helps the persons involved in a conflict to negotiate effectively and arrive at a mutually acceptable settlement. He or she helps them in communication, understanding the other party's concerns and brainstorming different ways to settle.

The mediation process is one of many modes of alternative dispute resolution (ADR) - that is, "alternative" to court proceedings. ADR also includes arbitration, similar to a court trial except that the decision is made by an appointed arbitrator and not a judge.

Another process similar to arbitration is private adjudication, entailing setting up specialised tribunals empowered to make decisions on specific types of disputes.

Mediation stands in sharp contrast to arbitration and private adjudication because of its informal nature. Because no binding decision is made by the mediator, disputants have the opportunity to have a frank and private conversation about the issues underlying their conflict. Communication or inter-personal problems may be addressed, thus salvaging their relationship.

The range of potential solutions within mediation is also large; disputants may reach a solution that even the law does not provide for, such as making a genuine apology or arriving at a long-term business arrangement.

In addition, substantial time and costs savings are reaped when a matter is swiftly settled without resorting to court proceedings.

As a mediator, some of the most poignant moments in my life have been when warring parties took significant steps to restore their relationship, and left the mediation room with their burdens lifted.

I have also observed how mediation does not work well in certain circumstances. First, the disputants have to be willing to participate in the mediation process in good faith.

I have come across individuals who are not willing to listen to other points of view or to consider a range of solutions. No amount of intervention by the mediator will assist in such circumstances.

Second, mediation usually does not work well when there is a stark disparity in bargaining power among the disputants. Each disputant has to agree with the way the dispute is settled. If one party feels intimidated by the other, they may be pressured to accept the proposed solution without being comfortable with it.

For instance, a person with little means may feel vulnerable when being sued by a company with deep pockets. They may think that there is no choice but to accept the demands of the company, even when they seem unreasonable.

However, the converse may also occur - a seemingly disadvantaged person may hold the other party to ransom with threats of negative publicity.

Indeed, Ms Tham pointed out that difficult customers could wear everybody out with unreasonable demands, causing the mediation to be long-drawn without any resolution. A well-trained and experienced mediator will intervene to level the playing field. Sometimes, the mediator stops the mediation and lets the matter be decided in court.

Third, mediation is inappropriate in situations of infringements of a person's rights and well-being, such as domestic violence, serious criminal offences or grave harassment.

The victim may not have the capacity to negotiate because of fear. They may also risk giving up legitimate rights in the course of the mediation.

HOW TO DECIDE WHAT'S APPROPRIATE

The challenge facing policymakers is to discern when mediation is appropriate for a particular type of dispute. There ought to be an assessment of the potential participants' attitudes and characteristics; a consideration of the usual quantum involved; and an evaluation on whether mediation will truly provide a low-cost and quick solution.

Since mediation does not fit all types of dispute, it is highly risky to introduce mandatory mediation schemes without a careful analysis of the underlying issues.

Finality is another consideration. What if the mediation is unsuccessful? The dispute may be unnecessarily prolonged if the disputants have to go to court. It is notable that the dispute resolution schemes for telcos in Britain and Australia involve private adjudication instead of mediation, probably because of the final outcomes that adjudication brings.

It is also worth exploring combining a few types of processes. There are blended dispute resolution programmes in certain industries, such as the Council for Estate Agencies' Mediation-Arbitration scheme.

Mediation is provided by organisations like the Singapore Mediation Centre and Case. If mediation fails, the matter can be decided by a private arbitrator in the Singapore International Arbitration Centre or Singapore Institute of Surveyors and Valuers.

ADR is now also known as "appropriate" dispute resolution, emphasising the importance of choosing the most suitable method.

Forty years ago, Professor Frank Sander from Harvard University spoke about using a variety of dispute resolution processes to fit the relevant dispute. The growth of modern ADR is commonly attributed to this speech. His call to take a considered approach in fitting the dispute to the right ADR process applies with full force today.

The writer is assistant professor at Singapore Management University School of Law, principal mediator at the Singapore Mediation Centre and an accredited mediator of the International Mediation Institute.