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Introducing a ‘presumption of ADR’ for civil matters in the Subordinate Courts

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Introducing a "Presumption of ADR" for civil matters in the Subordinate Courts

This article traces the development of court ADR programmes in the Subordinate Courts for civil disputes. It also discusses the implications of a recent Practice Direction introducing a "Presumption of ADR".

A. Introduction

The courts were once associated primarily with the adversarial trial process. The judiciary was perceived as a forum for public vindication and adjudication of disputes. That concept of the judiciary has slowly changed as the Alternative Dispute Resolution (ADR) movement grew steadily. In many jurisdictions, ADR options have been gradually incorporated into the judicial process, and become an integral part of the litigation landscape. The courts have redefined their role to provide not only adjudication, but also a range of dispute resolution options.[1]

In this regard, the Subordinate Courts' vision expressly states that the courts serve the society with a "variety of processes for timely resolution of disputes".[2] The Subordinate Courts provide court ADR services and refer parties to external ADR providers. In addition to providing a range of dispute resolution processes, the Courts have also been encouraging parties to consider ADR at the earliest possible stage. This article traces and reviews the development of the Court ADR for civil matters and discusses the changes introduced via a recent Practice Direction.

B. The Subordinate Courts' philosophy concerning the use of ADR in civil disputes

There are two prongs to the courts' philosophy concerning the use of ADR. First, the courts seek to provide litigants with *access to ADR*. The trial process provides many benefits as a process for the vindication of rights. However, it may also engender ill effects such as the deterioration of relationships or the incurring of large or disproportionate expenses. The Subordinate Courts, while not eschewing the trial process, have provided a non-confrontational setting to resolve civil

[1] See generally Loukas Mistelis, *ADR in England and Wales: A Successful Case of Public Private Partnership,* 12 ADR Bulletin: Vol. 6: No. 3, Article 6; Kimberlee Kovach "The Evolution of Mediation in the United States: Issues Ripe for Regulation May Shape the Future of Practice" in Nadja Alexander, *Global Trends in Mediation* (Kluwer Law International, 2006) ch 15 at p 392, and *The Hon Hugh F Landerkin, QC and Andrew J Pirie*, "What's the Issue? Judicial Dispute Resolution in Canada" in Tania Sourdin, *Alternative Dispute Resolution and the Courts: Law in Context,* Vol 22 No 1 (Dec 2004), at 25.

[2] The Subordinate Courts' Justice Statement, accessible at http://www.subcourts.gov.sg under the section "About Subordinate Courts".

disputes. The Primary Dispute Resolution Centre ('PDRC') was established in 1994 to provide Court Dispute Resolution ('CDR') services within the courts. The former Chief Justice Yong Pung How highlighted then that ADR was being developed not as a means to reduce case backlog, a problem the courts had already resolved in the early 1990s, but as a non-confrontational way of resolving disputes to preserve relationships.[3] In short, the Subordinate Courts view ADR and the trial process as different ways to resolve disputes; a holistic judicial system should provide litigants access to both modes of resolving disputes.

Moving a step further, the courts have also encouraged litigants to *consider ADR as their first choice in resolving disputes in court*.[4] Using ADR at an early stage helps minimise cost of litigation as well as potential deterioration in relationships between opposing litigants. Conversely, attempting ADR at a more advanced stage of a civil suit has proven to be challenging, because parties have become increasingly entrenched in their positions and are intent on proceeding to trial.[5] There have been several steps taken by the courts to exhort parties to make ADR their first choice in dispute resolution:

(a) Pre-action protocol and ADR for non-injury motor accident (NIMA) claims

This was the first ADR programme initiated in 2002. The pre-action protocol introduced a costs and case management regime that facilitate early exchange of information and pre-writ negotiation. All NIMA claims that are filed in court are also required to go through the CDR process in the PDRC, approximately 8 weeks after appearance has been entered.[6] A judge from PDRC gives a brief neutral evaluation of the case to enable parties to understand their chances of success at trial and to negotiate using the evaluation as a basis. To complement this measure, the Subordinate Courts worked together with the Monetary Authority of Singapore to introduce the FIDeRC-NIMA scheme in 2008 to facilitate the resolution of low value NIMA claims in an affordable way. All NIMA claims less than $1,000 had to be first brought before the Financial Industry

[3] See former Chief Justice Yong Pung, speech at the Opening of the Legal Year 1996, in Hoo Sheau Peng et al, *Speeches and Judgments of Chief Justice Yong Pung How* (FT Law & Tax Asia Pacific, 1996) at p 212-213, where CJ Yong stated that the backlog problem in the courts had been eliminated, but there was still a keen awareness that alternative means of dispute resolution may be more desirable than litigation for the litigant, "especially in the context of an Asian society which stresses harmony and cohesiveness".

[4] See Code of Ethics and Basic Principles of Court Mediation, available at http://www.subccourts.gov.sg, under "Civil Justice Division, Court Dispute Resolution/Mediation".

[5] Roselle L. Wissler, *Court Connected Mediation in General Civil Cases: What We Know from Empirical Research,* 17 Ohio St. J. Disp. Resol. 641 (2001-2002), at 677, noting that empirical data suggested that cases were more likely to be settled if the mediation was held sooner after the case was filed.

[6] Paragraph 25B of the Subordinate Courts Practice Directions, available at http://www.subccourts.gov.sg, under "Legislation and Directions".

Dispute Resolution Centre for resolution through mediation or adjudication. The jurisdiction for this scheme was increased to $3,000 in 2010.[7]

(b) Medical negligence claims

Having observed the success of the above scheme, the courts in 2006 introduced a similar pre-action protocol for medical negligence cases. This protocol gave potential claimants the opportunity to discuss their cases with medical practitioners or hospitals at an early stage instead of commencing legal action. Where a medical negligence suit was filed, it would also be directed to the PDRC for CDR.[8]

(c) Pre-action protocol and ADR for personal injury claims

The above regime was extended to personal injury matters (excluding medical negligence cases) in May 2011. Cases such as motor accidents resulting in injury or industrial accidents have to comply with a pre-action protocol that facilitates negotiation. As with NIMA cases, these cases also are also dealt with the PDRC by way of brief neutral evaluation.[9]

(d) All other civil disputes: The ADR Form at the Summons for Directions stage

For all other civil suits, litigants could request for a CDR session in PDRC at any stage of the proceedings by consent. In 2010, the courts encouraged litigants to consider using ADR at the summons for directions stage. The parties are required to read the ADR Form which set out information on ADR options, certify on the form that they and their lawyers had discussed ADR options and indicate their decision concerning using ADR. The Deputy Registrar hearing the summons for directions would use the information in the forms as a basis to refer the cases for the appropriate mode of ADR.[10] The authors have written earlier about this initiative, and highlighted that this was a step taken by the courts to facilitate greater awareness of ADR and to encourage a culture change to consider ADR at an early stage.[11]

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[7] See Practice Direction No. 1 of 2008 and Practice Direction No. 4 of 2011.
[8] See Practice Direction No. 3 of 2006, and paragraph 25D of the Subordinate Courts Practice Directions.
[9] See Practice Direction No. 2 of 2011, and paragraph 25C of the Subordinate Courts Practice Directions.
[10] See Practice Direction No. 2 of 2010.
[11] Joyce Low and Dorcas Quek, *Finding the Appropriate Mode of Dispute Resolution,* Singapore Law Gazette 18 (April 2010), available at http://www.subccourts.gov.sg, under “Civil Justice Division, Court Dispute Resolution/Mediation”.

(e) The latest change: A Presumption of ADR

In tandem with the above developments, the most recent Practice Direction has introduced a significant change in the use of ADR. The courts now expressly endorse the early use of ADR, as *it is now presumed that ADR should be attempted.* We turn now to elaborate on this development.

C. The Courts and ADR: should the courts intervene?

A more fundamental question is whether the lower courts should actively encourage the use of ADR and what might be the most appropriate way to do so. Judiciaries have often stepped in to recommend ADR because of the low rate of participation and general unfamiliarity with ADR. As Lord Woolf astutely noted in the Report on Access to Justice, *"[P]arties are often reluctant to make the first move towards a negotiated settlement, or to suggest ADR, in case this is interpreted by their opponent as a sign of weakness. Legal advisors who are not themselves experienced in ADR often adopt a similar attitude, and so the court itself, as a neutral party, has an important role in pointing out what options are available*."[12] Another academic has opined that some degree of mandating ADR is needed as a temporary expedient because individuals do not usually use ADR voluntarily and should be given the opportunity to experience the benefits of ADR[13]. Yet another writer reviewed data from a few jurisdictions and highlighted that where the courts have been active in referring cases for mediation over some time, the culture of the legal profession could change and lawyers were more likely to use mediation on their own volition.[14] In other words, the courts are in a unique position to facilitate the use of ADR when the parties or lawyers are tentative and unfamiliar with ADR, More importantly, the courts' encouragement could contribute to a change in culture.

The courts' intervention, while well-intended, should not undermine the voluntary and consensual nature of ADR. In particular, mediation, which is the most common form of ADR, places great emphasis on the parties' self-determination and autonomy. The parties have to make their own decisions to resolve their dispute during the mediation. The mediator merely facilitates their negotiation and does not impose a solution on them. When a party is compelled into participating in ADR, the very essence of ADR may potentially be eroded.

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[12] Lord Woolf*, Final Report – Access to Justice* (London HMSO, July 1996) at para 32.

[13] Frank E.A. Sander, H. William Allen & Debra Hensler, *Judicial (Mis)use of ADR? A Debate,* 27 U.Tol.L.Rev. 885, 886 (1996); Frank E.A. Sander, *Another View of Mandatory Mediation,* Disp.Resol.Mag, Winter 2007, at 16.

[14] Nadja Alexander, "Mediation on Trial: Ten verdicts on Court-Related ADR", in Tania Sourdin, *Alternative Dispute Resolution and the Courts: Law in Context,* Vol 22 No 1 (Dec 2004), at 13.

The author has noted this palpable tension between "coercion into" and "coercion within" mediation elsewhere. It was also submitted, in the light of this danger, that court ADR programs should permit parties to opt out of ADR based on exceptional circumstances. The courts in Florida and Ontario have implemented such programmes, and satisfaction rates have been high. A referral of all cases for ADR would lead to arbitrariness and also neglects the reality that not all cases may be appropriate for this mode of dispute resolution. On the other hand, the courts' exhortation to participate in ADR should not be easily diluted by freedom for the parties to opt out for any reason. The criteria for opting out should be clear and not set at too lenient a standard.[15] A nuanced approach is needed for a court ADR programme to ensure that it is effective and yet does not lead to excessive coercion.

D. The Presumption of ADR: What it means

In brief, this initiative provides for automatic referral of all civil cases for ADR. Provision is made for parties to be exempted based on certain stipulated grounds. There may, however, be subsequent cost implications, where a party has opted out of ADR based on unsatisfactory reasons. More attention is also directed towards cases of low value, in which the cost of litigation is likely to be disproportionate to the amount sought in the claim.[16]

Pre-Trial Conference to consider ADR

The presumption applies to all civil disputes. NIMA and personal injury cases are currently referred to the PDRC as a matter of course according to Practice Directions. In respect of other cases, parties may file a summons for directions ('SFD') as usual, according to the Rules of Court. Where a Defence has been entered and six months' have lapsed without the parties filing a summons for directions, the court will call for a pre-trial conference ('PTC'). One of the main focuses of the SFD and PTC is to discuss and refer cases to suitable ADR.

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Two Tracks

Cases will be dealt with at the PTC or SFD according to two tracks:

(a) *"Recommended ADR" Track*

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[15] Dorcas Quek, *Mandatory Mediation: an Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program,* Cardozo Journal of Conflict Resolution, Volume II, Number 2 (2010), at 490-492, 508-509.

[16] See generally paragraph 25A and Form 6A of the Subordinate Courts Practice Directions.

These are general claims of lower value, the early settlement of which is likely to result in more substantial savings in time and costs for parties. The following cases fall under this track:

(i) claims is $20,000 or less; or

(ii) claims between $20,000 and $60,000 *and* will take more than 3 days of trial.

(b) "General" Track

All other cases fall under the General Track.

Automatic referral for ADR

Cases will be automatically referred by the SFD or PTC Judge for ADR unless the parties opt out of ADR. Under the General Track, a party may opt out for any reason. Under the Recommended ADR Track, a party may opt out based on three stipulated reasons: (i) ADR has been attempted before; (ii) the dispute involves a question of law; or (iii) for other good reason. A party may still opt out for unsatisfactory reasons as ADR is not mandatory. However, such conduct maybe taken into account by the Court when making subsequent costs orders pursuant to Order 59 Rule 5(1)(c) of the Rules of Court, which states:

> *"The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution."*

The ADR Form

The ADR Form, which used to be filed at SFD stage, will continue to be filed by all parties before the date of the SFD or PTC[17]. The form has the following 3 components:

(a) A section to be completed by lawyers, concerning details of the case such as the nature of claim and the expected number of days at trial. This section was in the previous ADR Form.

[17] Paragraphs 18 and 25A of the Subordinate Courts Practice Directions.

(b) A section to be read by parties. This section provides information on the different ADR options and provides a guide on how to choose the most suitable option.

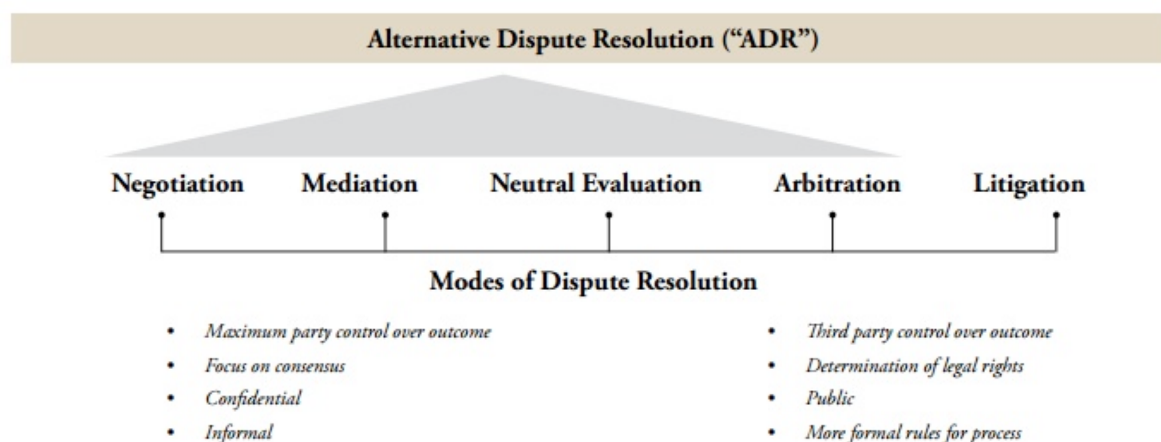
(c) A section to be completed by parties: The parties have to certify that their lawyers have explained the available ADR options to them. They should also indicate whether they are opting out of ADR.

The ADR Options

There are 4 ADR options for litigants to choose from:

(a) Mediation at PDRC
(b) Neutral Evaluation at PDRC
(c) Mediation at Singapore Mediation Centre
(d) Arbitration under the Law Society Arbitration Scheme

An earlier article in the Law Gazette explained the different ADR options more thoroughly.[18]



- Mediation involves a neutral third party facilitating the conversation between the disputing parties with the goal of assisting them to reach an agreement.
- Neutral Evaluation was made available as an ADR option last year under a pilot project.[19] It involves a third party neutral, a judge, giving the parties a non-binding assessment of the case at an early stage on the basis of brief presentations made by the parties. Unlike mediation, in which the mediator assists the parties in reaching an agreement without necessarily stating an

[18] Dorcas Quek and Seah Chi-Ling, *Finding the Appropriate Mode of Dispute Resolution in the Subordinate Courts: Introducing Neutral Evaluation in the Subordinate Courts,* The Singapore Law Gazette 21 (November 2011), available at http://www.subccourts.gov.sg, under "Civil Justice Division, Court Dispute Resolution/Mediation".
[19] Registrar's Circular No. 3 of 2011. See also Law Gazette.

opinion on the case, the explicit aim of Neutral Evaluation is to provide a without-prejudice evaluation of the strengths and weaknesses of a case.

- Arbitration is similar to litigation as a neutral party makes a binding decision on the dispute, except that the neutral is a private adjudicator instead of a judge. The Law Society Arbitration Scheme has been in place since 2007, and provides a speedy and simple way of resolving disputes. More information on this scheme may be found at http://www.lawsociety.org.sg/lsas.

Mediation of civil disputes filed in the Subordinate Courts at the Singapore Mediation Centre has been recently made available this year. The Subordinate Courts and SMC have jointly launched a premier mediation scheme, in which parties may pay SMC a reduced fee of $800 (plus GST) per party to use SMC's mediation services. More information on all these options is provided on PDRC's website, at http://www.subcourts.gov.sg, under Civil Justice Division – Court Dispute Resolution/Mediation, and Law Society's website at http://www.lawsociety.org.sg/lsas/.

Effective Date

Only cases filed on or after the effective date of the Practice Direction will be called for pre-trial conferences six months after the date of writ. In respect of earlier cases, the new ADR Form should be filed if a summons for direction is taken up after the effective date of the Practice Direction.

E. Other changes

Apart from introducing the Presumption of ADR, the Practice Direction has also created a new section in the Subordinate Courts Practice Direction concerning ADR. Previous paragraphs concerning resolution of NIMA claims, personal injury claims, medical negligence claims and assessment of damages have been moved to this section. Furthermore, the expected standards for preparation for and attending mediation and neutral evaluation have been clearly set out. The following are notable changes:

(a) Opening statements for both mediation and neutral evaluation have to be exchanged and submitted to court not less than 2 days before the session. The formats for these opening statements have been provided in the Practice Direction.[20]

(b) Requests for adjournments should be made not less than *2 working days* in advance for NIMA and PI cases; and not less than *7 working days* in advance for other cases undergoing mediation or neutral

[20] Paragraphs 25F and 25G of the Subordinate Courts Practice Directions.

evaluation. Consent of all parties should be obtained before the request is submitted by fax to PDRC.[21]

(c) Attendance of parties: For NIMA and PI cases, only lawyers have to attend the first Court Dispute Resolution session. Parties need not attend unless the court subsequently directs so. For mediation and neutral evaluation sessions, generally, both lawyers and their clients have to attend.[22]

(d) It has been highlighted that all communications made during CDR are without prejudice and confidential, and shall not be revealed in pleadings or affidavits or communicated to the court in other ways.

F. Conclusion

The presumption of ADR represents a culmination of the Subordinate Courts' attempts to exhort parties to consider conciliatory ways of resolving their disputes, before using litigation as a last resort. As stated in the courts' Code of Ethics and Basic Principles on Court ADR, the courts seek to "help court users to resolve their differences through joint problem solving in a non-confrontational setting, without resorting to trial" and the courts "envision a future in which court users will make [Court Dispute Resolution] their first choice in resolving disputes in court". The Courts' role is limited only to encouraging the use of ADR through various measures that increase the awareness of ADR. The building of an ADR ethos would ultimately hinge on the joint collaboration of the judiciary, the Bar and other major players in the mediation scene.

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The Practice Direction referred to in this article is available on the Subordinate Courts' website at http://www.subcourts.gov.sg under "Legislation and Directions". More information on ADR for civil disputes is also available at the Subordinate Courts' website under "Civil Justice Division – Court Dispute Resolution/Mediation".

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[21] Paragraph 25 of the Subordinate Courts Practice Directions.
[22] Paragraph 25B, 25C, 25F, 25G and Appendix C of the Subordinate Courts Practice Directions.