A Securities Industry Dispute Resolution Center Publication

dr
dispute resolution

Vol. 2, No. 2, September 2020

PP 19442/03/2019 (035044)

The Future of Dispute Resolution

spotlight

Digitising the Courts

with Tan Sri David Wong Dak Wah

Also in this issue

Vol. 2, No. 2, September 2020

In this Issue

spotlight

Digitising the Courts

forethought

Resolving Disputes Early

between the lines

Reconsidering Mediation

intelligent investor

Protecting Your Investments: Use Your Pre-Investment Controls

insider

Navigating Diversity

just the gist

dr dispute resolution

A Securities Industry Dispute Resolution Center Publication

The Editorial Team

Chief Editor
Sharmila Sharma

Editors
Steven K C Poh
Krishantini Palaraja

Creative Producer
Noel Chang

Support & Circulation
Azlina Abdul Wahab
Ismail Boyak

Securities Industry Dispute Resolution Center *(909583-H)*
Unit A-9-1, Level 9, Tower A
Menara UOA Bangsar
No. 5, Jalan Bangsar Utama 1
59000 Kuala Lumpur
MALAYSIA

T: +60-3-2282 2280
F: +60-3-2282 3855
E: info@sidrec.com.my

W: sidrec.com.my

fb.com/sidrec.com.my/
linkedin.com/company/sidrec-my/
instagram.com/sidreccc
twitter.com/SIDREC_MY

Printer

Color Bean Design Studio *(1685867-V)*
C-2-22A
Jalan PJU 1A/3K
Taipan Damansara 1
Ara Damansara
47301 Petaling Jaya
Selangor Darul Ehsan
MALAYSIA

Readers are encouraged to contribute their thoughts and opinions, including suggestions related to the improvement of this E-magazine, by writing to the editor at comms@sidrec.com.my. Please remember to include your name and contact information.

Sharmila Sharma
Chief Executive Officer, SIDREC

The Future of Dispute Resolution

When tabling the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Bill 2020 in the Dewan Rakyat of the Malaysian Parliament, the Minister-in-Charge announced that a special mediation centre will be set-up to help eligible parties resolve disputes involving contractual obligations that cannot be met because of the COVID-19 pandemic.

The announcement of the establishment of a special COVID-19 mediation centre is a development that is very much in line with a key trend in the field of dispute resolution that has emerged as a result of the COVID-19 pandemic – greater use of mediation as a means to resolve disputes following the anticipated rise in the volume of disputes because of the pandemic. The other key trend that has emerged is the increased reliance on technology in the conduct of dispute resolution across all modes – mediation, adjudication, arbitration and litigation – due to physical distancing requirements that have been imposed to combat the spread of COVID-19. These two trends are likely to last beyond COVID-19.

SIDREC has long been a proponent of mediation as a means to resolve disputes. The mediation process undertaken by SIDREC is both facilitative and evaluative in nature and approach, and may involve the mediator suggesting options to either or both parties towards the objective of achieving an agreed resolution or settlement of an eligible dispute. In addition, due to the COVID-19 pandemic, SIDREC has been holding mediation sessions and adjudication hearings either fully virtually i.e. all parties participate in the mediation or adjudication at different locations via video conferencing or on a hybrid basis i.e. all parties are present at SIDREC's physical premises but participate in the mediation or adjudication in three separate rooms via video conferencing. With the Recovery Movement Control Order in place till 31 December 2020, mediations and adjudications at SIDREC will continue to be conducted on a hybrid basis.

We are thus very privileged to have the former Chief Judge of Sabah and Sarawak, Tan Sri David Wong, to shed light on both these key emerging trends in dispute resolution in this edition of ***dr***. Tan Sri Wong, who is among the pioneers in the effort to digitise the Malaysian judiciary, elaborates on how mediation allows for disputes to be resolved in a confidential, time-efficient, cost-effective and less intrusive manner, with disputing parties potentially being able to maintain a long-lasting relationship based on a better understanding for future dealings between them. He also addresses some of the concerns that have been raised with regard to online dispute resolution.

Echoing Tan Sri Wong's thoughts are two highly accomplished lawyers – Jaime Orchard, who was previously the Executive General Manager (Resolution) of Australia's Financial Ombudsman Service and a member of SIDREC's Advisory Group and Wong Lu Peen, another mediator extraordinaire and a member of SIDREC's panel of mediators and adjudicators. They each delve into the critical need to resolve disputes early in order to limit their impact in terms of time, cost and emotions as well as the practical steps on how to cultivate a facilitative or mediative approach within an organisation as a means to do so. At the same time, the Federation of Investment Managers Malaysia (FIMM) details some of the precautionary measures that investors should take to protect their investments. Such upfront exercise of caution may go some way to mitigate the risk of a dispute arising from an investment in the first instance.

Finally, as we put this edition of ***dr*** to bed during the month of Merdeka and into Malaysia Day, in an acknowledgement of Malaysia's diversity, SIDREC's Senior Case Manager shares her thoughts on navigating diversity in mediation.

We hope you find this edition of ***dr*** an interesting read and welcome feedback. Do follow us on Facebook and LinkedIn. Meanwhile, stay healthy, stay safe! dr

Resolving Disputes Early

By Dr Jamie Orchard

Introduction

In the course of the provision of financial services, it is inevitable that disputes will arise between those providing the services and their clients. Usually such disputes arise through misunderstanding but in a minority of cases, can involve some degree of malfeasance or fraud.

Whatever the reason for the dispute, it is critical that disputes be resolved as quickly as possible, in order to:

- limit the emotional impact of the dispute on the client, especially when the client is unrepresented;
- limit the impact on both of the parties of the time, effort and cost of resolving the dispute;
- use facilitative processes with the parties directly involved so that the outcome can be tailored to the particular circumstances, leading to greater likelihood of acceptance by the parties; a longer lasting solution and an outcome that addresses the needs of the parties, as opposed to an adjudicated decision that is more likely to be based on the legal rights of the parties (as tempered by the need for fairness); and
- allow the parties to maintain an ongoing commercial relationship.

Industry-based dispute resolution schemes such as SIDREC are critical in being able to achieve these outcomes. Such a scheme offers fast, fair and cost-efficient resolution which avoids the need for expensive, drawn out litigation through the courts. Such schemes seek early resolution of disputes not only for the reasons set out above, but also to ensure their scarce resources can be applied to the small number of other disputes that cannot be resolved early through facilitative means. Ultimately, this means that a higher quality service can be provided to all parties.

So how can firms and dispute resolution schemes like SIDREC encourage early resolution? The answer lies in understanding how people will develop trust in organisations and decide whether to accept any form of resolution.

The Decision

Disputes arise when a client feels that the firm has failed them in some way – by not honouring a contract, by misleading them, by providing poor advice, service or simply by not taking care of their interests.

In some cases, it may be that the firm offers to resolve the dispute by providing all that the client seeks (a complete refund, payment of full compensation for losses etc). However, typically, there will be a decision

involved for the client as the likely outcome will be an offer of a compromise or an explanation as to why the client is not entitled to the outcome they seek.

That decision for the client may arise when the client initially raises their concern directly with the firm or later when the dispute is being handled through SIDREC.

If the firm or the dispute resolution scheme understands the nature of this decision for the client and what influences the client in making it, the firm or scheme may tailor their approach to influence clients to react more positively to possible outcomes with earlier acceptance by clients of offers and, especially, early views on the merits of the dispute.

How is the Decision Made?

Over the years, social scientists have identified a number of factors that influence the acceptance (or rejection) of an offer of resolution. Three particular factors, which are not mutually exclusive, are:

- **Social comparison.** This refers to the tendency of people to evaluate an outcome (and therefore their reaction to it) by reference to where the outcome falls relative to the outcome of others. That is, if the person is satisfied that the outcome offered is the same as that offered to everyone else in the same or similar situation, the person is more likely to accept it.

- **Expectation.** This refers to the notion that people are more likely to accept an outcome that falls within or above their expectation while rejecting those that fall below their expectation.

- **Fair process effect.** This refers to the fact that people are more likely to accept an offer of resolution if they are satisfied that the process by which the proposed outcome was developed was fair. This fair process effect tends to arise in circumstances of uncertainty, such as when the person has insufficient information to compare the outcome with those of others or to form an expectation of outcome.

So, an unhappy financial services client that is offered some form of outcome will consider whether the offered outcome is the same as others would be offered, whether the offer meets their expectation and finally whether the process by which the offer was developed was fair. But often that client will not know what others might have been offered and they may have no way of determining an expectation and that is when the fair process effect is critical.

> ***Schemes such as those provided by SIDREC offer fast, fair and cost-efficient resolution which avoids the need for expensive, drawn out litigation through the courts.***

The Fair Process Effect

Often the client is unable to evaluate the outcome and to determine whether they are satisfied with it. This might arise when the outcome is of such a different nature to what is expected that evaluating the outcome is difficult. It may also arise if the client has no pre-conceived idea as to what the outcome should be (and therefore cannot judge it against their expectation) or where there is an absence of information about the outcomes received by others so that they are unable to compare their outcome.

Effectively, when people do not have the information they need to form a judgment about their outcome (usually because they do not know the outcomes of others) or because they are generally unsure about the outcome, they will use the information they do have available to them. That available information is typically the fairness of the procedure used to arrive at their outcome and the client is more likely to decide that their outcome is fair (and therefore accept it) if they are satisfied that the outcome was decided after a fair process.

How Do People Decide If the Process is Fair?

Accepting that a person's perception of the fairness of the process by which an outcome was reached affects their reaction to the outcome and therefore

the likelihood of them accepting the outcome, the question arises as to how to satisfy a party of the fairness of the process?

It is generally accepted that there are four issues to define whether a person will decide a process as fair:

- Whether the person has had an opportunity to explain their situation (their side of the story) and to be heard by the firm and / or by the scheme;
- Whether the person considering the matter and determining the outcome is neutral;
- Whether the person has been treated with dignity and respect; and
- Whether the person developing the offer is trustworthy.

Applying the Principles

Applying these general principles in an attempt to resolve a dispute with a client as early in the process as possible, whether you are a representative of a firm or an industry-based dispute resolution scheme means adopting the following basic practical approaches:

- Make contact with the client as early as possible, ideally verbally (and then followed up in writing). Such early contact is an opportunity to:
    - allow the client to fully explain their view of the dispute and to develop an agreement as to the issues to be resolved.
    - allow the client to explain any view as to possible outcomes that should be pursued and to start moving the parties toward realistic possible outcomes. Standard approaches to the particular type of disputes and to outcomes in similar disputes should be explained.
    - allow the client to have a say about the process to be followed to resolve the dispute. A general agreement about the process to be followed should be developed.
    - perhaps above all else, develop a rapport with the client by treating them respectfully and politely.
- Maintain regular contact with the client throughout the course of considering the dispute.

> ***"Effectively, when people do not have the information they need to form a judgment about their outcome or because they are generally unsure about the outcome, they will use the information they do have available to them."***

At each stage, the client should understand where they are in the dispute resolution process and what opportunity exists for them to have a voice (in respect of the process and possible outcomes).

- Contact the client before any additional information is sought from them. The client should understand what is required and why it is required, and have an opportunity to agree on an appropriate timeframe.
- Explain any offers of resolution or any view on the merits of the dispute so that a fully informed decision may be made. More importantly, before any view on the merits is provided in writing, the client should be contacted by telephone for a discussion. Any tendency to simply forward a written view on the merits or an offer to the client should be avoided – if it is not exactly what they seek, they are quite likely to reject it. Contacting the client before a written merits view is provided is not just to advise that a view is to be despatched but rather represents a final, and very powerful, opportunity to remind parties of the fair process that has been applied in arriving at the view. That is, this is the best opportunity to convince the client that a thorough and fair process has been applied in developing any offer of resolution or view on the merits.

A useful way of handling that final telephone contact is by using a "PAR" methodology to structure the contact in the following order:

- **Process.** Remind the client of the fair process used to arrive at the merits view. This should include a reminder of the discussions about the issues to be resolved, a reminder of the material obtained from the client, an assurance that the material was carefully considered, a reminder of any resolution discussions and an indication of any specialist advice received and taken into account (legal advice, portfolio valuations, account reconstructions etc).
- **Answer.** An indication of the proposed outcome.
- **Reasoning.** A concise explanation of the key reasons for the decision. Given that a written view is likely to be provided, this could be kept reasonably short, although some allowance should be made where it seems that the client may benefit from a more detailed discussion.

> ***"Contacting the client before a written merits view is provided is not just to advise that a view is to be despatched but rather represents a final, and very powerful, opportunity to remind parties of the fair process that has been applied in arriving at the view."***

Conclusion

By adopting these simple practical measures, clients are much more likely to accept early offers or views on the merits of the dispute. This means earlier resolution with more satisfied clients and firms and a much greater likelihood of a continuing relationship. A very positive outcome for all parties to a dispute! dr

---

Dr Jamie Orchard is a member of SIDREC's Advisory Group. A highly qualified lawyer with significant senior executive level experience in Australia and internationally in regulatory compliance, investigations and enforcement in the financial services sector, he currently serves as General Counsel with the Australian Health Practitioner Regulation Agency. He was previously the Executive General Manager (Resolution) of the Financial Ombudsman Service, Australia.

Reconsidering Mediation

By Wong Lu Peen

The COVID-19 crisis has taken the world by storm. It is a crisis that affects every country in the world, impacts every business and individual and permeates through every aspects of our lives – be it physically, socially or financially. Coupled with the pandemic are other issues that rub salt in an already septic wound, including volatile oil prices, threats of trade wars and the list goes on.

Every country needs to address how they can help its citizens through this time, with leaders around the world scrambling to extend their political lives as they consider what monetary policies to adopt and how they are to stage an economic recovery. Similarly, businesses are fighting for their survival, with terms "staying ahead of the curve", "re-inventing", "treating challenges as opportunities", "adjusting to the new normal" being bandied about as they strive to make the right decisions in these uncertain times.

Valuing Expedient Dispute Resolution

Disputes occur within and between organisations. They can range from internal disputes with employees and between staff members to disputes with outsiders. Internal disputes may originate from tea ladies to company directors who refuse to communicate – all within the business which leads to waste of productive time. Disputes with outsiders may lead to the need for an organisation to defend a claim from an external party, which will incur costs and unwelcome publicity.

A constant during these trying times is the fact that disputes will continue to exist and may even increase. Losses have been incurred and businesses need to recover. This is the time for businesses to take a very serious re-look at mediation and not dismiss it as a "new-wave-soft-solution" for resolving disputes.

Corporations adopt mission statements relating to ethics, morality, fair play and social responsibility. Businesses must learn that disputes are not about legal rights only and their actions should reflect their mission statements and project their values. During these difficult times, corporations can ill afford to "fight to the end" or "prove a point" or "teach lessons" or take on expensive litigation to enforce a right. A responsible management should increase shareholder value by saving time, costs and minimising risk. This is the time to move on – resolve all disputes and concentrate on profit creation.

To Err is Human

The capital markets are no longer just into lending money or buying and selling capital instruments. Capital Market Service Providers (CMSPs) have extended their businesses to marketing financial products, wealth management, trust management, offering electronic

> *Businesses must learn that disputes are not about legal rights only and their actions should reflect their mission statements and project their values.*

banking and share trading facilities, operating trading platforms as well as offering complex products which may not be easy for the man in the street or a busy client to comprehend.

CMSPs are big institutions, generally well run and regulatory compliant. Bank Negara Malaysia (BNM) and the Securities Commission Malaysia (SC) have kept a protective eye on consumers to ensure that they are fully informed and aware of their contractual obligations, rights and remedies.

There is, however, one observed chink in this web of forms, approvals and information dissemination – it is the human element. CMSPs cannot be protected from the mistakes, miscommunication and missteps of their staff and agents. Relationship managers have been known to overpromise on products. He or she may have had the client sign all the correct forms which will protect a CMSP contractually but can the CMSP be sure that a court will not allocate fault on the part of the CMSP should a dispute arise?

Mediation as the First Port of Call

There are at least three reasons why mediation should be a CMSPs' first port of call for resolution of any dispute and these relate firstly, to risk management, secondly, costs and finally, time.

The first reason is about risk management. Every dispute that goes to court shifts the determination of an outcome to a third party. The CMSP does not decide what happens – the adjudicator, judge or arbitrator makes the decision and the CMSP will have to deal with the impact of the fall out. With mediation, the CMSP agrees on a decision that it can accept. The CMSP determines the outcome of the dispute and not the court.

Let me give you an example of a case where the management of a CMSP was very certain that the dispute at hand was an "open and shut case". The client was a housewife who had run up a debt of RM150,000. The opening of the relevant accounts and the corresponding contracts were perfectly documented. The CMSP claimed that it would have no problems going to court.

When the parties met for mediation, the CMSP started the session by saying that it was open to discussion for installment payments, but would go no further. The CMSP was ready to sue, with lawyers appointed and ready to move. The housewife said she came to mediation because she wanted the CMSP to know that the signatures on all the forms were not hers. Furthermore, she claimed that she has never opened an account with CMSP.

The CMSP reminded the housewife that she was sent a confirmation of each transaction to her email. The housewife claimed that she had no email account and was prepared to give samples of her signature for testing. Moreover, neither had she ever met the dealer nor had she ever stepped foot into the CMSP's premises. The "open and shut case" was more than open and shut – this was a potential fraud case with a dealer who was not "contactable".

The housewife accepted that she did pass her details to open a trading account to an investment adviser who had helped her open an account with another CMSP. She admitted that she may have been careless but she was very certain that the transactions with the current CMSP were not hers. Strangely, the housewife was willing to pay 50% of the debt incurred and the CMSP accepted her offer.

One may wonder why the housewife was willing to settle the matter at mediation if she was not involved. However, the answer to this question will neither help

> *A constant during these trying times is the fact that disputes will continue to exist and may even increase.*

the CMSP settle the case nor prove her liability. The CMSP calculated the potential legal fees, the costs of getting a handwriting expert, and the likelihood that the housewife's explanation will be accepted by the courts and proposed a settlement. They preferred to take ownership of the outcome of the dispute and manage the risks.

The second reason is costs. Costs do not relate to legal fees alone. CMSPs are aware that the time cost for their staff to manage a dispute can mount. Any dispute will involve a report to be prepared by the staff concerned, with facts to be collated. The staff concerned will have to be supervised by his or her immediate superior and the report, once completed, sent to the department head, who will in turn report to the branch and head offices. If not resolved, depending on the CMSP, the matter will go to the recovery or legal department, who will access the case and send it out to lawyers.

In the midst of all this, the matter will sit with an officer-in-charge who will monitor and report to a committee. If the matter goes to court, there is the preparation of witnesses, production of evidence, meetings with lawyers and attendance at court. It will be safe to say that each case that goes to court will involve input by staff from various departments and efforts spent on non-revenue producing work hours. Mediation is therefore inevitably cheaper.

The third reason is the simple issue of time. Time goes hand-in-hand with costs. The rationale is obvious – the faster a dispute is resolved, the better it is for the CMSP. Many cases do not go to full trial and are settled just before. Why not settle it earlier and save time? Time saved through mediation needs no further explanation.

The Perils of Being "Right"

Many organisations often adopt a policy that if no wrong has been established and there is a legally strong case, the courts will be the right venue to enforce its rights or defend a case, as the case may be. However, more often than not, most disputes arise because both parties think they are right. Thinking that one is right does not equate to a judge or adjudicator telling you that you are right. At the same time, a mediated settlement does not mean that a party is wrong – it just means that the parties are smart.

Here is an example. It is possible that debtors do not pay their debts because they genuinely do not have the money to do so. If this is the case, going to court to prove a debt will not get the CMSP anywhere. Instead, the CMSP may be better off with a mediated settlement and giving the debtor some time to pay off his or her debt. This will improve the CMSP's chances of collecting something – however little – whilst at the same time recording an admission of a debt rather than using the time to prove the debt in court. There are also debtors who have the money but would rather pay only when compelled to do so. Mediated settlements accord the CMSP more flexibility as the CMSP may offer the debtor an incentive to pay – for example, a rebate or forgiving interest.

Organisations should therefore teach and empower their staff to adopt a mediative approach from ground zero to stop disputes from developing. Things are rarely clear and straightforward. Why would a company reject mediation if this is a cheaper and faster means of resolving a dispute, the outcome is controlled by the parties and there is no necessity to concede fault or wrongdoing?

> ***"Why would a company reject mediation if it is a cheaper and faster means of resolving a dispute?"***

Introducing a Mediative Approach to Resolving Disputes

CMSPs can start by taking small steps to introduce a mediation friendly dispute resolution approach within their organisations.

Start with educating stakeholders. The challenge here is to get top management to see how mediation works. Once that is done, the next step is to train top management. Start with department heads and invest in mediation courses which are available in Kuala Lumpur. Alternatively, send a team of in-house trainers to learn and teach mediation skills. This will equip departments heads, branch heads and human resources personnel to nip potential disputes in the bud. They can learn to engage their skills at every level of their work, not necessarily only when there is a dispute. The departments that influence practices within an organisation, such as the legal, finance,

human resources and risk management departments, must lead the way.

Continue by all means to look at rights and remedies. At the same time, however, do assess the "interests" and "needs" of the parties. Sometimes, parties just want an apology from the CMSP or an acknowledgement that they have been inconvenienced (not legally wrong). Sometimes, a dispute arises purely because of a human element – different personality traits, personal issues, communication issues or bad body language. Very often a symbolic concession would suffice.

Introduce a mediate first policy. Make sure that all potential disputes go through a mediation process – this can cover staff issues, complaints from suppliers, clients and other third parties as well as actions against staff, vendors and borrowers.

Another step to take is to engage with mediation bodies. SIDREC, for example, has trained its staff to attend to public complaints and to try and resolve disputes. Adopt an open mind and embrace the objectives of SIDREC. Make use of the facilities and processes SIDREC offers to resolve your disputes. Sending your people to SIDREC with the message that "the management-thinks-no-wrong-has-been-done-so-we-have-no-mandate-to-settle" highlights how some SIDREC Members fail to understand the basis of mediation. Learn skills to make use of the facilities for resolution offered to you by SIDREC to resolve your disputes.

Tackling Disputes Early

Set an "early dispute resolution" policy in motion. Adopt this approach at the early stages of a dispute. It is likely that CMSP would have had many discussions with opposing parties before it turns into a full-blown dispute. It is helpful to have a neutral third party to facilitate these discussions, soothe egos and bring the real issues into focus.

From time-to-time, CMSPs may be faced with a situation where they are put into a 'defensive' position. These relate to complaints against them where the chances of a successful claim by the other party could be low but involve a waste of time and money. Why and how far would an individual pursue a claim against a CMSP?

Most CMSP processes have been protected by print – disclaimers, risk warnings, forms, procedures and processes. All these are done in order to be SC-compliant and to build a solid wall to protect CMSPs from legal action. What CMSPs cannot predict, however, is human interaction, miscommunication and personalities. When this happens, the CMSP team is immediately put on a non-negotiation mode – after all, if the paper work is right nothing can be wrong. What is at risk for these cases may not be CMSP's legal rights or pecuniary loss but the risk of bad publicity and reputation.

These are the very cases that can be resolved with the correct mediation skills exercised by its staff. If a client claims that the officer of the CMSP has "misled him or her", take the matter out of that officer's hands, and empower other staff to resolve the issue. Let the client feel heard and address his or her anger or dissatisfaction. Do not keep reminding him or her that he or she has signed the necessary documents and there is nothing to be done. Do not give him or her the reason to accuse you of protecting your own staff. Do not avoid him or her. This approach will only anger the client further. Instead, tell him or her that you understand his or her situation, acknowledge his or her frustration, tell him or her that you are sorry that he or she misunderstood the relationship manager, offer to help him or her and maybe even offer a solution. Staff trained to adopt mediation techniques will be able to assist in reducing the number of claims against a CMSP.

Conclusion

Mediation is not a new phenomenon. It has been practised in all cultures in some shape or form. The Bar Council created the Malaysian Mediation Centre in 1999. The Asian Mediation Association was formed in 2007, with Malaysia being one of its founder members. The government has passed the Mediation Act 2012. The courts are encouraging mediated settlements. With the Covid-19 pandemic and fears of a second or third wave of cases, the time is right for CMSPs to re-consider mediation. dr

---

The author runs her own practice at Wong Lu Peen & Tunku Alina. She sits on the Arbitration & Alternative Dispute Resolution of the Bar Council and the Malaysian Mediation Centre (MMC) and is an associate accredited mediator with the Singapore Mediation Centre and a member of the advisory panel of the Australian Dispute Resolution Centre in Sydney. As an Accredited Mediator on the MMC panel, she trains and assesses candidates for accreditation with the MMC. She was also the Chairperson of the committee for disciplinary proceedings brought by the Bar Council Disciplinary Board. She obtained her LLB (Hons) degree from the University of Reading and an MBA degree from the University of Malaysia. She has been called to the English Bar and admitted to the Malaysian Bar.

Protecting Your Investments: Use Your Pre-Investment Controls

We are living in challenging times. It is undeniable that the outbreak of COVID-19 has impacted the world significantly. At the time of writing, approximately 11.7 million people worldwide have been infected. Malaysia was not exempted, having recorded around 8,700 cases around the same time.

In his speech on 1 May 2020, Prime Minister Tan Sri Muhyiddin Yassin revealed the economic cost of the Movement Control Order (MCO) that was implemented to curb the spread of COVID-19: the country incurred a loss of RM63 billion, as businesses were not allowed to operate at full capacity and some were not able to operate at all.

However, financial losses are not only felt at the macroeconomic level. Many Malaysians felt the financial strain with a large number finding it hard to bring home their wages. Although some Malaysians were able to work from home, some had their salaries reduced. Some even lost their jobs during the pandemic.

Having an Emergency Fund

It is for challenging times like this that having an emergency fund or a buffer fund is beneficial as the monies saved and invested can be used to purchase basic needs when income is low or, in the worst-case scenario, unavailable. Unfortunately, not everyone is able to save and invest their monies to build up an emergency fund. According to the *FIMM Nationwide Survey Report* (*NWS Report*; published on 24 June 2020), a total of 52% of investors and 59% of non-investors (Figure 1) either earn insufficient income or earn just enough to cover their basic needs.

The *NWS Report* discovered that more than 50% of investors who invest in unit trust schemes (UTS) and in private retirement schemes (PRS) share the common investment objective of creating an emergency fund (Figure 2).

When investing, be it to establish an emergency fund or any other investment goal, it is important to ensure that the investment capital is well protected, including during the pre-investment period (i.e. the period when investors are applying for the intended investments).

As such, it is crucial for investors to implement "pre-investment controls" to ensure that their initial investment capital is not lost due to an oversight or, in the worst case, fraud.

Fraudsters Capitalising on Fears and Hardships

During difficult times, fraudsters would prey on unsuspecting and desperate people in order to capitalise on their fears and hardships. The COVID-19

Figure 1: Investors' and Non-investors' Financial Adequacy

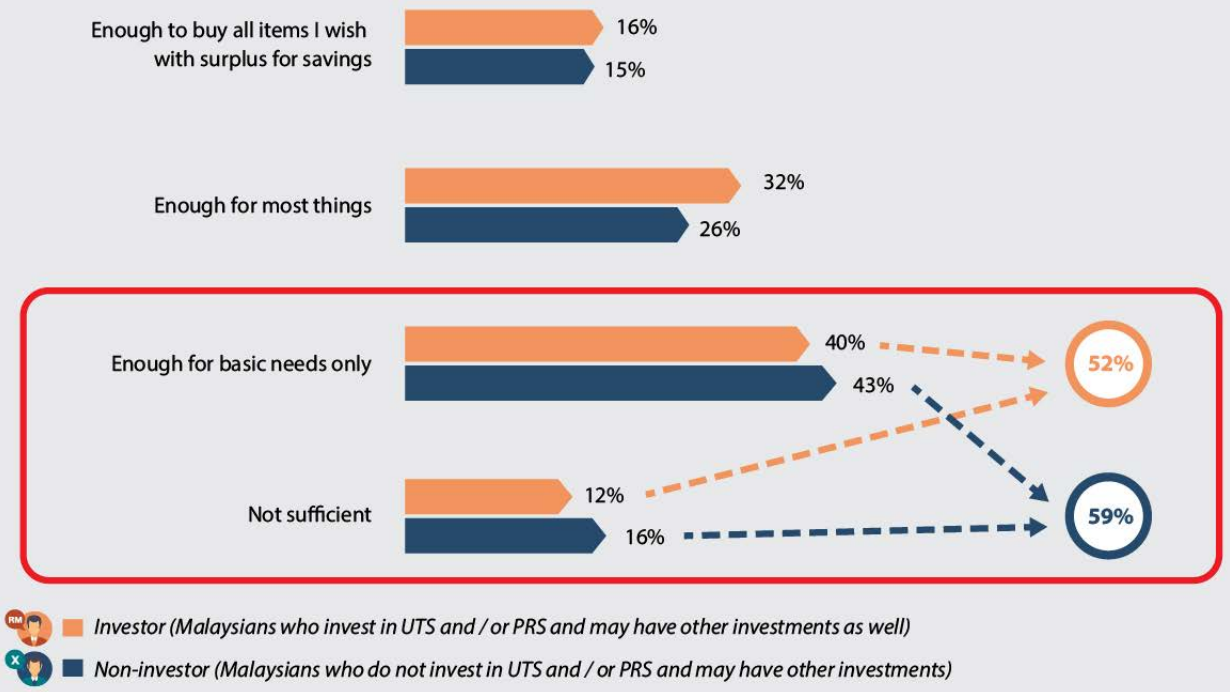
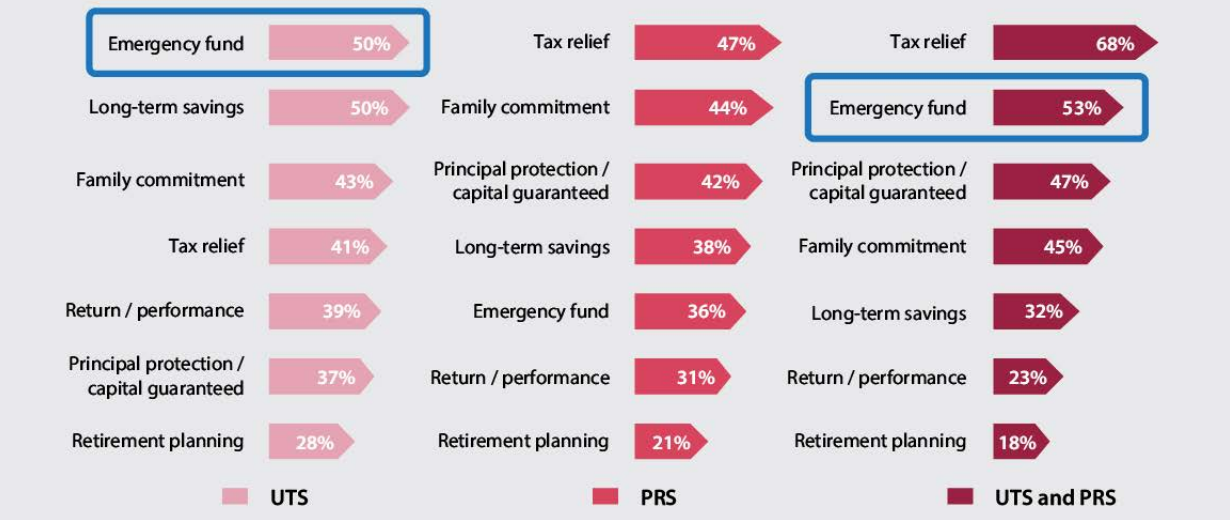


Figure 2: Investors' Investment Objectives (UTS, PRS, UTS and PRS)



Source: FIMM's NWS Report.

pandemic and the MCO that ensued brought about negative financial impact for Malaysians, making them easy targets for fraudsters.

The Securities Commission Malaysia (SC) had, on 24 April 2020, advised investors to be on alert for COVID-19 investment scams. On 29 May 2020, the SC reported that clone firm scams are on the rise (this is where a company with the intention of deceiving investors will set itself up to look like a capital market entity licensed or registered with the SC).

It is, therefore, critical for investors to implement their own pre-investment controls.

> *"It is crucial for investors to implement 'pre-investment controls' to ensure that their initial investment capital is not lost due to an oversight or, in the worst case, fraud."*

Consultants and Distributors

In the investing process, it is very common for an investment consultant or an investment product distributor to be involved. To purchase shares, one will have to go through a broker or remisier. For UTS and PRS, a UTS or PRS consultant or distributor would be involved. These consultants or distributors play important roles in the investing process by connecting investors to the investment products or solutions. Consequently, they are well-equipped to explain to the investors the features and characteristics of the investment products and help investors make informed and suitable investment decisions. Thereafter, the consultants or distributors would help to start the investment process for the investors.

At the Federation of Investment Managers Malaysia (FIMM), it is our role to authorise or register and regulate the consultants or distributors for UTS and PRS. As at 31 December 2019, there were 58,068 UTS consultants and 24,728 PRS consultants registered with FIMM.

From the *NWS Report*, it is noted that 71% of respondents prefer to invest via consultants (either belonging to a unit trust management company, a PRS provider, or a financial planning firm). More details can be seen in Figure 3 below.

During the commencement of the investment process, investors would have to deposit their money to access the investment product or solution. It is at this point that investors would need to take precaution to ensure that their money would indeed be used for the intended investment and not for other purposes.

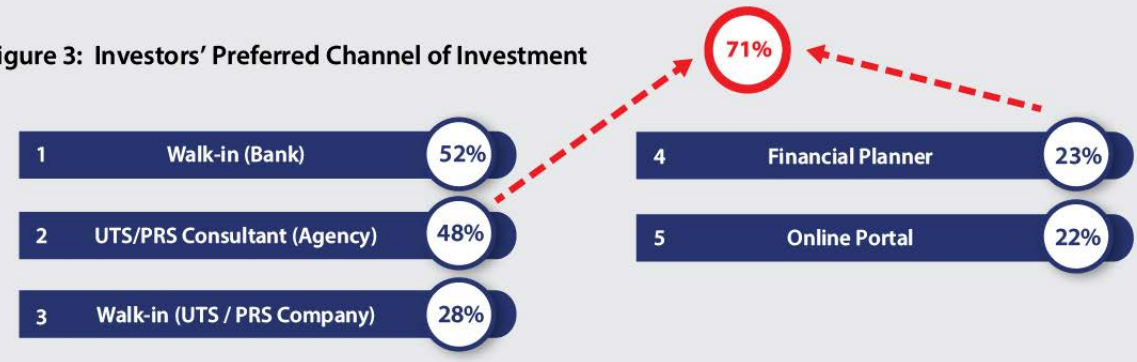
Protecting Your Money

1. Ensure that the Investment Product is Authorised

Investment products or solutions that have been authorised by the relevant regulator, e.g. the SC, have gone through the necessary processes prior to being made available for investment. As such, the risk of investors being defrauded is low. Additionally, because they are within the regulators' purview, the said regulator would be able to monitor these investment products or solutions and take necessary actions when required.

To know whether an investment product is authorised or not, investors can visit the SC's website (www.sc.com.my), where, along with other investment products or solutions, the SC discloses a list of UTS and PRS that it has approved and has been launched.

Figure 3: Investors' Preferred Channel of Investment



Note: In the survey, this was a multiple-choice question where the respondents were allowed to choose more than one (1) answer. Hence, the sum of percentages would exceed 100%.

Source: FIMM's NWS Report.

2. Ensure that the Consultant is Authorised

Likewise, authorised consultants or distributors are expected to have undertaken all the necessary trainings and registration processes prior to them being allowed to connect investors with investment solutions. As registered consultants, they are governed by the rules and regulations imposed by the relevant regulators. For example, UTS and PRS consultants are registered with FIMM and hence, are subject to FIMM's Rules. Should they commit any misconduct, FIMM can take action against them.

For UTS and PRS, investors are able to verify whether the consultant is authorised or not by visiting FIMM's website and clicking on the "Is My Consultant Authorised" link (www.fimm.com.my/search/).

3. Ensure that the Forms You Sign are Complete

To perform investment transactions, investors are required to sign the relevant forms. It is of paramount importance that investors fill up those forms *completely* before signing and submitting them.

Signing empty forms puts investors' money at great risk!

A consultant with bad intentions could fill in the pre-signed blank forms to perform unwanted or unauthorised transactions using investors' money. Likewise, the consultant may not have bad intentions, but he or she could have completed the pre-signed blank forms incorrectly and inadvertently perform unwanted or unauthorised transactions. Both scenarios could lead to investors losing their hard-earned money.

Hence, if a consultant insists that the investor signs a blank form, the investor should refuse and proceed to complete the form himself or herself. If the UTS or PRS consultant is persistent in asking the investor to sign a blank form, the investor must lodge a complaint with the distributor and / or FIMM at complaints@fimm.com.my.

4. Do *Not* Give Cash Directly to the Consultant

Investors must never give cash directly to the consultant or transfer his or her money into the consultant's personal bank account for any investment. By doing this, the investor is putting his or her money at risk, especially if the consultant has bad intentions and absconds with the money.

The risk is even greater if the consultant is *not* authorised. Nonetheless, even if the consultant has no bad intentions, it is not a guarantee that the investor's money will be safe. What if, after receiving physical cash from the investor, the consultant was robbed, and the money was stolen? Or, if the money was transferred by the investor into the consultant's personal bank account, that bank account got hacked, and the money stolen?

Always make payments in the method described in the relevant offering document. For UTS, the payment method is disclosed in the prospectus. For PRS, it is in the disclosure document.

If the consultant insists that the investor pays directly to him or her in cash, the investor must steadfastly refuse and lodge a complaint with the relevant regulator. For UTS or PRS Consultants, the investor can lodge a complaint with FIMM at complaints@fimm.com.my.

Take Necessary Precautions

According to the NWS Report, one of the top five reasons people are reluctant to invest (i.e. barriers to invest) is that they are worried about the risks involved. However, there are risks in all investments. Nonetheless, risks can be mitigated by implementing controls such as the ones mentioned above.

Additionally, it is essential for investors to read the offering documents and understand the features and costs involved prior to investing. This is part of the precautionary measures taken to ensure that we protect and do not lose our money.

At FIMM, we will continue to perform our role in monitoring all complaints received as well as supervising the sales practices of those within our regulatory scope. To ensure investors' monies would not be misused, we would not hesitate to take serious action against any consultant for misconducts. In 2019, we imposed sanctions on ten consultants.

For more details, kindly visit www.fimm.com.my. dr

FIMM functions in a dual capacity as a self-regulatory organisation, and industry representative advocating the development and growth of the UTS and PRS industry.

Digitising the Courts

On 15 February 2020, at the launch of the Borneo Colloquium on Environmental Justice, Tan Sri David Wong Dak Wah reiterated that artificial intelligence (AI) is set to make its way into the Malaysian courtroom soon. "It is going to be a big step for the Malaysian Judiciary," the former Chief Judge of Sabah and Sarawak was quoted as saying in a news report before stating that, "The use of AI [in the Malaysian courts] will be first in Asia. To my knowledge, no other country apart from the United States uses it this way."

Four days later, on 19 February 2020, the Malaysian judiciary made history by employing AI in the sentencing of two drug cases in a Magistrate's Court in Kota Kinabalu, Sabah. This marked a key milestone in the journey of transforming the East Malaysian courts from one of manual system to a fully digital system. It is a journey that started in 2006 i.e. 14 years ago under the leadership of the then Chief Judge of Sabah and Sarawak, Tan Sri Richard Malanjum, who was eventually appointed as the ninth Chief Justice of Malaysia.

Wong, who is also largely credited for the digitisation of the courts in Sabah and Sarawak believes that the time has come for the legal fraternity to embrace technology in their work. The reasons: court procedures need to be expedited, processes standardised and information made available for simultaneous access. And, when delivering his last speech as the Chief Judge of Sabah and Sarawak at the opening of the 2020 legal year in Kuching, Sarawak on 17 January 2020, Wong said that if he were to be asked what the most satisfying part of his judicial career is, he will not hesitate to say that it is his involvement in the digitisation of the courts.

"It is undeniable that if not for the co-operation extended to the judiciary during the early years of transformation, we would not have achieved what we have today," he said in his speech. "We now have an app for the judiciary of East Malaysia which allows Judges and Lawyers to manage their works. For the lawyers, they can access their files, file in documents and check on the status of their cases from that apps from anywhere in the world. For Judges, they are also able to access their files with details as to their status in terms of timelines for finishing their trials, delivery of decisions and grounds."

Wong further said that as Chief Judge, the app was a powerful management tool as he was able to instantly access the performance of judges in terms of pending decisions and grounds, in addition to approving their application for leave.

dr caught up with Wong, a law and accountancy graduate of the University of New South Wales, Australia, via a written interview.

You were a member of the Malaysian judiciary from 2005 to 2020, including being Chief Judge of Sabah and Sarawak from July 2018 to February 2020. In your view, what are the pros and cons of relying on mediation and / or adjudication to resolve a legal dispute as compared to litigating the matter in court?

When Tan Sri Richard Malanjum became the Chief Judge of Sabah and Sarawak in 2006, he embarked on a journey to reform the judiciary to make it more relevant to the needs of our society today. One of the reforms was to make alternative dispute resolution (ADR) a part of the fabric of the judiciary. This happened in 2007.

The first step taken then was to educate the legal officers and judges on the concept of mediation, how it would complement the judiciary and the manner in which it should be conducted. Secondly, we also educated the community on the benefits of mediation. It actually took us a few years before we gained traction, but once we did, it became very popular. As such, mediation is now very much the fabric of the judiciary.

There are now mediation centres at all courts in the country and simple guidelines are available on the website and at the court complex in the form of a pamphlet, to which the public may refer.

The pros of mediation:

1. The parties are in control of the mediation process in that they ultimately determine whether or not there is a settlement. This control, from my observation, really empowers the parties.

2. It is a private proceeding and whatever is agreed between the parties remains confidential. This prevents the washing of dirty linen in public to protect the reputation of both parties.

3. It is a less intrusive and inexpensive (in fact there are no charges from the judiciary) exercise as compared to litigation, where much more time and financial resources are spent; so much so that it may drain the resources of the parties involved.

4. It is a quicker process than that of the court.

5. Relationship between parties could be maintained, resulting in a better understanding for future dealings between parties.

The cons of mediation:

1. Mediations are voluntary. I have always advocated that mediation for certain disputes be made compulsory by law. The most glaring dispute suitable for mediation is injuries suffered due to road accidents. That said, the judiciary in Practice Direction No. 4 of 2016 – Practice Direction on Mediation dated 30 June 2016 – encourages mediation and had listed six areas for the same, namely:

    a. Claims for personal injuries and other damages due to road accidents or any other tortious acts because they are basically monetary claims;

    b. Claims for defamation;

    c. Matrimonial disputes;

    d. Commercial disputes;

    e. Contractual disputes; and

    f. Intellectual property cases.

    The concept of "access to justice" must be expanded to include ADR and cannot mean that only the Courts dispense justice. ADR is very much part of the justice system.

2. Some mediators misunderstand their roles (which is one of facilitating), thus resulting in some unhappiness among parties alleging that they were arm-twisted by the judge-led mediators to enter into a settlement.

3. There are also parties who have no intention to compromise but partake in the mediation process merely to delay the trial.

During your tenure as Chief Judge of Sabah and Sarawak, we witnessed the implementation of significant technological advancements in court procedures, from the conduct of paperless hearings to the use of AI in the imposition of sentences at the criminal courts. What were the factors that drove these changes? What were the challenges faced at the implementation stage and what benefits were derived from their implementation?

One of the transformations which happened during my time as a judge in Sabah and Sarawak was the digitisation of the court manual filing and record

system. The main objective of the computerisation process was to speed up court procedures, standardise processes, forms, lists and schedules of the entire legal system in the Sabah and Sarawak courts and most importantly assure simultaneous access to information.

> *"The concept of "access to justice" must be expanded to include ADR and cannot mean that only the Courts dispense justice. ADR is very much part of the justice system."*

At the initial implementation stage, apart from the labourious task of extracting data from the printed format into the case management system (CMS), we were faced with the challenge of changing the mindset of the legal profession. The inevitable issue that relates to the transformation from the conventional system into the adoption of technology is the readiness of the court officials and legal practitioners. We achieved that by going on road shows to every major city and town in Sabah and Sarawak with the sole purpose of convincing them that the embrace of technology would make their practice more efficient and less costly and most importantly make access to justice easier. We reached out to the judges and even the court staff and developed a close liaison between the courts and law firms.

Two main innovations stand out from our CMS. One was what we call the "triggering system" or the e-monitoring features. Prior to the implementation of the CMS, there were common complaints of late return of documents filed in courts, no fixture of hearing dates, inactive and outstanding cases and judgments not being delivered within the prescribed time. With the CMS, email notifications are automatically sent to the Chief Judge, judges and the officers in charge each time there is a lapse in any of the processes. This actually serves as a monitoring and administrative tool.

Second, lawyers are part of the CMS in that they are able to access general information of the courts, announcements, cause lists, judgments and their particular files. Every lawyer who has a CAP account is able to view and manage the cases and schedules handled by him or her, or his or her firm. This feature is an added-value and operates as an audit tool to ensure transparency in the system.

This brings us to paperless appeals in the High Court in Sabah and Sarawak which started in 2010. It was made possible then as the virtual files, one of the most important features in the CMS, have replaced the conventional hardcopy dockets or files. The virtual files contain all the cause papers uploaded to the CMS including the records of appeal which can be accessed during the appeal hearing. This mode of hearing came into effect for the Appellate Courts in November 2019 where all appeals for the Court of Appeal and Federal Court in Sabah and Sarawak were heard paperless in Kota Kinabalu and Kuching. Prior to this, a tremendous amount of costs was incurred by transporting hard copies of records of appeal from Kuala Lumpur to Kota Kinabalu and Kuching for the appellate hearings. This has resulted in operational efficiencies and costs and very much less of paper wastage.

Of course, there will be continued challenges as some of the judges are still happy with the hard copy approach. But I have no doubt that it will soon become second nature to all judges. I understand that paperless hearings have commenced in the Federal Court at the Palace of Justice. That said, regretfully the legal profession has been slow in embracing this area of technology as they continue to refer to their hard copy when submitting.

Since its establishment, SIDREC has relied on online dispute resolution (ODR) in situations where parties resided in different states or countries. The COVID-19 pandemic and the resulting Movement Control Orders (MCO) have necessitated the precipitation of the adoption of technology such as video-conferencing facilities to conduct mediation sessions and adjudication hearings online. There are lingering concerns of the confidentiality of online proceedings. What are your thoughts on this?

The use of video technology has been with us for quite some time. The courts in Sabah and Sarawak started using video technology in 2007 for interlocutory hearings and have since used it for part of trial work where witnesses are not able to travel.

As mediation is supposed to be private and confidential, online mediation and adjudication provide challenges in so far as security issues are concerned. That said, this to me is a technical issue which I am sure can be resolved by the platform operators. The government has barred the use of Zoom platform for its business and had sanctioned Skype for Business. However, is there a guarantee that it could not be hacked? The fear of being hacked, in my view, may be over exaggerated. We must accept the fact that we are now in a pandemic and the only known way to combat it is to avoid face-to-face contact as far as it is possible to do so.

Another concern with regard to ODR seems to be the effectiveness of it, particularly so, due to the loss of human touch. For instance, there are concerns that mediators, in particular, and to a certain extent, adjudicators, may experience difficulties in perceiving the subtleties of the body language of the various parties. This may affect their interaction with parties and the outcome of the process. How may these concerns be addressed?

The former Chief Justice, Tan Sri Richard Malanjum in a recent webinar said that in view of the current pandemic, mediation will be difficult to conduct as there will be no personal interaction, which in his view, is a prerequisite for an effective mediation process. I have no doubt that this is a fairly accurate assessment of the situation which we are in.

But as mediators, we just have to take up the challenge of having to re-educate ourselves as to how to conduct effective mediation online. The benefit of not requiring parties to travel to a physical place to conduct a mediation session should not be underestimated. In my view, this benefit would be most welcomed as it would save time and costs and shield parties from COVID-19 and hence would make them more willing to partake in the mediation process.

As to the ability to perceive the subtleties of the body language of the various parties in a physical face-to-face mediation, I think this is overexaggerated. As a mediator, one is there to facilitate negotiations between the parties and in the process, one would surely get to know what the parties' respective positions are and one's job as a mediator is to get parties to an acceptable middle ground. Can we not see those same "subtleties" in a video conference? Sometimes not having the parties in a same physical room has its own advantage in that a video conference provides a buffer zone of respective parties' angst against each other. Hence it provides a conducive and neutral cyberspace for mediation.

As for adjudication and trials in courts, the usual complaint I encounter is that the adjudicator or the judge will not be able to properly observe the demeanour of the witnesses. This fear is in my view, overexaggerated as well. Adjudication and trial nowadays are predominantly resolved through witness statements and documents, and in my experience, disputes are not resolved purely through the demeanour of the witness. The testimony of the witness must be judicially appreciated in the context of the documents before the tribunal.

> *"We must accept the fact that we are now in a pandemic and the only known way to combat it is to avoid face-to-face contact as far as it is possible to do so."*

As reported, one sitting judge in the United Kingdom remarked recently in the case of *A Local Authority v Mother* when hearing a cross examination of a witness remotely said, "Some people are better at lying, whether remotely or in person".

There are various ODR providers such as *The Mediation Room* (www.themediationroom.com) and *Benoam* (www.benoam.co.il) which provide online platforms that allow mediators and arbitrators, wherever they might be, to exchange documents and communicate with parties without having to meet face-to-face. *Cybersettle* and *Smartsettle* are two applications which we all should look at.

Cybersettle provides a simple blind bidding formula approach online where one party to the dispute informs the machine the amount he is willing to pay with the other party telling the machine the minimum amount he is willing to accept. The bidding is made on the agreement that should the amounts offered by respective parties be within the agreed percentage range, they are to split the difference and settle. If the amounts offered are not within the range,

there would be no settlement and the respective parties will not be informed of the amounts offered. (Paul Kirgis, *Cybersettle and the Value of Online Dispute Resolution, INDISPUTABLY* (7 July 2010), www.indisputably.org/?p=1456)

What do you think are the benefits of the increased usage of ODR? Do you foresee any other challenges from its increased usage apart from those already discussed?

The other challenges are purely technical in nature. It is more on the operation of the platforms used by the mediators who must be very conversant with the usage of the platform. Users need also to be taught how to download the platform application – how to invite parties to the session, how to launch a session, how to mute or unmute a party, how to pause a video link of one party and how to upload a document during the process.

AI continues to gain traction in various aspects of our life. There has been much discussion of its use in the sphere of ADR, ranging from the use of expert systems to intelligent software agents, to help parties and the mediator or adjudicator reach a fair solution based on the view of a "digital judge". In your view, should ADR bodies like SIDREC adopt AI technology to mediate or adjudicate a dispute given the fact that the human element is very much present in ADR, particularly mediation?

Let me just say this. Like it or not, technology advances like AI is very much part of us in many ways. When we drive, we use Waze; when we search, we go on Google Search; when we pay, we use Boost or Fave. All of these applications involve some form of AI, so it is already very much part of our lives. Hence it is not an option not to embrace AI technology.

> *"In my experience, disputes are not resolved purely through the demeanour of the witness."*

The High Court of Sabah and Sarawak took its first step in the use of AI in data sentencing for two offences, namely Section 12(2) of the Dangerous Drugs Act and Section 376(1) of the Penal Code. Why did we implement it? Sentencing disparity is an issue which every jurisdiction has to deal with and we are no different. In fact, during my stint as Chief Judge, I would say complaints on sentencing disparity was a common one.

> *"Like it or not, technology advances like AI is very much part of us in many ways."*

What we did was to collect all the data from our CMS over a period of years and put them into the AI machine to do its work and make a recommendation to the trial judge as to what is the appropriate sentence. I emphasise here that the AI machine's recommendation remains a recommendation to the sentencing judge and such recommendation is also subject to challenges by the respective counsel which the sentencing judge must take into account before handing down his sentence. This is to ensure compliance with the due process of law.

We have also started the process of compiling data for damages pertaining to personal injury cases arising from road accidents to be fed into the AI machine so that it can make recommendations as to the likely amount of damages which the injured party would get. In my view this will be a "game changer" to how litigation or mediation in this area will be conducted. As mediation in personal injury cases is usually mandated by the court in practice, the AI recommended amount will be used by the court mediation centre as the basis in the mediation process. I have no doubt that once this is implemented, there will be quicker settlement of disputes and hence would free up lots of judicial time to deal with other cases. This is not a case of a "digital judge" taking over. It is more of embracing technology to make the judicial system more efficient to meet the changing demands of society and the times.

Though I do not know in detail how ADR is conducted at SIDREC, there is no reason why AI technology cannot be adopted for the mediation process as is done by

SIDREC's Dispute Resolution is Available in Two Schemes

Mandatory Scheme

A SIDREC Member is obligated to participate in SIDREC's Mandatory Scheme, if the dispute meets the following criteria:

Dispute against a SIDREC Member

Claimant is an individual investor or sole proprietor

Capital Market Product / Service from SIDREC Member or representative

Claims up to RM250,000

Service is free to the investor

If mediation succeeds, both parties are bound by settlement agreement

If mediation fails, case proceeds to adjudication unless investor withdraws claim

Member must participate in adjudication

Member is bound by adjudicator's decision if claimant accepts outcome

The claimant has the choice to reject the adjudicator's decision and pursue other legal recourse. However, once the claimant accepts the decision and enters into a settlement agreement, the claimant is bound by the decision.

Voluntary Scheme

SIDREC may also mediate and / or adjudicate disputes for claims under its Voluntary Scheme. Unlike the Mandatory Scheme, the Member is not required to participate unless they wish to. SIDREC will only accept a case under this Scheme if both the claimant and Member agree to seek SIDREC's help.

Prerequisites

Dispute involving claims exceeding RM250,000

Court-referred mediation for any claim amount

Dispute against a SIDREC Member

Claimant is an individual investor or sole proprietor

Capital Market Product / Service from SIDREC Member or representative

If parties agree to SIDREC's mediation process, they will be bound by the agreement

If mediation fails, parties in a court-referred mediation will be referred back to court. In other instances, both parties must agree to proceed to adjudication.

Both parties are bound by adjudicator's decision

Both parties will be required to pay a reasonable fee for SIDREC's service

the judiciary in regard to personal injury cases. The AI technology is just another tool which the mediator can use in the mediation process.

Finally, what is your vision for ADR in general and mediation specifically in Malaysia?

What the pandemic has taught us is this - embracing technology is not only a necessity; it also brings with it many benefits especially in terms of operational efficiency and costs. The arbitration regime is facing competition from an increasingly efficient judiciary. Conventional litigation is now comparatively cheaper and quicker, invariably making the courts the first choice. Therefore, there is only one option open to the arbitration regime: embrace technology.

Pre-trial case managements in courts are now conducted via the internet without the physical presence of lawyers saving much cost and time. Arbitrators should adopt the same. Preliminary meetings can be done via the internet or by video conference. Stricter timelines should also be imposed on arbitrators, for example, to deliver awards either for small and large claims within two or three months respectively and for jurisdictional challenges to be decided in no longer than two weeks.

In the case of mediation, the courts have made significant inroads through their annexed mediation centres. There is little doubt in my mind that the success there is largely due to the fact that it is free and conducted by a judge-mediator. Personally, I think it is

> *"What the pandemic has taught us is this – embracing technology is not only a necessity; it also brings with it many benefits especially in terms of operational efficiency and costs."*

time to shift some, if not most, of this burden back to qualified private mediators or bodies like SIDREC or the Bar Council Malaysian Mediation Centre.

I am attracted to the model SIDREC operates; the model based on two schemes – the Mandatory Scheme and the Voluntary Scheme.

I have always been a proponent for mandatory mediation prior to the filing of suits in court. Most disputes, if not all, are suitable for mediation. We have to take that quantum leap to put into place a pre-action protocol whereby parties are required in law to attempt to settle the disputes through negotiations whether in the form of mediation, arbitration or early neutral evaluation.

Unless this quantum leap is taken by the Legislature or the Judiciary (please see Practice Direction – Pre Action Conduct and Protocols at www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct), mediation will not be embraced by the public in a manner as seen in other common law jurisdictions and the judiciary will continue to be burdened with mediation work.

In my view, this should not be the courts' main focus. The judiciary exists with the primary focus of dispensing justice under established rules guided by advocacy. Mediation operates under a complete different set of rules and its primary focus is one of facilitating a channel of communication between two combating parties to arrive at a settlement. We are at a time where we have many qualified mediators in our country who are able to take up this challenge.

Finally let me express my gratitude to SIDREC for giving me an opportunity to express my thoughts on this area of ADR which no judiciary can afford to ignore. dr

Navigating Diversity

By Jelisa Tan

Diversity makes each individual unique. We all share different perspectives about the world because we each take in different information and then interpret this information in our own unique ways. Our past experiences, family upbringing, cultural and educational backgrounds, as well as age and gender, all contribute to our uniqueness. They will inevitably shape our worldview. Imagine a world without diversity. Human extinction? Robots? Clones?

In this increasingly interconnected world, appreciating diversity is an important aspect of our lives. In our workplace, diversity can ensure that there is a large pool of knowledge, skills, perspective and expertise. In the capital market, investors are offered a greater variety of investment choices, seamless investments in foreign markets and financial products which are becoming increasingly complex. Diversity powers innovation and creativity.

Whilst diversity opens up a world of opportunities, if not handled delicately, it can lead to misunderstanding, and eventually a full-blown dispute.

Dispute Resolution at SIDREC

At SIDREC, we open our doors to monetary disputes relating to capital market products and services between investors and financial institutions. We receive complaints and enquiries from people from all walks of life. I believe our role at SIDREC is an important one to bridge the differences in perceptions and interpretations, neutralise conflicts and assist parties to arrive at an amicable resolution for the dispute. We seize every opportunity to transform a negative situation into a positive one. This, in essence, is the mediative approach we adopt at SIDREC.

We are often asked about our opinion on the chances of claimants winning their cases. A claimant would ask: "What should I do to win this case?"

For starters, SIDREC does not provide any legal advice. Imagine a squabble between two kids and a parent providing advice separately to each kid on how to outdo each other. The same parent may also need to referee this argument if the dispute persists. SIDREC is in the position of this imaginary parent and it is based on this very same rationale why SIDREC must preserve its fundamental principle of independence and impartiality when performing its role.

Secondly, every dispute is different. For instance, a dispute in relation to an alleged misrepresentation by an agent of a financial institution who purportedly talked an investor into transferring all his savings from fixed deposit to an investment that did not match the investor's risk appetite.

The investor and agent may have participated in the same conversation prior to the investment, but they may

share very different perspectives of the sales process. Why is that? The different levels of financial literacy, educational background, command of language and even the character of the individuals involved may have contributed to the different perspectives. This also extends to the understanding and interpretation of disclosures in offer documents in some instance.

Tips for a Successful Mediation: There are Two Sides to Every Story

- In any dispute, there is a tendency for a party to defend its viewpoint, and expect the other party to accept and embrace it. But there are always two sides to every story. As such, the ingredients for a successful mediation is the readiness to listen and understand what has happened from each other's point of view – acknowledging feelings and reconciling interests. When one is treated with decency and respect, they will usually reciprocate. At SIDREC, we have observed when parties engage in an open and constructive discussion during mediation, they typically learn something that significantly change the way they view the dispute. In doing so, parties can work together to explore options and agree on a solution acceptable to both.

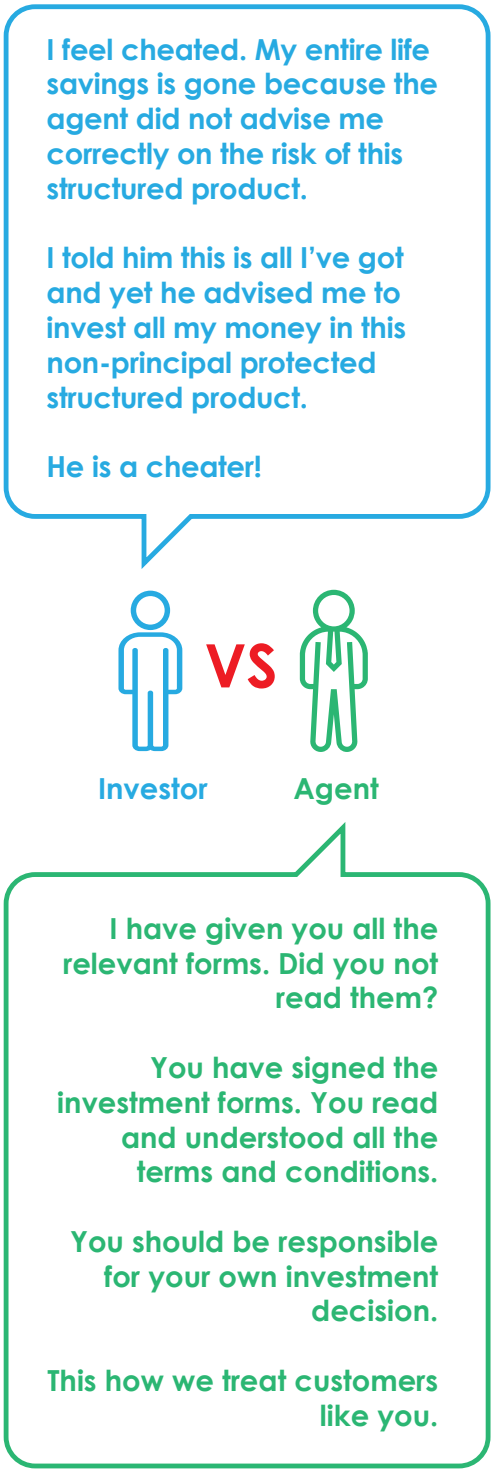
- Arguments about who is right and who is wrong is more often than not a futile exercise. Nothing gets settled. The issue lies not always with the truth, but with each individual's unique perceptions, interpretations, expectations and values. In mediation, discussions revolve around what matters most to each party and the primary aim is to fill the gap created by these unique attributes.

- Assigning blame is often counter-productive to a mediation process. Similar to finding the truth, blame does not resolve the dispute. At its worst, parties become defensive, stop listening to each other and stop being receptive to any discussion or suggestion. A dispute is rarely contributed by solely one party. Often times, a dispute is contributed by the actions or inactions of both parties.

  An involvement of a neutral mediator helps narrow down the issues that matters, facilitate the conversation and identify how each party contributed to the conflict. There is a fine line between assigning blame and understanding contributory factors; the latter seeks to explore why things went wrong and attempt to find a solution to move forward, thus bringing the matter to a close.

- It is a challenge to deliver difficult messages. How and when a message is delivered is as important as the message itself. Sometimes, the identity of the messenger is crucial. Imagine an investor who lost his entire life's savings from an investment in a risky structured product.

Let me share a possible scenario in a mediation session:



The illustrated imaginary conversation NEVER took place in any of SIDREC's mediation. But this could potentially be what the investor and agent are hearing in their heads during any heated arguments. Exchanging accusatory remarks is similar to assigning blame and is counterproductive and achieve no results.

For financial institutions, it is important to identify representatives with the right demeanour to attend a mediation session. In addition to knowing the facts of the case and regulatory requirements, it would be desirable for representatives to have good interpersonal skills and compassion. The agent alleged in the dispute should never be the spokesperson for the financial institution during a mediation because it can get personal and the mediation session may end up as a right-wrong and blame session.

Accessibility

Here are some interesting observations on the demographics of SIDREC's claimants. Male claimants have consistently outnumbered female claimants in the last three years, where they represented approximately 58% of total claims and enquiries received by SIDREC. Ethnic Chinese represented almost 50% of claimants in the last three years followed by ethnic Malays at 33%, ethnic Indians at 12% with the remaining 5% of unverifiable ethnicity.

SIDREC's response to diversity in demographics is a flexible and informal process which upholds our core principles at all times – independence, fairness and impartiality, accessibility, accountability, transparency and effectiveness. Its case managers, mediators and adjudicators are trained professionals with diverse experience and equipped with skills to understand how diversity may affect a dispute and they strive to overcome the diversity impasse to seek a common ground to amicably resolve the dispute.

> *"We received complaints and enquiries from people from all walks of life."*

> *"I believe our role at SIDREC is an important one to bridge the differences in perceptions and interpretations, neutralise conflicts and assist parties to arrive at an amicable resolution for the dispute."*

Example: One of SIDREC's recent cases involved an unfortunate claimant who has only a few years of formal education and was semi-fluent in Bahasa Malaysia. SIDREC's case manager communicated with the claimant in Mandarin and written correspondences were in Bahasa Malaysia. The mediation session was conducted in the Hokkien dialect and representatives from the financial institution spoke Bahasa Malaysia, English and various Chinese dialects interchangeably throughout the session. SIDREC had also approved the participation of an interpreter, which in turn encourages trust and understanding of the process.

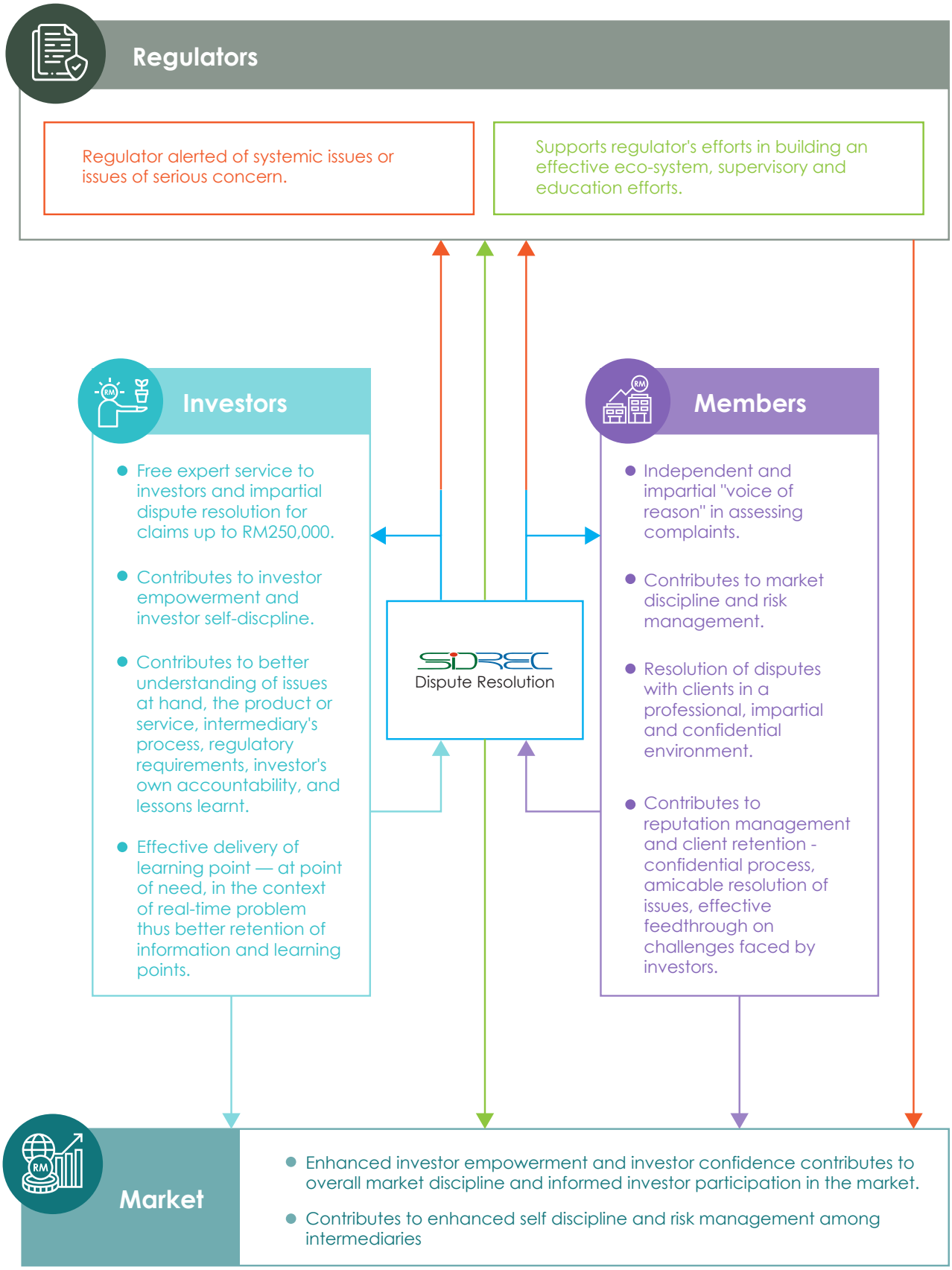
With all these arrangements in place, combined with an experienced mediator – parties understood their different perspectives, clarified the unclear, acknowledged why things went wrong and this resulted in a successful mediation.

Prevention is Best

That said, some disputes cannot be resolved through mediation despite best efforts by all parties. In SIDREC's dispute resolution process, the case would proceed to adjudication where an adjudicator would make a decision based on what is fair and reasonable in all circumstances of the claim.

It takes two hands to clap. And as mentioned earlier, a dispute is more often than not contributed by actions or inactions of both parties.

How SIDREC Benefits the Capital Market



> *SIDREC's case managers, mediators and adjudicators are trained professionals with diverse experience and equipped with skills to understand how diversity may affect a dispute and they strive to overcome the diversity impasse to seek a common ground to amicably resolve the dispute.*

Firstly, many disputes could have been prevented if investors exercise more care before making their investment decisions. A reasonable investor would be expected to undertake some form of risk-reward analysis guided by their own risk appetite before making the decision to invest. This includes understanding the salient features of the products, in particular, the risks associated with the product.

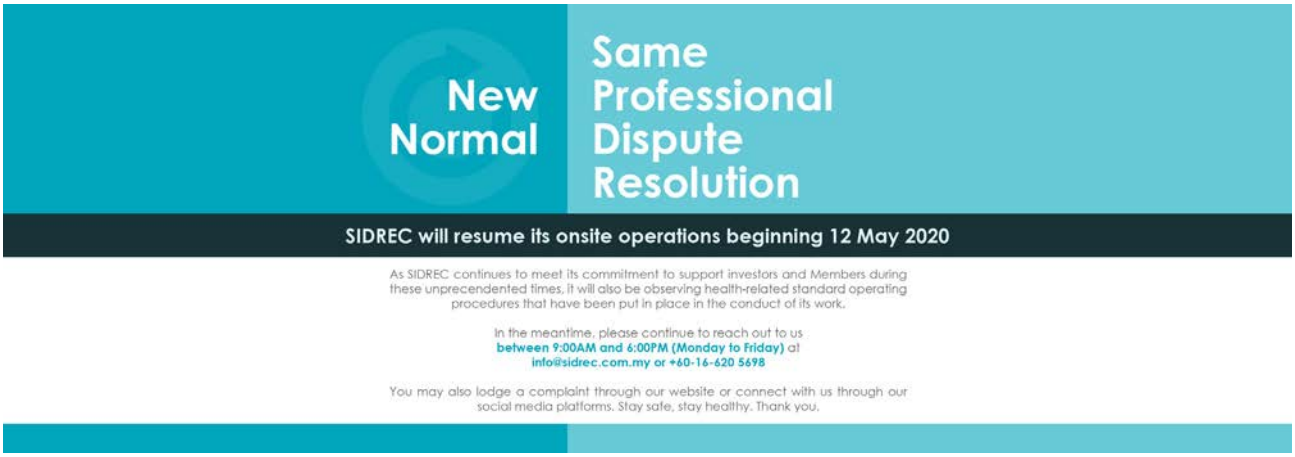
At SIDREC, ignorance is not bliss. In any dispute adjudicated by SIDREC, if liability is established on the part of the financial institution, contributory negligence by the investor will be taken into consideration. Has the claimant acted reasonably to protect his or her own interest? Was it a case of inability to understand and ask the relevant questions, wrong judgement or ignorance? It is unfortunate that at times it is an expensive lesson to investor.

Secondly, it is also necessary for financial institutions to have in place appropriate policies and procedures, adequate control measures for its sales process and ensure agents involved in sales are adequately trained in the investment products offered to properly advise investors. Sales agents must ensure that products sold or recommended are suitable, and that investors are clearly and fully informed of the nature and risks associated with these products.

The expectation that investors should be accountable for their investment decisions should be complemented by clear obligations on the part of the financial institutions to act honestly, fairly and professionally. Greater due diligence on the part of the financial institution is expected for retail and vulnerable investors. dr

Jelisa Tan is SIDREC's Senior Case Manager.

New Normal, Same Professional Dispute Resolution



Following the Government of Malaysia's announcement of the Recovery Movement Control Order (RMCO), SIDREC resumed onsite operations on 12 May 2020 with strict adherence to the required standard operating procedures (SOP) to keep COVID-19 at bay. Mediation sessions and adjudication hearings were held either fully virtually or on a hybrid basis i.e. they were held at SIDREC's physical office but in three separate rooms to ensure physical distancing. dr

SIDREC Shares Its Views on Dispute Resolution in the COVID-19 Era

SIDREC was invited to be a panelist for one of the Asian International Arbitration Centre's webinar series on 25 June 2020.

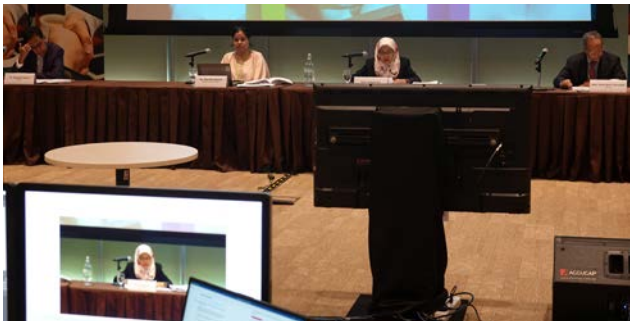
In the session entitled *Resolving Banking Disputes in the COVID-19 Era: Tailor-made Solutions*, Jelisa Tan who represented SIDREC, lent her views on how alternative dispute resolution functions as a mechanism to resolve disputes, particularly in the capital market. dr

MACC Visit to SIDREC

In its ongoing efforts to refine its policies to be in line with the National Anti-Corruption Plan (NACP), SIDREC had a meeting with Malaysian Anti-Corruption Commission (MACC) officials on 9 July 2020. The meeting included an in-depth discussion between SIDREC and MACC representatives with aims of fulfilling the requirements of the NACP to promote good governance in the company. dr

SIDREC's 10th Annual General Meeting

SIDREC successfully held its 10th Annual General Meeting (AGM) on 4 August 2020. For the first time in its decade-long history, the AGM was conducted virtually, in line with safety practices amid ongoing efforts to mitigate the spread of COVID-19. We would like to thank our Chairman, Board and Directors and Members for their tremendous support. dr



International Mediation Standards

SIDREC attended a focus group discussion organised by the Legal Affairs Division of the Prime Minister's Office (BHEUU) on 28 July 2020. The discussion was one of the many sessions hosted by BHEUU on Malaysia's ratification of the United Nations Convention on International Settlement Agreements Resulting from Mediation, popularly known as the Singapore Mediation Convention. SIDREC was invited as a stakeholder to contribute its views and concerns on the impact of the Convention on SIDREC's work. dr

Update on SIAC Members

SIDREC is pleased to announce that effective 1 September 2020, the SIDREC Appeals Committee (SIAC) shall comprise of the following members:

Dato' John Louis O'Hara
Chairman & Independent Member

Chee Fei Meng
Representative from Senior Management of the Securities Commission Malaysia

Mahadzir Azizan
Representative from SIDREC's Board of Director

Tan Sri Aziah Ali
Independent Member

Hasnah Omar
Industry Member

We help to resolve eligible disputes between retail investors and capital market service providers

Our service to the investor is free for claims of up to RM250,000

Disputes against any capital market service providers who are SIDREC members

Claimant is an individual investor or sole proprietor

Capital market products or services provided by SIDREC members or their representatives

RM250,000

Monetary claims of up to RM250,000

Visit sidrec.com.my to find out more on how we can help you

Securities Industry Dispute Resolution Center

Securities Industry Dispute Resolution Center (201001025669)
Unit A-9-1, Level 9, Tower A, Menara UOA Bangsar,
No. 5, Jalan Bangsar Utama 1, 59000 Kuala Lumpur, Malaysia

+60-3-2282 2280
+60-3-2282 3855
info@sidrec.com.my
sidrec.com.my