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Mediate, not litigate, to resolve disputes

Aloysius GOH

Terence QUEK

Mediate, Not Litigate, to Resolve Disputes

A leader's first resort.

By Aloysius Goh and Terence Quek

A Singapore-based food company sees its products listed at a price lower than the agreed rate on an e-commerce site. The listing was posted by a company that is partly owned by the Singapore company's distributor for Thailand. The Singapore company threatens to terminate its supply to the distributor if the price is not adjusted within two days. The distributor refuses and claims the website is owned by its client, so it has no control over the listed pricing.

If you were one of the parties above, how would you resolve the dispute?

Why choose mediation for commercial disputes

For a growing number of businesses around the world, turning to mediation to resolve commercial disputes like the one above is now the norm.

Mediation is essentially a facilitated negotiation process. When businesses have a dispute they cannot resolve on their own, they seek a neutral third party to help confidentially. This mediator has no power to impose a binding outcome on the parties. Rather, his or her responsibility is to facilitate the negotiation and use problem-solving skills to guide the parties towards a mutually agreed solution through a face-saving and pragmatic process.

In many jurisdictions, including Singapore, parties are required to attempt mediation first before courts hear the matter. Refusing to engage in mediation without proper reason may lead to cost sanctions by the judge. This opt-out initiative was first introduced in Singapore in 2007, so that the court's resources can be devoted to matters where there is a genuine dispute on the law.

As awareness of mediation grew over time, businesses are now choosing mediation of their own accord. For them, the motivators are cost, speed, and relationship preservation.

COST

Mediation costs a fraction of what is charged for arbitration or litigation. For a dispute of S$100,000, the total mediation fees can be less than S$1,500 for each side. This compares extremely favourably with the lowest estimate of S$13,537.50 provided by the fee calculator on the Singapore International Arbitration Centre (SIAC) website.[1] For disputes over S$1,000,000, the cost savings of using mediation over arbitration or litigation easily exceed S$200,000.

SPEED

Most mediations end within a day. Setting up and completing a mediation can be done in less than a week through private mediation centres. This is significantly faster even when compared to emergency arbitration proceedings, which take two weeks for an interim award and 90 days for a final award.[2] Through mediation, parties can obtain specific remedies for disputes involving the delivery of perishables or the repair of equipment before more damage and loss are suffered.

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RELATIONSHIPS

Mediators are trained to help restore trust between the parties. Instead of determining right or wrong, they support the achievement of deals that build a future that is attractive to all sides. Unlike arbitration and litigation, mediation is not premised on a win-loss paradigm. It is designed to be value-creating and relationship-preserving.

Success rates

But is mediation really effective? The good news is that it is, and increasingly so.

The settlement rate at the Singapore Mediation Centre is about 70 percent. Amongst private full-time mediators, the rate is even higher at around 85 percent. In nearly nine out of 10 instances, parties who were unable to negotiate a deal on their own managed to do so with the help of a neutral third party (refer to Box 1 for how mediation outcomes are upheld in Singapore). This was not always the case. Settlement rates had been around 50 percent in the 1990s–similar to that for many jurisdictions now which are just starting to introduce mediation as a dispute resolution pathway. One of the main drivers for the higher settlement rates today is the increased sophistication in mediation practice.

In 2014, the Singapore International Mediation Institute (SIMI) was launched with the support of the Singapore government to establish clear professional standards for those seeking to practise as mediators. To be certified, mediators need to complete at least 40 hours of training, pass a practical and written test, and conduct at least 20 mediations in three years. Client testimonials are also needed to show satisfaction with the mediator's services. It is a high bar designed to provide assurance for users.

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Expected growth of mediation in Asia

Aside from Singapore's championing of mediation on the world stage, there are a few other underlying socio-economic factors driving the use of mediation in Asia.

The global pandemic has disrupted nearly all businesses. All over Asia, the near-term landscape for the aviation, shipping, hospitality, food and beverage, and construction sectors remains mired in uncertainty. Mediation has become widely accepted as a sensible way to help parties overcome the hurdles created by this *force majeure*.

Notwithstanding the pandemic's impact on businesses, Asia continues to attract the largest share of foreign capital injection. China, India, and Southeast Asia are the three regions with the fastest growing middle class in the world. Increased wealth is also set to raise education levels, thus leading to greater sophistication in dispute resolution.

Asia's young educated business leaders will be more inclined to entrust the solutioning of their commercial disputes to neutrals who are familiar with their operating environments. They will want their conflicts resolved faster and in ways that they have more control over. They will not just seek vindication but the practical and sustainable results which only mediation can offer. The long-drawn procedural methods of the courts will make it an increasingly less attractive pathway for dispute resolution.

UPHOLDING MEDIATED OUTCOMES

Despite the well-publicised advantages, some businesses are still reluctant when asked to mediate. One traditional concern has been the uncertainty about how one can be sure that the other side will perform his or her side of the obligations in a mediated settlement agreement (MSA). In Singapore, there are clear laws and protocols that uphold the outcome from mediation.

Local Mediation Legislation–the Mediation Act

In Singapore, parties who settle their disputes with the help of a certified mediator can apply to have their MSAs converted into a court order.[3] Parties can thereby avoid re-commencing litigation if the MSA is breached.

Hybrid Arbitration-Mediation-Arbitration Protocols

When the dispute involves overseas parties or the performance of obligations laid down in the settlement agreement lies in another jurisdiction, the SIAC has an Arbitration-Mediation-Arbitration (AMA) Protocol that allows the MSA to be converted into an arbitral award. Parties can rely on the New York Convention on Arbitration to enforce the MSA as an arbitral award in nearly 160 jurisdictions. This offers parties a useful layer of protection where performance of the MSA obligations is valid over an extended period of time. Since the Protocol's launch in 2014, there have been 27 AMA matters and settlement rates have been high. What is more impressive, however, is that of the matters settled at the mediation stage, none has needed to be converted into an arbitral award, thereby saving further costs for the parties. The main reason for there being no take-up for the conversion of the MSA into an arbitral award is that the mediations have been successful in repairing the relationship between the parties. When there is sufficient trust between the parties, they do not see the need to convert the MSA into an arbitral award.

International Treaties-the Singapore Convention on Mediation

To assuage the concerns of users about the enforceability of the MSA, there is now the UNCITRAL (United Nations Commission on International Trade Law) Convention on Enforcement of International Settlement Agreements Resulting from Mediation. Also known as the "Singapore Convention on Mediation" in recognition of where the treaty was signed,[4] the Singapore Convention "establishes a harmonised international legal framework for the right to invoke settlement agreements as well as for their enforcement". In principle, you can mediate and settle the dispute in Singapore and have the MSA enforced in other countries if that is where the obligations of the MSA are to be performed. The Singapore Convention only came into force on 12 September 2020 and early signs have been promising. Amongst its 54 signatories are the U.S., China, India, and South Korea. In total, the current signatories make up more than half the global economy and more than 60 percent of the world's population.

BOX 1

There is also the impact of technology and the resulting interconnectedness. Asia has one of the highest Internet usage rates and negative sentiments can spread rapidly. Relationship and reputation preservation will thus become a priority when managing disputes. The confidentiality of mediation and the speed of resolution will become more attractive to the generations who place significant value on how well-'liked' they are in the virtual world.

If mediation is not included in your current contract, it does not prevent you from attempting it before going for arbitration.

Mediation as a strategic business and leadership tool

Seasoned business leaders accept that commercial disputes are part and parcel of doing business. For those who are not comfortable with the costs and uncertainty of arbitration and litigation, mediation is a worthwhile pursuit that is within easy reach. Similarly, those who are concerned about their reputation or who wish to preserve the goodwill that took a long time to build would do well to acquaint themselves with mediation. In any case, after a case is filed in court, the judge will more likely than not direct parties to attempt mediation first.

Learning about mediation will not only raise the chances of a successful mediation but the skills acquired can be used to resolve intra-organisational disagreements and facilitate smooth change management in these turbulent times.

Just as having a certified mediator to conduct the mediation process can greatly increase the chances of resolving a dispute, having the skills, knowledge, and attitude of a mediator can help a business leader become a better negotiator, communicator, and relationship-builder. It may even save situations from deteriorating to the point where last resorts are needed.

Getting into the game

With mediation offering obvious advantages and increasingly viewed as the norm when resolving disputes, the question for business leaders should not be whether to use mediation over arbitration or litigation, but how to avoid becoming part of the about 30 percent whose mediations are unsuccessful.

So how can business leaders get positive results through mediation?

There are some simple steps that can be taken. First, recognise that mediation is always your legal right. In fact, the dispute resolution clause in many new contracts provides for mediation. However, older templates continue to stipulate arbitration only. This is because when such clauses were first inserted in these contracts, arbitration was truly a faster, cheaper, and more confidential means of resolving disputes than going to court. Mediation then was not a mature process and success rates were low. However, presently, arbitration costs have risen. In jurisdictions like Singapore, arbitration is not only more expensive but also can be slower than litigation. Mediation, in contrast, has become a faster, more affordable, and more successful resolution method. If mediation is not included in your current contract, it does not prevent you from attempting it before going for arbitration. You can agree with the other side to amend the original dispute clause and add a mediation clause. Alternatively, if your dispute is with a foreign party, you can agree to use the AMA protocol.

Second, consider commencing the mediation process early. One of the common reasons cited for not doing so is the fear of giving the other side the wrong impression. Seeking mediation is viewed as a willingness to compromise because you have a weak case and are afraid of the cost and consequences of a full legal battle. However, the costly and protracted nature of court proceedings means it is likely that even if you have a strong case, the legal victory may be hollow. The other side may have bankrupted itself during the trial or the legal costs may have exceeded the amount won. If the matter is complex, it is also likely that a party may simply not survive to witness the outcome. In India, one of the still unresolved matters in court dates back to 1960! The original aggrieved parties involved in the suit have long passed on and they are now represented by their grandchildren. In contrast, savvy negotiators know how to use the strength of their case to get an even better deal via mediation rather than through the courts. When you mediate early, you avoid unnecessary expenses.

Third, choose your mediator and case manager wisely. Mediation is a diverse and dynamic field. Pick a mediator who has the right level of conflict resolution experience. The mediator is a process leader who shepherds everyone towards the resolution. He or she should be a person whom you can trust to understand the context of the dispute. If you and the other side cannot agree on a specific individual to serve as the mediator, seek help from a mediation centre. Inform the case manager of the criteria that you each have for the selection of a mediator. These include language, technical expertise, and any other conditions you think will be useful. If you do not provide such information, some mediation centres resort to an opaque roster system and your case may be referred to a mediator without the relevant technical knowledge for your matter. This sets your mediation up for failure and may cause the dispute to become aggravated. The point is, even if you had no specific criteria in mind but need the case manager to break the impasse with the other side on the selection of the mediator, find out how the case manager will go about selecting the mediator and whether you can reject whom the case manager selects.

Last and most important, prepare well for the mediation. A mediation is different from a negotiation or a litigation. In a mediation, there is a neutral person present to help you communicate some of the difficult messages that you had been unsuccessful in getting through. Think about how you want to leverage on this neutral. What are the messages you need help transmitting? The neutral person is not a judge. How can you explain the reasoning for your claims while refraining from making personal attacks on the other side? How can the mediator help you to achieve a settlement that is better than what you can get in court? A good case manager or mediator will offer to explain the process to you in a pre-mediation meeting. Make sure that the attendees of the mediation are present for this meeting and clarify any questions they may have (refer to Box 2 for how business leaders can prepare for mediation).

PLAYING FOR THE GREAT WIN

Before going into a mediation, business leaders should consider the following questions as part of their preparation.

What are your interests?
In litigation, the outcome is often monetary compensation. In mediation, most mediators view money as a means, not an end.They will ask questions like "What does the money mean to you?", "What can you see yourself doing with it?", or "How will you want to spend it?".

A contractor who has lost his job may not have the money to compensate you such that you can engage another contractor to repair the damage done to your wall. But he may have the skills to repair the damage.

Come for the mediation prepared with the knowledge of what the amount you are seeking means to you and what the other side can offer you that is of equivalent or greater value if he or she cannot pay.

Do you have a clear and specific back-up plan?
In mediation, we call it knowing your BATNA, i.e., your best alternative to a negotiated agreement. If the mediation fails, what is the best outcome you can achieve on your own? When you know the BATNA and its likelihood, you will have a clearer idea whether to accept the deal proposed by the other side.

For instance, your BATNA in a S$300,000 dispute may be to go to court because the evidence is in your favour. You may have to spend S$100,000 in legal fees (even after factoring in that the other side paid part of it because they lost). So the only upside is receiving S$200,000 after a 12- to 24-month delay depending on whether the matter is appealed. Is this a better deal than receiving S$180,000 in three months?

Why is what you are seeking fair?
You want to come across as being reasonable to the mediator and the other side. Fairness is not determined by your personal sense of right or wrong. One of the most frequently cited defences for demanding aggravated damages is, "It's a matter of principle". For mediators to help persuade the other side to give you what you are seeking, they need stronger reasoning. Is what you are proposing consistent with market practice? Is it close to what the law prescribes for similar precedents? For your claims to be legitimate, help the mediator understand why you believe they are reasonable.

BOX 2

There are also many good mediation courses available. These range from hour-long introductory sessions to 80-hour advanced certification courses. If the stakes are sufficiently high and if there are a number of disputes confronting your organisation internally and externally, it would be sensible to send your senior managers for a course.

Achieving mutually agreeable outcomes

Back to our earlier case of the dispute between the food company and its overseas distributor–through mediation, it was discovered that the crux of the dispute was not the low price listed on the e-commerce site. Instead, the Thai distributor was offended that the Singapore company had issued it a lawyer's letter of demand. As they had been dealing with each other for more than 10 years, the Thai distributor expected a first attempt at friendly negotiation. That the Singapore company's young CEO made no offer to negotiate was viewed as a deliberate snub to the Thai distributor's 70-year-old founder. At the same time, the new CEO perceived the Thai distributor's flouting of the contract as a thinly-veiled challenge to his leadership. Through mediation, the mediator was able to defuse the matter. Not only did both parties work out a feasible timeline for the correct price to be listed, they also saved face in the process. The mediation ended with conversations about distributing more of the Singapore company's products in Thailand.

Mutually agreeable outcomes like the above are common in commercial mediation. When business leaders make mediation their first resort when they encounter disputes, they set themselves and their organisations up for success. In the modern economy, savvy business leaders will be those who know how to harness the power of mediation to achieve outcomes which create value for both internal and external stakeholders.

Aloysius Goh
is Founder and Chief Executive Officer at Sage Mediation Pte Ltd and an IMI-certified mediator

Terence Quek
is former chief executive officer at Emergenetics APAC and a SIMI-accredited mediator

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