

MEDIATION BILL 2012

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A BILL

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An Act to promote and encourage mediation as a method of alternative dispute resolution 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.

[]

ENACTED by the Parliament of Malaysia as follows:

PART I

PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the Mediation Act 2012.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

Non-application

2. This Act shall not apply 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.

Interpretation

3. In this Act, unless the context otherwise requires—

“non-party” means a person who participates in a mediation, other than a party or mediator, and includes counsels of each party, experts in the subject matter of a dispute and witnesses;

“institution” means a body or organization that provides mediation services;

“mediation communication” means an oral or written statement made—

(a) during a mediation;

(b) in relation to a mediation; or

(c) for the purposes of considering, conducting, participating in, commencing, continuing, reconvening or concluding a mediation or retaining a mediator;

“Minister” means the Minister charged with the responsibility for legal affairs;

“mediator” means a mediator appointed by the parties under section 7;

“mediation” means a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute;

“mediation agreement” means the agreement referred to in section 6;

“settlement agreement” means the agreement referred to in section 13;

“party” means a party to a mediation agreement and includes the Federal Government and a State Government;

“proceedings” means any proceedings of a civil nature and includes an application at any stage of proceedings.

Mediation does not prevent court action, arbitration, etc.

4. (1) Subject to section 2, any person may, before commencing any civil action in court or arbitration, initiate mediation.

(2) A mediation under 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.

PART II

COMMENCEMENT OF MEDIATION

Commencement of mediation

5. (1) A person may initiate mediation by sending to the person with whom he has a dispute, a written invitation regarding the mediation.

(2) The written invitation referred to in subsection (1) shall briefly specify the matters in dispute.

(3) Upon receipt of a written invitation sent by the person initiating the mediation under subsection (1), the person with whom he has a dispute may, in writing, accept the written invitation.

(4) A mediation shall be deemed to have been commenced upon the person initiating the mediation receiving the acceptance of the written invitation from the person with whom he has a dispute under subsection (3).

(5) An invitation regarding a mediation under subsection (1) shall be deemed to have been rejected if the person initiating the mediation does not receive a reply from the person with whom he has a dispute, within fourteen days from the date he sends the person the written invitation or within such other period of time specified in the written invitation.

Mediation agreement

6. (1) Upon the commencement of a mediation as specified under subsection 5(4), the parties shall enter into a mediation agreement.

(2) A mediation agreement shall be in writing and signed by the parties.

(3) A mediation agreement shall contain an agreement by the parties to submit to mediation disputes which have arisen or which may arise between them, the appointment of a mediator, the costs to be borne by the parties and other matters the parties deem appropriate.

PART III**MEDIATOR****Appointment of mediator**

7. (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.

(3) The parties may request for assistance from the institution to appoint a mediator or mediators on their behalf.

(4) The appointment of a mediator under subsection (1) shall be made by way of a mediation agreement under section 6 and there shall be one mediator for a mediation unless the parties agree otherwise.

(5) If there is more than one mediator, the mediators shall act jointly in the mediation.

(6) No appointment of any mediator shall be valid except with the prior written consent of the mediator.

(7) A mediator appointed under this Part shall disclose, before accepting the appointment, any known facts that a reasonable person would consider likely to affect his impartiality as mediator, including a financial or personal interest in the outcome of the mediation.

(8) The mediator may be paid a fee or given any other consideration as agreed between the parties.

Termination of appointment of mediator

8. (1) If a mediator appointed under this Part—

- (a) no longer possesses the relevant qualifications, special knowledge or experience in mediation as required under paragraph 7(2)(a);
- (b) no longer satisfies the requirement of an institution in relation to a mediator as required under paragraph 7(2)(b);
- (c) is found to have financial or personal interest in the dispute;
- (d) is found to have obtained his appointment by way of fraud; or
- (e) is unable to serve as a mediator for the mediation,

the parties may terminate the appointment of the mediator and appoint another mediator for the mediation or request the institution to appoint another mediator.

(2) Notwithstanding subsection (1), the parties may terminate the appointment of a mediator for any reason and shall inform the mediator the reason for the termination.

PART IV

MEDIATION PROCESS

Role of mediator

9. (1) A mediator shall facilitate a mediation and determine the manner in which the mediation is to be conducted.

(2) A mediator may assist the parties to reach a satisfactory resolution of the dispute and suggest options for the settlement of the dispute.

(3) For the purposes of subsection (1), the mediator shall act independently and impartially.

Submission of statements to mediator

10. (1) A mediator may request each party to submit a statement setting out the brief facts of the dispute, supplemented by any documents that the party deems appropriate to submit.

(2) At any stage of a mediation, a mediator may request any party to submit any additional information or document as the mediator deems appropriate.

Conduct of mediation

11. (1) A mediator shall ensure that a mediation is privately conducted and he may meet with the parties together or with each party separately.

(2) Notwithstanding subsection (1)—

(a) a non-party of any party's choice may participate in a mediation to assist the party, subject to the consent of the mediator; and

(b) a non-party of a mediator's choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.

(3) A mediator may end the mediation if, in his opinion, further efforts at mediation would not contribute to a satisfactory resolution of the dispute between the parties.

PART V

CONCLUSION OF MEDIATION

Conclusion of mediation

12. A mediation shall conclude—

- (a) upon the signing of a settlement agreement by the parties under section 13;
- (b) upon the issuance of a written declaration by a mediator to the parties stating that further efforts at mediation would not contribute to a satisfactory resolution of the dispute;
- (c) upon the issuance of a written declaration by the parties to a mediator stating that the mediation is terminated; or
- (d) unless otherwise provided by mediation agreement referred to in section 6—
 - (i) upon the issuance of a written declaration by a party to the other party and the mediator stating that the mediation is terminated;
 - (ii) upon the withdrawal from a mediation by any party; or
 - (iii) upon the death of any party or incapacity of any party.

Settlement agreement

13. (1) Upon the conclusion of a mediation and the reaching of an agreement by the parties regarding a dispute, the parties shall enter into a settlement agreement.

(2) The settlement agreement under subsection (1) shall be in writing and signed by the parties.

(3) The mediator shall authenticate the settlement agreement and furnish a copy of the agreement to the parties.

Effect of settlement agreement

14. (1) A settlement agreement shall be binding on the parties.

(2) If proceedings have been commenced in court, the settlement agreement may be recorded before the court as a consent judgment or judgment of the court.

PART VI

CONFIDENTIALITY AND PRIVILEGE

Confidentiality

15. (1) No person shall disclose any mediation communication.

(2) Notwithstanding subsection (1), mediation communication may be disclosed if—

- (a) the disclosure is made with the consent of the parties;
- (b) the disclosure is made with the consent of the person who gives the mediation communication;
- (c) the disclosure is required under this Act or for the purpose of any civil or criminal proceedings under any written law; or
- (d) the disclosure is required under any other written law for the purposes of implementation or enforcement of a settlement agreement.

Privilege

16. (1) Any mediation communication is privileged and is not subject to discovery or be admissible in evidence in any proceedings.

(2) Notwithstanding subsection (1), the mediation communication is not privileged if—

- (a) the privilege is expressly waived in writing by the parties, the mediator and the non-party;
- (b) it is a public document by virtue of the Evidence Act 1950 [Act 56];
- (c) it is a threat to inflict bodily injury or commit a crime;
- (d) it is used or intended to be used to plan a crime, attempt to commit or commit a crime, or to conceal a crime or criminal activity or an ongoing crime or ongoing criminal activity;
- (e) it is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or
- (f) it is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, non-party, or representative of a party based on their conduct during any mediation session.

PART VII

MISCELLANEOUS

Costs

17. (1) The costs of a mediation shall be borne equally by the parties.

(2) Notwithstanding subsection (1), the parties may agree on the amount of costs to be borne by each party.

Power to amend Schedule

18. The Minister may, by order published in the *Gazette*, amend the Schedule.

Liability of a mediator

19. 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 wilful misconduct.

Regulations

20. The Minister may make regulations for the better carrying out of the objects and purposes of this Act.

SCHEDULE

[Paragraph 2(a)]

NON-APPLICATION

1. Proceedings involving a question which arises as to the effect of any provision of the Federal Constitution.
2. Suits involving prerogative writs, as set out in the Schedule to the Courts of Judicature Act 1964 [*Act 91*].
3. Proceedings involving the remedy of temporary or permanent injunctions.
4. Election petitions under the Election Offences Act 1954 [*Act 5*].
5. Proceedings under the Land Acquisition Act 1960 [*Act 486*].
6. Proceedings involving the exercise of the original jurisdiction of the Federal Court under Article 128 of the Federal Constitution.
7. Judicial review.
8. Appeals.
9. Revision.
10. Any proceedings before a native court.
11. Any criminal matter.

EXPLANATORY STATEMENT

The proposed Mediation Act 2012 (“the Act”) seeks to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.

PART I

2. Part I deals with preliminary matters.

Clause 1 contains the short title of the Act and empowers the Minister to appoint the date for the coming into operation of the Act.

Clause 2 seeks to provide that the Act shall not be applicable to matters specified in the Schedule, mediation conducted by the courts pursuant to any civil action that has been filed in court and any mediation conducted by the Legal Aid Department. The Act thus intends to cover mediation conducted by private persons or entities.

Clause 3 contains the definitions of certain words used in the Act.

Clause 4 seeks to provide that any party to a dispute may initiate mediation before commencing any civil action in court and the mediation does not act as a stay of, or extension of any civil proceedings, if that proceedings have been commenced.

PART II

3. Part II deals with provisions relating to the commencement of mediation.

Clause 5 seeks to provide for the initiation of mediation by the sending of a written invitation regarding the mediation by the person initiating the mediation to the person with whom he has a dispute. The mediation shall be deemed to have been commenced if the person initiating the mediation receives the acceptance of written invitation in writing from the person with whom he has a dispute. This *clause* ensures that the mediation conducted under the Act is voluntary.

Clause 6 seeks to formalize mediation under the Act by requiring the parties to enter into a mediation agreement upon the commencement of the mediation. The mediation agreement shall be in writing and signed by the parties, and shall contain the matters agreed by the parties regarding the mediation which includes the appointment of the mediator.

PART III

4. Part III deals with the appointment and termination of the appointment of the mediator.

Clause 7 seeks to provide for the appointment of a mediator by the parties, number of mediator to be appointed and other requirements regarding the appointment of mediator. In order to secure the appointment of an independent and impartial mediator by the parties, the mediator appointed under this *clause* shall possess the relevant qualifications, knowledge and experience or satisfy any requirement of an institution in relation to a mediator. This *clause* also seeks to provide for payment of fee or other consideration to the mediator.

Clause 8 seeks to provide for the circumstances in which the appointment of a mediator under the Act may be terminated by the parties.

PART IV

5. Part IV deals with the mediation process.

Clause 9 seeks to provide for the role of a mediator.

Clause 10 seeks to enable a mediator to request the parties to submit statements setting out the brief facts of the dispute supplemented by any documents that the party deems appropriate to submit.

Clause 11 seeks to provide that a mediation shall be privately conducted, which involves the meeting of the parties together or separately. This *clause* further provides that even if the mediation is privately conducted, non-parties of the parties' choice or of the mediator's choice may participate in the mediation to assist the parties or mediator respectively. As defined in *clause 3*, non-parties may include counsels of each party, experts in the subject matter of the dispute and witnesses.

PART V

6. Part V relates to the conclusion of mediation.

Clause 12 sets out the circumstances when a mediation concludes. Amongst the circumstances are the signing of a settlement agreement by the parties, the withdrawal of a party from the mediation and death or incapacity of any party.

Clause 13 seeks to provide for the settlement agreement which is an agreement signed by the parties upon the conclusion of a mediation and the reaching of agreement by the parties regarding the dispute.

Clause 14 seeks to provide for the effect of a settlement agreement. The agreement may be recorded before the court as a consent judgment or judgment of the court if proceedings have been commenced.

PART VI

7. Part VI deals with provisions relating to confidentiality and privileges.

Clause 15 deals with the confidentiality of mediation communication and provides for circumstances in which the mediation communication may be disclosed.

Clause 16 deals with the privilege of mediation communication and sets out the circumstances where the privilege is not applicable.

PART VII

8. Part VII deals with miscellaneous provisions.

Clause 17 seeks to provide that the costs of a mediation shall be borne equally by the parties but the parties are free to agree on the amount of costs to be borne by each party.

Clause 18 empowers the Minister to amend the Schedule by order published in the *Gazette*.

Clause 19 seeks to provide that a mediator shall not be liable for any act or omission done or omitted to be done in discharging his functions as a mediator unless the act or omission is proved to be fraudulent or involves wilful misconduct.

Clause 20 empowers the Minister to make regulations for the better carrying out of the objects and purposes of this Act.

FINANCIAL IMPLICATIONS

This Bill will not involve the Government in any extra financial expenditure.

[PN(U²)2638]