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New fronts for mediation as preferred form of dispute resolution amid Covid-19

Singapore International Mediation Centre rolls out new protocol – including online sessions – as business confidence takes beating in changed climate

BT EXCLUSIVE

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A FAILED joint venture, strained communication and both parties – an American and a Korean – at loggerheads on how to move on.

This was the tense situation senior counsel George Lim was in as a mediator several years ago. To ease the tension, he called for a break, with tea served from a teapot he picked up just a day before the mediation session in Seoul.

"When I first stepped into the room, the atmosphere was very tense. More than just serving tea, the gesture gave me an opportunity to talk to the parties separately, and then together," said Mr Lim, who chairs the Singapore International Mediation Centre (SIMC).

"I managed to build some trust and rapport with them during the private sessions, which made them more comfortable expressing their concerns and needs."

After a full day of talking things out, the American party agreed – at midnight – to buy the former partner's shares while keeping all jobs.

As the Covid-19 pandemic continues to jolt financial markets and rattle business globally, the number and types of cross-border commercial feuds will inevitably shoot up. Yet this may not lead to more court cases.

Encouraged by a new business climate ushered in by the fallout of the

pandemic, along with a protocol for more efficient and economical dispute resolution just introduced, many of the parties in disputes could now turn to mediation, instead of litigation, to settle their differences.

"Covid-19 is a special situation," Mr Lim said. "All over the world, we will see more disputes. More will have to be faced with this decision: Do you want to fight it out, or talk it out?"

Civil litigation, which involves going to court, has been the traditional course taken to resolve disputes. The lesser and alternative platforms are arbitration and mediation, which require neutral third-parties to adjudicate or serve as referees.

But arbitration and mediation also have their differences. The biggest is that while an arbitrator in an arbitration makes a final, binding decision, the aim of mediation is for parties to come to an agreement voluntarily.

Mediation itself is also likely to take on a new guise in the time of an infectious pandemic; it will look quite different from Mr Lim's teapot approach.

The new protocol for mediation, including a new set of fees, was rolled out two weeks ago by the SIMC. Essentially it sets all mediation to be conducted online, with fees estimated at between S\$3,000 and S\$10,000 per party, depending on dispute value.

Prior to this, a mediation session with the SIMC cost S\$6,000 each, regardless of dispute type.

"We hope to make mediation accessible to a wider group of firms and individuals," said SIMC chief executive Chuan Wee Meng.



SIMC's Mr Lim (left) expects more disputes all over the world amid Covid-19; SMIC's Mr Chuan hopes to make mediation accessible to a wider group of firms and individuals with the new protocol

His team has designed the protocol in line with regulations that took effect in April, which provide temporary relief to people and businesses unable to meet their contractual obligations.

While lauding the authorities for promptly mandating such reprieve, Mr Chuan stressed: "A moratorium is useful but does not completely resolve the problem. While parties may prefer to kick the can down the road, finding a resolution could be tougher later because of costs that have accumulated.

"It may be better for some parties to try to sort things out earlier through mediation," he said, adding that the SIMC has received a number

of queries since the protocol's launch. He declined to share details of these prospective applications.

There are drawbacks to mediating digitally, particularly for cross-border disputes, but mediators and other lawyers *The Business Times* spoke to agreed that given safe distancing constraints, this is a time- and cost-effective option – as compared to litigation and arbitration.

Francis Goh, partner and head of international arbitration at Eversheds Harry Elias, noted that on average, a trial litigation case in Singapore's courts would take about six to nine months to conclude, while an arbitration takes about 11 to 13 months.

With various jurisdictions halting

certain court hearings in recent months, the backlog of cases is likely to further drag out such proceedings – possibly driving more to seek mediation.

"(Prior to Covid-19), a mediation at the SIMC can be arranged in about one month and the average hearing takes one day for the parties to reach a mutually agreed mediation settlement of their dispute . . . This timeline is expedited under the new protocol, with SIMC aiming to organise the session within 10 working days," said Mr Goh, who has been a mediator for nearly two decades.

He said one misconception of mediation is that it connotes a "sign of weakness". "Litigation in the courts was the established norm, hence the popular phrase 'I will see you in court'. In that climate, if a party tries to 'settle', it is perceived as weakness."

But the climate is changing, according to Mr Goh. And with business confidence already taking a beating, parties may not want to be saddled with hefty legal fees.

Mediation also opens the door for firms to preserve relationships and goodwill, he added.

Another common myth is that mediation is suitable only for low-value matters, or for smaller firms, said law professor Joel Lee, who also chairs the Singapore International Mediation Institute.

"International experience has been that high value, international commercial disputes, which in the past may have gone to arbitration or litigation, are being resolved by mediation," he said.

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New fronts for mediation as preferred form of dispute resolution

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Law professor Nadja Alexander, who directs the Singapore International Dispute Resolution Academy, said mediation is becoming more prominent in cross-border disputes.

"Disputes are more challenging with the international element with different laws, court systems and cultures," she said. "Mediation is a culturally agile and procedurally adaptable forum that can make solving problems across borders less daunting."

Professor Alexander said some

parties in disputes may opt for hybrid mechanisms, such as a combination of arbitration and mediation, which allow them to enjoy the efficiency of mediation, as well as the enforceability of arbitration.

While optimistic that current circumstances can drive the uptake of cross-cultural mediation, some observers also caution about the drawbacks of mediating remotely.

Lim Tat, founding partner of Aquitas Law and a certified mediator with various panels, noted that cultural nuances and non-verbal commu-

nication – a key feature of intercultural communication – may be lost.

"It will be harder to pay attention to people's expressions or notice someone feeling uncomfortable. If there were an opportunity for us to step into the room and have coffee, the chances of us forming some bond before the discussion could be higher," said Mr Lim.

Because cross-border online mediations are conducted across time zones, parties may feel pressured to arrive at an agreement, which may result in ideal settlements. "With

everyone cooped up in their homes, there is also less room to, say, 'take a break' before reconvening the discussion," he said.

As a result, some may opt to "park their problems away" until they are able to mediate face-to-face.

Still, the lawyers consider the pandemic a "tipping point" for mediation to take up a more prominent role in an already shifting international dispute resolution space here, with many citing the signing of the Singapore Convention on Mediation in August last year as another driver of growth.

Four of the 52 state signatories have ratified the convention thus far, namely Singapore, Fiji, Qatar and Saudi Arabia.

Amidst the pandemic, there will be a number of contractual breaches that arise not because of the other parties' faults, but due to circumstances beyond their control, senior counsel Lok Vi Ming pointed out.

"The suddenness and universality of the difficulties can be a factor to bring both parties to the negotiation table, and that's where the persuasions of a skilled and respected mediator can work magic," he said.