

**MEDIATION IN THE NEW DISPUTE
RESOLUTION LANDSCAPE; A CASE FOR THE
ENHANCEMENT OF ITS APPLICATION IN
MALAYSIA**

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**FACULTY OF LAW
UNIVERSITY OF MALAYA
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ABSTRACT

This dissertation supports the paradigm shift in the administration of the civil justice system that strives for disputes to be resolved without adjudication. Various measures have been introduced and adopted in many jurisdictions across the common law world to achieve this overriding objective. It cannot be denied that alternative dispute resolution processes play an important and fundamental part in furthering and attaining this principal goal of the new procedural philosophy.

The focal point of this dissertation is on the 'mediation' as an option for resolving disputes. Mediation, as a form of dispute resolution mechanism, is widely used to facilitate settlement of disagreements across many industries and nature of disputes. The mediation movement continues to gain momentum and popularity in more and more jurisdictions. The civil courts in these jurisdictions are beginning to utilize this mechanism to address and help overcome the tensions or recurrent challenges such as delay, costs and the backlog of cases in the civil justice system.

The central theme of this dissertation is the role of mediation in speeding up the disposal of cases, relieving backlog of cases in the civil courts and giving convenient disposals for the disputing parties. Mediation should be regarded and adopted as an imperative component of the dispute resolution landscape in Malaysia. The greater use of private mediation will reduce the volume of cases filed into the civil court and the structured approach of court annexed mediation will speed up the disposal of cases and reducing the number of backlog cases. Therefore the dissertation proposes mediation to be enhanced at these two levels; the private mediation or non court mediation and at the stage of court annexed mediation. This dissertation takes the position that the civil justice system in Malaysia should encourage, facilitate and even mandate the use of mediation in the dispute resolution process. While mediation may not be the sole means to alleviate the problems relating to the delay and backlog of cases, it is submitted that mediation plays a pivotal role in combating the issues encountered by the civil justice systems in most jurisdictions.

In this regard, this dissertation will analyse, the suitability of mediation in Malaysia, the problem of backlog cases in the civil court, the manner in which mediation is most effective and attractive for Malaysians and the effective application of private mediation and court annexed mediation in Malaysia. This dissertation will also scrutinize the use of mediation in other jurisdictions, particularly Singapore and Australia as the means to resolve disputes and to reduce backlog cases. We will draw from the experiences and lessons learnt from these jurisdictions; and offer suggestions for the adoption and/or reform of the mediation practice in Malaysia.

ABSTRAK

Kajian ini mendokong peningkatan model didalam pentadbiran sistem keadilan sivil yang menekankan penyelesaian pertikaian tanpa perbicaraan. Berbagai pendekatan telah diperkenalkan dan dipakai di dalam banyak negara untuk mencapai objektif ini. Sesungguhnya tidak dapat dinafikan bahawa proses pertikaian alternatif memainkan peranan yang penting dan asas untuk menjayakan pendekatan prosedur baru ini.

Fokus utama kajian ini adalah ke atas pemakaian 'mediasi' sebagai satu kaedah penyelesaian pertikaian. Mediasi telah diguna pakai secara meluas untuk menyelesaikan pertikaian dan mencapai kata sepakat didalam banyak industri dan untuk berbagai jenis pertikaian. Mediasi telah berkembang dan semakin mendapat tempat di beberapa negara. Mahkamah-mahkamah sivil di negara terbabit juga telah mula menggunakan mediasi sebagai satu mekanisme untuk penyelesaian masalah yang berbangkit di mahkamah terutamanya masalah kes-kes tertunggak, kelewatan penyelesaian kes dan kos mahkamah yang tinggi.

Tema utama kajian ini adalah peranan mediasi sebagai satu mekanisme untuk mempercepatkan penyelesaian dan mengurangkan kes-kes tertunggak di mahkamah sivil serta peranan mediasi dalam memberikan penyelesaian terbaik kepada pihak-pihak yang bertikai. Mediasi seharusnya dianggap dan digunapakai sebagai satu komponen untuk landskap penyelesaian pertikaian di Malaysia. Kajian ini mengutarakan bahawa sistem keadilan sivil di Malaysia seharusnya menggalakkan, memudahkan dan seterusnya mewajibkan pemakaian mediasi sebagai satu cara penyelesaian pertikaian. Pemakaian mediasi di luar mahkamah secara meluas akan mengurangkan jumlah kes yang difailkan ke mahkamah dan pendekatan mediasi yang berstruktur dan terancang di mahkamah pula akan mempercepatkan penyelesaian kes-kes dan seterusnya akan mengurangkan jumlah kes tertunggak. Untuk itu kajian ini mencadangkan penggunaan mediasi dipertingkatkan di ke dua peringkat ini; iaitu mediasi di luar mahkamah dan juga mediasi di dalam mahkamah. Walaupun mediasi adalah bukan satu-satunya cara untuk mengurangkan kes-kes tertunggak dan kelewatan di mahkamah, penggunaannya telah memberikan impak yang besar dalam menyelesaikan isu-isu berbangkit dengan sistem keadilan di beberapa negara, terutamanya dalam menangani masalah kes-kes tertunggak.

Untuk itu tesis ini akan mengkaji kesesuaian pemakaian mediasi di Malaysia, permasalahan kes-kes tertunggak di mahkamah sivil, bentuk mediasi yang paling efektif and menarik kepada penduduk Malaysia dan juga pemakaian mediasi di luar mahkamah dan mediasi didalam mahkamah yang paling efektif. Selain itu kajian ini juga akan meneliti penggunaan mediasi di beberapa negara terutamanya di Singapura dan Australia sebagai satu mekanisme penyelesaian pertikaian dan pengurangan kes di tertunggak di mahkamah. Pengalaman dan pengajaran dari negara-negara ini akan di jadikan panduan dan cadangan untuk satu reformasi pemakaian mediasi di Malaysia.

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UK Civil Procedure Rules 1998
UK Civil Procedure Rules 1998
U.K. Civil Procedure Rules
Uniform Civil Procedure Rules (1999) (Qld)

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ADRA	Administrative Dispute Resolution Act
ACCC	Australian Competition and Consumer Commission
ADC	Australasian Dispute Centre
ACDC	Australian Commercial Dispute Centre
ACDC	Australian Commercial Disputes Centre
ACICA	Australian Centre for International Commercial Arbitration
ADRA	Australian Dispute Resolution Association
AG	Attorney General
AJAC	Access to Justice Advisory Committee
AOA	Articles of Association
CASE	Consumer Association of Singapore
CEDR	The Center for Dispute Resolution
CFMS	Case Flow Management System
CIDB	Construction Industry Development Board
CJC	Community Justice Centre
CJRA	Civil Justice Reform Act
CMCs	Community Mediation Centres
CMU	Community Mediation Unit
CPR	Civil Procedure Rules
DCSV	Dispute Settlement Centre, Victoria
EMCC	Eagles Mediation and Counselling Centre (Singapore)
FMB	Financial Mediation Bureau
FRCs	Family Relationship Centres
HBT	The Housing Buyers Tribunal
IAMA	Institute of Arbitrators and Mediators Australia
JKSM	Jabatan Kehakiman Syariah Malaysia
KLRCA	Kuala Lumpur Regional Centre for Arbitration
KPI	Key Performance Index
LEADR	Lawyers Engaged in Alternative Dispute Resolution
MMC	Malaysian Mediation Centre
MOU	Memorandum of Understanding
MSB	Mediator Standards Body
NADRAC	National Alternative Dispute Resolution Council (Australia)
NCC	New Commercial Court
NCvC	New Civil Court
NCSS	National Council of Social Service (Singapore)
NMAC	National Mediator Accreditation Committee
NMAS	National Mediator Accreditation System (Australia)
NSW	New South Wales
PDRC	Primary Dispute Resolution Centre of the Subordinate of Singapore.
PDR	Primary Dispute Resolution
PNG	Papua New Guinea
RAV	Relationships Australia, Victoria
RHC	Rules of High Court

RMAB	Recognised Mediator Accreditation Body
SAL	Singapore Academy of Law
SIAC	Singapore International Arbitration Centre
SIDREC	Securities Industries Dispute Resolution Centre
SMC	Singapore Mediation Centre
TCM	Tribunal for Consumer Claim
UK	United Kingdom
UNCITRAL	United Nations Commission on the International Trade Law
US	United States
VCAT	Victoria the Civil and Administrative Tribunal

CHAPTER 1

INTRODUCTION

1.1 Background of Research

The undue delays, rising costs and demanding technicalities of the adversarial system and the animosity it generates between the contending litigants have been the main factors which facilitated the Alternative Dispute Resolution (ADR), in particular, mediation to emerge.¹ The problem with the court system of most countries is that it is too legalistic, bureaucratic and costly. Thus, due to these procedural and technical difficulties, the disputants are made to seek other options to resolve their litigation issues.

Civil justice reforms in many countries have introduced alternative dispute resolution processes, particularly mediation, as part of the reform with the objective to achieve for a 'just, speedy and inexpensive resolutions' in civil cases. In the United States, mediation, was considered a means of increasing access to justice since 1960. Its potential to reduce the caseloads led to further development whereby in the late 1970s it became a part of a larger reform movement directed to resolve the internal problems of the courts. The Civil Justice Reform Act was then introduced in 1990 to authorize court annexed mediation². As of 1996, more than half of federal courts have some form of mediation programme. The final report of the CJRA committee in

¹ Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia*, (Kuala Lumpur: IIUM, 2002), 2.

² See Boule, Laurence and Nestic, Miryana, *Mediation, Principles, Process, Practise*. (London; Butterworths 2001), 225.

1997, indicated the ADR component particularly mediation was a success and Rules committee supported the continued use of appropriate forms of ADR. The Dispute Resolution Act was then introduced in 1998 requiring every federal court to consider mediation specifically³.

The civil justice reform in the United Kingdom introduced by Lord Woolf amended the UK Civil Procedure Rules 1998 to give powers to the judges at the case management stage to give order for mediation.⁴ The failure of parties to mediate will lead to cost penalties.⁵ Lord Woolf also make it compulsory for lawyers to advise clients the benefits of mediation.⁶

The approach by the United Kingdom has been followed by Hong Kong whereby unreasonable refusal of a party to mediate will risk adverse cost orders. Civil Justice Reform took effect in Hong Kong on 2 April 2009 with the objective of increasing cost effectiveness and facilitating dispute settlement. Under the Civil Justice Reform, lawyers encourage parties to alternative dispute resolution (ADR) procedure if

³ See Spencer, David and Brogan, Michael, *Mediation Law and Practice*, (New York:Cambridge University Press 2006), at 29.

⁴ See Part 26.4 of the CPR. Rule 26.4(1) provides that “a party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle by alternative dispute resolution or other means

⁵ See Part 44 of the CPR. Rule 44.3(4) provides; “In deciding what order (if any) to make about cost, the court must have regard to all the circumstances, including: a) conduct of all the parties, b)whether a party has succeeded on part of his case, even if he has not been wholly successful, and c) any payment into court or admissible offer to settle made by a party which is drawn to the court attention.

⁶ See The Nationwide Academy for Dispute Resolution (UK) Ltd., *The Spread of ADR from the US to the Global Community*, 17 April 2006, <http://www.Nadr.co.uk/background/spread.php>.,

appropriate in the hope of leading to an amicable settlement.⁷ Practice Direction 31 on mediation was issued effective on 1 January 2010.

In Australia, the application is more advanced where court related ADR exists in every court and tribunal. For instance, in 1991, the Courts (Mediation and Arbitration) Act was introduced, facilitating court-sponsored mediation and arbitration in the courts of federal jurisdiction, namely the Federal Court and Family Court. The Court has reported that between 1994-95 and 1998-99 an average of 220 matters were referred to mediation each year, with 347 matters to mediation in 1998-1999.⁸

In Singapore, to improve the justice delivery system, major changes have been implemented in the civil procedural laws to encourage litigants to settle their disputes without litigation. These changes have eventually made way for the formal introduction of mediation within the judicial system.

The introduction of mediation in the reforms was reported to have resolved the internal problems in the court system. The backlogged cases were reduced and the courts managed to speed up the disposal of cases. In the UK, US and Singapore for example, mediation reduced the number of cases reaching the trial stage by 90%.⁹

⁷ See Tanner De Witt solicitors, *An Effective Way of Resolving Disputes in Hong Kong*, 7 May 2012, <http://www.tannerdewitt.com/practice-areas/mediation.php>.

⁸ Peter Megens, *The Satisfaction of Litigation*, 21 June 2006, <http://www.mediate.com/articles/parselle10.cfm>

⁹ Human Rights Commission of Malaysia, *Report; Follow-Up Forums on the Right to an Expedient and Fair Trial, 10 & 11 March 2006*, 21 June 2006, www.suhakam.org.my/c/document_library/get_file

The application is more accepted globally particularly for civil law countries. Mediation is perceived to be a mechanism to speed up disposal of cases with expeditious, timely and cost effective.

Beside the introduction of mediation in the court system, non court mediation or private mediation was also introduced and developed. Started in the United States, private mediation has been accepted globally. Community mediation centres, family mediation centres, and various dispute settlement centres are established in the UK, Australia, Hong Kong, New Zealand, Singapore and many other countries to accommodate the needs for the settlement of disputes out of court. In Australia, for instance, T Sourdin commented ¹⁰ that most disputes in Australia were resolved before entry into the court and the tribunal system. The number of cases that end up in the litigation system is small as compared to the overall disputes in the Australian society. Even issues filed within the litigation system are also resolved by the use of ADR particularly mediation. In Singapore, The Chief Justice of Singapore, Chan Sek Keong commented¹¹ that mediation and Alternative Dispute Resolution (ADR) in Singapore has moved fast and is no longer viewed as “alternatives”.

The referral of cases to the dispute settlement centres gave an impact to the number of cases filed into the court system. It reduces the number of backlog and speeds up the disposal of cases. Furthermore, certain types of cases are seen to be better

¹⁰ See Sourdin, Tania, *Alternative Dispute Resolution*, (New South Wales: LawBook Co, 2002, 81-82)

¹¹ Chan Sek Keong, *Launch of the SMU-Centre for Dispute Resolution*, Singapore, 16 April 2009, <http://app.supremecourt.gov.sg/default.aspx?=2841>

resolved through mediation rather than adjudicated or litigated. In family mediation for example, the settlement or agreement reached is not only responsive to the needs of each party, but also the needs of their children, and the continuing relationship as parents can also be enhanced. Mediations are conducted in a calm, constructive and confidential setting, which is a major consideration for parties involved in a family dispute.¹²

In Malaysia, there have been an increasing number of cases brought before the civil courts. The Annual Report of 2006/2007 shows that from the year 2001 to 2007 there was an increase of more than 20,000 civil cases filed yearly at the Magistrates Court alone. As for the Sessions Court, there was an increase of about 10,000 cases yearly,¹³ and for the High Court, the new civil cases being filed is about 5,000 cases. From the year 2001 to 2008, the settlement rate for pending cases was very slow¹⁴ and this has caused the civil courts to face a serious problem of backlog.¹ As of July 2006, there were 319,862 civil cases pending at the High Courts and the Subordinate Courts in Malaysia. These cases were all registered as from 1 January, 2000.¹⁵ As at December 2008, the backlog or cases pending in the High Court and the Subordinate Court have increased to 344,130¹⁶.

¹² Department of Justice, The Government of Hong Kong, Special Administrative Region, *Report of the Working Group on Mediation*, February 2010, www.doj.gov.hk/eng/public/mediation.htm, 12.

¹³ Only in the year 2004, there was an increase of 6,770. The statistics shows a gradual increase yearly and no decrease of cases recorded for the new cases registered in these particular years.

¹⁵ The Annual Report of Subordinate Court and Superior Court, 2006/2007.

¹⁶ Zaki Azmi, *Overcoming Case Backlogs, The Malaysian Experience*, Asia Pacific Court Conference (Singapore; , 4-8 October 2010)

Due to this perennial problem,¹⁷ the former Chief Justice, the Right Honourable Tun Zaki Azmi initiated aggressive motions¹⁸ to expedite the disposal of backlog cases. As of June 2010, two years after the introduction of such bold initiative to reduce the backlog of cases at the High Court and the Subordinate Court, the number of backlog cases were reduced to 187, 394 cases. There was a reduction of 52.8% at the High Court, 36.3% at the Session Court and 47.4% at the Magistrates Court,¹⁹ respectively.

Undoubtedly, the concerted measures taken by the judiciary was successful. Despite the courts' bold efforts to tackle the problem it still remains obvious that cases are not being cleared as fast as new ones are being registered. The backlog of cases is still pending in our court system; and if society becomes more litigious, the problem will be forever unresolved. Furthermore, the public²⁰ are more conscious of their rights and demands expeditious delivery of justice. It is also reported that there is an increasing number of community disputes, family disputes and commercial disputes yearly. For community disputes the cases may become worst if the parties are from different races as it may lead to instability of social integration in the society. The statistics²¹ of Royal Police Department shows that there are an increasing number of multiracial disputes yearly.

¹⁷ As stated by former Chief Justice, backlogs and delays of disposal of cases caused injustice to a lot of innocent parties.

¹⁸ Several measures have been introduced; file operation, judge specialisation, case tracking, mediation, application of electronic processes, introduction of new commercial court and new civil court.

¹⁹ Zaki Azmi, *Ibid*.

²⁰ Refers to Malaysian society.

²¹ See further illustration in Chapter 4 of the thesis.

For family disputes, the rate of divorce cases is also increasing. In the year 2009 alone, there were 27,116 of divorce registered for Muslim marriage. As it increased the number of cases filed into the court system, the separation also gave an impact on the interest of the children. In this regard, if cases are mediated the interest of the children will be more protected and preserved. The parents are given opportunity to negotiate the best for their children, and as parties are more content with their agreement, the compliance of the terms agreed is expected.

The high volume of community disputes, family disputes and commercial dispute will only increase the cases filed into court system. On this basis, the researcher is in the opinion that mediation practice must be seriously introduced at all levels of the society and be further strengthened in its implementation as such initiative can reduce the volume of cases filed into the court system. Further, the application of court annexed mediation should also be improved as the structured approach of the application may help the court to dispose cases in a speedy and judicious manner.

At the present time, the Judiciary has introduced Practice Direction 5/ 2010 in August 2010 to facilitate and encourage the practice of court annexed mediation. The issuance of the said Practice Direction can be seen as an initial impetus for mediation to be acknowledged by the disputants and the legal fraternity. However, since the application is still at its infancy, and yet to gain confidence of the disputant parties and the lawyers, the experience of other countries will also be looked into for consideration of some further improvements.

The research will focus on the application of private mediation or non-court mediation and court annexed mediation, i.e., mediation before and after cases are filed in court. It is noteworthy that the greater use of private mediation in the United States, Australia, Singapore and other countries have registered high rate of reduction of cases filed into the court system. Even if cases are filed into the court, only a few numbers of cases proceed to adjudication. The application of court annexed mediation has resulted in the increase on the resolution of cases and reduces the number of backlogged cases. As a result, it has contributed to the efficiency in the civil justice delivery system.

Mediation has gained momentum, but has yet to gain popularity in Malaysia. In 1999, the Bar Council set up the Malaysian Mediation Centre (MMC) with two objectives: (1.) to promote mediation as a means of alternative dispute resolution, and (2.) to provide a comprehensive range of mediation services for civil disputes of all kinds.²² However, at present the number of cases referred to the MMC is very few. It is commented²³ that there are many mediators as compared to the number of cases referred to at the centre.

When compared to other countries, for example, Singapore and Australia, the movement of mediation in Malaysia is considered to be inert and unpromising. Most Malaysians are still unaware of this new option. Therefore, there is a need for urgent

²² PG.Lim and Grace Xavier, *Dispute Resolutions in Malaysia*, (The Hague, The Netherlands: Kluwer Law International, 2002, 223).

²³ Unstructured interview with Puan Hendon Mohamed, Mediator Malaysian Mediation Centre after the Mediation Conference on 25th October 2010.at AG Chambers Putrajaya.

pro-active actions and effective initiatives to adopt mediation in resolving civil disputes. This research examines what would be the best ways to apply mediation so as to provide the best mechanism to resolve civil disputes in Malaysia.

1.2 Objectives of Research

The research objectives are as follows:

1. To study the development of mediation and the aptness of its application in Malaysia and to propose whether mediation is suitable to be adopted as a culture to resolve disputes in the Malaysian society.
2. To study the development of civil court and the backlog of cases in Malaysia and the role of mediation in civil justice reform in other countries in speeding up the disposal of cases.
3. To analyse the mediation practices of certain institutions in Malaysia, their approaches, procedures and governing rules that are most effective and attractive for Malaysians.
4. To study the application of private mediation or non-court mediation in other countries and to propose an effective application of private mediation in Malaysia.

5. To analyse the application of court annexed mediation in Malaysia and to propose recommendations for its enhancement. The application of court annexed mediation in other countries is therefore referred to and examined.
6. To study the mediation movements and developments of mediation in Australia and Singapore and thereafter, propose for a reform to the mediation initiatives in Malaysia.

1.3 Outline of Chapters

In order to answer the above objectives, the study is organized into seven chapters. Chapter One: Introduction, discusses the issues pertaining to the study; Chapter Two: Historical Background of Mediation, the Court System and Backlog of Cases in Malaysia, discusses the development of mediation globally and in Malaysia particularly. The Chapter also discusses the reception of English legal system that introduced the court system in Malaysia, and also the problem of backlog faced by the civil courts in Malaysia. Civil Justice Reform in other countries that introduced mediation as part of the reform will also be looked into.

Chapter Three: The Application of Mediation by Institutions in Malaysia discusses the manner in which mediation is most effective and attracted for Malaysians. In this regard, the approaches, procedures, governing rules and effectiveness of mediation

adopted by the institutions are analysed. The analyses also suggest some improvements of court annexed mediation in Malaysia.

Chapter Four: Private Mediation or Non-Court Mediation discusses the experience of other countries in the application of private mediation, the relevant and success of the application in resolving civil disputes and how such precedent could enhance of our private mediation initiatives. Malaysia lagged behind in the application, therefore some guidelines for the improvements are needed.

Chapter Five: Mediation after Cases Filed into Court or Court-.Annexed Mediation, discuss the application of court annexed mediation and its need to enhance the access of justice. The chapter also analyses the application of court annexed mediation in Malaysia and in what manner it could be enhanced.

Chapter 6: The Mediation Movements in Australia and Singapore discusses the precedents for the development of mediation in Malaysia. Australia and Singapore are chosen as Singapore has a similar cultural and historical background with Malaysia, whereas Australia has a very fast and rapid movement and development of mediation that should be looked into.

The last Chapter, Chapter 7: Conclusions and Recommendations, presents the findings of the study with recommendations and suggestions for enhancement of mediation practice in Malaysia.

1.4 Hypothesis

Effective use of mediation can prevent disputes from entering into the court system , and alternatively it can bring litigation to an early end.

1.5 Statement of Problem

The Annual Report ²⁴ shows that from the year 2000 to the year 2008 our civil courts were having serious problems of backlog of case. Due to this perennial problem, the Judiciary has taken determined measures in 2008 to resolve the problems. The statistics of June 2010 showed that for civil cases there was a reduction of 52% at the High Courts, 36.3% at the Sessions Courts and 47.4% at the Magistrates Courts. Although, there has been some encouraging achievement and despite the valiant efforts and bold steps taken by the Judiciary, the backlog of cases is still beleaguering our court system. Undoubtedly, the delays and the backlog of cases defeat the main purpose of the civil justice system. Hence, the research attempts to expound how mediation can be one of the alternative mechanisms to speed up the disposal of cases in the Malaysian's courts system.

We have to note that there has been an increased in the number of cases filed yearly in our civil court.²⁵ Nowadays, Malaysians are more conscious of their legal rights and obligations and thus, they become more litigious. This attitude has resulted in the increase of cases filed yearly in our civil court. If this trend continues the slow

²⁴ The Annual Report of Subordinate Court and the Superior Court, 2006/2007.

²⁵ As discussed earlier in the 'Background of the Research'

disposal of cases in the court system cannot be resolved. The former Chief Justice Tan Sri Fairuz Sheikh Abdul Halim²⁶ commented that most of the delayed cases were mainly those which involved issues on the technicalities of procedure.

It is suggested that if parties have better understanding of the mediation process and embrace such dispute resolution, it will definitely decrease the amount of cases filed into the court system and thus, reduce the number of backlog of cases and speed up the disposal of cases.

Further, the judicial process has its limitations. Once a case is in court, it is the judges and lawyers who are the major participants while the affected parties often sit on the sidelines. The judicial approach does not consider the affected party's feeling and allows little room for other values, such as making an apology to the aggrieved victim or substitute employment for the injured worker.²⁷

As stated earlier, there are an increasing number of community disputes recorded yearly. The cases may become worst if the parties are from different races as it may lead to instability of social integration in the society. The statistics of Royal Police Department shows that there are an increasing number of multiracial disputes yearly²⁸. In this regard, the amicable settlement introduced in mediation is seen to be the best mode for resolving community disputes. The parties will gain satisfaction with the agreed settlement thus preserve the harmony in the society.

²⁶ Speech at the National Judicial Officers Conference (Kuala Lumpur:2003)

²⁷ M. Nolan-Haley, Jacqueline, *Alternative Dispute Resolution*, (USA;St. Paul, Minn, 2001, 9-10)

²⁸ See further discussion in Chapter 4 of the thesis.

Besides the community disputes, the rate of divorce cases is also increasing, the year 2009, recorded 27,116 of divorce registered for muslim marriage. The high volume of family disputes will undoubtedly increase the cases filed in the Shariah Court as well as in the civil court²⁹. Further, the separation will give an impact on the interest of children. In this regard, if cases are mediated, the interest of the children will be more protected and preserved as the parents are given opportunity to negotiate the best for their children.

In Australia, Sourdin³⁰ commented that most disputes are resolved by mandatory referred mediation before they enter into litigation system. The ADR in particular as a form of mediation is used at all levels of Australian society. Even within the litigation system, the traditional trial processes account for the determination of a relatively small number of disputes. In another instance, in Singapore, the Chief Justice Chan Sek Keong stated that ADR particularly mediation is no more viewed as alternatives, but is viewed as the same status as litigation. Furthermore, mediation has also been introduced as part of the judicial system in the dispensation of an efficient justice. Mediation is used as a mechanism to ensure the efficient running of civil justice system.

At present, most Malaysians are not fully aware that there are options to settle their disputes. Most of the disputants do not know that they can go for mediation to resolve their problems. In today's environment, most lawyers neither understand nor perform

²⁹ For non-muslim marriage.

³⁰ T. Sourdin, *loc.cit.*

mediation to a great extent. They do not seem to show keen interest in this area.³¹ A recent survey by the Malaysian Bar on the subject of mediation conducted by Datuk William Lau and Prof. Archie Zariski gained a response rate of less than one percent.³² The survey revealed that interest of lawyers in the area of mediation is still low.

In order for mediation to succeed it is suggested that the application of mediation is enhanced by both the private mediation as well as the court annexed mediation. The experience of other countries shows that the effective application of private mediation has decreased the volume of cases filed into the court system. Moreover the application of court annexed mediation managed to speed up the disposal of cases in the court system.

The researcher opines that in-depth study need to be undertaken over the approaches adopted, the methods employed and the problems confronted, so as to actualize mediation as another option or another way to settle disputes. The public should also be made aware of this mechanism and lawyers need to be educated on this method.

In this regard, this research will study how private mediation could be generated and applied effectively and how court annexed mediation could be enhanced to expedite

³¹ North, John, Court Annexed Mediation in Australia – An Overview, *Malaysian Law Conference* (Kuala Lumpur: 17 May 2005) 11 May 2006, <http://www.malaysianbar.org.my/content/view/2053/27>

³² Zariski, Archie, “Lawyers’ Resistance to Mediation: Evolution and Application”, *2nd AMA Conference, Rediscovering Mediation in 21st Century*, (Kuala Lumpur: 24-25 Feb 2011)

the settlement and disposal of cases. The fast movement of mediation in Singapore and Australia is viewed so as to suggest some precedents for reforms in Malaysia.

1.6 Definition of Term

The Oxford Dictionary defines “mediation” as “intervention” between two persons or groups for purpose of reconciling them.³³

For the purpose of this research “mediation” is termed as a decision making process in which the disputants are assisted by a third party, the mediator, who attempts to improve the process of decision making and to assist the parties to reach an outcome which each of them can assent.³⁴ The mediator helps the disputants to find solutions to their conflict that make more sense to them rather than continuing with their dispute. The mediator helps them to search for common ground and find yet creative realistic ways to resolve their issues.³⁵

1.7 Literature Review

Throughout the world, mediation is fast becoming a popular method of settling dispute. The development of mediation in many societies in the late twentieth century was part of a broader trend affecting law and other disciplines. Developments in ADR particularly mediation have been influenced by reactions against litigation and

³³ The Oxford Dictionary of Current English, (Oxford University Press), 456.

³⁴ Boulle L., Teh, Hwee Hwee, *Mediation*, (Asia: Butterworths, 2000) 3.

³⁵ J Stitt, Allan, *Mediation a Practical Guide*, (Great Britain: Cavendish Publishing, 2004) 1.

demand for additional processes which are quicker, cheaper and otherwise more appropriate.³⁶

At present, very little literature on mediation is available in the Malaysian context. Syed Khalid Rashid, in his book entitled “Alternative Dispute Resolution in Malaysia”³⁷ gives a brief picture on the application of mediation in Malaysia. Lim and Xavier in “Dispute Resolution in Malaysia”³⁸ also describe the development of mediation in a very cursory manner. Thus, the researcher opines that the absence of vast volumes of literature on the application of mediation locally has in some way affected the development of the application in Malaysia.

The general development of traditional mediation and modern mediation can be found in the work of Spencer and Brogan,³⁹ Boulle and Nestic,⁴⁰ Yuan⁴¹ and many others. These authors share similar views that most indigenous populations in any countries have practised negotiation and consultation as their mode of resolving disputes. However, the approaches adopted depend greatly on the culture of each tribe. Supporting this view is Raihanah⁴² who commented that sulh or mediation is practised by most of the Muslim world before the introduction of modern mediation

³⁶ Boulle, Laurence and Nestic, Miryana *Mediation*, (London: Butterworths, 2001,) 76

³⁷ Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia*, (Kuala Lumpur: IIUM, 2000)

³⁸ P.G.Lim, Xavier, Grace, Malaysia, *Dispute Resolution in Asia*, (The Netherlands: Kluwer Law International, 2002)

³⁹ Spencer, David and Brogan, Michael *Mediation Law and Practice*, (New York: Cambridge University, Press 2006).

⁴⁰ Boulle L., and Nestic M. *Mediation, Principles, Process, Practice*, (London: Butterworths, 2001).

⁴¹ Lim, Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia, 1997).

⁴² Raihanah Azhari, *Sulh Dalam Kes Kekeluargaan Islam*, (Kuala Lumpur; Penerbit Universiti Malaya, 2008)

by the United States in the early 1960s. Nonetheless, these authors also agree that negotiation in the early days was not properly structured, codified or legalised.

Since the application of mediation is considered new in Malaysia, it is difficult to find a large collection of articles or books that discuss the application, its suitability and the development in Malaysia. Therefore, it is significant for the researcher to clarify the practicality of this new option in Malaysia. Any writings on the development of mediation in Malaysia are rather scarce. Some of the writers that have commented on the concept of dispute resolution in Malaysia include, *inter alia*, R.H. Hickling,⁴³ Wu Min Aun⁴⁴, Wan Arfah, Rami Bulan⁴⁵ and Lee Mei Pheng.⁴⁶ Their writings seem to be noteworthy in the context of the historical backgrounds of dispute resolutions, the development of court system and the reception of English legal system in Malaysia.

As for collections of articles and books on ‘Sulh’ and its application in Malaysia, the work of Raihanah⁴⁷, Ramizah⁴⁸ and Aziah⁴⁹ are referred to. Aziah⁴⁹ in “Sulh” provides a narration on the application of sulh or mediation for Muslim in the Shariah Court. She clarified the practice as becoming popular and is reported to have reduced the backlog of cases in the Shariah Court in Malaysia. The meaning of sulh is wide

⁴³ R H Hickling, *Malaysian Law*, (Kuala Lumpur :Professional (Law) Books Publishers, 1987)

⁴⁴ Wu, Min Aun, *The Malaysian Legal System*, (Kuala Lumpur: Addison Wesley Longman Sdn Bhd., 1992).

⁴⁵ Wan Arfah and Rami Bulan, *An Introduction to the Malaysian Legal System*, (Kuala Lumpur: Oxford Fajar Sdn Bhd., 2003)

⁴⁶ Lee Mei Pheng, *General Principles of Malaysian Law*, (Kuala Lumpur: Penerbit Fajar Bakti Sdn Bhd).

⁴⁷ See Raihanah, *loc.cit.*.

⁴⁸ Ramizah Wan Muhammad, “Sulh (Mediation)in the Malaysian Shariah Courts,” *Mediation in Malaysia the Law and Practice*. Ed. Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed, (Lexis Nexis. 2010).

⁴⁹ Noor Aziah Mohd Awal, “Sulh as an alternative Dispute Resolution in Malaysia for Muslims”, *The 3rd ASLI Conference* (China., 25-26 May 2006).

enough to include every mode of amicable settlement: negotiation, mediation, compromise and conciliation.⁵⁰ It is a developing concept in the Syariah Courts system and has benefited many Muslims, particularly, women in their application for ancillary relief before or after divorce. Despite the prohibition to hear divorce application, many sulh sessions enable parties to reach agreement for mutual agreement divorce, which is quick and short. The informal atmosphere has certainly created a better environment for parties and as such is able to settle their conflicts amicably. The study also made reference to the application when necessary.

As for determining the issue of backlog of cases in civil court, The Annual Report⁵¹ from the website of the judiciary is referred to. The article⁵² on the backlog of cases in the website of the Office of Sabah and Sarawak gives an illustration on the meaning of backlog of cases in Malaysia. The discussions on the problem of backlog were derived from the statistics given in the Annual Report 2006/2007, the testimony of the former Chief Justice, the Right Honourable Tun Zaki Azmi⁵³ in overcoming the problem, the statement of the Minister in the Prime Minister Department, Datuk Seri Mohammad Nazri Abdul Aziz⁵⁴ and also the speech of the former Chief Justice, the Right Honourable Tun Dato Sri Ahmad Fairuz in the 4th Asia Pacific Conference

⁵⁰ Sulh is an alternative dispute resolution for Muslims in Malaysia. It is within the court system but operate outside the trial, i.e a trial will only be necessary if resolution cannot be agreed upon

⁵¹ The Annual Report of Subordinate Court 2006/2007 and The Annual Report of Superior Court 2006/2007. (<http://www.kehakiman.gov.my>)

⁵² <http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/sabah/...>

⁵³ Zaki Azmi, *Overcoming Case Backlogs, The Malaysian Experience*, Asia Pacific Court Conference, 4-8 October 2010, Singapore

⁵⁴ Mohammad Nazri Abdul Aziz, "Measures in place to reduce backlog of cases". *The Star Online*, Monday, November 22, 2010, <http://www.thestar.com.my/>

on Contemporary Mediation in Asia Pacific.⁵⁵ The comments by YA Justice Datuk Wong Dak Wah⁵⁶ also seems to be relevant. In analyzing this issue the views from members of the Bar were also consulted, for example, the comments by the President of Penang Bar,⁵⁷ Mr. Mureli Navaratnam, in a Memorandum⁵⁸ to the former Right Honourable Chief Justice⁵⁹ to revise the approach commented that the application of KPI have forced the court to be the very place for a speedy justice where the sanctity and quality of justice is sacrificed. The view by Steven Rares⁶⁰ on the meaning of quality judiciary seems to suggest that the KPI approach adopted by the judiciary is not suitable to be adopted. The recent development witnessed that the judiciary has reviewed and modified the approach.

The analysis on the practice of mediation by some of the institutions in Malaysia is reviewed thorough the information provided in the website from each of the institutions, the amendment to the Acts, and the new guidelines issued to monitor the application. The statistics from some of the institutions are also sought to determine

⁵⁵ The conference was held In Kuala Lumpur on 17th-18th July 2006.

⁵⁶ David Wong Dak Wah, "Court Annexed Mediation," 2nd *AMA Conferece, Rediscovering Mediation in 21st Century*, (Kuala Lumpur, 24-25 February 2011).

⁵⁷ Mureli Navaratnam, "When KPI enter the courts", *The Malaysian Insider*, 4 Nov 2010, , <http://www.TheMalaysianinsider.com/breakingviews/artcle/when-kpis-enter-the> court retrieved on 4/1/2011

⁵⁸ The memorandum was sent to the Right Honourable YA Chief Justice Tun Zaki Azmi to revise the approach adopted by the judiciary in speeding up the disposal of cases in civil courts. Members of the Bar agree that tougher measures had to be taken to get the judicial system moving at a nuch a faster speed, but they regret that the emphasis has been solely on the speedy disposal of cases; all other important features to create a good judiciary, namely the emphasis on the integrity of judges and judicial officers; having sufficient time for hearing and disposal of trials and applications; giving due considerations of evidence and arguments and well reasoned written judgments, which all the crucial for the development of the law, have all been unceremoniously sacrificed in the process. See Mureli Navaratnam, *loc.cit.*

⁵⁹ The Right Honourable Tun Datuk Seri Zaki Azmi

⁶⁰ Rares, Steven "What is Quality Judiciary", *Asia Pacific Courts Conference*, (Singapore,4-6 October 2010).

the effectiveness. Semi structured interviews with some of the institutions were also conducted.

The practicality of private mediation particularly the community mediation and family mediation is sought from the work of Yuan,⁶¹ Boule and Hwee,⁶² Beckett, Curtis, Jignan, C Patrick and Wells edited by Liebmann,⁶³ Yuan and Leng,⁶⁴ R. Singer,⁶⁵ Lim, Lim and Tan,⁶⁶ M. Moore and many others. The authors share the same view that mediation has a good deal to do with a desire to live in an improved community as it provide communal return, providing people with a sense of belonging, recognition and acceptance as being part of the community. High costs and inordinate delays coupled with lengthy and complex procedures indicate that court litigation is not so suitable for community and family disputes. Maintaining harmony and peaceful relationship should be of the main essence in dissolving these types of disputes. The promotion of mediation should therefore develop the community into a more gracious and civic minded society. It is without doubt that the application will also reduce the bulk of cases pending trials in the court. However, the focus studies of the abovementioned authors are of the application in the United Kingdom, Australia and Singapore. In order to bridge the gap as to the suitability of

⁶¹ Lim, Lan Yuan, *loc.cit.*

⁶² Laurence Boule, The Hwee Hwee, *Mediation, Principle, Process, Practice* (Asia: Butterworths, 2000).

⁶³ R Beckett, Gavin et al, *Community and Neighbour Mediation*, Ed., Marian Liebmann, , (London: Cavendish Publishing Limited, 1998).

⁶⁴ Lim Lam Yuan, Liew Thiam Leng, *Court Mediation in Singapore*, (Singapore; FT Law & Tax Asia Pacific, 1997)

⁶⁵ R Singer, Linda, *Settling Disputes, Conflict Resolution in Business, Families and the Legal System*, (Boulder, San Fransisco, Oxford; Westview Press).

⁶⁶ Gloria Lim, Cheryl Lim and Elaine Tan, "Promoting Mediation as an Alternative Dispute Resolution Process to Resolve Community and Social Disputes- A Singapore Perspective", *1st AMA (Asian Mediation Association) Conference*, (Singapore, 4-5 June 2009).

its application in Malaysia it is significant for the researcher to conduct an in-depth study in this area.

In addition, Nelson on ADR pointed out that in mediation, the parties themselves shape the outcome of the negotiation as mediation is based upon the democratic principle of self-determination which recognizes the rights of persons to make their own voluntary non-coerced decisions.⁶⁷ Further, Carrie Menkel-Meadow, in his article ‘The Trouble with the Adversary System in a Postmodern, Multicultural World’, criticised the adversary system. The writer commented that the courts with the limited remedial imaginations may not be the best institutional settings for resolving some of the disputes as modern life with its complex problems often require complex and multifaceted solutions. Carrie suggested that mediation can be the intermediate space where individual disputants can meet outside, in an informal atmosphere, for example, family or workplace, while the formal ones usually in the court settings. He further illustrated that intermediate spaces, even without formal or complex facilitated rules, may allow for more authentic grappling with issues and differences and may even lower the stakes to some extent. In such environment, as with privately negotiated settlements, the parties may arrive at contingent agreements, promises to meet and confer again, contingent performances, plans for the future without adjudication of the past.⁶⁸

⁶⁷ M. Nelson, Robert, *Nelson On ADR*, (Ontario: Thomson, Carswell, 2003) 57.

⁶⁸ Carrie Menkel- Meadow, “Trouble With The Adversary System In A Postmodern, Multicultural World”, *William and Mary Law Review*, (1996) (Vol.38:5) *The International Library of Essay in Law & Legal Theory, Second Series, Mediation*, , (UK, Suffolk: St Edmundsury Press Ltd 2001) 635,664

Most of the writers proposed that mediation should be opted and litigation should be the last resort in resolving a dispute. Even though mediation promises the better solution, we must not ignore the significance of litigation which has been practiced since long time ago. The complexities of the procedures sometimes help the deprived parties to preserve their rights. In this regard, the researcher will examine further how mediation can be adopted effectively in the court process in easing the parties settling of disputes.

The study on the court annexed mediation made a major reference to the writing of Boulle and Nestic,⁶⁹ Sourdin,⁷⁰ John North,⁷¹ P G Lim,⁷² Dorcas Quek,⁷³ Yuan and Leng⁷⁴ and few others. The issue of voluntary and mandatory mediation is highly debated. In Australia, the courts in most of the jurisdiction mandated the application and the approach give a positive impact that it enhances the awareness of the disputants, legal fraternity and the public at large on the option of mediation. Whether the application is suitable in Malaysia need to be analysed by the researcher, as the discussion of the foregoing authors were about the jurisdictions of Australia, Singapore and United Kingdom.

⁶⁹ See Boulle L and Nestic M, *loc.cit.*

⁷⁰ Sourdin T, *Alternative Dispute Resolution*, LawBook Co. NSW 2002

⁷¹ John North, *Court Annexed Mediation in Australia-an Overview*, Speech by Law Council President@ John North to the Malaysian Law Conference, November 17, 2005.

⁷² P G Lim, *The Growth and Use of Mediation throughout the World; Recent Developments in Mediation/Conciliation among common law and non-common law jurisdiction in Asia*, (1998), 4 MLJ cv, (1998) 4 MLJa 105.

⁷³ Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing of a Court-Mandated Program*, cojcr.org/vollno2/479-510. Pdf. Retrieved on 5/4/2011

⁷⁴ See Lim, Lan Yuan, Liew, Thim Leng, *loc.cit.*

It is apparent that the practice of mediation could ease the court in settling cases; also it will aid the court to reduce the backlog of cases. It will give room for the parties to compromise for the settlement before the court enforces its judgement. The process of mediation could be done before and even during the court process. In order to propose the best method for the application of mediation in resolving dispute, and see how mediation can be expanded progressively in Malaysia, this research will also study and examine the approach and experience of other countries, particularly, Australia and Singapore.⁷⁵ Therefore, the works and writings on the movement of mediation in these two countries are referred to.

For the development in Australia, Sourdin⁷⁶ has contributed a great work; the development of ADR particularly mediation is discussed in detail and in a structured manner. The emphasis is also given on the standard to enhance the practice of mediation and ADR in Australia. Besides, Spencer and Brogan, Astor and Chinkin have also contributed rich discussions on this issue.

Megens commented in his article “Mediation in Australia”, that one of the factors which drives the movement is the courts’ determination to use ADR for the purpose of relieving strains (both in times and cost) generated by steadily-increasing rates of litigation. The process of adoption of mediation prior to trial has been assisted by recognition among governments at all level that the courts need help to reduce the

⁷⁵ Australia and Singapore were chosen as Singapore has a quite similar cultural and historical background with Malaysia, whereas Australia has a very fast and rapid movement and development of mediation that should be looked into.

⁷⁶ Sourdin T, *Alternative Dispute Resolution*, (NSW: LawBook Co. 2002), Tania Sourdin, “The Use of Mediation in Australia” , *Global Trends in Mediation*, Ed., Alexander, Nadja 4th ed., (Australia)

backlog of cases. Indeed, the rush by governments to introduce ADR procedures into the traditional legal system has been described as a “legislative avalanche”. It started in New South Wales, when in 1980 a Community Justice Centres (Pilot Project) Act was introduced. Under the Act, the infrastructure was established for the mediation of small civil and criminal disputes by specially trained mediators. In 1983, the said pilot project was made permanent. Now the Community Justice Centres are used for the resolution of neighbourhood, family, environmental and employment disputes.⁷⁷

Megens further commented that it is not just the courts that have pushed for greater emphasis on ADR in Australia. In the mid-1980s, commercial lawyers awakened to the benefits of mediation and began to influence the development of ADR regimes. As a result, in 1986, the Australian Commercial Dispute Centre was established. In 1989, a private network of practitioners formed Lawyers Engaged in Alternative Dispute Resolution (LEADR).⁷⁸ The Group actively promotes and offers training on mediation.

Megen further commented that mediation is a key form of private-dispute resolution at the federal level in Australia. For example, the Family Law Act 1975(Cth) (Family Law Act) s16A states: “The court must, if it considers it is in the best interest of the parties or their children to do so, direct or advise either or both parties to attend counseling.” While The Federal Court of Australia Act 1976 (Cth) s53A on the other hand states: “The Court may order a proceeding, or any part of the proceeding, to a

⁷⁷ Megens, Peter, *Mediation in Australia* 20th June 2006
<http://www.rics.org/Management/Disputeavoidancemanagementandresolution/Disputeman..>

⁷⁸ *Ibid.*

mediator for mediation, with or without the consent of the parties to the proceedings.”⁷⁹

It is interesting to note the comment by Sourdin⁸⁰ that most disputes in Australia nowadays are resolved before entry into the court and tribunal system. Those which end up in the litigation system form a very small majority of the overall disputes in the Australian society and even matters within the litigation system are also resolved by the use of ADR particularly mediation.

The development in Singapore is best illustrated by Yuan, Yuan and Leng, Joel Lee and Hwee. Besides, Joel Lee and Hwee have contributed a great deal on the Asian perspectives on mediation. The Asian values and culture in the context of negotiation are examined in details to ensure the structured negotiation of mediation meet the need of Asians.

Lim, in “Dispute Resolution in Asia; Singapore” illustrated that the official ADR movement began in 1994 when judicial and academic institutions began programmes to promote mediation as a form of dispute settlement. The major impetus for this movement came from the Honourable Chief Justice Yong Pung How where in his effort to improve the justice delivery system, he conducted major procedural changes. These changes have been implemented in the civil procedural laws of Singapore, to encourage litigants to settle their disputes without litigation. These changes have

⁷⁹ *Ibid.*

⁸⁰ See Sourdin, T., *loc.cit.*

eventually made way for the formal introduction of mediation within the judicial system. By far the most remarkable aspect of the development of mediation in Singapore is the speed in which the mediation programmes were implemented. In the eight (8) years since the beginning of the Singapore ADR movement, a great number of institutions have adopted mediation and conciliation as a means of resolving disputes which range from family to commercial conflicts.⁸¹

The researcher also attempts to peruse all these literature, their suitability and application from the Malaysian perspectives and the approaches that require modifying and adopting to ameliorate the application of mediation in Malaysia.

The recent publication of a book on Mediation in Malaysia entitles, “The Law and Practice”⁸² in December 2010 edited by Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed, whereby the researcher has contributed a chapter on Court Annexed Mediation in Malaysia. The book has two chapters on the application at the civil court contributed by Ashgar Ali and the researcher. The chapter contributed by Ashgar Ali made a reference to the practice of court mediation in Singapore, whereas the researcher made an overview comment on the application of court annexed mediation.

⁸¹ Lim, Lei Theng, “Singapore; Litigation and Mediation”, *Dispute Resolution in Asia*, Ed. Pryles, Michael, (The Hague;The Kluwer law International,2002) 319.

⁸² Mohammad Naqib Ishan Jan, Ashgar Ali Ali Mohamed, eds. *Mediation in Malaysia: The Law and Practice*, (Lexis Nexis,,2010) .

It can be seen that the application of mediation has drawn attention and interest of authors from many jurisdictions, particularly, the United States, United Kingdom, Australia and Singapore. However, there are still limited works written on its application and development in Malaysia. In view of this, the present study seeks to contribute to bridge this gap in knowledge by exploring the manner in which mediation should be enhanced in this country. Therefore, the application of mediation will be more accepted and advanced in Malaysia, the volume of cases that are being filed into the court system will be reduced and pending cases in the court system will be disposed in a fast manner.

1.8. Scope and Limitation of the Research

This dissertation limits its discussion to civil cases, as this type of cases is more suitable and practical for mediation as compared to criminal cases. The cut-off date for statistics and data for this research is at the year 2010/2011. Further, the discussion on private mediation will emphasise on three major areas, i.e., community mediation, family mediation and commercial mediation due to the increase number of these types of disputes in the Malaysian community.

1.9 Research Methodology

The study adopts library and internet research as well as conduct empirical studies. The collected material consists of primary sources in the forms of Courts Rules, Statutes, Acts and Practice Directions on the application of mediation issued in

Malaysia and other countries, particularly, Singapore and Australia. Secondary sources referred to are from books, journals, reports, statistics, seminars and conference proceedings⁸³, newspaper articles and theses. Various data are also obtained from several official websites of the relevant agencies, ministerial departments and international organizations. The library research is particularly done at the Library of International Islamic University Malaysia, Ahmad Ibrahim Law Library of University of Malaya, CJ Koh Law Library, National University of Singapore, Law Library University of Melbourne and Free Hills Law Library University of Sydney.

For the empirical research the researcher applied qualitative approach with personal observation, unstructured and semi-structured interviews. Observations and interviews are done at various mediation centres and institutions that practice mediation in Malaysia, Singapore and Australia. Basically, the observations and interviews are divided into private mediation at various institutions that practice mediation and court annexed mediation at the relevant courts. As for Chapter 6, on the analysis of the development and application of mediation in Singapore and Australia, the personal observations on these two countries seem to be relevant. Further, the application of mediation in Australia and Singapore were also referred to in few other chapters.

⁸³ The researcher has also attended many conferences and seminars inter alia; i) 4th Asia- Pacific Mediation Forum Conference, 16th-18th June 2008, IIUM, Kuala Lumpur, ii) Seminar on Mediation; *The Navigation of Malaysian Mediation-Route to Resolutions*, 25th Oct 2010, Attorney Generals' Chambers, Putrajaya, Kuala Lumpur, iii) 2nd Asian Mediation Conference, *Rediscovering Mediation in the 21st Century*, 24th -25th February 2011, Sheraton Imperial Hotel, Kuala Lumpur, iv) Asia Pacific Conference on Contemporary Trends in Mediation and Arbitration, 17th – 18th July 2006, Seri Pacific Hotel, Kuala Lumpur, v) Workshop on Empowering Communities Through Mediation in Malaysia, 16th -18th June 2009, Vistana Hotel, Kuala Lumpur and few others.

For the analysis of the application of mediation in Malaysia, the researcher managed to interview Osman Ahmad,⁸⁴ Secretary Consumer Claims Tribunal, Ruzita Ramli⁸⁵ Sulh Coordinator, Jabatan Kehakiman Shariah Malaysia, Putrajaya, Rosdi Hanapi,⁸⁶ Sulh Officer of Shah Alam Shariah Court, Dayang Ellyn Narisa Bt Abang Ahmad,⁸⁷ Deputy Registrar Kuching High Court and Tuan Shahrizad,⁸⁸ Registrar of Kuching High Court. Online interview was done with Isma Juliana Ishak, Mediator Legal Aid Department, Putrajaya. Unstructured interview was also done with Ramson Ho,⁸⁹ Mediator, Malaysian Mediation Centre, Hendon Mohamed,⁹⁰ Mediator Malaysian Mediation Centre, Dermawatty,⁹¹ Mediator Financial Mediation Bureau and also with a few practicing lawyers.⁹² The answers are relevant to analyse the application and effectiveness of mediation in Malaysia and in what manner Malaysian are most attracted to adopt mediation.

For the application of mediation in Australia, the researcher have interviewed David Leonard,⁹³ Policy and Project Officer, Dispute Settlement Centre of Victoria, Colin Lavars,⁹⁴ Acting Manager of Dispute Settlement Centre of Victoria, Di Moloney,⁹⁵

⁸⁴ The interview was conducted on the 9th June 2010 at Consumer Claim Tribunal office, Putrajaya.

⁸⁵ The interview was conducted on 12th May 2010 at the Office of Jabatan Kehakiman Shariah Malaysia, 2010.

⁸⁶ The interview was conducted on 12th May 2010.

⁸⁷ The interview was conducted on 1st August 2011,

⁸⁸ The interview was conducted on 1st August 2011.

⁸⁹ done at the Asia Pacific Conference on Contemporary Trend in Mediation and Arbitration held in Kuala Lumpur on 17th July 2006

⁹⁰ done at Seminar on "The Navigation of Malaysian Mediation-Route to Resolution, held at AG Chambers on 25/10/2010

⁹¹ done at 2nd AMA Conference, Sheraton Imperial Hotel on 24/2/2011.

⁹² namely, Puan Mursyidah Mustafa, Puan Noraida Ismail and Cik Hanna Ambarass Khan and few others.

⁹³ Conducted on 1/6/2011

⁹⁴ Conducted on 1/6/2011

⁹⁵ Conducted on 1/6/2011

Principal Mediator, Family Relationship Center, Melbourne, Ian De Lacey,⁹⁶ Principal Mediator, Victorian Administrative Tribunal. Nicholas Flaskas,⁹⁷ Senior Deputy Registrar, Supreme Court of New South Wales, Laurei Walton,⁹⁸ Senior Deputy Registrar, Supreme Court of New South Wales, online interview was also done with Steve Jupp, Manager Court Services and Prothonotary, Supreme Court of New South Wales, and Jeannie Highet, Senior Deputy Registrar Supreme Court of New South Wales. The researcher also managed to observe court mediation conducted by Nicholas Flaskas at the mediation room of the Supreme Court of New South Wales.

For the research in Singapore, the researcher interviewed Kamaria Djourimi, Mediator, and Assistant Manager, the Shariah Court of Singapore, Mustafalhadi, Mediator Shariah Court of Singapore, Angela Mitakidis, Manager, Singapore Mediation Centre, Elliot Goon, Senior Executive of Singapore Mediation Centre, Josephine Kang, Deputy Registrar, Primary Dispute Resolution Centre of the Subordinate of Singapore, (PDRC, Sbct, Singapore), unstructured interview was done with Settlement Judge Marvin (PDRC) Subordinate Court of Singapore, and Joyce Law, Director and Settlement Judge of PDRC, Subordinate Court of Singapore. The researcher also managed to observe court mediation session conducted by Deputy Registrar Josphine Kang at the PDRC Subordinate Court and mediation session conducted by Mustafalhadi at the Shariah Court of Singapore. The observation and

⁹⁶ Conducted on 1/6/2011

⁹⁷ Conducted on 7/6/2011

⁹⁸ Conducted on 7/6/2011. The researcher was also given opportunity to observe the ‘Direction for FamilyMediation’ conducted by Senior Registrar, Laurie Walton.

interviews indeed gave a clear picture on the application and useful inputs for this study.

CHAPTER 2

HISTORICAL BACKGROUND OF MEDIATION, THE COURT SYSTEM AND BACKLOG OF CASES IN MALAYSIA

2.1 Introduction

This chapter will study the development of mediation and the aptness of its application in Malaysia. The writer will explore and expound the existence of mediation in the traditional communities and the growth of modern mediation movements. The discussion will then focus on the historical application of mediation in the Malay States during the era of British colonialism in Malaya. Since the British introduced the English common law to the Malay States in 1807, the Malays' method of amicable negotiation and conciliation was replaced with the adversarial court system in resolving disputes. Over the years, the traditional negotiation and conciliation method of resolution was gradually removed and replaced by the adversarial court system ever since then. As the adversarial system becomes more accepted, the court witnessed an unprecedented rise of backlog of cases. Thus, the researcher will also discuss the issue of backlog of cases and the efforts taken by the judiciary to clear the problem and to propose the notion of mediation as a culture of resolving disputes to the Malaysian society as an alternative to speed up the disposal of cases in the court system. Civil justice reform in other countries that introduced mediation as part of the reform will also be looked into.

2.2 The Historical Background of Mediation

This section will trace the development of mediation that has been practised by the traditional societies and the modern concept of mediation that has started in the United States. The discussion will further explore the concept of negotiation and mediation in the Malaysian traditional communities. This is with the view that the origin of the application need to be studied to see the practicality of the application in Malaysia.

2.2.1 Traditional Mediation

Mediation has existed since the dawn of human civilization. In support of this argument, Spencer and Brogan⁹⁹ opine that when the first humans started to argue for their basic needs and wants, in order to keep community together and sense of belonging, they resorted to employ a third party to assist in them in resolving the disputes. It is no doubt that mediation existed in many traditional societies, but it is not clear as to how traditional form of mediation was conducted and most writers seem to agree on this issue. There were evidences that support the existence of mediation in such societies; although the society did not have a formal state system and legal institution, nevertheless, they had a well organized system for managing conflict within the families and communities.¹⁰⁰

⁹⁹ See Spencer, David. and Michael Brogan, *Mediation Law and Practice*, (New York: Cambridge University Press, 2006) 23-24. It was analysed that there are evidences that support the existence of mediation in many traditional society.

¹⁰⁰ *Ibid.*

Apparently, the traditional mediation was unstructured, informal and non-institutionalized.¹⁰¹ Normally the respected leader or elder in the community would be the intermediary or the mediator after been approached by the parties in disputes. The intermediary or the mediator had gained the trust and authority through his or her capabilities, knowledge, experience and sense of fairness. The mediator would resolve the disputes through moral persuasion and a strong emphasis on the importance of maintaining harmonious relationships. It was observed that a mediator in a traditional mediation plays an active role in the sense that he or she intervenes to maintain the relationship of the parties. On this basis, he or she might be described as an educator of good social conduct and might reprimand the parties for their roles in the disputes. This method strengthened the understanding amongst the members of the community.¹⁰²

Most researchers seem to agree that mediation has its roots in Confucianism. According to Confucius, the peaceful organization of society starts from proper inquiry and understanding that lead to compassion and empathy. Besides, the principle of harmony leads towards a conflict free, group based system of social interaction. These are the main core of Confucianism. It is acknowledged that the concepts of inquiry, understanding, empathy and forgoing harmonious relationships are the essence of mediation.¹⁰³ It is also observed that in traditional Chinese culture, the emphasis is more on achieving collective good and the merits of each disputant is

¹⁰¹ See Boule, Laurence. and Miryana Nestic, *Mediation, Principles, Process, Practice*, (UK: Butterworths, 2001), 223-224. Most writers seems to agree that traditional mediation was not formalised and not institutionalised. The form it was conducted was also not clear.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

secondary. In distributing justice, Confucianism requires that the needs of each party are taken into account as the primary objective is to maintain and strengthen the social order and the integrity of the community as a whole. Furthermore, a person defines his or her identity, rights and obligations according to the perceived relationship between the parties. Right and wrong are not determined by the merit of each case regardless of the relative position or relationship between the parties. It can be seen that the basis of Confucianism reflects the main core of mediation which emphasizes on the preservation of harmonious relationships and de-emphasizes the rights or wrongs of the matter of disputes.¹⁰⁴

It seems that mediation is also recognized under the Islamic Law as Shariah promotes conciliation. The Quran highlighted its importance as seen in the following verses:

Surah Al Hujurat (49), ayah 10;

“The Believers are but a single Brotherhood: so make peace and reconciliation (sulh) between two (contending) brothers; and fear Allah, that ye may receive Mercy.”

Surah Al Hujurat (49) ayah 9;

“If two parties among the Believers fall into a quarrel, make ye peace (sulh) between them ...

¹⁰⁴ *Ibid.* See also Bhagshaw, Dale, Family Mediation Chinese Style, (1995) vol.6 *Australian Dispute Journal*, 12, Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997) 364.

Surah An-nisa' (4) ayah 114;

“In most of their secret talks there is no good; but if one exhorts to a deed of charity or justice or conciliation (sulh) between men, (secrecy is permissible) to him who does this, seeking the good pleasure of Allah, we shall soon give A reward of the highest (value).”

Sulh literally means ‘to end dispute’ or to cut off dispute either directly or with the aid of a neutral third party. The word sulh as used in the Quran is also defined as mediation, conciliation as well as compromise in action.¹⁰⁵ According to Ibnu Qudamah, sulh is an agreement between two disputed parties which would lead to peace.¹⁰⁶

In another verse, on the issue of qisas, Allah prescribes that the punishment for a murderer is qisas or retaliation. However, when the family of a victim pardons the murderer then there should be compensation given to the former. This verse did not use the word salah or sulh, but the whole context of this verse is to be understood that the right to pardon the accused was given to the family of the victim and finally make peace between them. Ibnu Abbas also reported that the above verse is to show that sulh is one way to achieve justice and peace between the two parties.¹⁰⁷

Several research have shown that most of the communities, races and religions in the world whether they be Polynesians, Romans, Greeks, Hindus, Jews, Christians and

¹⁰⁵ See Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia*, (KL: IIUM, 2000) at 29.

¹⁰⁶ Ibn Qudamah alMughni, (Makkah:,Maktabah Tijariyyah, 1984) Vol.4, 351 cited in Ramizah Wan Muhammad, (2010) Sulh (Mediation) in the Malaysian Syariah Court, *Mediation in Malaysia:The Law and Practice* Eds. Mohammad Naqib Ishan Jan, Ashgar Ali bin Ali Mohamed, (Kuala Lumpur: Lexis Nexis, 2010) at. 416.

¹⁰⁷ See Ramizah, *Id.* 417.

Muslims follow the teachings of their religions and rituals which require peace and harmony in resolving disputes. Peace and harmony form the main core for mediation.¹⁰⁸ The evidences show that mediation as a method of dispute of settlement is not a new phenomenon. It can be seen in most oriental cultures such as Japan and China, mediation has long been used as a means for resolving conflicts because of its emphasis on moral persuasion and maintaining harmony in human relationship.

The application of mediation was adopted by traditional communities in Asian countries. In the instance, the Chinese who believe in Confucianism hold that maintaining peace is the best option over lawsuit which is the worst. In the Ching Code, the code which is inherited from the Ming Dynasty (1368-1644), provides that the village leader and the elderly people has power to do mediation in minor conflicts which relates to domestic and community relationship. They prefer a peace resolution (*youhao xieshang*).¹⁰⁹

The Japanese whose majority embraced Confucianism and practised the laws of Shogun Tokugawa, from 1603-1868, provided that any civil dispute should be referred to village headmen for mediation. This was the pre-condition for the case to be brought to court for trial. In Sri Lanka, the mediation has been practised since 425 years ago before the Christian era. It was done by the tribe headmen who acted as a

¹⁰⁸ See Raihanah Azahari, *Sulh Dalam Kes Kekeluargaan Islam*, (Kuala Lumpur: Penerbit Universiti Malaya, 2008) 2-3.

¹⁰⁹ *Ibid.*

mediator. While in Pakistan and Nepal, the disputes were normally resolved by the village elders known as panchayats¹¹⁰.

Mediation was also practised by the African society. The process however is more transparent and open. Music, dance, storytelling and poetry are used as vehicles for conveying a peace message injected with spiritual values and goals.

In Indonesia, generally, the dispute resolution can be classified to two according to their community social structure. First, for those who follow the hukum adat, they have a formal structure of resolving dispute where the leader of the community was appointed to resolve the dispute. For those who are not bound by hukum adat, they have their own way of resolving dispute like the ethnic group of Batak, Jawa, Bukat and Kereho. The terms used like 'runggun' and 'rapat' show that conciliation are being considered in resolving disputes.¹¹¹

With these evidences, it is no doubt that mediation has been practised and has become popular with the traditional communities although it was not structured or formalized. The evidences also suggest that mediation was practiced differently in different societies.

¹¹⁰ *Ibid.*

¹¹¹ See *Ibid.*

2.2.2 Modern mediation

The traditional practice of mediation has been around since time immemorial. In contrast, the modern Western conception of mediation is new and of recent origin. Research shows that modern mediation started in the United States.¹¹²

Boulle¹¹³ suggested that the modern mediation has its roots in America when in 1913 a small claims mediation scheme was introduced in the Municipal Court in Cleveland Ohio. In the 1930s, the United States judiciary took the initiative on insisting lawyers to consider conciliatory methods of dispute resolution.¹¹⁴ It was from the middle of 1960s that saw mediation began a period of expansion.¹¹⁵ It first became popular over issues involving labour management and in neighbourhood disputes. These cases brought mediation to the attention of the bench and administrators as they offered relief for a court system that was unable to provide enough trials.

By the late 1960s mediation was considered a means of increasing access to justice in the United States.¹¹⁶ The growth of mediation was due to the increase of civil cases filed in court. New procedural rights were also introduced that took much of the court's time. As a consequence, the trial date and the judgment were no more

¹¹² See Spencer D. and Michael Brogan, *op.cit*, 23-24.

¹¹³ *Ibid*.

¹¹⁴ See Boulle L and Miryana Nestic, *op.cit.*, 225.

¹¹⁵ See Spencer D., Michael Brogan, *op.cit.*, 25-26.

¹¹⁶ See Boulle L., Miryana Nestic, *loc.cit.*.

expedient.¹¹⁷ As a result, the situation led to a backlog of cases. In order to solve the problems mediation was used as one of the mechanisms.

Hence, the courts and legislatures started mediation program for domestic relations cases and small claim cases.¹¹⁸ The programs were conducted in the courthouse and staffed by state employees. In some courts, participation was mandatory; but the initiation of domestic relations mediation programs was later changed from purely voluntary process to a mandatory procedure in appropriate cases. This development was further enhanced in 1970s. Mediation was seen as a potential means for reducing caseloads that led to ‘quantitative-efficiency’ arguments in its favour. Mediation then became part of a larger reform movement directed towards resolving the internal courts’ problems.¹¹⁹ The 70s and 80s witnessed judges and academics made efforts for a new kind of judicial system, with mediation as a central feature of the resolution. Professor Frank Sander in the 1976 Pound Conference called for a new kind of courthouse which can screen cases into processes other than litigation.¹²⁰ Mediation was included prominently in this model of “multi-door courthouse” as a feature of a better justice system. This model was tried in several sites and was deemed successful.

¹¹⁷ The research shows that during the period of 1960s, civil trials become more popular and expedient. In the early period of litigation, the litigant will get an early trial date after filing the case. The judgment and resolution was also expedient. In this period also (1960—1970) many new causes of action for example in the areas of environmental rights and civil rights were created increased the amount of aggrieved citizens These new causes of action proved to be fairly complex and time consuming for the courts. See. Spencer D., Michael Brogan, *Mediation Law and Practice*, (New York:Cambridge University Press,2006) 25-26.

¹¹⁸ Small claim cases here refer to neighbourhood level cases.

¹¹⁹ See Boule L, Miryana Nestic, *op.cit.*, 225.

¹²⁰ See Spencer D., Michael Brogan, *op.cit.*, 28.

The development of the Alternative Dispute Resolution (ADR) specifically mediation in the United States was also contributed by Ford Foundation which played a pioneering role in the development of ADR processes. The Foundation launched a search around 1978 for the so-called new approaches to conflict resolution, dealing particularly with complex 'public policy disputes', 'regulatory bodies', disputes arising out of social welfare programmes with the intention to find alternative ways to handle dispute outside the formal justice system. This search yielded certain alternative forms of resolution which were conciliatory and non-contentious.¹²¹

The period of 1970s continuing through 1980s saw the mediation expanded from a small practice in discrete disciplinary areas to other industries and areas of law.¹²² Encouraged by the domestic relations experience, supporters of mediations spread this new practice to other civil and to some extent in criminal matters. Mediation advocates insisted legislators and court administrators that mediation was faster, cheaper and more satisfying than the court process. They financed several state and federal mediation programs.¹²³

The expansion of mediation created the need for more trained mediators. To meet this demand, law schools started offering the course and training on mediation. By mid 80s, many law schools began offering such training. In addition, several independent

¹²¹ What also emerged was the fact that Western civilizations have unnecessarily glorified the ideal of fighting for one's right, and thereby neglected the alternative or co-existential justice approach. It was found that there was a lot to be learnt from Asian and African traditions which are geared more towards achieving consensus than picking a fight to prove right and wrong. Also see Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia* (Kuala Lumpur: IIUM, 2000) at 9-10.

²⁴ See Spencer D, Michael Brogan, *Mediation Law and Practice*, (New York: Cambridge University Press, 2006) 28.

¹²³ *Ibid.*

training organizations offered short courses for anyone who wanted to be a mediator. The training produced a larger than ever number of mediators.¹²⁴

By the 1990s, mediation in the United States was considered part of a trend towards private dispute resolution methods. At this stage, mediation was offered by a large and disparate group of courts, agencies, individuals and groups both large and small. There is a growth in the number of mediation service providers like JAMS, Endispute, Bates-Edwards, Conflict Management Inc. and others. This period also witnessed the expansion of mediation into most areas of legal practice.¹²⁵

The corporate world learned that in-house use of mediation was able to lessen or avoid costs of litigation or contested cases. Public policy disputes came to be seen as suited to mediation, as litigation in complex matters such as the environmental affairs and land use seemed to drag on while the case or issues in question worsened. Mediation practices extended further to be used in the health care industry, for cases pending appeal, and by public school systems in the form of peer mediation program.

Two significant federal laws were passed in 1990, and they ensured that mediation was a national enterprise, and not a method for only local disputes. The Congress passed the Civil Justice Reform Act (CJRA) and the first Administrative Dispute Resolution Act (ADRA). The CJRA required all ninety-four of the federal district to create a mechanism that would reduce expense and delay. The objective is to achieve

¹²⁴ *Id.* at 27.

¹²⁵ See Spencer D. and Brogan M., *Mediation Law and Practice*, (New York: Cambridge University Press, 2006), 27-28.

for a just, speedy and inexpensive resolutions in civil cases. The program started with ten pilot courts, ten courts that would be a control group, and five more courts that would each try a different experimental effort.¹²⁶ The CJRA included recommendations relating to discovery reform and case management as well as alternative dispute resolution. The final report of the CJRA committee in 1997 indicated the ADR component was a success and rules committee supports the continued use of appropriate forms of ADR.

While the CJRA treated all ADR processes equally, mediation became the dominant form. As of 1996, more than half of all federal courts had some form of mediation program. The Dispute Resolution Act of 1998 went one step further, requiring that every federal court to consider mediation specifically.¹²⁷ The introduction of the Acts gave more strength to mediation. As CJRA authorized mediation for the judicial branch, The ADRA did the same for the executive branch. The ADRA mandated that every agency in the United States government adopt a policy that promotes alternative dispute resolution,¹²⁸ that each agency has a designated senior official in charge of ADR, and that it review its standard operating procedure, including contracts, to encourage the use of alternative means of dispute resolution.

The law also promoted the executive branch to apply mediation. There were precedents abound. The United States Air Force which was used to grievance and arbitration procedures turned to mediation in many of its internal disputes. Mediation

¹²⁶ *Id.* at 29.

¹²⁷ *Ibid.*

¹²⁸ *Ibid*

is further used to resolve issues in federal natural resources agencies, including energy and water disputes. Federal employment issues were mediated by the Equal Employment Opportunity Commission. Mediation is even used to resolve tax disputes at the Internal Revenue Service.¹²⁹ Hence, the United States experience shows that in a short period of time the nature of legal practice and mediation have changed significantly. It is learnt that mediation in the United States started with labour disputes, domestic relation and neighbourhood disputes.

With the efforts of the judges, mediators, advocates, the government and the private sectors mediation then spread to other areas. The introduction of the two Acts, i.e., the Civil Justice Reform Act (CJRA) and the Administrative Dispute Resolution Act (ADRA) have given encouraging impact in the expansion, enforcement and regulation of mediation. It is noteworthy that mediation has been used as a mechanism to reduce the backlog of cases in courts.

The success of mediation in reducing backlog of cases in the United States has influenced other countries to adopt the method. Mediation has been the main agenda in Civil Justice Reform in the United Kingdom¹³⁰, Canada, New Zealand, Australia

¹²⁹ *Ibid.*

¹³⁰ The Civil Procedure Rules 1999 came into effect on 26 April 1999 that represents the most extensive overhaul of the Civil Justice System since the Judicature Act 1873-75. The rules reinforcing the messages given by Lord Woolf MR and Lord Bingham LCJ. The fact that litigation is not the only means of achieving appropriate and effective dispute resolution was the reason cited by Lord Woolf for including mediation and other forms of alternative dispute resolution on his inquiry on improving access to justice to English Courts. Lord Woolf's interim report included: that court should encourage the use of ADR, that parties should acknowledge at case management conferences and pre-trial reviews whether or not the parties had discussed the issue of ADR, that judges should take into account a litigant's unreasonable refusal to attempt ADR when considering the future conduct of a case. See Boule and Nesic, *op.cit.*, 228; see also Mackie, Karl, David

Singapore and other countries. Hence, mediation has been recognized globally as one of the effective mechanisms to dispose backlog and speedy disposal of cases in courts.

Beside the introduction of mediation in the court system, non court mediation or private mediation was also introduced and developed. Started in the United States, private mediation is been accepted globally. Community mediation centres, family mediation centres, and various dispute settlement centres are established in the UK, Australia, Hong Kong, New Zealand, Singapore and many other countries to accommodate the needs for the settlement of disputes out of court.

2.2.3. Historical Background of Mediation in Malaysia

In the Malaysian context, R H Hickling¹³¹ points out that conciliation and mediation are the traditional dispute resolution mechanism of different races.¹³² It was observed that the local villages conducted most of neighbourhood disputes relating to land ownership and boundaries, stray cattle, the use of water, family disputes or petty quarrels. The disputes are disposed by the village headmen, often with the advice of the elders of the community.¹³³

Miles, William Marsh, Tony Allen, *The ADR Practice Guide, Commercial Dispute Resolution*, (UK: Butterworths, 2000) 64.

¹³¹ R H Hickling, *Malaysian Law*, (Selangor: Pelanduk Publication (M) Sdn Bhd., 2001) 147-148.

¹³² The same was also pointed out by N Pathmavathy, *Alternative Dispute Resolution Procedures, Seminar on Rights and Remedies in Contract Law*, (Kuala Lumpur, 19th May 2004,).

¹³³ This is observed in Terengganu Muslim, One of the elders, Encik Zakaria is quoted as saying that “in conducting dispute settlement, he is governed by the shariah anchor, while adat which is the rope that is linked to it. This was observed by R H Hickling, *Malaysian Law*, Selangor: Pelanduk Publication (M) Sdn Bhd., 2001) 147-148.

As for the Chinese, they brought with them, the Confucian concept of yielding and compromise, and the Confucian views based on the family and morality. For Chinese litigants they usually sought the restoration of his reputation and his family's face in the eyes of his community. As such, the traditional symbolic gifts, for instance, red candles, red cloth and gold flowers were considered more valuable than any monetary damages. Most of them rely on the principle of *kan-ching* (good relations) and preferred the disputes to be settled through mediation.¹³⁴

As for the Tamils, the mediation process can be seen in the text of its scriptures as well as in the concept of the panchayat. It is a form of mediation practice in the villages to mediate the problems involving the villagers. This method usually gathered the village head alongside a few other senior members.¹³⁵

Thus, it can be concluded that Malaysia, with its multi-racial and multi-religious population, provides a favourable place for the practice of mediation. The teaching of Islam, Hinduism, Buddhism, Christianity, Confucianism and other beliefs encourage conciliation and settlement. The study shows that mediation has been the mode of settling disputes amongst the Malaysian in the old days as it promotes conciliation, but with the English common law principles has since reduced its importance with the concept of confrontational or the adversarial system.

¹³⁴ See R H Hickling, *Ibid.*

¹³⁵ Cecil Abraham, *Alternative Dispute Resolution*; (Retrieved) 6 May 2008, <http://www.aseanlawassociation.org>.

When the court system was introduced, it was reported amongst the Malays that the legal system remains to be an alien legal system by the nature of its rules of procedure, court atmosphere and expensive process. Furthermore, the concept of adversarial system during trials was creating disharmony in the community. The use of formal court system only occurs when there are some economic or political reasons. Disputing parties will usually opt for the court when they do not know each other, or when they do, are not on good terms.¹³⁶

It was also hardly accepted by the Chinese as the English judicial process requires a judge verdict rather than a compromise solution. It is said amongst the Chinese that the manner the court resolve problem is destructive and not constructive and on that basis they should not resort to the courts. It is observed that to have one's case adjudged in the court amounts to a public display of family shame in the Chinese sense.¹³⁷ As one Confucius proverb renders a strong distaste to the adversarial process by the saying, "in death avoid hell, in life avoid law courts."

Negotiation and conciliation were also observed by the indigenous people in Peninsular Malaysia as well as Sabah and Sarawak. The customary laws as practised by the indigenous people form a system of adat laws which the communities have embraced and administered for generations without the assistance of any outside agency. It was observed that when the British administration introduced the English

¹³⁶ As observed by R H Hickling, *Id.* at 148.

¹³⁷ *Id.*, at 139-140.

Goh quotes Lee Seok Yew, of the Paloh Chinese School, "Law is one of the many ways of solving problems. However, the manner in which it solves problems is destructive, not constructive. Villagers here observe *li* (ceremony, correct behaviour) and thus there is no need for them to resort to the law courts to settle their problem.

legal system to them, it was considered alien to the indigenous administration of justice. For the natives all disputes should be settled by the headman and a council of elders. A similar situation was observed in Sabah, as customary laws were the basic law of the land. Therefore, the British sought to formalize the native customary court system so as to bring it within the general legal system in order to have a comprehensive system of law.

The practice of mediation can also be seen in Semai community in the Peninsular Malaysia's rainforest. In order to settle a dispute, a "community bcaraa"¹³⁸ is usually arranged where the natives would be seated in circle to discuss what had happened, and discussed as to how to resolve the issue and mend the injured relationship.

From these observations, we can conclude that the Malaysian communities whether they are Malays, Chinese, Tamils or native tribes have used conciliation as a method of resolving disputes. It has been the culture of the community to invite a third party, who is either a village headman, or a respected leader or an elder to be an intermediary in resolving dispute. The utmost concern of the people at that particular time was the preservation of harmonious relationship. From these observations, it can be inferred that modern mediation could be accepted and be absorbed as a culture for the Malaysian community if it is seriously reintroduced.

¹³⁸ As observed by William Lury. See Lury, W, *Getting to Peace: Transforming Conflict at home, at work and in the world*. (New York: Viking Penguin Group, 1999).

2.3 The Reception of English Legal System and the Court System in Malaysia

The Malaysian legal system has developed over a period of some six hundred years and can be divided into three major periods. It started with the founding of the Malacca Sultanate at the beginning of the fifteenth century, followed with the spread of Islam to Southeast Asia and its subsequent absorption by the indigenous culture; and finally, the introduction of British constitutional government and the English common law via the extension of British colonial rule.¹³⁹

Before the British came, the laws governing the Malay States were the Malay adat¹⁴⁰ and the customary laws of the various communities. The adat law was the basic law of the land since the time of the Melaka Sultanate in the mid-fifteenth century. The British administration introduced Common law to replace Malay adat¹⁴¹ law as the basic law of the land. The latter was then reduced to being the personal law of the locals; it concerned family and religious matters applicable only to Muslims. It evolved into what is now Islamic law, administered by the Shariah courts and the system of state courts which operate parallel to the federal courts administering the common law from 1948 onwards.¹⁴²

¹³⁹ See Wu, Min Aun, *The Malaysian Legal System*, 2nd ed. (Selangor: Addison Wesley Longman Sdn. Bhd., 1999) at 2.

¹⁴⁰ It refers to Malay Customary Law. It was a composite of indigenous Malay adapt law with Hindu-Buddhist element, overlaid with principles of Syariah law, the latter received with the coming of Islam early in the same century. See Wan Arfah, Ramy Bulan, *An Introduction to the Malaysian Legal System*, (Selangor: Oxford Fajar Sdn Bhd., 2003) at 7.

¹⁴¹ As modified by syariah.

¹⁴² See Wan Arfah, Ramy Bulan, *loc.cit.*

The court system was introduced¹⁴³ so as to accommodate the complaints and petitions raised by the people who wanted a better system of administration of justice. The Royal Charter of Justice was formed in 1807 which marked the first statutory introduction of English law into the country. The Charter established ‘The Court of Judicature of Prince of Wales’ Island’¹⁴⁴ to exercise jurisdiction in all civil, criminal and ecclesiastical matters.

There were problems and legal chaos during this period as the administrators were trained in English Law with little or no knowledge of Malay adat, Hindu law, Chinese customary law or Islamic law. The situation demanded for a better administration of justice.

The Second Charter of Justice was then introduced in 1826.¹⁴⁵ The Charter created a new court of Court of Judicature of Prince of Wales’ Island, Singapore and Malacca. Its jurisdiction was similar to that granted to Penang by the 1807 Charter, but the English Law to be applied under the new Charter was as it stood on 27 November 1826 and were subject to the local conditions. Even after the introduction of the Second Charter, it still did not accommodate for the calls of better administration of justice and was far from satisfactory. There was only one professional judge, known as Recorder, who was assisted by lay judges. The Recorders that were sent to dispense justice made Penang their headquarters, visiting Singapore and Malacca

¹⁴³ The research shows that for some twenty years, following the first settlement of Penang in 1786, no known body of law administered. See Wu, Min Aun. *op.cit.*, 12.

¹⁴⁴ As Penang was then known.

¹⁴⁵ By the introduction of this Charter, Penang had a second statutory reception of English Law, although it was the first for Singapore and Malacca. See Wu, Min Aun., *The Malaysian Legal System*, 2nd ed. (Selangor: Addison Wesley Longman Sdn Bhd,) 15-16.

only twice a year¹⁴⁶. In the meantime, the number of cases waiting for trial increased in great proportion to a corresponding increase in population and the commercial activities especially in Singapore.

The inadequacy of the Second Charter to cope with the rapid economic development in Singapore led to the introduction of the Third Charter of Justice in 1855. This Charter enabled the reorganization of the whole court system. An additional Recorder was appointed for Singapore and the jurisdiction of the Recorder in Penang was extended to Province Wellesley, a mainland settlement across the island. Since the court sat in two divisions, separate Registrars were appointed for each of the divisions.¹⁴⁷

The Court system was reorganized after the transfer of the administration of the Straits Settlement¹⁴⁸ from India to the Colonial Office in 1867. The Recorder of Singapore became Chief Justice of the Straits Settlement, an act acknowledging Singapore's rapid growth, and the Penang Recorder was designated "Judge of Penang". This shift reflected the pre-eminence of Singapore over Penang. Law Officers of the Crown were appointed and designated Attorney-General and Solicitor-General. The Court of Judicature of Prince of Wales' Island, Singapore, and Malacca was abolished by virtue of by Ordinance 5 of 1868. It was replaced by a new court known as the Supreme Court of the Straits Settlements. In 1873, the Supreme Court

¹⁴⁶ *Ibid.*

¹⁴⁷ See *ibid.* at 16

¹⁴⁸ In 1826, Singapore, Malacca and Penang were collectively administered under one entity known as the Straits Settlements under the British Colonial System

was further reorganized under four judges: the Chief Justice, the Judge of Penang, the Senior Puisne Judge and the Junior Puisne Judge. The Court of Quarter Sessions was established as a criminal court¹⁴⁹ and presided over by the Senior and Junior Puisne Judges in Singapore and Penang respectively. A Court of Appeal was also constituted. By then, the judiciary had slowly evolved into its modern form.¹⁵⁰ Nonetheless, the introduction of the adversarial system by the British, the method of resolving dispute amongst the Malaysian gradually changed from conciliation to adjudication.

2.4 Civil Courts and the Backlog of Cases in Malaysia

Before attempting to analyse the issues surrounding backlog of cases, there is a need to probe the structure of our court system and its jurisdiction to have a clear picture on its state of affairs.

2.4.1 The Civil Court Structure

Under the Malaysian court system, the judicial power is vested in the Federal Court, Court of Appeal, the High Courts and the Subordinate Court. The establishment of these courts is governed by the Federal Constitution, Court of Judicature Act 1964 and Subordinate Court Act 1948.

¹⁴⁹ There in fact was such a court between 1807-1856.

¹⁵⁰ Wu, Min Aun., *op.cit.*, 16-17.

The Subordinate Court is composed of the Penghulu Court, Magistrates Court and Sessions Court. A subordinate Court is one of those courts established under Section 3(2) of the Subordinate Court Act 1948¹⁵¹ which reads:

There shall be established the following subordinate courts for the administration of civil and criminal law:

- a) Sessions Court
- b) Magistrates Court and
- c) In West Malaysia only, Penghulu Courts.

The Penghulu Court is the lowest level of Subordinate Court in Peninsular Malaysia.¹⁵² It is presided over by a penghulu or headman appointed by the State Government for a mukim. Wherever possible, a penghulu normally settles disputes informally.¹⁵³ The penghulu is empowered to hear and determine original proceedings of a civil nature in which the plaintiff seeks to recover a debt or liquidated demand in money not exceeding RM5,000/- and in which all the parties to the proceedings are persons of an Asian race speaking and understanding the Malay language.¹⁵⁴

The Magistrates' Court deals with minor civil and criminal cases. The court is presided by a magistrate. As regard to civil matters, the first class magistrate has

¹⁵¹ Section 3(2) Subordinate Court Act 1948.

¹⁵² It is observed that in the urban areas, penghulu court no longer exists.

¹⁵³ See Lee, Mei.Pheng., *General Principles of Malaysian Law*, (Kuala Lumpur: Penerbit Fajar Bakti Sdn Bhd.)

¹⁵⁴ Section 94, Subordinate Court Act 1948 (Act 92).

authority to try all actions and suits where the amount in dispute or value of the subject matter does not exceed RM25,000/-. It may also exercise jurisdiction in actions for the recovery of rent, mesne profits and damages when the money claimed does not exceed RM25,000/- or where the rent payable in respect of the premises does not exceed RM25,000/- per year.¹⁵⁵

The Sessions Court is the highest of the Subordinate Court. It is presided by a Sessions Court judge. In civil matters, it has jurisdiction to try all actions and suits of a civil nature where the amount in dispute or value of the subject matter does not exceed RM250, 000/-. However, in general, matters relating to land, specific performance or recession of contracts, injunction, probate and administration of estates, divorce, bankruptcy, trusts, and accounts are excluded from its jurisdiction. Disputes involving these matters usually involve difficult points of law and therefore best determined by High Court judges. The Sessions Court has unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents, and landlord and tenant distress.¹⁵⁶

The High Court in Malaya, the High Court of Sabah and Sarawak, the Court of Appeal and the Federal Court form the superior courts. The High Court and Federal Court have both original and appellate jurisdiction whereas the Court of Appeal has

¹⁵⁵ Section 90, 93 and 70(2), Subordinate Court Act 1948(Act 92).

¹⁵⁶ Section 65(1), Section 69 Subordinate Court Act 1948(Act 92). Under section 54 of the Subordinate Court Act, the Sessions Court also assumes a limited supervisory role over the Magistrates and Penghulu Court. A Sessions Court judge may call for and examine the record of any civil proceedings before a Magistrates Court or a Penghulu Court which is within its local limits where he or she has jurisdiction. If in the view of the judge a decision is illegal or improper or that a proceeding is irregular, he or she shall forward the record together with the appropriate remarks to the High Court who is authorized to make further orders as justice may require.

only appellate jurisdiction. The High Court exercises original, appellate and supervisory jurisdiction. Sections 22, 23, and 24 of the Court of Judicature Act 1964 lay down in broad terms the criminal and civil jurisdiction of the High Court.¹⁵⁷

For the original jurisdiction, the High Court possesses unlimited criminal and civil powers, where there is no limitation. It can try any criminal case irrespective of the gravity and any civil case regardless the value of the case, and the matters which cannot be determined in the subordinate courts.¹⁵⁸

For the appellate jurisdiction, the High Court can hear civil and criminal appeals from the subordinate courts. In civil appeal from the decision of subordinate courts, the amount in dispute or the value of the subject matter must ordinarily exceed RM10,000/- except on question of law and proceedings relating to maintenance of wives and children. All civil appeals are by way of re-hearing.¹⁵⁹

¹⁵⁷ Section 25(1) preserves the powers as may be vested in it prior to Malaysia Day and such other powers set out in it by any written law in force within its local jurisdiction. Section 25(2) provides for it to exercise the additional powers set out in the Schedule to the Act, for example, the issue of prerogative writs, sale of land and others.

¹⁵⁸ In addition to its general civil jurisdiction, a High Court also exercises specific civil jurisdiction which is enumerated in section 24 of the Court of Judicature Act 1964. It includes the following:

- a) divorce and matrimonial causes;
- a) admiralty matters;
- b) bankruptcy and companies;
- c) appointment and control of guardian of infants and generally over the person and property of infants;
- d) appointment and control of guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and
- e) grant, alter or revoke probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the Court' territorial jurisdiction.

¹⁵⁹ Section 2, 28, 29 Court of Judicature Act 1964 (Act 91).

On 24 June 1994, the Court of Appeal was established under Article 121 of the Federal Constitution to act as an appeal chamber. The creation restores the three-tier system that existed before the abolition of appeals to the Privy Council.¹⁶⁰ In civil matters, the amount or value of the subject matter of the claim must exceed RM250,000/- and if less than that amount, it must be with leave from the Court of Appeal.¹⁶¹

The Federal Court is the highest level of the Superior Courts. The Court consists of the Chief Justice who is the President of the Court, the President of the Court of Appeal, the two Chief Judges of the High Court and “until the Yang Di-Pertuan Agong by order otherwise provides, of four other judges and such other additional judges as may be appointed pursuant to Clause (1A)”.¹⁶² As ordered by His Majesty the current number of Federal Court judges is seven.¹⁶³

The general jurisdiction of the Federal Court may be classified as original, referral¹⁶⁴, advisory¹⁶⁵ and appellate. The Federal Court is empowered to deal with constitutional issues for its original jurisdiction.

¹⁶⁰ See Wu Min Aun, *The Malaysian Legal System*, (Selangor: Addison Wesley Longman Sdn. Bhd. 1999), 138-139, 308-309. As provided by Section 38 Court of Judicature Act 1964 (Act 91), proceedings in the Court of Appeal are heard and disposed of by three judges or such greater uneven number of judges as the President may in any particular case determine. Decisions will be made by a majority of judges.

¹⁶¹ Section 68, Court of Judicature Act 1964 (Act 91).

¹⁶² Article 122, Federal Constitution.

¹⁶³ Wu, Min Aun., *op.cit.*, 135-138, 309-312. As provided by Section 74 Court of Judicature Act 1964 (Act 91), when hearing cases, the Court would consist of no less than three judges or such as the Chief Justice may in any particular case determine. Decisions are made by a majority of judges composing the Court.

¹⁶⁴ The referral jurisdiction gives the Federal Court the authority to determine constitutional questions which have arisen in the proceedings in the High Court. When it has decided, the case will be transmitted to the original court to be disposed of in accordance with that determination, pending

The matters are laid down under Article 128(1) of the Federal Constitution which states:

- a) any question whether a law made by legislature, federal or state, is invalid on the ground that it deals with a matter to which it has no power to legislate; and
- b) disputes of any other question involving states and between the federation and any states.

In civil appeals, the Federal Court has appellate jurisdiction to hear appeals from the Court of Appeal with leave of the Federal Court granted in accordance with section 97 of the Courts of Judicature Act 1974, which states:

- a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; and
- b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.¹⁶⁶

With the structured court system, the adversarial system of litigation in resolving dispute becoming more acceptable for Malaysians, whenever there is a dispute, the court will be the preferred venue to seek redress. Thus, conciliation or mediation method is gradually ignored and rendered unsuitable.

determination of the case by the Federal Court. The judge in the High Court may order stay of proceedings. See Section 84, Court of Judicature Act 1964 (Act 91).

¹⁶⁵ The Federal Court also has advisory function pursuant to Article 130 of the Federal Constitution where it can give opinion on any question referred to it by His Majesty concerning the effect of any provision of the Constitution which has arisen or appears likely to arise.

¹⁶⁶ Section 97 Court of Judicature Act 1964 (Act 91).

2.4.2 Backlog of Cases

The issue of backlog of cases is a universal and perennial problem in most countries. The degree and disparity of the problem depends on the definition given on what constitutes backlog.¹⁶⁷ In Malaysia, the definition of backlog has been varied. One definition given is that backlog of cases are confined to those cases which are ready for trial, but yet to be disposed of and without any definite time for disposal as in Singapore and United Kingdom. Second definition is those cases which are not disposed of within a given time by the courts as in South Africa and New Jersey, United States. The third definition encompasses all pending cases filed in court irrespective whether they are set down for trial or not as in Hong Kong and New South Wales, Australia.¹⁶⁸ There are also cases with the disposal period being predetermined by circulars issued either by the Chief Justice, President of Court Appeal and any of the Chief Judges. Usually, these are remand cases, cases involving children, criminal cases involving government servant and public interest cases.¹⁶⁹

¹⁶⁷ See The Office of Chief Judge of Sabah and Sarawak, Kuching, Sarawak; *Backlog Of Cases- Definition And Disposal From The Perspective Of The High Court Of Sabah And Sarawak*, 18th April 2008 (retrieved), www.highcourt.sabah.sarawak.gov.my/

For instance, in some Common Law countries these are the following definitions:

- 1) Singapore: any case pending for hearing after being set down for trial;
- 2) Hong Kong: those cases pending for disposal including cases;
- 3) New South Wales:
(Australia): any case pending for disposal.
- 4) United Kingdom: any case pending for hearing after being set down for trial.
- 5) South Africa: in the Lower Court, it is where a case exceeds the cycle of 6-months from the date of first appearance in the District of Regional Court; and in the High Court, it is where a case exceeds the cycle time of 12 months from the date of first appearance in the High Court; and
- 6) New Jersey Judiciary: cases those are not resolved within time goals.
United States: that court has set down for themselves.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

In the instance, in 2008, the former Chief Justice, The Right Honourable Tun Dato Seri Abdul Hamid Mohamed remarked:

The main problems in our Malaysian civil courts are the ever-increasing number of cases being filed, backlog, protracted and expensive trials leading to delay in the disposal of cases.¹⁷⁰ The litigation system that we have now is not able to cope in disposing the ever-increasing cases within a reasonable time and costs, partly due to the system, the procedure is too complex, legal fees are too expensive and the lawyers themselves contribute to the delay.¹⁷¹

In the instance, the Annual Report of High Court and Subordinate Court 2001- 2007 clearly show the rising trend of backlog of cases¹⁷²:

Annual Report 2007:

Table 2.1: Magistrate Court (Civil Cases)

Year	Matter	No. of Cases
2007	Cases brought forward	77624
	Cases filed	31022
	Cases disposed off	28388
	Cases unresolved/unattended	80258

¹⁷⁰ Abdul Hamid Mohamad, officiating speech for 4th Asia Pacific Mediation Conference, Mediation in Asia Pacific, Constraints & Challenges, Kuala Lumpur, Malaysia, 16th June, 2008.

¹⁷¹ *Ibid.*

¹⁷² See Appendix A of this thesis, 'Annual Report 2001-2007' shows the rising trends of backlog cases in both subordinate court and high court.

Table 2.2: Sessions Court

Year	Matter	No. of Cases
2007	Cases brought forward	109265
	Cases filed	88400
	Cases disposed off	78884
	Cases unresolved/unattended	118781

Table 2.3: High Court

Year	Matter	No. of Cases
2007	Cases brought forward	77624
	Cases filed	31022
	Cases disposed off	28388
	Cases unresolved/unattended	80258

The above figures show the problem of backlog in our courts has reached a critical level and poses serious problems to litigants. As reported in the year 2007 there was a huge number of backlogs that need to be cleared off. In response to this problem, The Right Honourable Chief Justice Tun Zaki Tun Azmi urged¹⁷³ the court and the Bar Council to look for other modes of dispute resolution as the current practice of court adjudication to dispose cases would not help much due to the large volume of

¹⁷³ Zaki Azmi, “Look for new modes to clear backlog CJ” At the opening of *The Sabah and Sarawak Legal Year 2009*, Saturday February 28, 2009, *Daily Express Newspaper Online*, 23/3/2009, <http://www.dailyexpress.com.my/print.cfm?NewsID=63196>

pending cases. The Chief Justice further cited that mediation seems to be a promising alternative. Besides, other possible way proposed is by diverting some of the cases, for example, personal injuries claims, land matters and building construction disputes to be heard by tribunals as practiced in some other jurisdictions such as Hong Kong, Singapore and New South Wales in Australia. The judge further stated:

We should no longer be thinking of two years or more in disposing of cases before the court. It is therefore crucial for the courts to set a target on acceptable waiting periods.¹⁷⁴

The Right Honourable Chief Justice took an aggressive motion by introducing several measures in disposing the backlogs, such as system for file operation, judge specialization and case tracking. File operation by physical counting was introduced to determine the number of backlog of cases in each court for systematic planning. Specialization of judges was introduced as it was seen to dispose of cases better and quicker. Where judges are hearing both civil and criminal cases, specialization provides for the judges to hear either civil or criminal cases.¹⁷⁵

The tracking system divides the hearing cases to be heard by “Track A”, “Track T” and Track “M” judges. “Track A” judges heard cases involving evidence through affidavit. “Track T” judges heard cases involving oral evidence and “Track M”

¹⁷⁴ *Ibid.* Citing Singapore as an example, the Chief Justice stated the average waiting period for disposal of civil cases is within 18 months from the date of filing and criminal trial is six weeks from the date of preliminary inquiry. In Hong Kong, the criminal fixture is 120 days from filing of indictment to hearing and civil fixture is 180 days from application to fix date of hearing, he pointed out. With this mind, Zaki said he has directed all judges and al judicial officers to be strict in granting adjournments.

¹⁷⁵ See also Mohammad Nazri Abdul Aziz, Measures in place to reduce backlog of court cases. Nazri, *The Star Online*, 22 November 2010 <http://www.thestar.com.my>.

judges heard various cases. Cases were fixed for case management before the deputy registrar to ensure that those coming before the judges were ready for hearing. Other measures taken include the introduction of New Commercial Court (NCC) and the New Civil Court (NCvC) and also special courts for specific cases, such as intellectual property, corruption, illegal immigrants, and traffic.¹⁷⁶

In addition, mediation is also adopted as one of the agenda in clearing off cases. Other mechanism includes the application of electronic processes for case management and hearing in courts, such as e-filing, case management system, queue management system, court recording and transcription, and audio conferencing. By applying these approaches, there was a tremendous reduction of backlogs after the implementation of the new measures particularly for civil cases. The rapid decline can be seen from the balance of pending cases in June 2010 as compared to December 2008. Just in 18 months of the application, pending cases at the High Courts were reduced by 52.8%. However the reduction for criminal cases was not so drastic, but the courts somehow managed to clear the old cases.¹⁷⁷

¹⁷⁶ Zaki Azmi, *Ibid.*

¹⁷⁷ See Zaki Azmi, "Overcoming Case Backlog, the Malaysian Experience", *Asia Pacific Courts Conference*, (Singapore, October 2010).

The figures¹⁷⁸ below illustrate this state of affairs:

Table 2.4

High Court	Civil	Criminal
B/Forward 2008	93,523	4544
Registration (Jan 2009 – June 2010)	109,597	5,954
Disposal (Jan 2009 – June 2010)	158,977	7,118
Balance Pending	44,143	3,380
Reduction (%)	52.8%	25.6%

Table 2.5

Sessions Court	Civil	Criminal
B/Forward 2008	94,554	8,750
Registration (Jan 2009 – June 2010)	220,699	46,597
Disposal (Jan 2009 – June 2010)	254,026	46,643
Balance Pending	61,227	8,704
Reduction (%)	36.3%	0.5%

Despite the rapid reduction of backlog, the new system introduced received severe criticisms from members of the Bar.¹⁷⁹ Their main criticism is directed at the key feature of the System that is the Key Performance Indicator (KPI) aimed for speedy

¹⁷⁸ *Ibid.*

¹⁷⁹ See comments by Mureli, When KPI enter the courts-Mureli Navaratnam,. *The Malaysian Insider* , 4 Nov 2010, 4 Jan 2011, <http://www.Themalayssianinsider.com/breakingviews/article/when-kpis-enter-the-court>

disposal of cases that is said to becoming the “be-all” and “end-all” of the court system in the administration of justice. The court is said to becoming function like the Passport Section of the Immigration Department, which had to issue ‘Y’ number of passport in a day; the courts too were given a target to dispose of ‘X’ number of cases in a day. The clearing of the targeted number of cases meant that the KPI was achieved and justice served¹⁸⁰.

President of Penang Bar, Mr. Mureli Navaratnam commented in the memorandum from Penang Bar Committee to Chief Justice for an improvement of the system where he commented:

“This KPI, which had until then been kept out of the judicial system, took the courts by storm with the sole aim of clearing the backlog of cases which had reached serious proportions. The use of rates for disposal of cases as a measure of judicial expediency in the courts is, however, one that needs serious re-thinking because of the far-reaching consequences it has brought about and the repercussions that will necessarily follow. The sanctity and quality of justice cannot be sacrificed in the name of speed and statistics. Although we agree that tougher measures had to be taken to get the judicial system moving at a much faster speed, it is regretted that the emphasis has been solely on the speedy disposal of cases- and all other important features to create a good judiciary, namely the emphasis on the integrity of judges and judicial officers; having sufficient time for hearing and disposal of trials and applications; giving due consideration of evidence and arguments and well-reasoned written judgments, which all are crucial for the development of law, have all been unceremoniously sacrificed in the process. Courtrooms, which should be the last bastion of justice, have become the very places where so called-speedy justice or injustice is dispensed because members of the bench are compelled to race to meet their judicial KPI. The steps that have been put in place in the name of speedier disposal of cases are in effect steps which will slowly and effectively destroy the Malaysian judiciary, which, for all its shortcomings, was up to now still a significant contributor to the development of the common law by its judicial precedents reported in the law journals.”¹⁸¹

¹⁸⁰ *Ibid.*

¹⁸¹ See *Ibid.*

The Penang Bar has joined some of their colleagues in the Johor Bar who are disgruntled over the judicial measures for clearing the backlog of cases and improving the administration of justice. Extraordinary general meeting on this issue scheduled by the Johor Bar in August 2010 saw the Johor Bar Committee office bearers walked out of no confidence motion against the chairman. The meeting in Penang progressed more calmly as the Bar Committee has taken a proactive action and sent a memorandum to Chief Justice and Chief Judge of Malaya on the issue earlier. All these scenarios show that the majority members of the Bar are dissatisfied with the implementation of KPI in the court system.

The Bar Council in its 65th Annual General Meeting¹⁸² passed a no confidence motion against the Key Performance Index (KPI) introduced by the Chief Justice and is demanding its immediate withdrawal before a protest is called. The motion was almost unanimously passed with only one objection and two abstentions. In support of the dissatisfaction, it is interesting to quote the notes of Justice Steven Rares¹⁸³ on quality judiciary:

“Each case presents its own unique set of facts and issues. The role of the judicial branch is to do justice according to law in each case - not in selected number of cases or by some statistically verifiable methodology. Justice cannot be made to fit the statistician’s or bureaucrat’s facts or figures. A case that takes a short time to hear,

¹⁸² Held on Saturday, 12th of March 2011, *Malaysian Legal And Tax Information Centre database*, 14 March 2011; <http://malaysianlaw.my/bar-passes-no-confidence-motion-against-chief-justice-s-kpi>

¹⁸³ Rares, Steven., What is Quality Judiciary, *Asia Pacific Courts Conference*, (Singapore, 4-6 October 2010).

may involve legal issues of great significance or difficulty that will take a judge or judges considerable time to consider and resolve, before he, she or they can deliver reasons for judgment. There is no valid relationship between the time it takes to hear a case and the time it takes to decide that case or between the times one case takes to hear and determine as against that taken with any other. Courts must not be required or measured to meet targets, or the management school's holy grail of key performance indicators. They are not production lines intended to meet other people's targets. They are an independent arm of government for a very good reason. It is so that they may continue to perform their central function of doing justice according to law.”

The application of KPI for speedier disposal of cases has also been commented by some judges in their judgment. In the instance, in *Jennifer Anne Harper v Timothy Theseira*,¹⁸⁴ Balia Yusof Wahi J noted:

Trial judges are too occupied with far too many cases and judgments to write. They no longer have the luxury of time to produce well researched and authored judgments... The pressure of work and the demand for quicker and speedier justice has created this dilemma among trial judges. Clearing the backlog of cases has become the top priority.

Again in *Bomanite (Malaysia) Sdn Bhd v. Pen Harvest Sdn Bhd*, Balia Yusof Wahi J¹⁸⁵ recommended the use of short and concise judgments as a solution to elevate the backlog of cases in the civil courts. His Lordship stated:

This is done simply to suit to the current situation where judges are hard pressed for time to write judgments. Judges do not have the leisure of time to pen their judgments. Unlike the days far gone, the surge in

¹⁸⁴ 7 MLJ 711, (2009), 2 CLJ 499 at 514. Cited in Ashgar Ali Ali Mohamed, Court Annexed Mediation with Reference to the Practice in Singapore, *Mediation in Malaysia: The Law and Practice*, Eds. Mohamad Naqib Ishan Jan, Ashgar Ali Ali Mohamed, (Malaysia:Lexis Nexis, 2010) 451-452.

¹⁸⁵ (2008) 1 LNS 563 cited in Ashgar, *Ibid*.

the volume of cases before the courts and the demand for speedier disposal of cases and the general abhorrence for backlog of cases from all quarters, judges must also react accordingly and innovate. This mode of judgment writing, I believe and I earnestly hope will lessen the number of delayed written judgments from judges and hence a speedier disposal of appeals by the higher hierarchy. It goes also to suit the appellate court's preference for short and concise judgments. In the same token, it will also ease the judges' struggle against the eight weeks time period permitted of them to prepare their written judgments.

It seems that the implementation of KPI has denied the judges' much needed time to produce well researched and authored judgments. In addition, with the strong refusal and no confidence motion from members of the Bar, the KPI measures that was introduced in the new system in the year 2009 to measure the performance of judges and judicial officers in a bid to clear the backlogged has been scrapped. The action was disclosed by Chief Judge of Malaya, Tan Sri Ariffin Zakaria at a conference on April 4, 2011. The argument given by members of the Bar was that the KPI measurers did not serve the interest of justice and litigants.

In this regard, alternative mechanism is therefore needed so as to ensure the judicious and expeditious justice is upheld. Pursuant, to the above, the researcher proposes that mediation be vigorously applied in our court system. Standards and proper guidelines on the practice of mediation should be issued and mediators should be properly trained. If some cases are resolved by mediation it will ease the judges struggle against the limited time available to prepare the written judgments.

As noted in several jurisdictions mediation has been used as the main agenda and mechanism in civil justice reform and reducing backlog of cases. The success of the application has been widely acknowledged; therefore, the application of mediation in Malaysia should seriously be considered.

With the efforts of the Chief Justice mediation has been introduced in our court in April 2010 after a successful workshop conducted by Senior Judge Wallace of United States in April 2010. Since there was no authority for its application, the acceptance and reception of mediation amongst the judicial officers and legal practitioners were not encouraging. The second step saw the issuance of Practice Direction 5/2010 on Court Annexed Mediation to Order 34 of High Court Rules 1980 in August 2010. It can be said that the application of mediation is still new and at its infancy stage. Therefore, further improvements are needed to ensure the efficiency of the application and thus, determine the success of mediation. Only then mediation can be a sound alternative mechanism in reducing backlog and speed up disposal of cases in court.

A report from Suhakam indicates that the use of ADR has benefitted the court system by reducing cases registered in courts, encouraging settlement, reducing hearing and case preparation cost by narrowing issues that require adjudication within courts and developing sustainable solutions that are less likely to repeat re-litigation.¹⁸⁶ The report reveals a survey conducted in New Zealand that disputes which underwent

¹⁸⁶ Human Rights Commission of Malaysia, *Report; Forum On The Right To An Expedious And Fair Trial*, 7-8 April 2005, www.suhakam.org.my/c/document_library/

ADR before claims filed in court were less likely to end up in the courts than disputes that did not take up ADR. Further, it was also found out that even after a claim has been filed in court, ADR could, to a certain extent, encourage settlement, thereby, reducing pressure on the court system.¹⁸⁷

The report further states that, In Ontario, Canada, mandatory mediation was imposed where all civil cases are required to go before a mediator within 90 days of the filing of the statement of defence. The AG reported that 38% of cases, which underwent the mandatory mediation process settled at or immediately after the mandatory session.¹⁸⁸

It is learnt from other countries that mediation has been used as one of the means in reducing the backlog of cases in court. Therefore, mediation should be vigorously promoted and litigants need to be aware of such application in court. The application however should be monitored and regulated to ensure the efficiency in its application.

2.5 Civil Justice Reform and Mediation

Civil justice reforms in many countries has introduced alternative dispute resolution particularly mediation as part of the reform with the objective to achieve for a 'just, speedy and inexpensive resolutions' in civil cases. In the United States mediation was considered a means of increasing access to justice since 1960. Its potential to reduce the caseloads led to further development whereby in the late 1970s it became a part of a larger reform movement directed to resolve the internal problems of court. Civil

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid.*

Justice Reform Act was then introduced in 1990 to authorize court annexed mediation.¹⁸⁹ As of 1996, more than half of federal courts have some form of mediation program. The final report of the CJRA committee in 1997, indicated the ADR component particularly mediation was a success and committee of 'rules' support the continued use of appropriate forms of ADR. The Dispute Resolution Act was then introduced in 1998 requiring every federal court to consider mediation specifically¹⁹⁰.

The civil justice reform in the United Kingdom introduced by Lord Woolf in 1999 amended the UK Civil Procedure Rules 1998 to give powers to the judges at the case management stage to give order for mediation. The failure of parties to mediate will lead to cost penalties. Lord Woolf also make it compulsory for lawyers to advise clients the benefits of mediation.¹⁹¹ The court-annexed mediation model devised by Lord Woolf was said to have contributed to a substantial reduction of issued claims that have proceeded to hearing from 5.1% in 1999 to 2.9% in 2005.¹⁹²

According to some judicial statistics released by the Department for Constitutional Affairs, the number of proceedings started in Queen Bench Division decreased by just over 300% from 70,000 in 1999 to 17,000 in 2002. The huge decrease could have

¹⁸⁹ See Boule, Laurence and, Miryana Nestic, *Mediation, Principles, Process, Practice*. (UK: Butterworths, 2001), 225.

¹⁹⁰ See Spencer, David and Michael Brogan, *Mediation Law and Practice*, (New York: Cambridge University Press) 2006, 29.

¹⁹¹ See The Nationwide Academy for Dispute Resolution (UK) Ltd., *The Spread of ADR from the US to the Global Community*, 17 April 2006 (<http://www.nsdrr.co.uk/background/mediation/php>).

¹⁹² Wong Yang Lung, Concluding address, *Conference on Civil Justice Reform* (Hong Kong, 16 April 2010), <http://stockmarketsreview.com/pressrelease/2010/04/17>.

been attributed to a number of factors related to the CPR¹⁹³ but the key element was contributed to the increase in the development and use of ADR, which had been a natural and desired result of CPR.¹⁹⁴ In addition, The CEDR Mediation Audit in 2007 revealed that the ADR market in the UK had grown by 33% in the last two years. The significant growth gave a clear demonstration that reform to the rules of procedure can bring about a cultural change in the mindset of parties towards the use of different methods of dispute resolution¹⁹⁵.

The approach by the United Kingdom has been followed by Hong Kong whereby unreasonable refusal of a party to mediate will risk adverse cost orders. Civil Justice Reform took effect in Hong Kong on 2 April 2009 with the objective of increasing cost effectiveness and facilitating dispute settlement. Under the Civil Justice Reform, lawyers encourage parties to alternative dispute resolution (ADR) procedure if appropriate in the hope of leading to an amicable settlement.¹⁹⁶ Practice Direction 31 on mediation was issued effective on 1 January 2010.

In Australia, the application is more advanced where court related ADR exists in every court and tribunal. In an instance, in 1991, the Courts (Mediation and Arbitration) Act was introduced, facilitating court-sponsored mediation and

¹⁹³ such as the publicity surrounding the impetus for the reform, fears of increased cost and delays, and a decline in public funding for civil litigation, stated in ¹⁹³ “The CPR Regime five years on”, Khawar Qureshi, 154 NLJ 644, 30 April 2004, cited in “Civil Justice Reform-Implications for the Future of Alternative Dispute Resolutions, *Alternative Dispute Resolution*, , *Asian DR.*, 2009, 49.

¹⁹⁴ Khawar Qureshi “*The CPR Regime five years on*”, 154 NLJ 644, 30 April 2004, cited in “Civil Justice Reform-Implications for the Future of Alternative Dispute Resolutions” *Alternative Dispute Resolution, Asian DR.*, 2009, 49.

¹⁹⁵ *Ibid.*

¹⁹⁶ See Tanner De Witt solicitors, *An Effective Way Of Resolving Disputes In Hong Kong*, <http://www.tannerdewitt.com/practice-areas/mediation.php>.

arbitration in the courts of federal jurisdiction, namely the Federal Court and Family Court. The Court has reported that between 1994-95 and 1998-99 an average of 220 matters were referred to mediation each year, with 347 matters to mediation in 1998-1999.¹⁹⁷ In 1997, the Federal Court was given power to order cases for compulsory mediation, although it was made compulsory, in practice most referrals have been “at the request, or with the consent of the parties. The Court Annual Report 2008-2009 recorded a steady increase in mediation referrals over the last five years remarking that this “reflects the increasing recognition both within the court and the legal profession of the benefits of Alternative Dispute Resolution and its role in the effective case management of cases to resolution.”¹⁹⁸

In another instance, Part 4 Civil Procedure Act 2005 (NSW) introduced mediation provisions for Supreme Court of New South Wales. Earlier, the Supreme Court Amendment (Referral of Proceedings) (NSW) amended s110 of the Supreme Court Act 1970 authorised the court to refer matters to mediation with or without the consent of the parties. In 2008, the New South Wales Supreme Court Registry recorded 868 separate referrals to mediation. Approximately 65% of these referrals were processed through court-annexed mediation. Of those cases proceeded to court annexed mediation, 59 per cent were settled at mediation¹⁹⁹.

¹⁹⁷ Peter Megens, *The Satisfaction of Litigation*, 21 June 2006 (retrieved)

<http://www.mediate.com/articles/parselle10.cfm>

¹⁹⁸ Federal Court of Australia, *Annual Report 2008-2009* at 32 cited in *Civil Justice Reform in Australia*, http://www.lawlink.nsw.gov.au/lawlink/supreme_court.

¹⁹⁹ See Supreme Court of New South Wales, *Annual Review 2008* at Appendix (ii) cited in “*Civil Justice Reform in Australia*, http://www.lawlink.nsw.gov.au/lawlink/supreme_court

In Singapore, to improve the justice delivery system, major changes have been implemented in the civil procedural laws to encourage litigants to settle their disputes without litigation. These changes have eventually made way for the formal introduction of mediation within the judicial system. The reform was reported to have resolved the internal problems in the court system. The backlogged cases were reduced and the courts managed to speed up the disposal of cases.

In regard to the importance of mediation in civil justice reform, Dame Hazel Genn, in her Hamlyn Lecture 2008 on Judging Civil Justice said:

“In my view, mediation has rightly become a feature on the landscape of dispute resolution- an option for unfortunate enough to have become involved in civil dispute. I believe that the public and the legal profession should be properly educated about the potential of mediation from the earliest moment and I believe that mediation facilities should be made easily available to anyone contemplating litigation.”²⁰⁰

The success of mediation in improving the access of justice has influenced the application to be accepted globally particularly for civil law countries. Mediation is perceived to be a mechanism to speed up disposal of cases with expeditious, timely and cost effective.

²⁰⁰Hazel Genn, “Judging Civil Justice”, *The Hamlyn Lectures 2008*, Cambridge University Press, 2010 cited in www.doj.gov.hk/eng/public.mediation.htm.

2.6 Conclusion

The historical development of mediation shows that mediation has been practised by most of the traditional communities in the world. However the practice was not formalized and institutionalized. Besides, the practice was applied differently in different societies. Such development further revealed that modern mediation started in the United States in 1913 when a small scheme was introduced in the Municipal Court in Cleveland, Ohio. In 1930, The United States judges urged lawyers to consider conciliatory method of dispute resolution. When the backlog of cases emerged during the period of 1960-1970, mediation became one of the mechanisms to minimize the problem. Looking at its potential in reducing the backlog of cases, the judiciary took the initiative to have mediation program in court where then it was mandated. The courts move further with introduction of Multidoor Courthouse which was reported to be successful to give a better justice system. The success of the application has influenced other countries to adopt the method as the main agenda in the civil court reform.

In Malaysia, specifically, traditional mediation has been practised by the Malaysian communities, involving the Malays, Chinese, Tamils or other indigenous people. The basis for this is their religious teachings and their beliefs that encourage conciliation and settlement, Nonetheless, the method of the practice was not standardized. It was observed that preservation of relationship is the utmost concern of Malaysian traditional communities. On this basis, it can be inferred that mediation is suitable to be promoted as a culture for resolving disputes to the Malaysian societies.

It was also observed that the adversarial court system was an alien system when it was first introduced for Malaysian communities. The use of formal court system only occurred when there were some economic or political reasons. The parties only opted for court system when they did know each other or when they did not on good terms. The adversarial system then gradually been accepted and became popular.

If the adversarial court system with the complex procedure and been considered alien by our traditional communities can be absorbed and then became accepted, it could be seen that the mediation concept of negotiation and conciliation could be easily absorbed by the Malaysian communities. The elements of negotiation and conciliation are not alien for the communities, the process does not involve complex procedure and further, the aim of mediation is to preserve the relationship which is in line with the teaching of each community's religion and belief.

The adversarial court system was first introduced by the British Colonial administration in Penang to administer justice under Royal Charter of Justice 1807. It was further improved by Second Charter of Justice 1826 and then by Third Charter of Justice 1855. The system was further reorganized after the transfer of the administration from India to the Colonial Office in 1867. The adversarial court system then evolved into its modern form and gradually became known and accepted by various societies. The popularity of the system then led to backlog of cases in court.

Mediation as acknowledged by several countries can be used to resolve internal courts problems and speed up the disposal of cases. Civil justice reforms in many countries have introduced mediation as part of the reform. The application was introduced to help disputants to reach settlement without undergo a trial process. This may expedite the settlement and help the court to dispose the case early.

Besides, the non court mediation or private mediation was also introduced and developed. Started in the United States, community mediation centre, family mediation centre, and various dispute settlement centres are established in the UK, Australia, Hong Kong, New Zealand, Singapore and many other countries to accommodate the needs for the settlement of disputes out of court. If these centres can successfully mediate the case, then there is no reason why the case should be brought in court. Thus, by doing so the volume of cases filed might be reduced.

In conclusion, mediation can be adopted as a culture to resolve disputes in Malaysia and be used to resolve the internal court problems. The application will be more effective if both court annexed mediation and private mediation are upgraded and enhanced. Proper implementations, improvements and regulations may give mediation an upsurge of interest in Malaysian communities.

CHAPTER 3

ANALYSES OF THE APPLICATION OF MEDIATION BY THE VARIOUS INSTITUTIONS IN MALAYSIA

3.1 Introduction

Some institutions in Malaysia have moved forward by introducing mediation as a mechanism to resolve disputes in their institutions. This Chapter will analyse the approaches, procedures, governing rules and effectiveness of mediation as adopted by such institutions. The objectives of the analysis are to evaluate the practicality of mediation as a mechanism in resolving disputes and the manners in which mediation is most attractive and effective for Malaysians. As court annexed mediation is new to the Malaysian court system, the dissertation will also suggest some guidelines for the improvement of court annexed mediation in Malaysia.

3.2 Analyses of the Application of Mediation in Malaysia: Approach, Procedure, Governing Rules and Effectiveness

As aforementioned, the analyses will focus on four categories: i.e., (i.) the approach adopted, (ii.) the technical procedure applied, (iii.) the governing rules introduced for the application of mediation and (iv.) the effectiveness of mediation in resolving disputes.

i). Approach

The analysis on approach will discuss the mode of mediation adopted by the relevant institutions and provide observation in relation to the common features of voluntariness, confidentiality of the information and documents revealed and prepared for the sessions as well as the impartiality of the mediator in conducting the sessions. These observations are to determine whether the institutions practise true mediation or otherwise. Besides, this dissertation will also touch on the status of accreditation of mediators with the aim of evaluating the quality of mediation offered. This is because the success of mediation depends largely on the skills and good qualities of the mediators.

ii). Procedure

The analysis on procedure will look into the technical part of mediation under the following issues:

- a). Legal Documentation
- b). Fees
- c). Choice of Mediator
- d). Legal Representation
- e). Locality of Services offered
- f). Concluding Period
- g). Termination of Mediation
- h). Settlement Agreement

The selection of these issues is to determine the simplicity of the procedure, cost, efficiency and effectiveness of the process in resolving disputes.

iii). Governing Rules

This dissertation will analyse the rules and regulations as presented by the related institutions in introducing mediation. The purpose is to see the standard of mediation practised by the related institutions.

iv). Effectiveness

The effectiveness of the application will be analysed by examining the statistics and reports produced. The aim is to see the role and practicality of mediation in resolving disputes and in what manner it is most attractive and effective for Malaysians.

3.2.1 Extent of Application of Mediation in Resolving Disputes in Malaysia.

There are institutions, for examples, the legal aid department, administrative tribunals, corporate bodies, private institutions and international organisations, in the country that acknowledge and recognize the benefits of mediation as a means of resolving disputes and expediting their settlement.

For the purpose of analysis, the institutions that are classified under the heading of administrative tribunals and legal aid department include: (i.) the Tribunal for Consumer Claims (TCM), (ii.) the Housing Buyers Tribunal(HBT),(iii.) the Industrial Court, and (iv.) the Legal Aid Department.

Under the category of corporate bodies, two institutions are analysed namely: (i.)the Financial Mediation Bureau and (ii.) the Construction Industry Development Board (CIDB).²⁰¹

The Malaysian Mediation Centre is analysed under the category of “private bodies” and the Kuala Lumpur Regional Centre for Arbitration is categorised under the heading of international institutions. The Malaysian Mediation Centre is supervised by The Bar Council while the Kuala Lumpur Regional Centre for Arbitration was established under the auspices of international agreement between the Asian-African Legal Consultative Committee and the Malaysian Government.²⁰² The final part of the analysis will expound the application of ‘*sulh*’ by Shariah Court in Malaysia.

3.2.2 Administrative Tribunals and Legal Aid Department

- i). Tribunal for Consumer Claims (TCM)
- ii). Housing Buyers Tribunal
- iii).Industrial Court
- iv).Legal Aid Department

3.2.2.1 Introduction of the Institutions

The Tribunal for Consumer Claims Malaysia was established under the Ministry of Domestic Trade and Consumer Affairs.²⁰³ The Tribunal came into operations on 15 November 1999. Its primary objective is “to provide an alternative channel for

²⁰¹Persatuan Arkitek Malaysia has also introduced mediation, since the application is new, no data is available to be analysed.

²⁰²²⁰² The WorldBank Group-*Justice Sector at a Glance, *Malaysia-ADR Mechanism*, 9 May 2008, <http://www4.worldbank.org/legal/database/Justice/Pages/jsADR.asp?Count=2745&cD=Malaysia>

²⁰³S.85 of Consumer Protection Act 1999 give authority for the establishment of Tribunal for Consumer Claims

consumers to claim for any loss suffered in respect of any goods or services purchased or acquired in an easy and speedy manner and at a minimal cost”.²⁰⁴ It is an independent body established under the Consumer Protection Act 1999 with the primary function of hearing and determining claims lodged by consumers under the Act.

The Tribunal for Consumer Claims has jurisdiction to hear and settle consumer claims for any loss suffered on any matter concerning person’s interest as a consumer under the Consumer Protection Act 1999 where the total award sought does not exceed RM25, 000. Mediation is adopted as one of the mechanisms to resolve disputes for it is fast and gives more satisfaction to the disputing parties²⁰⁵.

The Housing Buyers Tribunal was set up under the Ministry of Housing with the introduction of S.16B of the Housing Development (Control and Licensing) Act 1966 which came into effect on 1 December 2002. The objective of the Housing Buyers Tribunal is to provide an easy, cheap and fast means of settlement for homebuyers claiming against the developers. The amount claimed should not exceed RM50, 000. Mediation is also used as one of the mechanisms in resolving disputes at the Tribunal.

The Industrial Court is a quasi-judicial tribunal established under the Industrial Relations Act 1967 under the Ministry of Human Resources and Manpower. The main function of the court is to arbitrate disputes between the employer and employee

²⁰⁴ Nor Adha Abdul Hamid, ‘Win-Win Innovation Through Alternative Dispute Resolution (ADR) Special Reference to the Practice of Mediation in Asian Countries’, *The International Colloquium on Business & Management Bangkok 2007*, (The Bangkok Palace Hotel, Bangkok: 19-22nd November 2007).

²⁰⁵ Interview with Encik Osman Ahmad, Secretary of Consumer Claims Tribunal on 9 June 2010.

or its trade union over issues connected to the employment or non-employment or conditions of the work. The Minister of Human Resources and Manpower may refer a case to the Industrial Court after the parties fail to reach a settlement during the conciliation proceedings at the Industrial Relation Department.²⁰⁶ The Minister acts as an intermediary to ascertain the facts and materials received to determine whether there is a serious question of fact or law to be adjudicated by the Industrial Court. The Honourable Minister will transfer the case to the Industrial Court if he deems fit.²⁰⁷

Mediation was introduced in the Industrial Court officially in August 2004. The triggering factor was the backlog of cases that had delayed the disposal of cases.²⁰⁸

Since the number of cases referred by the Honourable Minister to the Industrial Court has increased, this has also led to the corresponding increase in the number of backlog of cases. The Court has decided to introduce mediation conducted by the Court's Chairmen themselves to dispose the cases. Mediation was mooted as the presiding Chairmen find it difficult²⁰⁹ to dispose the cases speedily even though the number of courts has increased. The move was very much encouraged by the former

²⁰⁶Before the case is brought to the the Industrial Court, it has to undergo 4 stages of procedure namely: 1) Lodge Report, the person must lodge a report with the office of the Director General of the Industrial Relations 2) Conciliation proceeding; the Director or its authorized officer will seek to conciliate over the dispute 3) Reporting; The Director General reports to the Minister after finding the disputes irconciliable, 4) Referral; The Minister decides whether or not to refer the dispute to the Industrial Court. See Ashgar Ali Ali Mohamed, Farheen Baig Sardar Baig, *Procedure for Unfair Dismissal Claims in Malaysia*, (Malaysia: Lexis Nexis, 2009) at 121

²⁰⁷ See Zaini Abd. Rahman, "How Industrial Court Arbitrate and Mediate Trade Disputes in Malaysia", *Conference on Mediation in the Asia Pacific: Constraints and Challenges*, (Kuala Lumpur, 17-18- July 2006)

²⁰⁸ *Ibid.*

²⁰⁹ The presiding chairmen find the case difficult to be to disposed speedily as it involves a complex procedure such as filing the statement of case, filing statement of reply and supporting documents. Many of the proceedings had emphasized on examination of witnesses despite the facts that the proceedings is civil in nature and not adversarial. See Zaini, *Ibid.*

Minister of Human Resources and Manpower, Datuk Seri Dr. Fong Chan Onn. The Minister had proposed that mediation be considered as a condition precedent before the case is listed for adjudication at the court. The reasons for the proposal were to expedite the settlement of dispute as well as to alleviate the serious problem of backlog.²¹⁰ It is submitted that mediation was introduced in the court as one of the mechanisms to reduce the number of backlog cases. The flexibility and the simplicity of the process could help the parties reach an amicable settlement in a better way as compared to the normal adjudication practised by the court.

The Legal Aid Department is a government agency that provides legal advice and legal assistance to the lower income group²¹¹ who cannot afford to pay private lawyers to represent them in courts in disputes relating to contentious legal issues or matters.²¹² The Legal Aid Act 1971 and the Legal Aid and Advice Regulations 1970 regulate the operation of Legal Aid. Its jurisdiction covers Syariah family matters, civil family matters, civil cases²¹³ and minor criminal cases.²¹⁴ According to its

²¹⁰ See, Zaini, *loc. cit.* See also Kamal Halili Hassan, Alternative Dispute Resolution in Industrial Dispute, (2006) 5 Malayan Law Journal xii; (2006) 5 MLJA 13, 7 May 2009

<https://www.lexis.com/research/retrieve/y 7 May 2009>, and Ashgar Ali Ali Mohamed, Farheen Baig Sardar Baig, *Procedure for Unfair Dismissal Claims in Malaysia*, (Malaysia: Lexis Nexis, 2009)

²¹¹ The applicant will be granted legal aid when the Director General is satisfied that the applicant possesses financial resources which do not exceed RM25,000.00 per annum. For this category there is a fee of RM2.00 (S.15(2) Legal Aid Amendment Act 2003). For the second category The Director General is satisfied that the applicant possess financial resources of resources exceeding RM25, 000 but do not exceed RM30,000 per annum that . For this group they are eligible for legal aid with registration fee of RM2.00 plus a contribution of RM300. (S. 16(1)) Legal Aid (Amendment) Act 2003

²¹² Malaysian Legal Aid Department, www.jbg.gov.my.

²¹³ As Stipulated in the Legal Aid Act Third Schedule, jurisdiction for civil cases covers workmen compensation, rights and liabilities of padi cultivators, distribution of small estates, road accident claim, moneylenders, hire purchase, tenancy matters, probate and letters of administration, adoption and consumer claim

²¹⁴ As stipulated under 2nd Schedule of the Act The legal Aid Department has jurisdiction to handle ; i) all criminal proceedings in which the accused are not being represented by counsel pleads guilty to the charge and wishes to make a plea in mitigation respect thereof, ii) Criminal proceedings under

former General-Director, Puan Faridah Abraham, about 70% to 80% of cases handled by the Department comprise of Muslim matrimonial matters, which include matters pertaining to divorce, maintenance of spouses or children, custody of the children after divorce, distribution of matrimonial property and others²¹⁵.

The Legal Aid Department had introduced mediation through the establishment of Mediation Unit in 2006 by way of amendment of the Legal Aid Act 1971. The amendment introduced Part VA that deals with the provisions of mediation services. Some twenty-four mediators were appointed from its pool of paralegals with the enforcement of that provision on 1 September 2006.

3.2.2.2 Analysis of the Approach of Mediation Adopted

As noted earlier, this dissertation will focus on a number of key that are the cornerstone of mediation namely; i.e., the mode of mediation adopted and the observation of elements of voluntariness, confidentiality and impartiality. Besides, the issue on accreditation will also be looked into as good qualities of mediators will determine the success of mediation.

All the four above-stated institutions adopt the core feature of mediation that the role of mediator is to assist the parties to reach an amicable settlement where each of the

the Child Protection Act 2001 (Act 611) and, iii) Criminal proceedings under the Minor Offence Act 1955 (Act 336).

²¹⁵ Faridah Abraham, "Realizing the Potential of Women in Building Effective Family Mediation and Community Mediation Programmes", *Workshop on Empowering Communities Through Mediation in Malaysia*, (Kuala Lumpur, 16-18 June 2009).

parties agrees on the terms of the outcome.²¹⁶ The mediator is not given any right or authority to give an award in case the mediation fails. If the parties fail to reach an amicable settlement, the case will proceed to a hearing. S.107 (4)(b) of the Consumer Protection Act 1999 provides that where the parties are unable to reach an agreed settlement in relation to the claim, the tribunal shall proceed to determine the dispute. The tribunal will not directly give an award but shall proceed with hearing to determine the dispute. Similar provisions are also stated in S.16 T (3) and S.16 T(4) of the Housing Development (Control and Licensing) Act 1966.

Although the Industrial Court has no official rules on mediation, the practice²¹⁷ is that the case will be reverted to the original court for adjudication in case mediation fails. In the situation where the parties have chosen the chairman from the original court as a mediator the case will be transferred to another court for adjudication. It is not a duty of a mediator to make a decision or give an award in the situation where the mediation fails.

For the Legal Aid Department, Rule 7 (b) of the Legal Aid (Mediation) Regulation 2006 provides that a mediator shall facilitate negotiations between the parties and steers the direction of the mediation session with the aim of finding a mutually acceptable solution to the dispute. It is clear from the provision that the role of the

²¹⁶ See the discussion on the core features of mediation by Boule, Laurence and Miryana Nestic, *Mediation, Principles, Process, Practice*, (UK: Butterwoths, 2001), 6-7.

²¹⁷ The Chairman will be the mediator, parties are given liberty to appoint a chairman to be a mediator and it is not confined to the Chairman of the court where the case was registered. If a chairman of another court is chosen, the case will be transferred to that particular court. See Zaini Abd Rahman, *How Industrial Court Arbitrate and 'Mediate' Trade Disputes in Malaysia*, Conference on Mediation and Arbitration in Asia Pacific, (Kuala Lumpur, 17-18 July 2006).

mediator is to assist the parties reaching an agreement and not making a decision. Rule 5 of the Regulation states that during a mediation session, a mediator shall not make any ruling or finding with respect to a dispute. In case the settlement is not reached within 30 days of the mediation session held, the case will be resolved through litigation unless parties decide otherwise.

The method adopted empowers the parties to determine their own options and create their own resolution. The use of techniques like brainstorming and the development of creative options enable the parties to produce a unique resolution that might be outside the “normal remedies” or remedies that would not be within the legal system.²¹⁸

Thus, it can be concluded that the four said institutions practise the true nature of mediation whereby the role of the mediator is to assist the parties reaching an agreement and not giving a decision.

3.2.2.2.1 Mandatory or Voluntary

The Home Buyers Tribunal and the Tribunal for Consumer Claims adopt the mandatory approach. Section 107 of the Consumer Protection Act 1999 (Act 599) and Section 16T Housing Development (Control and Licensing) Act 1966 provide that:

²¹⁸ A detail discussion on empowerment and unique solution can be found in Spencer, David and Michael Brogan, *Mediation Law and Practice*, (New York: Cambridge University Press, 2006)

“The tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim.”

The word “shall” connotes that it is compulsory for the tribunal to assess whether the case is appropriate for negotiation. In case it is appropriate, it is a duty for the tribunal to mediate the case. In the tribunal, the term ‘negotiation’ and ‘mediation’ is used interchangeably.²¹⁹

The Industrial Court and Legal Aid Department adopt the voluntary approach. Mediation is offered only to the parties at the industrial court when the parties appear in court after the case has been referred and registered at the court and the parties willingly give their consent for mediation.²²⁰ There is no compulsion for the parties to undergo mediation session before the adjudication of the case. For the Legal Aid Department Section 29C of Legal Aid Act 1971²²¹ provides a clear provision that attendance and participation in a mediation session is voluntary.

As the Home Buyers Tribunal and Tribunal for Consumer Claims adopt the mandatory approach, it is questionable whether they comply with the fundamental

²¹⁹ Interview with Encik Osman Ahmad, Secretary to the Tribunal for Consumer Claims Malaysia on 9 June 2010. See also Naushad Ali Naseem Ameer Ali, “Mediation in Malaysian Construction Industry”, *Mediation in the Construction Industry, An International Review* edited by Penny Brooker, Suzanne Wilkinson, (New York: Span Press 2010). Naushad commented that in Malaysia, mediation is not generally distinguished from conciliation and the terms are sometimes used interchangeably. For example, the mediation/conciliation under the auspices of the Kuala Lumpur Regional Centre for Arbitration. The KLRCA publishes its own rules for mediation and refers to them as the “Rules for Conciliation/Mediation of Kuala Lumpur Regional Centre for Arbitration.

²²⁰ There is no specific provision for the practice. Reference is made to the common practice in the Industrial Court. See Zaini, *loc.cit.*

²²¹ Act No. 26

nature of mediation, that it is a consensual process and voluntary. Stone²²² argues that voluntary nature of mediation is fundamental and the party cannot be ordered to mediate as a party is free to adopt mediation or not to do so. A party cannot be compelled to enter into mediation by law or any other form of compulsion.²²³ Astor and Chinkin²²⁴ also made a point that any sort or form of compulsion or encouragement to attend mediation from a person in authority compromises its consensual nature. In an article²²⁵, Astor argues that consensuality is crucially affected by the reality of the consents made by the parties to go to mediation. If the consent given to participate is not a real one, the outcome cannot also be said to be a consensual one. When mediation is made mandatory, it violates the consensual nature of the process.

The commentators who are against the mandatory approach argue that the mandatory character damages the system of justice and the ideology of mediation as it compromises the consensual nature. They argue that the mediation proceeding becomes settlement focused without assessing the merits and without observing the flexible nature of the process.²²⁶ Therefore, entering mediation should be at the choice of the parties.

²²² Stone, Marcus *Representing Clients in Mediation*, (UK: Butterworths,1998) at 19.

²²³ *Ibid.*

²²⁴ Astor Hilary, Christine Chinkin, *Dispute Resolution in Australia*, 2nd ed. (Australia: Butterworths, Lexis Nexis, 2002). See also; Spencer, David, Tom Altobelli, *Dispute Resolution in Australia, Cases, Commentary, Materials*, (Sydney: LawBook Co., 2005) at 152.

²²⁵ Astor, Hilary, “ Rethinking Neutrality : A Theory to Inform a Practice – Part 1” (2000) 11 *Australasian Dispute Journal* 73.

²²⁶ Spencer D, T Altobelli, *op.cit.* 154.

However, the voluntary concept of mediation has been challenged due to the evolution of mediation and the impact of legal, social and economic development.²²⁷ Spencer and Altobelli state that in the contemporary Australia, mandatory participation in mediation is very common.²²⁸ This is clear from the various Acts that have been amended to make the application mandatory.²²⁹ Commenting on this issue, Boule and Nestic state that in the US, the distinction is drawn between the compulsion to enter into mediation and compulsion within the mediation and since compulsion to mediate is pressure of the former kind, there should be no objection. The rationale given is that even if the parties are coerced to mediate, it is still up to them to participate in the process and to work out the terms of any settlement in the mediation.²³⁰ Looking at the reality of mandatory mediation systems, they argue that there seems to be little purpose in regarding mandatory mediation as a contradiction in terms. The better approach proposed is to focus on developing adequate safeguards to ensure that mediation works at its optimal level. This would involve screening²³¹ of cases to ensure that wholly inappropriate matters do not go to mediation, quality controls in relation to the qualifications and expertise of mediators,

²²⁷ See the discussion on consensuality. Spencer D, T Altobelli, *op.cit.*, 145.

²²⁸ *Id.* at 147

²²⁹ E.g of the Acts amended; Mediation under Farm Debt Mediation (NSW), Mediation under Retail Leases Act (NSW), NSW Legal Aid Commission Case Conferencing, Queensland Legal Aid Conferencing Scheme, NSW Supreme Court Act 1970, Federal Court of Australia Act 1976.

²³⁰ Boule, Laurence and Miryana Nestic, *Mediation, Principles, Process, Practice*, (UK:Butterworths, 2001), 14-16, 372-373.

²³¹ Boule and Nestic clarify that mediation will be appropriate where it is likely to result in a settlement and to achieve some of the other goals of mediation, and where its underlying principles are relevant to the circumstances. Mediation is likely to be inappropriate where there is a power imbalance between the parties, where there is a single issue in dispute, and where there is no continuing relationship between the disputants. See Boule and Nestic, *Id.*, 91. See also pg 92-97 for the indicators of its suitability and unsuitability. Noone suggests that advantages and disadvantages of the mediation process should be tested from three viewpoints : the material and substantive, the procedural and the psychological. See Noone, Michael, *Mediation*, (London: Cavendish Publication, 1996), 20-23.

and monitoring and surveys of the systems over time.²³² Besides that, the funding²³³ of mandatory mediation programmes also should be taken into account.²³⁴

It is submitted that the consensual mandatory approach adopted by the Tribunal for Consumer Claim and the Home Buyers Tribunal does not contravene the fundamental nature of mediation. The two tribunals are funded by the government and their establishment is to expedite the settlement of disputes for certain categories of cases where the maximum claim does not exceed RM25,000 for Consumer Claims Tribunal and RM50,000 for Home Buyers Tribunal. The mandatory approach taken is for the benefit of the parties as it brings awareness amongst the disputants. Since it is mandated, the parties have no choice but to mediate and negotiate first. Some of the parties are unaware of the options and do not know about the benefits. The mandatory approach gives opportunity for the parties to value the benefits of mediation. Even though the parties are mandated to enter into mediation, the parties are not compelled to agree on settlement; the consensual concept is still there as they

²³² Boulle and Nestic, *loc.cit.*

²³³ National Standards for Court-Connected Mediation Programs of the United States Institute of Judicial Administration also states that mandatory mediation should be publicly funded.

Sourdin T. commented that; mandatory referral objections arise in three areas linked to

1. Concerns about the possible adverse impact that mandatory referral practices may have upon the process
2. Questions about how the process should be funded
3. Concerns relating to the choice of ADR practitioner, this is also linked to training issues) (Sourdin, Tania, *Alternative Dispute Resolution*, (Sydney: Lawbook Co. 2002) 97-98.)

²³⁴ Boulle and Nestic, *loc.cit.*, The element of voluntarism has been discussed in detail. Interesting to note that the authors clarify the gradations of voluntariness where in certain situations mediation is neither completely voluntary nor completely mandatory, but falls somewhere on spectrum between the two.

still can opt for hearing to determine the case. The statistics²³⁵ show that mandatory mediation has positive impact on the participation and settlement of cases at the aforesaid tribunals.

3.2.2.2.2. Confidentiality

There is no specific provision on confidentiality provided for Consumer Claims Tribunal, Home Buyers Tribunal and the Industrial Court. However, there is an exception for the Legal Aid Department where Section 29E of Legal Aid (Amendment) Act 2003 provides that:

“No person shall be compelled to disclose to the court any confidential communication which has taken place between that person and a mediator, if the mediation process fails, unless that person offers himself as a witness, in which case that person may be compelled to disclose only such communications as may appear to the court to be necessary to be known in order to explain any evidence which he has given.”

At these two tribunals²³⁶, the element of confidentiality is not fully observed as the proceedings are open to public. However, the Industrial Court observes the element of confidentiality even though there is no specific provision provided. The process is confidential unless the parties authorise the disclosure.

William, in commenting on the confidentiality of mediation, explains that it has two dimensions. One relates to the separate meetings between mediators and the

²³⁵ See statistics under Section 3.2.2.5, “Analysis on the Effectiveness of Mediation” of this Chapter. Interview with Encik Othman Ahmad, Secretary to the Tribunal for Consumer Claim on 9/6/2010

²³⁶ Tribunal for Consumer Claims and Home Buyers Tribunal.

individual parties. The object here is to encourage parties to speak out with candour and frankness, and provides a safe environment for each party to reveal to the mediators their concern and interest. The other aspect of confidentiality relates to the mediation process as a whole, in respect of which both the mediator and the parties have obligations. This helps to prevent adverse publicity for mediation meetings and to avoid adverse legal consequences for the parties through subsequent reference to mediation disclosures in mediation.²³⁷

It can be seen that the element of confidentiality is observed by the Legal Aid Department with specific provision provided, it is also been observed by the Industrial Court without any provision provided. However, this element is not been observed by the Consumer Claims Tribunal and Home Buyers Tribunal. The general provision under Section 107 of the Consumer Protection Act 1999 (Act 599) and Section 16T of the Housing Development (Control and Licensing) Act 1966 that use the word ‘negotiation’²³⁸ lead to the leniency of the application without the assurance on observation of confidentiality which is the core element of mediation. Thus, this dissertation recommends some improvements or amendment for specific provision on mediation to these Acts.

²³⁷ See William K.H. Lau, “The Role of KLRCA As A Regional Centre For Arbitration And Mediation”, *Asia Pacific Conference on Mediation*, (Kuala Lumpur, 17-18 July 2006). It should be pointed out that privacy and confidentiality are not identical. There is a distinction between the two. Privacy refers to physical and structural circumstances under which mediation is conducted where external access may be denied, and public access is regulated, whereas confidentiality refers to the subsequent access of what transpired in mediation. Mediation can be private without being confidential. Most of the contentious issues have arisen in relation to the issue of confidentiality.

²³⁸ Section 107 of the Consumer Protection Act 1999 (Act 599) and Section 16T of the Housing Development (Control and Licensing) Act 1966 provide: “The tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim.”

3.2.2.2.3 Impartiality of the Mediators

There is also no provision governing the impartiality of mediator at the session for the Consumer Claims Tribunal, the Home Buyers Tribunal, and the Industrial Court. The Legal Aid Department, however, provides this element under Rule 3 of Legal Aid (Mediation) Regulations 2006 that provides a mediator shall be impartial and shall be seen to be so.

Although there is no specific provision provided on the observation of impartiality, the mediators at the Homebuyers' Tribunal, the Consumer Claims Tribunal²³⁹ and the Industrial Court are required to observe 'the said element' when conducting the sessions.

There are arguments that impartiality should not be of fundamental importance in mediation. In the instance, a school of thought has emerged to say that impartiality, taken in its ordinary meaning, should not be treated as prerequisite to mediation.

Robert Creo, a well-known US mediator has this to say²⁴⁰:

“It is my belief that impartiality should not be assigned to mediation. Mediators intervene in a dispute, as third parties. Many mediators have been judges or arbitrators in the past, and some still are. It is not the goal of mediation to judge the merits of the dispute; the goal of mediation is to have the parties work together to come to a solution, to allow them to move on with their lives. Sometimes, though evaluating party's case is exactly what is needed to make the parties work together.”

²³⁹ Interview with Encik Osman Ahmad Secretary to the Tribunal for Consumer Claims, 9 June 2010.

²⁴⁰ William K.H. Lau, *loc.cit.*

In holding this view, the role of a mediator may be seen immediately, in that the impartiality of a mediator would mean that he or she should neither be concerned with a particular outcome in a particular dispute nor open himself or herself to any goading by one of the parties.²⁴¹

Observation of the element of impartiality by the mediator in conducting a mediation session help the parties to be at ease and convenient that influence them to negotiate in a comfortable manner and achieve a settlement.

3.2.2.2.4 Accreditation of Mediators

In the four institutions aforementioned, it is not a requirement that mediators should be “accredited”²⁴² mediators. The proceedings at the Consumer Claims Tribunal and Home Buyers Tribunal are conducted by the Chairman, or Deputy Chairman or any member of the tribunal sitting alone.²⁴³ Members of the tribunal are sent for mediation training from time to time to equip them with mediation skill and

²⁴¹ See *ibid.*

²⁴² The term “accreditation” implies that an occupational group or public body recognizes that an individual has successfully completed a prescribed course of education or training meets certain level of performance. In a regulated practice, accreditation may be legally necessary to provide the particular service or to receive benefits, such as promotions and marketing, from the accrediting body. Ongoing accreditation may be withdrawn. Accreditation also implies that the accrediting body has some form of control and discipline over those accredited. (See Boule and Nesic, *op.cit.*, 436)

²⁴³ Section 86 of Consumer Protection Act 1999 provides that the Tribunal shall consists of a Chairman and a Deputy Chairman who are officers from the Judicial and Legal Service and not less than five other members being a person who are qualified person within the meaning of the Legal Profession Act 1976, Advocates Ordinance Sabah or Advocates Ordinance Sarawak or persons who have held posts specified in the Fourth Schedule to the Subordinate Courts Act 1948 or combination of the two. S.16C of the Housing Development (Control and Licensing) Act 1966 provides that The Tribunal shall consist of a Chairman and Deputy Chairman to be appointed by the Minister from amongst members of the Judicial and Legal Service and not less than five other members to be appointed by the Minister from amongst person who are members of or who have held office in the Judicial Service or advocates and solicitors admitted and enrolled under the Legal Profession Act 1976, the Advocates Ordinance Sabah or Advocates Ordinance of Sarawak and who have not less than seven years standing.

practice.²⁴⁴ In the Industrial Court, before mediation was introduced, all the Chairmen attended a formal training in mediation at the South Australia University led by Mrs. Dale Bhagshaw.²⁴⁵ Also at the Legal Aid Department, when the mediation unit was introduced, all the twenty-two mediators appointed were sent for mediation training by two trainers from New Zealand, Mr Geoff Sharp and Ms Deborah Llapshaw.²⁴⁶ Although it is not required that mediators must be accredited in the four institutions above, all the mediators conducting the sessions are given formal training sessions on mediation either done locally or abroad from time to time.

However, the issue on accreditation is debatable. The demands for accreditation by the governments and organizations that introduce and encourage mediation rested on the argument that it was necessary to avoid the luxury of making too many mistakes. If too many customers have had bad experiences, the desired level of acceptance and use of mediation in the community would have been unachievable. The institutions must provide the customers with the level of confidence in the quality of the services they will receive. The accreditation system is aimed at ensuring “quality mediators.”²⁴⁷

They are also views that argue that if accreditation system is introduced, mediation will lose the qualities that make it so attractive, that it is basic, simple, inexpensive and flexible process that helps people to resolve disputes. The process of regulating

²⁴⁴For e.g.All the members had undergone mediation training conducted by ILKAP.

²⁴⁵ Zaini Abd. Rahman, *Conference on Mediation and Arbitration in Asia Pacific*, *loc.cit.*

²⁴⁶ Faridah Abraham, *Conference on Mediation and Arbitration in Asia Pacific*, *loc.cit.*

²⁴⁷ See the discussion on accreditation by Breda Annesley, “The Accreditation of Mediators-Option or Obligation”, *Asia Pacific Conference on Contemporary Trends of Mediation and Arbitration*, (Kuala Lumpur:17-18 July 2006)

the mediation and the accreditation system of professional mediators is disastrous to the flexibility concept of mediation. The arguments stress that mediation training will become over proceduralised and develop rigidity that can damage the nature of mediation.²⁴⁸

A number of organization, including the National Alternative Dispute Resolution Council (NADRAC), highlighted that an accreditation system would have to be careful not to exclude individuals because of costs, academic degrees, reliance on recommendations of established persons or otherwise. There has been a growing concern that accreditation system could lead to the development of two tiers of mediation, resulting in “alienation” of some groups and the perceived “elitism” of others. Such groupings could be based on the different nature of practices (e.g. commercial vs. community), geographic locations (e.g. rural vs. city) or other means of distinction and segregation.²⁴⁹

The accreditation system can protect the rights of consumers, as they will receive high quality of mediation services provided without doubt. However, given the fact that the four institutions are government-funded bodies, consumers are required to pay minimal fees to get their cases listed, the accreditation system may put an extra burden to the customers, as they may need to pay higher fees. We cannot deny the fact that the administration of accreditation system will incur some further cost depending on how the system is devised. We also have to note that the jurisdiction of

²⁴⁸ See the view of Hew Dundas on the risks of accreditation. *Ibid.*

²⁴⁹ *Ibid.*

the tribunal is limited to RM25,000 for Tribunal for Consumer Claims and RM50,000 for Homebuyers Tribunal. As for the Legal Aid Department, the services are open to the lower income group. Further, the cases referred to the Industrial Court are trade dispute cases where the majority of claims related to unfair dismissal. Currently, there is no system of accreditation being introduced on the above-stated institutions. If such a system is imposed, it should be designed in such a manner that it will not burden the parties with extra fees.

In conclusion, considering the nature, amount and the category of cases filed in these particular institutions, it is submitted that “the accredited mediator” is unnecessary to be made a requirement to these institutions at present. The nature of mediation is to help the parties to resolve their cases in a simple manner and at a minimal cost. Further, the objective of the institutions is to provide an alternative forum to file claims in an easy, inexpensive and speedy manner. However, the mediators at these institutions must be well trained with the mediation skills and practices. In addition, the junior mediators must attend clients with the more experienced mediator for a certain number of hours before being allowed to conduct his own session. In order to maintain the standard of practice, it is suggested that the mediators should achieve a certain level of training or standard before being allowed to conduct a mediation session.

IN SUMMARY, it can be said that all the four institutions, Consumer Claims Tribunal, Home Buyers Tribunal, Industrial Court and Legal Aid Department adopt the true nature of mediation whereby the role of the mediator is to assist the parties to

reach an amicable settlement and not to give decision. However, in adapting the process only the Legal Aid Department has truly observed the main elements of mediation of voluntariness, confidentiality of the information as well as the impartiality of the mediator. Furthermore, the aforesaid elements are codified in its Act and Regulation. Even though, the Industrial Court observes these elements, but since the rules and regulations are not codified, the practice therefore, may vary from one mediator to another.

3.2.2.3 Analyses of the Technical Procedure

In general, mediation involves the following steps:

- i) Pre-mediation process where parties sign a mediation agreement indicating their submission to mediation.
- ii) Preliminaries which is an introduction to mediation.
- iii) Mediator's opening remark where the mediator will brief the ground rules for the session. Mediators are provided with a brief statement of facts.
- iv) Joint sessions where the parties are invited to state their respective cases in each other's presence.
- v) Caucuses where it is optional and usually exercised to enable parties to vent emotions and speak freely. The session may allow the mediator to pick out common issues and hidden messages.
- vi) Settlement agreement where if amicable solution is reached, the parties will sign a settlement agreement witnessed by the mediator.²⁵⁰

²⁵⁰ Sharifah Suhanah Syed Ahmad, Roy Rajasingham "The Malaysian Legal System, Legal Practice & Legal Education", *Judicial System and Reform in Asian Countries (Malaysia)*, IDE Asian Law Series, No.4., March 2001, Institute of Developing Economics (IDE-Jetro), Japan, 28 June 2010, <http://www.ide.go.jp/English/Publish/Download/AIs/p>

Nevertheless, the steps mentioned above and the four models of mediation: settlement, facilitative, transformative and evaluative mediation will not be analysed in this Chapter as they are not within the scope of the study.

3.2.2.3.1 What stage?

In resolving disputes, the Housing Buyers Tribunal and Tribunal for Consumer Claim practice negotiation and adjudication. Section 16T of Housing Development (Control and Licensing) Act 1966 imposes an obligation on the Housing Buyers Tribunal to assist the homebuyers and the housing developer to negotiate. On that basis, the tribunal must assess whether in all circumstances, it is appropriate for the tribunal to assist the parties to negotiate for an agreed settlement. In such a situation, where it is not appropriate for the parties to negotiate or where the parties fail to reach an agreed settlement the tribunal must proceed with hearing to determine the dispute. In hearing the dispute, the tribunal may receive evidence from the parties. Similar provision is also provided in Section 107 of Consumer Protection Act 1999. Mediation is imposed at the negotiation stage, which is fixed on the hearing date. At the tribunals mediation and negotiation are used interchangeably.²⁵¹

The Industrial Relations Act 1967 introduced compulsory arbitration in the Industrial Court.²⁵² The Court under Section 30 of the Act has power to give award after

²⁵¹ Interview with Encik Osman Ahmad Secretary to Consumer Claim Tribunal, 9 June 2010

²⁵² Industrial Court consists of a President, a panel of persons representing employers, and a panel of persons representing workmen. The Division of of the Court consists of a Chairman and two members from each of the above panels. The president and Chairman must be persons who have served as advocates and solicitors, or as members of the Judicial and Legal Service for the seven years preceding the appointment.. The president hears and determines disputes relating to the interpretation, variation and non-compliance of awards or collective agreements or cases relating to references to the

hearing the case. In resolving disputes, the Industrial Court performs adjudication function, which involves investigation of facts, findings of facts and the application of law to those findings.²⁵³ Mediation is offered to the parties when they appear in court after their disputes have been referred and registered in the court. Both parties may volunteer to undergo the mediation process at any time of the litigation process, i.e., at any stage before the Court hands down an award.

At the Legal Aid Department, mediation is one of services offered for the lower income group besides legal advice and legal assistance. In cases where the mediation fail, the legal aid department will provide legal assistance for the parties to bring the case to courts.

It can be seen that at the four institutions above stated, mediation is done at the early stage of the proceeding. Parties are given a chance to negotiate before proceed with any further action or hearing. Settlement at mediation may therefore speed up the disposal of cases.

3.2.2.3.2 Legal Documentation

It is observed that no specific form is needed to proceed with mediation²⁵⁴ except for the Legal Aid Department where the disputing parties need to sign the Consent

High Court on questions of law, and cases relating to writ of certiorari. The Chairman will hear cases related to dismissal, disputes on the terms and conditions of the employment and other cases that the president may direct.

²⁵³ See *Hotel Malaya Sdn. Bhd. & Ors. V. National Union of Hotel*, (1982) 2 MLJ 237 at 240 cited in Ashgar Ali Ali Mohamed and Farheen Baig Sardar Baig, *Procedure for Unfair Dismissal Claims in Malaysia* (Malaysia: Lexis Nexis, 2009) at 153.

²⁵⁴ Filing a specific document is needed to initiate the case at these institutions.

Agreement for Mediation upon which the mediation date is fixed. When the parties attend the session, they are required to sign a Form of Request for Mediation and a Form of Agreement for Mediation.

All the four institutions, however, adopt the same rule that when the parties reach an amicable settlement, the mediator shall prepare a written agreement of settlement. The signing of the settlement agreement must be done in the presence of the mediator.

For the parties to abide the terms of the agreed settlement, the amicable settlement reached must be put in writing and signed by the parties in front of the mediator.

It can be seen that even though the procedure for mediation as adopted by these institutions is simple, the rights of the parties are however protected by the signing of the settlement agreement.

3.2.2.3.3 Fees

Only minimum fees are charged on the disputing parties. As mentioned earlier to start a proceeding at the Consumer Claim Tribunal and Housing Buyers Tribunal, the claimant needs to pay only RM5 for filing the statement of claim. At the legal Aid department, only RM2 is charged depending on the eligibility of the claimant.²⁵⁵ No further fees is imposed on the parties to proceed with mediation.

²⁵⁵ See the discussion on the eligibility of the applicant in footnote 11, Supra.

It is observed that the minimum fees charged is one of the elements that attract the parties to file their cases at the relevant institutions, as it will not impose extra burden on the disputing parties.

We have to note that all the four institutions above are the government bodies where the mediators receive fixed salaries from the government. Therefore, the minimum fees charged will not burden or be unjust to the mediators.

The analysis on the effectiveness²⁵⁶ of mediation also reveals that Malaysians are most attracted to adopt mediation when the service offered is free or only with a minimum fee.

3.2.2.3.4 Choice of Mediator

The mediators available at the above institutions are limited. For that reason, the administration will fix the case to be heard before any mediator available. There is no option given to the disputing parties to choose their preferred mediator except for Industrial Court. However, if there is a conflict of interest or biasness, the parties or the mediator can lodge a complaint and the case will be sent to another mediator. Although the appointment of mediator is not at the choice of the disputing parties, nonetheless, the statistics²⁵⁷ of the cases settled through mediation is encouraging.

²⁵⁶ See statistics under Section 3.2.2.5, “Analysis on the Effectiveness of Mediation” of this Chapter

²⁵⁷ *Ibid*

3.2.2.3.5 Legal Representation

At the four institutions above, only the Industrial Court allows the parties to be represented by advocates and solicitors. Legal representation is not allowed at the Home Buyers Tribunal, the Tribunal for Consumer Claims and the Legal Aid Department. Section 16U(2) of Home Development (Control and Licensing) Act 1966²⁵⁸ and Section 108 of the Consumer Protection Act²⁵⁹ make it clear that no party shall be represented by an advocate and solicitor at a hearing. Section 16U of Home Development (Control and Licensing) Act 1966,²⁶⁰ however, provides an exception where the matter involves complex issues of law and one party will suffer severe financial hardship if he is not represented, legal representation is allowed, and if one party is allowed the other party shall also be entitled.

Section 4 of the Legal Aid (Mediation) Regulations 2006²⁶¹ gives a clear provision that the parties shall appear in person at any mediation session that has been fixed. Further, Section 5 provides that no person shall attend a mediation session other than the parties and the mediator who is assigned for the mediation.

At the Industrial Court, Section 27 (1)(a), Industrial Relations Act 1967²⁶² provides that in any proceedings before the court a party may be represented²⁶³ by an advocate with the permission of the President or the Chairman.

²⁵⁸ Act 118

²⁵⁹ Act 599

²⁶⁰ Act 118

²⁶¹ PU(A) 163/2006

²⁶² Act 177

²⁶³ To note that cases referred to the Industrial Court involve question of law.

It can be seen that representation is allowed if the case is complicated and involves complex issues of law where the right of a party might be prejudiced. The cases filed at the Tribunal for Consumer Claim and Home Buyers Tribunal are small claim cases and not complicated. The maximum claim for Consumer Claim Tribunal does not exceed RM25,000, whereas for the Home Buyers Tribunal, the amount claimed is not to exceed RM50,000. However, the cases at the Industrial Court involve more complicated issues as the matters relate to unfair dismissal claims and trade disputes between employers and employees. On the other hand, mediation at the Legal Aid Department relates to matrimonial matters, that is rather personal. In conclusion, it is submitted that to allow or not the legal representation would depend on the nature and the issues in the disputed cases.

3.2.2.3.6 Locality of Services Offered

There is no rule prescribed on the venue where the mediation is to be conducted. Generally, at the four institutions above, mediation is conducted in house, i.e., at the particular institutions itself. The locality of the mediation place is not emphasized.

Sourdin views that creating an atmosphere where parties can negotiate and communicate is also important as ordinarily, high level of anxiety exist when people are in dispute or conflict. Comfortable surroundings can assist to ensure that individuals share about issues as well values. Comfort can also involve a natural light, a view, tea and coffee making facilities and adequate room for parties to discuss issues in private. Besides, a circular table, is viewed to promote more relaxed dialogue and promotes the best listening opportunities as compared to a desk or

triangle-shaped area. Round tables are also said to promote problem solving approaches as the parties may feel as though they are part of a team rather than two or more opposing team or sides if a table with a straight sides is used²⁶⁴.

Even though the locality and surroundings are not emphasised by the above stated institutions, the aforementioned criteria are recommended to be looked into to have a better result of mediation.

3.2.2.3.7 Concluding Period

The concluding period for mediation at the above four institutions ranges from 30 to 60 days. The Legal Aid Department and Industrial Court adopt the 30 days period. For the Legal Aid Department, mediation should be concluded within 30 days from the time mediation session is held. If no settlement is reached within that particular period, the mediation process is terminated.

For the Industrial Court the 30 day period is counted from the date the case is referred to the court as stated under Section 30(3) of the Industrial Relations Act 1967²⁶⁵ that the court shall make an award without delay and where practicable within 30 days from the date the reference to it. Although no specific date is mentioned for mediation, the reference can be made to Section 30(3) of the Act that puts 30 days for the court to hand down an award. The terms agreed by the parties will be reduced into an award by the court.

²⁶⁴ Sourdin, Tania, *Alternative Dispute Resolution*, (Sydney; Lawbook Co., 2002) at 45.

²⁶⁵ Act 177

The Tribunal for Consumer Claims and Home Buyers Tribunal have 60 days to conclude the case from the first day the hearing commences as stipulated under the Consumer Protection Act and The Housing Development Act. Starting from 1st January 2010 the Tribunal for Consumer Claims has shortened the period to 45 days. The statistics show that the tribunal manages to comply with the new time limit of 45 days.

Within the range of 30 to 45 days of the concluding period, mediation seems to be practical to be adopted. Furthermore, it is observed that most of the cases managed to be settled during its first session²⁶⁶.

3.2.2.3.8 Termination of Mediation

There is no specific provision prescribing the termination of mediation for the aforesaid institutions except for the Legal Aid Department. Rule 6 of Legal Aid (Mediation) Regulations 2006 provides a clear provision on the termination of the mediation session. Mediation will be terminated if one of the following occurs:

- 1). One of the parties withdraws from the Mediation Session.
- 2). One of the parties does not attend the Mediation Sessions without leave of the mediator or without any reasonable excuse.
- 3). The Agreement settlement is reached, written out and signed by the disputing parties.
- 4). If no settlement is reached within 30 days of the Mediation session being held.

²⁶⁶ Interview with Encik Osman Ahmad, Secretary to the Tribunal for Consumer Claims on 9 June 2010.

- 5). The Mediator withdraws himself when he/she realizes that he/she has breached the Code of Ethics for Mediators or any of the disputing party requests in writing so to do.
- 6). The Mediator is directed to withdraw himself from the Mediation Session on the directive of the Director General.²⁶⁷

In the event the mediation session is terminated due to whatever reason the dispute or the case of the disputants will have to be resolved through litigation.

This dissertation adopts the argument that the provision for termination of mediation is needed as it will put a stop to the mediation session and it will not drag the case longer. The limitation will avoid the delay in the settlement of disputes. With specific provision on termination, neither party can use mediation as a tool to delay the settlement of the case.

There is no specific provision on the termination of mediation at the Tribunal for Consumer Claims and Home Buyers Tribunal. However, Section 107 (4) of Consumer Protection Act 1999 and Section 16T (4) of the Housing Development (Control and Licensing) Act 1966, make provisions that “where it appears to the tribunal that it would not be appropriate for it to assist the parties to negotiate an

²⁶⁷ Legal Aid Regulation (Mediation) Regulation 2006. PU(A) 163/2006. Faridah Abraham, *Conference on Mediation and Arbitration in Asia Pacific, loc.cit.*

agreed settlement in relation to the claim or the parties are unable to reach an agreed settlement in relation to the claim the tribunal shall proceed to determine the dispute.”

3.2.2.3.9 Settlement Agreement

It is a requirement imposed by the four institutions above that the agreed settlement reached by the parties will be reduced into writing. This is a requirement under Section 115 of the Consumer Protection Act 1999 and Section 16 AB of the Housing Development (Control and Licensing) Act 1966. There is no such specific provision for the Industrial Court but the reference is made to the unofficial rules of the mediation practised at the court.

Section 29D of the Legal Aid (Amendment) Act 2003 makes a more stringent rule where it provides that no settlement or agreement shall be binding on the parties to a mediation session, unless it has been reduced into writing and signed by the parties to the settlement or agreement.

IN SUMMARY, the application of mediation at the above stated institutions involves a simple procedure whereby only a few documents are involved, with minimum fees and a minimum period for settlement. In this regard, mediation is a practical mode of resolution that is recommended to be adopted. Further, the terms agreed are protected in a binding agreement signed by both parties. It is submitted that since both parties have agreed on the terms, it will give an assurance of the compliance. However, in case of non-compliance, the case can be brought to court for enforcement of the terms agreed. It must be emphasised that legal representation is

not allowed at the above institutions except for the Industrial Court. The aim is not to prejudice the parties as the case involved community and family disputes with small value. Further, the parties should be given the right to decide on their private matters. Thus, it is obvious that mediation does not involve a long and complicated process.

3.2.2.4 Analyses of the Governing Rules on Mediation

3.2.2.4.1 The Tribunal for Consumer Claims

Part XII of Consumer Protection Act 1999 introduces the establishment of the Tribunal for Consumer Claims. Section 83 to Section 122 state the provisions for membership²⁶⁸ and its revocation, jurisdiction and its limitation, commencement of proceeding, proceeding at the Tribunal, award of the Tribunal and other related members. Consumer Protection (The Tribunal for Consumer Claims) Regulations 1999 provides the rules and the procedure for the commencement of proceeding at the tribunal.

Negotiation for settlement is part of the proceeding at the tribunal.²⁶⁹ Section 107 of the Act provides that it is an obligation for the tribunal to assess whether in all circumstances, it is appropriate for the parties to negotiate; in case it is appropriate, the tribunal shall assist the parties to negotiate for an agreed settlement. Although

²⁶⁸ Refers to membership of the Tribunal, Section 86 provides that The Tribunal shall consist of a Chairman and a Deputy Chairman from among members of the Judicial and Legal Service and not less than five qualified members who shall be appointed by the Minister.

²⁶⁹ It is interesting to note that at the counter the party is advised to negotiate before they attend the hearing. Statistics shows there is significant percentage of cases settled through negotiation before the mediation session or hearing. The parties attend at the hearing just to record a settlement agreement.

there is no specific provision for mediation, the application of mediation is adopted under this provision. Rule 22 of the Consumer Protection Regulation further provides that at the hearing, the Tribunal shall, where appropriate, assist the parties to effect the settlement of the claim by consent. Section 107 of the Act gives a very brief and general provision on negotiation. Further, it states that where the parties reach an agreement, the Tribunal shall approve and record the settlement. The settlement shall take effect as if it is an award of the Tribunal and if it would not be appropriate to assist the parties to negotiate an agreed settlement or the parties are unable to reach an agreed settlement, the Tribunal shall proceed to determine the dispute. The Act and the Regulation are silent on the manner how the mediation should be carried out. It can be said that the application is more flexible as it solely depends on the Chairman conducting the session. There is no other regulation, manual or circulars issued to supervise or monitor the application.

Although the Act and the Regulation are silent on the manner mediation should be practised, Section 122 of the Consumer Protection Act makes a provision that the Minister may make such regulations as may be necessary or expedient in respect of the Tribunal.

3.2.2.4.2 Home Buyers Tribunal

Likewise, with the Tribunal for Consumer Claims, there is no specific provision of mediation for Home Buyers Tribunal in the Housing Development (Control and Licensing) Act 1966. The reference for mediation is found under Section 16T of the Act on negotiation for settlement. The provision is similar with Section 107 of the

Consumer Protection Act that provides the Tribunal shall assess whether the case is appropriate for settlement and to assist the parties to negotiate for an agreed settlement. There is no other regulation or circular issued to guide the Chairman in conducting mediation. The Housing Development (Control and Licensing) Act came into effect on 1 Dec 2002 replacing the Housing Developer's (Control and Licensing Act) 1966. The provision of 16B in the new Act introduces the establishment of the Tribunal for Homebuyers Claim. The relevant Section 16A to Section 16AI are inserted for setting up of the tribunal.

In the absence of specific provision and regulation on mediation, the practice of mediation may vary from one chairman to another.

3.2.2.4.3 Industrial Court

Mediation is introduced in the Industrial Court without any amendments made to the Industrial Relations Act 1967, its rules or regulations. The directive order from the Minister gives authority for mediation to be practised in the Industrial Court. There is also no rule or practice direction made to guide the application of mediation in the court. In the absence of such amendment of the Act, rules or regulations, the mode of mediation practised is subject to the Chairman's discretion who conducts the proceedings. The method and procedure may vary from one Chairman to another. The practice is not standardized. The absence of such regulations and guidelines have

led to the poor acceptance of the application from lawyers, parties and even the Chairmen²⁷⁰.

3.2.2.4.4 Legal Aid Department

The Legal Aid Department introduced mediation through the establishment of Mediation Unit in 2006 by way of amendment of the Legal Aid Act 1971. The amendment introduced Part VIA that deals with the provisions of mediation services. With the enforcement of that provision on 1 September 2006, twenty-four mediators were appointed from its pool of paralegals. It is noteworthy that the application of mediation at the Legal Aid Department is better structured as compared to the previous three institutions.

The Legal Aid (Amendment) Act 2003 that introduced Part VIA on mediation contains six provisions, i.e., Section 29A- Section 29F. The classifications are made under six subheadings;

- 1). Provision of mediation services²⁷¹
- 2). Dispute²⁷²

²⁷⁰ See further elaboration under Section 3.2.2.5, “Analyses on the Effectiveness of Mediation” in this Chapter

²⁷¹ Section 29A (1) give authorisation to the Director General to provide mediation services to aided person.

Subsection (2) provides that each mediation session shall be conducted by one or more mediators.

²⁷² Section 29B(1) authorize the disputing party related to the cases stipulated under Third Schedule of the Act to refer the case to a mediator whilst subsection (2) authorize the Director General to refer the dispute related to the same to a mediator.

Section 29B(3) provides that a mediation session may commence or continue whether or not the dispute can be a subject matter of a dispute before any court, tribunal or body.

Section 29B(4) give provision that an aided persons may be treated as being in dispute on any matter if he or they are not in agreement on the matter whether or not any relevant negotiations are still in progress.

- 3). Mediation to be voluntary²⁷³
- 4). Settlement or agreement to be reduced into writing²⁷⁴
- 5) Confidential communication with a mediator²⁷⁵
- 6) Mediators²⁷⁶

The amendment to the Legal Aid Act 1971 introduces the application of mediation at the department with the observation of the basic features of mediation of voluntariness and confidentiality. Although only six provisions are added to the Act, the amendment touches on the basic needs of the application that covers the authorization of the application and the appointment of mediators. The ultimate objective of mediation is to assist the parties to reach an amicable settlement. In order to ensure that the agreement reached is observed by the parties, the amendment also requires the agreement to be put into writing and signed by the agreed parties.

²⁷³The element of voluntariness is observed by the introduction of Section 29C that provides the attendance and participation in mediation session voluntary and a party may withdraw from the session at any time. The attendance, participation or withdrawal from the session will not affect the right or remedies that a party has.

²⁷⁴The amendment introduce Section 29D that requires the settlement agreement to be reduced into writing and signed by the parties. The settlement will not be binding on the parties unless it has been reduced into wring and signed by the parties.

²⁷⁵The element of confidentiality is also observed with introduction of Section 29E that provides no person shall be compelled to disclose to the court any confidential communication which has taken place between that person and the mediator, if the mediation fails, unless that person offers himself to be a witness, in which case that person may be compelled to disclose only communications as may appear to the court to be necessary to be known in order to explain any evidence which he has given.

²⁷⁶Appointment of mediators stipulated under section 29F. The section provides a very general provision where it states that the Minister may appoint any person as a mediator for the purpose of the Act. There is a limitation for the mediators appointed that they shall have no right to appear and plead in any court in Malaysia as stated in Section 29F (2) of the Act.

With the amendment to the Legal Aid Act 1971 mediation gains recognition and authority at the Department. It is officially adopted as one of the services offered to the aided persons.

It is also important to note that the amendment to section 31 gives mediators an exoneration of liability. The provision gives immunity and protection for the mediators from any liability if they act in good faith.

Besides the amendment made to the Legal Aid Act 1971, the Department also introduces Legal Aid (Mediation) Regulation 2006 in carrying out mediation. The introduction is in exercise of the powers conferred under paragraph 32(2) (ca) of the Legal Aid Act 1971 that gives power to the Minister to regulate the practice of mediation.

The Regulations²⁷⁷ provides seven (7) sections that deals with the attendance of parties, the procedure at the mediation session, the termination of mediation and the

²⁷⁷The regulations can be summarized as follows;

R.4 Attendance of parties;

Upon signing of the notice the parties shall be notified of the date of the mediation session and shall attend the session in person. The parties will also be notified in writing on the change of date .

If the parties absent without the permission of the mediator and or without any reasonable ground, the party is deemed to have withdrawn from the mediation.

R5. The Mediation session

No representation; no person shall attend a mediation session other than the parties and the mediator.

All forms of the communication made during the session are confidential

A mediation session shall be concluded within 30 days from the date of signing of the Consent Agreement For Mediation.

During the mediation session, a mediator shall not make any ruling or finding with regard to the dispute.

no settlement or agreement shall be binding unless it has been reduced into writing.

R.6 Termination of mediation

responsibilities of the mediator. As stipulated under Section 7 of the Regulations, the mediators are bound by the terms in the Mediator's Code of Ethics as prescribed in the Fourth Schedule. The Code of Ethics is attached to the Regulations as the Fourth Schedule to monitor the conduct of the mediators at the session.

The Mediator's Code of Ethics has four sections²⁷⁸ as prescribed in the Fourth Schedule. It covers the role and responsibility of mediators to ensure that they observe the basis of mediation of neutrality, confidentiality, impartiality and fairness to the disputing parties. In exercising his duty, the mediator should strive to be

R.7; Responsibilities of the mediator

A mediator shall

- a) Be bound by the Mediators Code of Ethics as prescribed in the Fourth Schedule;
- b) Facilitate negotiations between the parties and steer the direction of the mediation session with the aim of finding a mutually acceptable solution to the dispute; and
- c) Assist the parties in the drawing up of any written settlement or agreement.

²⁷⁸In brief, Section 1 is the citation and application.

Section 2 is on the acceptance of assignment- states that, a mediator before accepting an assignment be satisfied that he shall be able to conduct the mediation efficiently and impartially.

Section 3 discusses the Code of Ethics. It can be summarized as follows;

- 1) the mediator shall be impartial and fair to the parties and shall be seen to be so.
- 2) the mediator shall not-
 - a) shall not act in any capacity for any party;
 - b) have any interest either directly or indirectly in any party or the outcome of the mediation
 - c) conduct himself in such a manner as is likely to bring his private interest into conflict with his mediation duties;
 - d) lack efficiency or industry in assisting the Parties to arrive to a mutually acceptable solution;
 - e) acquire any confidential information about the parties or the dispute under mediation from sources outside the mediation;
 - f) act in any of the Parties subsequently in any matter relating to or arising out of the subject matter of the mediation;
 - g) disclose any document or information supplied or disclosed in the course of the mediation to any person.
- 3) When in doubt, the mediator may refer the matter to the Director or Assistant Director, as the case may be
- 4) A mediator shall withdraw from a mediation;-
 - a) When he realizes that he has contravened any provisions of this Code of Ethics;
 - b) if there is a request to do so in writing by a party; or
 - c) if he is directed by the Director General of Legal Aid to do the same.

The mediator must inform the Director or Assistant Director as the case may be of his withdrawal.

efficient in assisting the parties to reach an agreed settlement. The mediator should withdraw himself if he is of the opinion that he is unable to observe that particular elements. With these provisions in the Code of Ethics the mediators are persuaded to strive for excellence in performing their duties.

3.2.2.4.5 Summary of the Analyses

Although there was no amendment made to the rules or Act, mediation can still be practised. However, the manner it is perceived and carried out by the concerned parties and the mediators may differ. As mentioned earlier, there are no specific rules and regulations being introduced for the application of mediation at the Tribunal for Consumer Claims, Homebuyers Tribunal and the Industrial Court. Only the Legal Aid Department, amended its Legal Aid Act 1971 and introduced Legal Aid Regulation 2006 to practise mediation. The authority to practice mediation is derived from S. 107 Consumer Protection Act 1999 for Consumer Claims Tribunal and S. 16T of the Housing Development (Control and Licensing) 1966 for Home Buyers Tribunal.²⁷⁹ The provisions that require the tribunals to negotiate the case, empower mediation to be enforced and easily accepted at these tribunals.

As compared to the Industrial Court, the directive order from the Minister gives authority for mediation to be practised in the Industrial Court. There are no rules or regulations introduced. Neither has the court come up with any specific practice direction and rule to facilitate mediation. It is observed that mediation is hardly ever

²⁷⁹ As discussed earlier under Section 3.2.2.4, “Analysis on Governing Rules on Mediation” in this Chapter.

carried out or accepted by the disputing parties even by the Chairman or lawyers. According to Tuan Haji Zaini bin Haji Abd. Rahman, former Chairman of the Industrial Court, there was a slow response from litigants since mediation was offered in 2004. The Chairmen were told to conduct mediation at their own risks as the Industrial Relations Act 1967 does not contain any provision empowering the Court to conduct mediation. They face the consequences if any action is taken by any party. For this reason, many chairmen of the industrial court are not enthusiastic in conducting mediation.²⁸⁰

This dissertation adopts the approach taken by the Legal Aid Department. The Department amended its Legal Aid Act 1971 to include provisions for mediation, introduced the Regulations for the application and attached the code of ethics to the Regulations to guide and monitor the mediators observing and performing their duties within the prescribed limit. This approach has increased the acceptance and participation of the disputing parties as well as the mediators.²⁸¹

The elements of voluntariness and confidentiality are clearly mentioned in the Legal Aid Act 1971. Since it is stipulated in the Act, the mediators and the parties involved need to observe the provisions accordingly. The Act also stipulates the provision on the exoneration of liability that helps the mediator to conduct the session without fear. In comparison with the Industrial Court, the Chairman has to bear his own risk in conducting the mediation session.

²⁸⁰ See Zaini, "Mediation in the Industrial Court". *Asia Pacific Conference*, Supra.

²⁸¹ See statistics under Section 3.2.2.5, "Analyses on the Effectiveness of Mediation" in this Chapter.

With the clear provisions and guidelines the mediators and the disputing parties know their roles and limitations at the session. It is observed that the application of mediation is easily accepted by the involving parties if they are properly guided.

In conclusion, the Legal Aid Department has a proper structure on the rules and regulations of the practice of mediation. The Act and The Regulations provides guideline for the mediators in conducting the session. The other three institutions, i.e. The Tribunal for Consumer Claims, the Home Buyers Tribunal and the Industrial Court, have no specific Act or rules to guide the application of mediation. In the absence of such specific Act or Rules, the practice of mediation becomes unstructured, more flexible and varies depending on the Chairman conducting the session.

3.2.2.5 Analyses on the Effectiveness of Mediation

3.2.2.5.1 The Tribunal for Consumer Claims

The experience of the Tribunal for Consumer Claims in conducting mediation reveals that most mediation can be settled within one session. According to Encik Osman Ahmad,²⁸² the Secretary to the Consumer Claims Tribunal, some of the cases take half an hour to settle through mediation. The effectiveness of the application can be seen from the statistics below:

²⁸² Interview with Encik Osman Ahmad, Secretary of the Tribunal on 9/6/2010.

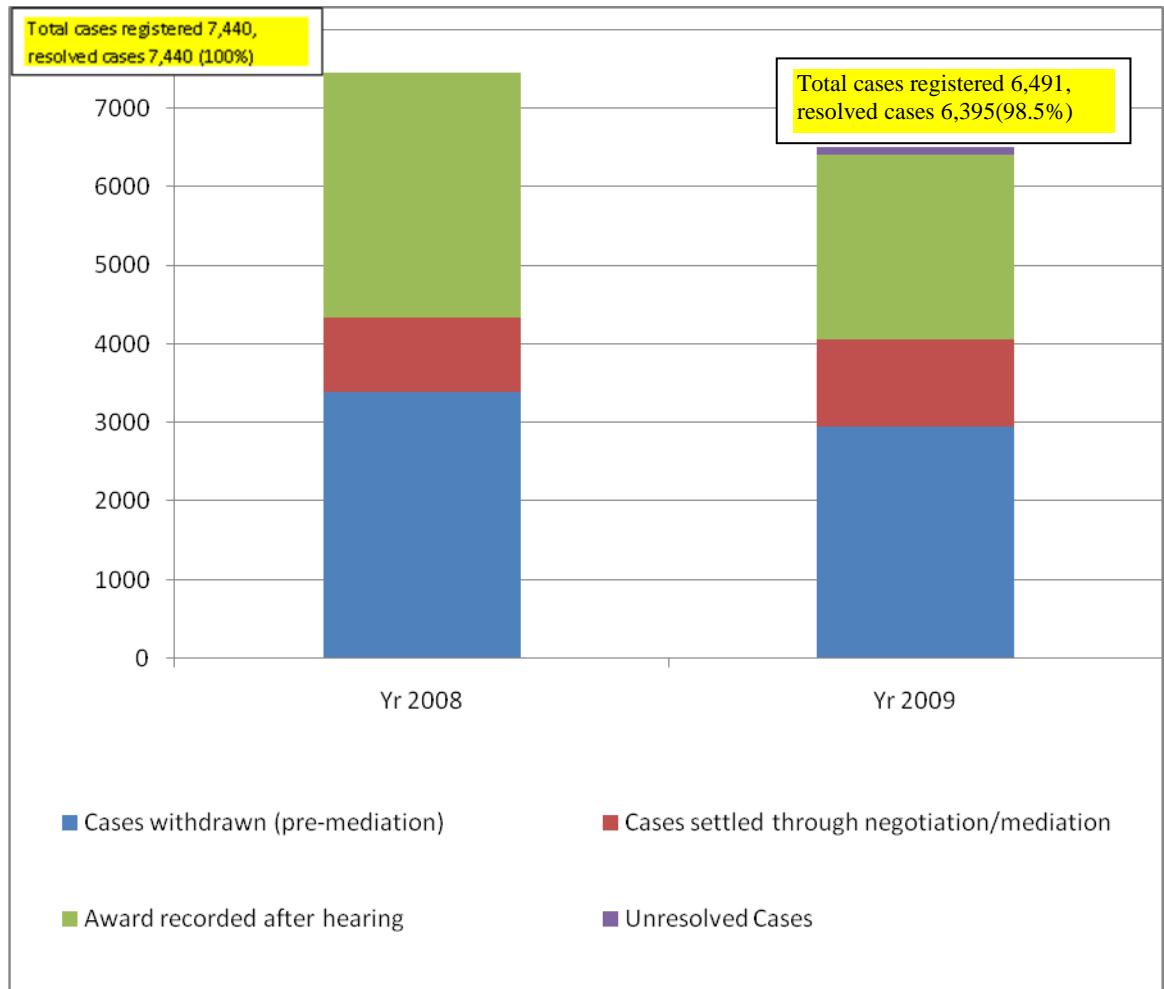
Statistics 3.1 : Records of Cases Filed and Methods of Settlement used for the Year 2008-2009;

Tribunal for Consumer Claims

Year 2008	
Cases registered	7440
Cases withdrawn (pre-mediation)	3389
Cases settled through negotiation/mediation	942
Award recorded after hearing	3109
Total Cases Resolved	7440
Unresolved Cases	0

Year 2009	
Cases registered	6491
Cases withdrawn (pre-mediation)	2956
Cases settled through negotiation/mediation	1108
Award recorded after hearing	2333
Total Cases Resolved	6395
Unresolved Cases	96

**Statistics.3.1: Records of Cases Filed and Methods of Settlement used for the Year 2008-2009;
Tribunal for Consumer Claims**



From the statistics above, it shows that in the year 2008, some 45.5% cases were withdrawn at pre-mediation stage, some 12.6% cases were settled through mediation and some 41.78% cases were resolved through hearing procedure. Although only some 12.6% were recorded for settlement through mediation, they still indicate that mediation can help the tribunal to speed up the disposal of cases. After 3389 cases were withdrawn, the balance of the cases unresolved amounted to 4051. 942 cases or

some 23% of the cases then were resolved through mediation. It is clearly shows here that mediation can save the time of the tribunal to proceed with other cases.

It is also interesting to note some 45.5% cases were withdrawn at the pre-mediation stage. Pre-mediation stage is the stage where the disputing parties are ordered to negotiate their case before they attend on the hearing date. The advice is given at the counter when the disputing parties file their case at the tribunal.

It is also important to note here that no backlog of cases was recorded. Some 966 cases were settled without proceeding to the hearing stage. Thus, it can be concluded that if no negotiation or mediation takes place, the tribunals will require more time to resolve all the registered cases that may cause and lead to backlog of cases.

In the year 2009, mediation recorded some 17.06% successful settlements. After 2956 of the cases were withdrawn the statistics showed that some 31.3% cases resolved through mediation. From the records, it shows that mediation can be a mechanism to help speed up the disposal of cases. The backlog of cases recorded for this year is some 1.47% which is negligible.

3.2.2.5.2 Industrial Court

With regard to the practice mediation, Hj Zaini Hj Abdul Rahman, a former Chairman of the Industrial Court commented that there was a slow response from the litigants, judicial officers and practitioners. Many of the Chairmen gave up the idea to conduct mediation as they were cautioned about the risks of doing it and the potential

of being sued by litigants. Moreover, not all Chairmen have the ability to conduct mediation. The Act is silent on the authority to conduct and to facilitate mediation. Currently, only a few Chairmen conduct mediation. Since there are no prescribed rules on its availability, mediation is offered to the parties when they appear in court, after the case has been referred to the court and registered.²⁸³

Hence, for mediation to be accepted by the parties and the lawyers, there is a need for the application to be standardized. In the absence of specific directions, we notice that the parties and even the Chairmen are not willing to practise mediation. On that premise, rules and regulations are needed to monitor the application.

In the year 2010, out of 39 cases mediated, 18 were settled and 14 failed, while the rest are still undergoing the process. The number of cases that have gone through mediation is rather small compared to the total number of cases referred to the Industrial Court. There were 1,437 cases referred to the court in the year 2010 where 1,179 of it were wrongful dismissal cases. It shows that only 2.5 % of cases were referred to mediation. However, some 46.15 % of cases referred to mediation achieved settlement. YA Dato Ahmad Rosli commented “this could be due to a number of factors but it cannot be discounted that the level of awareness among public and practitioners of the advantages of mediation, may have contributed to the low numbers”,²⁸⁴.

²⁸³ See Zaini, *Asia Pacific Mediation and Arbitration Conference*, Supra
⁸⁴ Ahmad Rosli Mohd Sham, “Mediating Employment Conflicts: Preserving, Nurturing and Harnessing Human Capital in Organisation”, *2nd AMA Conference Rediscovering Mediation in the 21st Century*, (Kuala Lumpur. 25 Feb 2011).

It is to be noted also that mediation in the Industrial Court is on a voluntary basis. Mediation has not been made compulsory in the Industrial Court. Moreover, there is no provision in the Industrial Relations Act 1967 that requires disputants to go through a mediation process before the cases can be tried²⁸⁵. It is submitted that with the low awareness of public and practitioners of the advantage of mediation and with the voluntary option to adopt the practice, the participation of parties in mediation will not be encouraging.

3.2.2.5.3 Legal Aid Department

The statistics for mediation cases recorded for consent judgment from the month of January to December 2009²⁸⁶ are as follows;

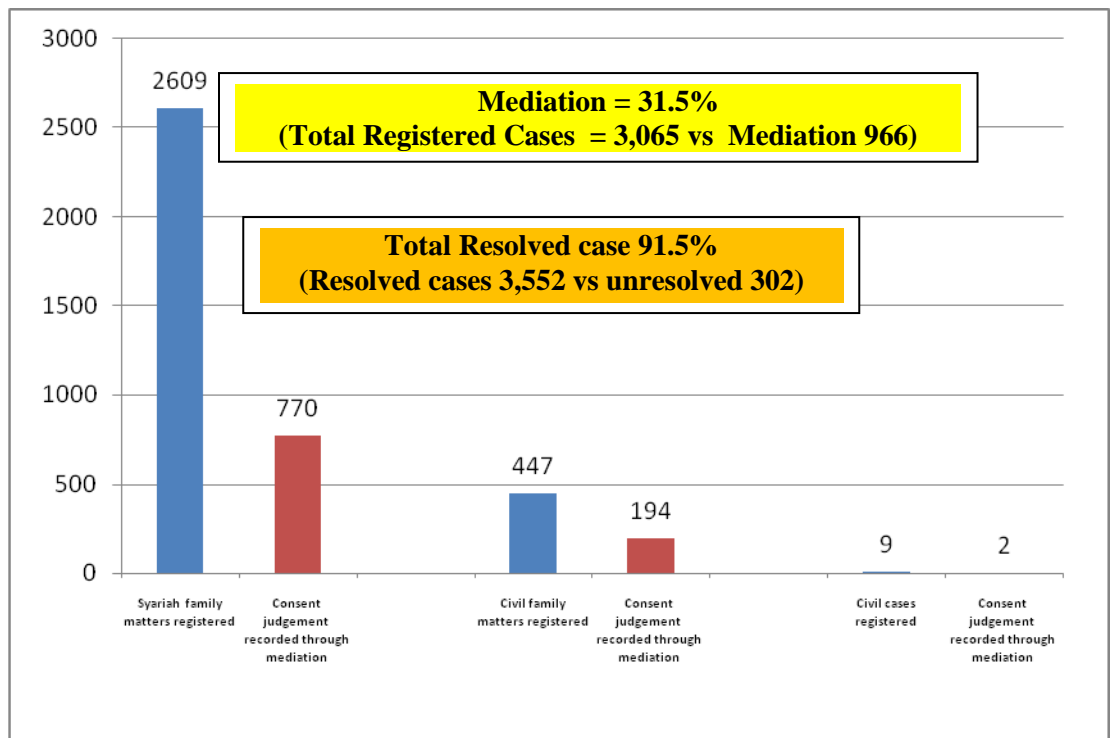
Cases Brought forward;	:489
Syariah family matters registered	:2609
Consent judgment recorded through mediation	:770
Civil family matters registered	:447
Consent judgment recorded through mediation	:194
Civil cases registered	:9
Consent judgment recorded through mediation	:2

²⁸⁵YA Ahmad Rosli also commented that some may argue that under the provisions of Section 29(g) of the Industrial Courts Act 1967, where the court may, in any proceedings before it direct and do all such things as are necessary or expedient for the expeditious determination of a matter before it, the court is empowered to order or direct the parties to go for mediation. But there may be others who are of the opinion that this section was not intend to go as to cover mediation. He further commented that the issue is an open one and in the meantime, the court will continue to encourage mediation but on a voluntary basis.

²⁸⁶ Online Interview with Puan Isma Juliana, Mediator Legal Aid Department, written answer emailed on 7 Sept 2010.

Total Registered Cases	:3065
Total Cases Recorded for Consent Judgment (Mediation)	: 966
Total cases resolved	:3252
Unresolved cases	:302

Statistic 3.2; Mediation cases recorded for consent judgment from the month of January to December 2009



The statistics show that some 31.5 % cases were settled through the mediation process. For division of cases, Syariah family cases recorded some 29.51% settlement through mediation, civil family matters recorded some 43.4% settlement and for civil cases some 22.2% of cases were resolved through mediation.

It is evident that mediation successfully speeded up the disposal of cases as shown from the statistic, where out of 3554²⁸⁷ cases, 3252 cases were resolved. It shows that the Legal Aid Department resolved some 91.5 % of cases in the year 2009. The unresolved cases were recorded at only 8.48 %, which is very low. The result is encouraging as it reveals that mediation can be a mechanism to speed up the disposal of cases. Thus, it prevents the Department from having the problem of backlog.

As discussed earlier, the structured approach adopted by the Legal Aid Department by amending its Act, introducing regulations and code of ethics has attracted the participation of parties and performance of mediators in conducting the sessions.

IN SUMMARY, the awareness of Malaysians on mediation and its advantages is still very low; the low participation of mediation at the Industrial Court is evidence of this. Further, without any guidelines, rules and regulations on mediation, the participation and acceptance of parties are not going to be encouraging. At the Consumer Claims Tribunal, the mediation practice is also not structured and there are no rules for the practice of mediation. However, the mandatory approach adopted by Consumer Claims Tribunal has resulted in high participation of parties in the process. With the increase of participation in mediation, the Tribunal has managed to dispose cases swiftly.

In addition, the structured approach adopted by the Legal Aid Department has gained the acceptance of parties in the process. This has enabled the Department to dispose

²⁸⁷ 3065 for newly registered cases plus 489 for case brought forward.

cases amicably and swiftly. Even though the Department adopts the voluntary approach, the parties are briefed and encouraged to opt for mediation when they register their cases at the counter.

3.2.3 Corporate Bodies/Commercial Industries

As mentioned earlier, two institutions are analysed under this category i.e;

- 1) Financial Mediation Bureau, and**
- 2) Construction Industry Development Board**

3.2.3.1 Introduction of Institutions

The Financial Mediation Bureau assists in resolving disputes and complaints between the complainants or customers and any of the financial institutions and insurance companies in Malaysia. Prior to the establishment of the Financial Mediation Bureau, there existed two bureaus: the Insurance Mediation Bureau (IMB) and the Banking Mediation Bureau (BMB). The IMB was established in August 1991 and opened its doors to insurance consumers in 1992 and its success prompted the banking industry to also establish the Banking Mediation Bureau in June 1996. Bank Negara (BNM) decided to amalgamate the Bureau under one umbrella so that the public will have a one-stop centre to seek formal redress as an alternative to litigation against the financial institution. Hence, the birth of the Financial Mediation Bureau

(FMB), a company limited by guarantee, established in August, 2004 and officially launched on the 20th January, 2005.²⁸⁸

The jurisdictions of the Financial Mediation Bureau are to mediate and arbitrate complaints, disputes or claims involving financial loss, not exceeding the following:

- 1). Banking/Financial related:
RM 100,000 (except for fraud cases involving payments instruments, credit cards, charge cards, ATM cards and cheques for which the limit is not more than RM25,000).
- 2). Insurance/Takaful related:
RM200,000 (Motor and Fire Insurance/ Takaful)
RM100,000 (others)
RM5,000 (3rdParty Property Damage)²⁸⁹

The Construction Industry Board was established under the Construction Industry Development Board Act (Act 520) by the Federal Government, back in 1994 as a regulated body entrusted with the responsibility of:

- i). Coordinating the needs and wants of the industry
- ii). Planning the direction of the industry
- iii). Addressing the pertinent issues and problems faced by the industry
and making recommendations in the formulation of policies for the industry.²⁹⁰

²⁸⁸ See N.Segara, "Mediation at the Financial Mediation Bureau (FMB) Financial Mediation", *Asia Pacific Conference on Contemporary Trends of Mediation and Arbitration*, (Kuala Lumpur:17-18 July 2006)

²⁸⁹ Financial Mediation Bureau homepage, June 2010, <http://www.fmb.org.my/pc02>

²⁹⁰ Construction Malaysia Development(CIDB) Official Portal, 5 July 2010 :<http://www.cidb.gov.my>

The Malaysian Construction Industry Development Board (CIDB) is the only body at present that is attempting to regulate the construction industry and to promote standards within the industry. In order to enhance its standard and speed up the disposal of dispute settlement within the industry, CIDB has since undertaken a few programs to promote the adoption of mediation approach to Construction Industry Players²⁹¹.

3.2.3.2 Analyses of the Approach of Mediation Adopted

The Financial Mediation Bureau was modelled on the lines of the British Ombudsmen System. A neutral person mediates between the financial institutions and the public whenever a dispute is referred to the Bureau.²⁹²

The mediator encourages communication between the parties and helps them explore the options of settlement. Generally, the parties arrive at an amicable settlement but there are several instances of deadlock. The mediator thereupon makes an award, taking into consideration the evidence (i.e., the statement of parties and the documents), the prevailing industry practices and the law. Hence, the role of the Mediator changes into one of the decision-maker, somewhat like an arbitrator. Although the bedrock of the process is based on the Ombudsmen System of the United Kingdom, in practice it is a hybrid between mediation and arbitration.²⁹³ The mediator is the Counsellor, Conciliator, Investigator and the Adjudicator. Where the

²⁹¹ *Ibid.*

²⁹² N.Segara, *loc.cit.*

²⁹³ *Ibid*

parties to the mediation arrive at an amicable solution, the mediator records the same by way of a letter to both the parties. However, where the parties do not reach an amicable solution, the mediator may reject the complaint, or make an award based on facts, industry practices and the law governing the issues. The mediator is independent in making the decision. Where the issues relate to Shariah matters which require guidance and advice, the Shariah Advisory Council at the (Central) Bank Malaysia is consulted²⁹⁴.

The Financial Mediation Bureau does not fully adopt the core feature of mediation that the role of the mediator is to facilitate and not to give judgment. The role of the mediator metamorphoses from a facilitator to an adjudicator when the parties fail to reach an amicable settlement. The mediator is given an authority to give an award in case the mediation fails. It is not a pure mediation, but it is a combination of mediation and arbitration.²⁹⁵

For CIDB, the mediation as stipulated under CIDB Mediation Rules (2000) is a private, confidential, voluntary and non-binding dispute resolution process in which a neutral person(the mediator) helps the parties to reach a negotiated settlement. The mediator is not authorized to give judgment in the situation where the mediation fails. The CIDB Mediation Rules are silent on this matter, however, the term of the Mediation Agreement states that the parties agree to appoint the mediator to assist them to resolve the dispute. Therefore, the role of the mediator is just to assist the

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

parties to facilitate a settlement and not to give judgment. The core feature of mediation is observed by CIDB.

3.2.3.2.1 Mandatory or Voluntary

Section 3(a) of the Memorandum of Association specifies the objectives of Financial Mediation Bureau to receive reference in relation to complaints related to policies of insurance and takaful certificates as well as banking matters. Although there is no provision whether it is mandatory or voluntary it can be seen that FMB will mediate on the matters referred to it voluntarily by the consumers.

For CIDB, Rule 1 of CIDB Mediation Rules clearly stipulates that mediation is voluntary and a non-binding process. Mediation Rules apply when the parties seek an amicable settlement and it must be based on the construction contract agreement with a “mediation clause” or a special agreement to refer the relevant specific dispute to mediation.

3.2.3.2.2 Confidentiality

No specific provision on confidentiality is provided for mediation at the Financial Mediation Bureau, however, the process is confidential and unless the parties authorise disclosure, statement and documents of the parties are not disclosed to anyone even to the parties. In contrast, for CIDB Rule 15 of the Mediation Rules strictly regulate the requirement of confidentiality in the process. The provision can be summarized as follows;

R.15 Confidentiality and Legal Privilege

- a). All mediation sessions shall be private and shall only be attended by the mediator, the parties and any individuals identified In Rule 12.
- b).The mediation process and all negotiations and statements and documents prepared for the purposes of the mediation shall be confidential and covered \by “without prejudice”. There shall be no formal record of the mediation save any settlement agreement produced under Rule 13(a) and 14 and the mediator will destroy any notes or other documents produced in the mediation.
- c).The mediation shall be confidential to the extent permitted by law. Unless agreed by the parties neither the mediator nor the parties nor any individual identified in Rule 12 shall disclose to any person any information regarding the mediation or any settlement terms or the outcome of the mediation save as provided for in R 19.
- d). All documents and other information produced for or arising from the mediation shall be privileged. Such documents and information shall not be admissible as evidence or otherwise discoverable in any arbitration or litigation in connection with the dispute referred to mediation, save for any documents or other information which would in any event be admissible or discoverable in any such arbitration or litigation.
- e). The parties shall not rely on or introduce as evidence in any arbitral or judicial proceedings any admission, proposals or views expressed by the mediator or the parties during the course of the mediation.

It can be said that both institutions observe the element of confidentiality which is the core element of mediation. The difference is that the provision is properly codified for CIDB but for Financial Mediation Bureau, the element is not regulated.

3.2.3.2.3 Impartiality of the Mediator

There is no specific provision on impartiality and neutrality for mediators at Financial Mediation Bureau, but the independence of the mediator is the principle maintained by the Bureau. To maintain this, the Board of Directors took steps to remove from the

Articles of Association's Article 15 which gives the power to the members²⁹⁶ to remove the mediator. The reason for this was the public must not perceive that the mediator could be influenced to make an award by reasons of the member's power to remove the mediator. Hence, the appointment and removal of the mediator lies with the Board of Directors.²⁹⁷

As for CIDB, Rule 7 of CIDB Mediation Rules has a strict rule on impartiality. It provides that prior to accepting appointment, the proposed mediator shall disclose to the parties and CIDB within 7 days, any circumstance likely to create a presumption of bias or prevent a prompt resolution to the dispute. If either of the parties takes objection within 7 days of the date of the disclosure, the proposed mediator shall not be appointed. In such a case, the CIDB shall nominate another person drawn from its panel of CIDB Accredited Mediators. Prior to accepting the appointment, the proposed mediator shall sign a declaration of independence to the effect that there are no known circumstances likely to give rise to justified doubts as to impartiality or independence.

²⁹⁶ The Bureau has been set up by 89 members comprising Commercial Banks(23), Merchants Banks(10), Development Banks(5), Islamic Banks (2), Insurance Companies(42), Takaful Operators(4), Credit /Charge Card Providers (3). As December 2006, the membership increased to 95.

²⁹⁷ N. Segara, "Mediation at the Financial Mediation Bureau", *Asia Pacific Conference on Contemporary Trends in Mediation and Arbitration*, (Kuala Lumpur, 17-18 July 2006). Further, the CGAP Consumer Protection Policy Diagnostic Report 2009 (Malaysia) stated that FMB's governance structure helps to ensure its dependence and accountability. A majority of the nine-member board is required to be independent, including the chair; and there is a standing member from one of the consumer associations. The mediators report directly to the board of directors, and in the event there is complaint against a decision made by a mediator, an audit committee reviews the mediator's decision. (See <http://www.cgap.org>)

It can be said that both institutions also observe the element of ‘impartiality of mediator’ in carrying out the practice of mediation, however with a codified rules adopted by CIDB, the provision is clear and the practice is guided and monitored.

3.2.3.2.4 Accreditation of the Mediator

There is no provision on the accreditation of mediators at FMB. The mediators are appointed by the Board, for such period and such terms of engagement that the Board thinks fit, provided that the amount of their remuneration shall be approved by the Board. The mediators receives fixed remuneration with the expertise in banking and insurance law. Therefore, the accreditation is not an issue as they are trained to be good and efficient mediators.

The panel of mediators at CIDB are the CIDB Accredited Mediators. CIDB maintains a panel of suitably trained individuals all of whom have achieved the status of CIDB Accredited Mediators. The CIDB Mediation Rules prescribe the procedure for potential mediators who wish to be accredited into panel of CIDB of Accredited Mediator. The accreditation would be subject to the CIDB Mediator Accreditation Requirements.

IN SUMMARY, mediation as practised at the Financial Mediation Bureau is not truly mediation but the combination of mediation and arbitration. In addition, the mediator is authorised to investigate the case and become the conciliator and adjudicator which are beyond the role of an actual mediator. Even though there is no specific provision on voluntariness, confidentiality and impartiality, the Bureau

observes these particular elements. Mediators are provided with work chart to guide them chair the mediation sessions. Even though, it is not purely mediation, but the practice records an encouraging result of participation and settlement.²⁹⁸ This dissertation finds that mediation or any other types of alternative dispute resolution that suits relevant cases can be applied to speed up the disposal of cases.

As compared to CIDB, the application of mediation is more structured and organised with CIDB Mediation Rules that are comprehensive in monitoring the practice of mediation covering all the basic elements of mediation as well as the procedure in carrying out mediation.

3.2.3.3 Analyses of Technical Procedure

3.2.3.3.1 Legal Documentation

There is no specific form required to be filled-up to mediate the case at the Financial Mediation Bureau. No complaint can be sent straight away to the Bureau without first going up to the Senior Management level of the financial service provider. Only if the decision does not satisfy the complainant, then he/she must refer a claim to the Financial Mediation Bureau within six (6) months of a final written decision from the financial service provider²⁹⁹. The Bureau however provides specific forms for the complainant to lodge complaint against the financial service provider. The complainant can lodge his/her complaint either:

²⁹⁸ See statistics under Section 3.2.3.5, “Analysis on the Effectiveness of Mediation” of this Chapter

²⁹⁹ N. Segara, *loc.cit.* See also, CGAP Independent Policy and Research Center, *CGAP Consumer Protection Policy Diagnostic Report, Malaysia 2009*, 29 July 2009, <http://www.cgap.org>. See also Financial Mediation Bureau homepage, <http://www.fmb.org.my>.

- i). Personally by attending the office of the Bureau, or
- ii). By writing a letter setting out the issue and enclosing the rejection letter of the Financial Institution, or
- ii). Via the e-mail
- iv). Complaint via the Bureau's Website³⁰⁰

It is the duty of the complainant to submit the following documents:

- i) The official rejection letter from the Financial Institution/service provider
- ii) Copies of all the relevant letters pertaining to the complaint
- iii) Copies of additional information or evidence, if any, to support the complaint.³⁰¹

As compared to FMB, CIDB has a specific form to proceed with mediation. In order, to start with mediation, the initiating party needs to fill-up "Request for Mediation Form." The form shall contain a brief self-explanatory statement of the nature of the dispute, the amount of the dispute (if any) and the relief/remedy sought. The request should also nominate a mediator or mediators who are accredited in the Panel of CIDB Accredited Mediators.³⁰²

After both parties agree on the appointment of the chosen mediator, they need to sign a Mediation Agreement. If there is disagreement on the appointment of the chosen

³⁰⁰ N. Segara, *Ibid.*

³⁰¹ N.Segara, *Ibid.*

³⁰² Rule 3(a), CIDB Mediation Rules 2000

mediator, the parties need to file using Form 4 to notify CIDB in which case the sole accredited mediator will be appointed by CIDB.³⁰³

The third document that needs to be signed is the settlement agreement after the parties reach an amicable settlement.

Thus, it can be said that the documentation involved is not complicated and not a burden to the parties involved.

3.2.3.3.2 Fees

The entire mediation process at the Bureau is free of charge. The Bureau is financed entirely by its members.³⁰⁴ The members pay a yearly subscription as membership fee which is utilized to defray the expenses of the Bureau.

At the CIDB, the “Request for Mediation Form” shall be sent to CIDB with the administrative fee of RM100.³⁰⁵ This charge shall be borne equally by the parties. As stipulated in Rule 16 of CIDB Mediation Rule, each party shall bear its own costs regardless of the outcome of the proceedings. All other costs and expenses inclusive of the mediator’s costs shall be borne equally by the parties. The costs include:

- i) The mediator’s fees and expenses. It includes travel and out-of pocket expenses of the mediator. The recommended fee is in the range of RM200 to

³⁰³ See Rule 5, CIDB Mediation Rules 2000

³⁰⁴ See footnote 96 on “members “ of FMB.

³⁰⁵ See Appendix 1 to Rule 3(c), CIDB Mediation Rules 2000.

RM500 per hour. Mediators may however change this rate as they deem fit.

A retainer fee in the range of RM2000 to RM5000 is payable to the mediator for all initial and preparatory work.

- ii) Expenses for any witness or expert advice or opinion requested by the mediator with the consent of the parties; and
- iii) Any administrative cost in support of the mediation including room hire and CIDB's Administrative Fee.³⁰⁶

At the CIDB, upon accepting the mediation appointment, the mediator shall prepare an estimate on the mediator's fee and expenses. Each party needs to pay the deposit³⁰⁷ with CIDB within 7 days after the mediator accepts the mediation appointment. The mediator may at any time during mediation, require the parties to make further deposits to cover any additional fees and expenses and suspend the mediation if no deposit is made. Any surplus funds deposited shall be returned to the parties at the conclusion of the mediation.³⁰⁸

There is a big gap here between the two institutions, no charge at all imposed for mediation services at FMB, but for CIDB, all the expenses incurred including the administrative costs, the mediator's cost and expenses, must be borne totally by the disputing parties.

³⁰⁶ Rule 16(a) CIDB Mediation Rules 2000

³⁰⁷ As stipulated in Appendix IV of the CIDB Mediation Rules 2000; the schedule deposit is as follows:

- 1) An initial deposits of half of the estimated costs of the mediators fees and expenses
- 2) The parties may be required to make further deposits where the initial deposit is deemed insufficient.
- 3) The above deposit will be borne equally by each party.

³⁰⁸ See Rule 16(b) and (c) CIDB Mediation Rules 2000.

Hence, the paid mediation services ensure the disputants to have accredited mediators and the right to choose his/her preferred mediator.

3.2.3.3.3 Choice of Mediator

There is no option given to the parties to select their preferred mediator at the FMB. Only limited mediators are available at the Bureau, since they are appointed by Board of Directors and receive fixed remuneration.

On the other hand, it differs with FMB, because at CIDB, the parties to a dispute are free to choose any person accredited in the panel of CIDB's Accredited Mediators, in which they have trust and confidence to act as the mediator.³⁰⁹

3.2.3.3.4 Legal Representation

As for the Financial Mediation Bureau, the rule is silent on this issue. For CIDB, Rule 12 allows each party to be represented or assisted by persons of their choice. The rule also requires each party to notify in advance the names and the role of such persons to the mediator and the other party. Besides, each party needs to identify a person who has full authority to settle the dispute on his behalf and to confirm this in writing.

Thus, the complexity of cases at the CIDB requires the parties to be represented by their lawyers.

³⁰⁹ See CIDB Mediation Rules 2000

3.2.3.3.5 Locality of the Services

At FMB, mediation is conducted at the Bureau itself, i.e. in house. There is a specific room provided for mediation session. The parties are seated facing the mediator so that they will not feel marginalized or that one party is being favoured. The friendly seating arrangement of the parties sets the tone for an amicable session of mediation.

At CIDB, the parties choose the mediation place. The parties may agree on the suitability of the place to conduct the mediation session.

3.2.3.3.6 Concluding Period

The mediation process at the Financial Mediation Bureau is to be completed within three (3) months or 60 days on receipt of the complaint. As the financial institutions are bound by the award given by the mediator, the complainant does not need to seek any other avenue to recover the sum awarded. The financial institutions usually make settlement very quickly. Therefore, the mediation process at the Bureau is considered a fast, convenient and efficient way to resolve complaints against any financial institutions or insurance company.³¹⁰

At the CIDB, the concluding period for mediation is forty-two (42) days as stipulated under Rule 9 of the Mediation Rules. However, upon written consent of the parties the period can be extended to three months.³¹¹

³¹⁰ N Segara, *Ibid.*

³¹¹ R. 9 of CIDB Mediation Rules 2000 states that the appointment of the mediator shall not extend beyond a period of three months without the written consent of the parties.

3.2.3.3.7 Termination of Mediation

There is no specific provision at FMB that specifies when mediation is to be terminated. However, where the parties do not reach an amicable solution, the mediator may reject the complaint or/and make an award on the facts.

As compared to CIDB, Rule 13 clearly specifies the situation on termination as follows:

- a) The signing of a settlement agreement by the parties; or
- b) The written advice of the mediator after consultation with the parties that in his or her opinion further attempts at mediation are no longer justified; or
- c) Written notification by either party at any time to the other party and the mediator (if appointed) that the mediation is terminated; or the time limit of 42 days has expired and the parties have not agreed in writing to extend that time limit.

3.2.3.3.8 Settlement Agreement

At the FMB, where the parties arrive at an amicable settlement, the mediator records the same by way of a letter to both the parties. The complainant upon receipt of the award must indicate that he or she either accepts or rejects the award. Any award made by the mediator is binding on the financial institution, but not on the complainant. If the complainant accepts the award, then the award binds the institution. However, if the complainant rejects the award, then either party may take

such action as they deem expedient to resolve the dispute; for example, file an action in the Civil Court.³¹²

With regard to the CIDB, Rule 14 of the Mediation Rules clearly provides that no settlement reached in the mediation will be binding until it has been reduced to writing and signed by or on behalf of the parties.

As a conclusion, it can be said that, mediation is a fast, simple and convenient procedure for the disputing parties to resolve their cases.

3.2.3.4 Analysis on Governing Rules on Mediation

3.2.3.4.1 Financial Mediation Bureau

The Financial Mediation Bureau is a company limited by guarantee. The Memorandum and Articles of Association set out:

- i). The jurisdiction of the Bureau,
- ii). Appointment of the Mediator and his/her powers,
- iii). The role and composition of the Board of Directors, and
- iv). Levy/fee collection from its members.³¹³

The Articles of the Association clearly set out the powers and duties of the Mediator. The Article³¹⁴ provides that the mediator may act as a counsellor, conciliator, adjudicator or arbitrator with regard to the complaints received. The Article therefore

³¹² N. Segara, *Ibid.*

³¹³ *Ibid.*

³¹⁴ Article 56, Articles of Association, Financial Mediation Bureau. See also S. Negara, *Ibid.*

gives power to the mediator to resolve the issue by making a decision (i.e. award).The decision will be based on the investigation, industry policies and practices and the relevant law if any, which is applicable.

The Roles of the Mediator at the Mediation Session, however, are not clearly defined in the AOA. There is no specific procedure of mediation being mentioned. With regard to the fees, Article 56 (iv)(d) stipulates that the complainants shall not be charged any fees, but the member against whom is lodged will be charged a case fee as may be determined by the Board from time to time. There is no other guideline issued except for the work chart, which provides easy reference for the mediators.³¹⁵

3.2.3.4.2 CIDB

The CIDB Mediation Rules 2000 was introduced by CIDB Malaysia to guide the application of mediation at the Board. The introduction of the rules specifies that the rules are published for use with the CIDB Standard Form of Contract, The CIDB standard form of sub-contract and for any other contract specify the use of the rules. The rules may also be adopted by parties to construction disputes who have not provided for mediation, but who wish to mediate their disputes, either in attempt to avoid arbitration or litigation or during the course of such arbitration or litigation.³¹⁶

³¹⁵ Informal Interview with Puan Darmawatty, Mediator, FMB at the Mediation Seminar, Attorney General's Chambers, Putrajaya, 25 Oct. 2010

³¹⁶ See CIDB Mediation Rules 2000

The 'Introduction' of the Mediation Rules specifies the Recommended Mediation Clause, Recommended Mediators, Accreditation of Local Mediators and Registration of Foreign Mediators.

The Recommended Mediators as specified in the Rules are any person accredited in the CIDB Panel of Accredited Mediators in whom they have trust and confidence to act as mediator. The CIDB maintains a panel of suitably trained individuals all of whom have achieved the status of CIDB Accredited Mediators.³¹⁷

The CIDB Mediation Rules 2000 provide a clear guideline on the procedure of mediation to be performed at the Board. The rules prescribe the specific form to be used by the parties and the time limit to be observed by the parties in carrying out the proceedings. The appointment and the disqualification of the mediators are also clearly defined.

Generally, the CIDB Mediation Rules has 19 provisions under the following subheadings:

- 1) Mediation
- 2) Application of Rules
- 3) Initiation of the Mediation Process
- 4) Response to Request for Mediation
- 5) Appointment of the Mediator by the Parties
- 6) Appointment Procedure of the Mediator by CIDB
- 7) Disqualification of Mediator
- 8) Appointment of Co-Mediator
- 9) The Mediation Process
- 10) Role of the Mediator
- 11) Role of the Parties and Identification of the Matters in Dispute
- 12) Representation and Settlement Authority

³¹⁷ *Ibid.*

- 13) Termination of the Mediation
- 14) Settlement Agreement
- 15) Confidentiality and Legal Privilege
- 16) Costs
- 17) Mediator's Role in Subsequent Proceedings
- 18) Exclusion of Liability
- 19) Record of the Mediation

Each subheading is clearly illustrated and clarified. Hence, the CIDB Mediation Rules contains a comprehensive guide for the application of mediation at the Board.

Besides the CIDB Mediation Rules, the application of mediation is also controlled by terms of Mediation Agreement and CIDB Code of Conduct.

The terms of Mediation Agreement³¹⁸ are as follows:

- a) The Mediation shall be conducted and be governed under the CIDB Mediation Rules 2000.
- b) The parties shall attend or be represented before the mediator by persons with full authority to settle the dispute. The parties agree to inform the mediator immediately should they not have authority to settle.
- c) The parties agree to bear equally the mediator's fees and charges and all other expenses incidental to the mediation process.
- d) The parties agree to abide by any settlement and effect the terms thereof reached through the mediation.
- e) The mediator shall not be liable to a party for any settlement, act or omission in assisting the parties to resolve the dispute unless the act or omission is fraudulent or dishonest.
- f) The parties jointly and separately indemnify the mediator against any claim and/or liabilities for any settlement, act or omission in assisting the parties to resolve the dispute unless the act or omission is fraudulent or dishonest.
- g) A party may terminate the dispute resolution process at any time after consultation with the mediator. The mediator may terminate the dispute resolution at any time after consultation with the parties.

The Mediation Agreement, therefore, clarifies to the parties their roles and limitations at the Mediation Session.

³¹⁸ Appendix 11 of CIDB Mediation Rules 2000

In order to ensure the efficient application of mediators by their mediators, the CIDB introduced the Code of Conduct that specifies the roles, duties, powers and limitation of the mediators in carrying out the proceeding. The mediator appointed, therefore, must prepare himself clearly before the commencement of the mediation session, abide by the terms of the Mediation Agreement, the CIDB Mediation Rules and the CIDB Code of Conduct.

3.2.3.5 Analyses on the Effectiveness of Mediation

3.2.3.5.1 Financial Mediation Bureau

The effectiveness of the application at the Financial Mediation Bureau is evident from the following statistics:

The FMB was launched in January 2005, the relevant figures for 2005 and 2006 are as follows

Statistics 3.3³¹⁹

Year 2005

Insurance Division	
No of cases received	1,254
No of cases resolved	1,180
Rate of success	94%

³¹⁹See N. Segara, Mediation at the Financial Mediation Bureau, *Mediation and Arbitration in Asia Pacific Conference Proceedings*, 17-18 July 2006, Ed. Syed Khalid Rashid & Syed Ahmad Idid, (Kuala Lumpur :IIUM Press) pg.157

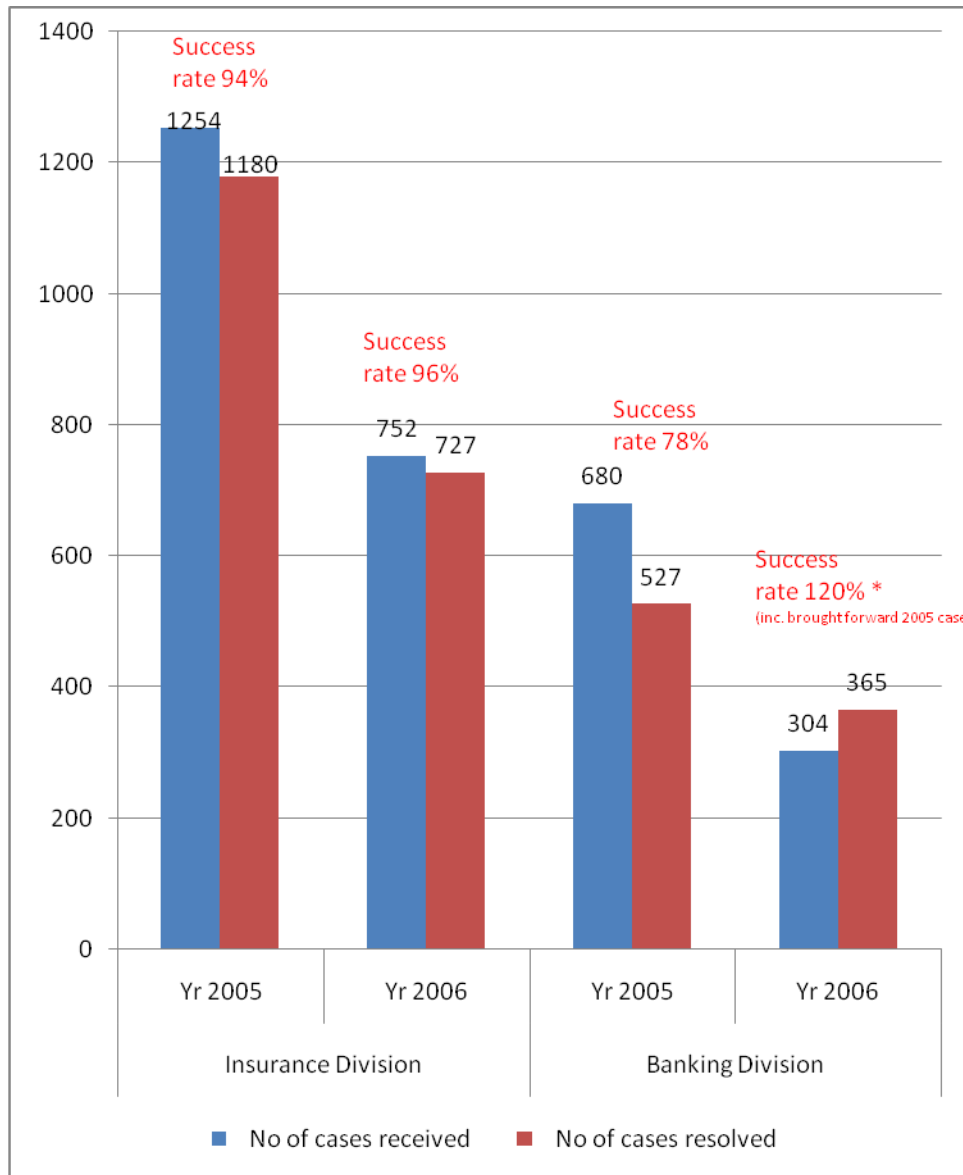
Banking Division	
No of cases received	680
No of cases resolved	527
Rate of success	78%

Year 2006

Insurance Division	
No of cases received	752
No of cases resolved	727
Rate of success	96%

Banking Division	
No of cases received	304
No of cases resolved	365 (including of cases carried forward from December 2005)
Rate of success	120%
Rate of success is well above 90%	

Statistics 3.3; Financial Mediation Bureau



Although the FMB has its own way in carrying out mediation, the application has shown a great success in resolving disputes from the customers. From the statistics, it shows that within two years after it was launched in 2005, FMB has received 2006 cases for insurance matters, whereas for banking matters the number of cases

received is 984 cases. In the Year 2005, FMB recorded 94% of success for insurance matters, whereas for banking matters, the rate of success was 78%. In the year 2006, 96 % of cases were resolved for insurance matters whereas banking matters recorded 90% of success rate.

According to its Chief Executive Officer, John Thomas, in the year 2011, six years after its establishment, the FMB handled some 50,000 cases related to banking, finance and insurance related matters. The Bureau is handling about 100 to 140 various cases a month. At the current period, the Bureau has seven (7) mediators and fourteen(14) assistant mediators.³²⁰ It is impressive to see that with the limited number of mediators, the Bureau manages to handle 100 to 140 various cases a month. In this regard, mediation is a practical method to be adopted as a mechanism to resolve disputes. The application helps the speedier disposal of cases and avoids backlog. Thomas, further commented that the service offered is fast, convenient and efficient.³²¹ In the meantime, where the parties fail to arrive at an amicable settlement the power of the Bureau to decide or give an award help the parties to end the dispute and get a fair result. Without the authority, it leaves the parties with no end and they have to find other avenues to get the case resolved.

Certain factors have increased the number of cases referred to the FMB. According to a recent survey, the consumer awareness of FMB is good, owing to word of mouth, websites and school education programs. In addition, insurers provide FMB contact

³²⁰Massita Ahmad, "FMB handles Increasing Number of Online Transaction Disputes", BERNAMA, 13 Oct 2011, 25 Apr. 2012, <http://finance.bernama.com/news.php?id=619799>

³²¹ See *Ibid.*

information in claims rejecting letters. It is also to be noted that FMB provides services at no cost and reviews complaints by corporations as well as individuals. About half of FMB clients are reported to be from the lower-income group.³²²

In this regard, in enhancing the mediation movement in Malaysia, the awareness programme is the element that is important to be studied.

The FMB is located in Kuala Lumpur and customers are obliged to travel to meet with the mediator, when needed. If he or she cannot afford to make the trip, FMB will fly the mediator to a local area, if necessary. It is possible, however, that potential claimants living far away or lacking resources to travel may self-select out the process before this option is available. To resolve this issue, it is a part of FMB's long-term plan to have five offices in different regions to offer better coverage. Also, the FMB plans to have a representative in all Bank Negara branches in every state next year as part of its efforts to assist the public nationwide.³²³

In summary, the awareness programme, the free service offered, the flexibility nature of the process and the convenience of the locality has attracted high participation and acceptance of mediation in the Financial Mediation Bureau.

³²² See CGAP Consumer Protection Policy Diagnostic Report (Malaysia 2009), *loc.cit.*

³²³ Masita Ahmad, *Ibid.*

3.2.3.5.2 CIDB

The CIDB has trained a pool of over 70 accredited mediators, yet mediation is not a common route for resolving disputes³²⁴ Despite its comprehensive rules and guides on its application, mediation has yet to gain popularity and acceptance within the industry.

Generally, mediation is not a popular mode of resolution in the construction industry. A research conducted on five major Malaysian agencies that have provided dispute resolution services between 2000 and 2008, demonstrates that the popularity of mediation for construction cases is very low compared to arbitration cases. In one agency, less than 1% of mediation cases was on construction, while in another agency, none of its more than 500 cases came before a mediator.³²⁵ Another research attempts to establish how the construction disputes are conceived by practising quantity surveyors in Malaysia. The findings showed that 23.1% and 21.4% of disputes were settled through negotiation and adjudication respectively. The study also reveals the following reasons on why mediation was not widely used within the Malaysian construction industry;

- i). Most problems can be resolved through direct-negotiation between the disputants without any involvement from others. The involvement of a third party can make disputes become more complicated or even worse.
- ii). Not widely known in Malaysia since it is a new approach.

³²⁴ Noushad Ali Naseem/Ameer Ali, "One step at a time", *Construction Journal*, Nov.-Dec 2007. 25Mac 2010 www. Cicqs.ccm/main/files. PDF.tem.pdf.

³²⁵ See reports by Zulhabri Ismail, Jamalunlaili Abdullah, Rosli Mohammad Zin and Padzil@Fadzil Hassan Mediation: "The Best Private Dispute Resolution in The Malaysian Construction Industry" p3, *13th Pacific Association of Quantity Surveyors Congress*, (Kuala Lumpur, 15-18 Aug 2009) cited in Zuhairah Ariff Abd. Ghadas and Rozina Mohd. Zain, "Mediation in the Malaysian Construction Industry", *The Law of Mediation in Malaysia* Ed. Mohd. Naqib Ishan Jan and Ahgar Ali Ali Mohamed, (Malaysia: Lexis Nexis, 2010)

- iii). Not exposed to any mediation procedure since no major disputes have occurred which needed settlement in value of work if substantial will be added or omitted progressively and this must be agreed by both parties.
- v). The main contractor will offer alternative works or projects as replacement if the sub-contractor suffers losses.
- vi). Not agreed or initiated by both parties.
- vii). Unaware³²⁶

Naushad³²⁷ commented that his meeting with Jocelyn on 30th March 2009, the person in-charge of mediation under the auspices of CIDB revealed that there were very few requests to the CIDB for the selection of mediators by CIDB. There were only two cases of formal selection of mediators by CIDB. Naushad further commented that, despite substantial efforts, mediation did not take off in a significant way in the decade following the first initiative to promote formal structured construction mediation. In this regard, he further viewed that providing for mandatory mediation in a construction contract may offer some potential benefit. If mediation is made mandatory prior reference to other formal binding dispute-resolution methods like arbitration, the parties that have disputes will be forced to take a “step” in the mediation process. Also, he further commented that if the process is right, mediation may be justified.³²⁸

If we compare between the two institutions above, CIDB has proper rules and regulations as compared to FMB in carrying out the application of mediation. The attractive part of mediation at FMB is no charge or fees imposed at all on the

³²⁶Haryati Mohd Isa, Padzil@Fadzil Hassan, Mohd. Faisal Ishak, &Othman Mohd Nor, “Conception of Dispute Amongst Malaysian Quantity Surveyors”.p 1579. *RICS COBRA Research Conference*, (Cape Town, 10-11thSept 2009) cited in Zuhairah Ariff and Rozina Mohd Zin, *Ibid*.

³²⁷Naushad Ali Naseem Ali, “Construction Mediation in Malaysia” *Mediation in the Construction Industry, An International Review*, (UK: Taylor and Francis e-Library, 2010).

³²⁸ *Ibid*.

complainants. This could be one of the factors why mediation at FMB receives good acceptance from the customers, even within one year of its establishment as reported in the statistics above. Besides, the low awareness on mediation and its advantages is seen to be the main element that resulted in the low participation of mediation in the construction disputes.

3.2.4. Private Institutions

Malaysian Mediation Centre is the only institution that is analysed under this category.

3.2.4.1 Introduction of Institution

The Malaysian Mediation Centre (MMC) is a body established under the auspices of the Bar Council with the objective of promoting mediation as a means of alternative dispute resolution. It also provides for a proper avenue for successful dispute resolution. The Centre offers the following services:

- a) Mediation Services;
- b) Assist and advise on how to get the other side to agree to mediation if one party has shown interest;
- c) Provides mediation training for those interested in becoming mediators and accreditations and maintains a panel of mediators.³²⁹

Currently, the Centre accepts civil, commercial and matrimonial matters and intends to expand the scope to other matters at a later stage.³³⁰

³²⁹ Khutubul Zaman Bukhari, "Arbitration and Mediation in Malaysia", Asean Law Association, 6 May 2008 (retrieved) [http://aseanlawassociation.org/9GA doc/w4Malaysia.pdf](http://aseanlawassociation.org/9GA%20doc/w4Malaysia.pdf)

3.2.4.2 Analysis of the Approach of Mediation Adopted

The MMC adopts the main core of mediation as the role of the mediator is to assist the parties to negotiate a settlement. The mediator will not make a ruling or finding unless expressly requested by all parties involved. Rule 12 of the MMC Mediation Rules states that the mediator does not have the authority to impose a settlement on the parties, but will attempt to help them reach a satisfactory resolution of their disputes.

3.2.4.2.1 Mandatory or Voluntary?

There is no provision that mandate the case to be referred to MMC. On the silence of the provision, it is concluded that mediation is referred to the Centre on a voluntary basis. The Centre may accept cases at any stage, whether pre-trial, commencement of legal proceedings and during proceedings etc.

3.2.4.2.2 Confidentiality

Confidentiality is strictly observed by the Centre. In order to preserve the element of confidentiality, Rule 15 of the Mediation Rules makes the following provision:

- i). All communications made in the mediation, including information disclosed and views expressed are made on a strictly “without prejudice” basis and shall not be used in any proceedings.

³³⁰*Ibid.*

ii). All records, reports or other documents including anything electronically or any other information produced or received by a mediator while serving in that capacity shall be privileged.

iii). The mediator or the MMC (or any employee, officer or representative for or arising in relation to mediation) shall not be compelled to divulge such records or testify as a witness, consultant, arbitrator or expert in regard to the mediation in any arbitral judicial or other proceedings.

iv). The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceedings:

- a) Views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
- b) Admissions made by another party in the course of the mediation proceedings;
- c) Proposals made or views expressed by the mediator; or
- d) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

Rule 16 further provides that there shall be no stenographic record, no transcript or formal record. No audio-visual recording will be made of the proceedings.

As compared to other institutions, MMC has the strictest rule on confidentiality. Any form of disclosure from the mediation session is prohibited and monitored.

3.2.4.2.3 Impartiality and Neutrality of the Mediator

The Code of Conduct prescribes the requirement of impartiality and neutrality of the mediator. It is a strict requirement on the mediator to observe the particular elements prescribed in the Code in conducting the session. The MMC applies the true mediation with observance of all its basic elements. Besides the requirement of impartiality to be observed by mediators in the Code of Conduct, Rule 5 (iii) of the Mediation Rules provides that the mediator should not act for any parties at any time

in connection with the subject matter of the mediation. The mediator and the MMC are stated not to be agents of, or acting in any capacity for, any of the parties. The rule further states that the mediator is also not an agent of the MMC.

In observance of the element of impartiality and neutrality, Rule 6 further provides disqualification of the mediator in the event he has any financial or personal interest in the result of the mediation.

3.2.4.2.4 Accreditation of Mediators

Mediators at the Centre are the Accredited Mediators. The Centre has its own rules for purpose of accreditation of mediators. All mediators of the Centre must be a practising member of the Malaysian Bar of at least 7 years standing. He/she must have completed at least 40 hours of training conducted and organised by the Centre and must also pass a practical assessment conducted by the trainers.

IN SUMMARY, it can be said that MMC practises true mediation with strict observation of its core elements of ‘impartiality and neutrality’. The application is also structured with proper codified rules. With the service of ‘accredited mediators’ and structured application MMC is expected to offer a quality mediation service.

3.2.4.3 Analyses of the Technical Procedure

3.2.4.3.1 Legal Documentation

Mediation can be filed individually or by joining application. The filing should be made together with non-refundable fee of RM100.³³¹ Upon the application, the initiating party shall inform the MMC of the names and particulars of all other parties interested in the dispute for further action by MMC. It is interesting to note that on the application to the centre, a Mediation Kit that contains the following will be provided:

- a) Mediation Agreement
- b) Mediation Rules
- c) Mediators Code of Conduct
- d) Settlement Agreement (Draft)
- e) List of Mediators

The documents provided earlier to the parties before the proceeding will enable the parties to understand and get a clear picture of the proceedings that they have opted for.

Thereafter, upon receipt of the Request, accompanied with the payment of RM100, the MMC will contact all parties involved in the dispute and attempt to obtain a submission to mediation within fourteen days (14) from the date of the receipt of the Request and shall within twenty one (21) days from the receipt of the Request inform all parties whether mediation can proceed.³³²

³³¹ See Rule 3 MMC Mediation Rules

³³² See Rule 3.3. MMC Mediation Rules

For the Joint Application, the initiating party need to file in the Joint Submission Form. Both the Joint Submission Form and the Request for Mediation Form for individual application shall contain a brief statement of the nature of the dispute and the names, addresses and telephone numbers of all parties to the dispute and those who will represent them in the mediation.³³³

It is a duty of the initiating party to file simultaneously two copies of the Request with the MMC and one copy with every other party to the dispute.³³⁴

Before mediation is carried out, the parties will enter into an agreement for appointment of mediator (Mediation Agreement).³³⁵ This Agreement also prescribes the terms that parties should abide at the proceedings.

Pursuant to Rule 11 of the Mediation Rules, at least five days prior to the mediation, each party shall submit to the mediator the following:

- a) A concise summary not exceeding three pages (“the Summary”) stating its case.
- b) If necessary, copies of all documents referred to in Summary and which are referred to during mediation.

Another document that needs to be notified by the parties is the Settlement Agreement. No settlement reached in the mediation will be binding until it has been reduced to writing, signed by and or on behalf of the parties.

³³³ Rule 4.1., MMC Mediation Rules

³³⁴ See Rule 4.2, MMC Mediation Rules

³³⁵ See Rule 7 MMC Mediation Rules

The documents involved in the proceedings are either “Joint Submission” for mediation or the “Request for Mediation” to initiate the proceeding, the Mediation Agreement before the proceeding starts, the Summary of the case to be drafted by the parties and the Settlement Agreement at the end of the session if the amicable settlement is reached.

It is observed that the legal documentation involved will not be a burden for the parties to draft as it is in a standard form. The parties need only to fill-up the required part of the form. The documents that need to be drafted by the parties are the “Summary” of each party’s case before the proceeding and filed at the Centre, five (5) days before the proceedings.

For the settlement agreement, the Centre will draft the terms agreed, the parties only need to read and sign the agreement.

3.2.4.3.2 Choice of Mediator

Upon the parties agreeing to submit to mediation, the MMC will forward a list of mediators on the panel. The choice is on the parties to select their preferred mediator. In the event the parties not having agreed upon a mediator within seven days, the MMC shall appoint a person on MMC’s panel to act as the Mediator.³³⁶ It is to be noted here that the appointment of the Mediator is done by the MMC when there is disagreement on the selection of mediators by the parties.

³³⁶ Rule 5 of the MMC Mediation Rules

The rule requires the MMC to choose a person who in its view will be best placed to serve as the mediator. It is also required for the MMC to appoint another person if the parties has reasonable cause to object to the choice.

3.2.4.3.3 Fees

In order to initiate the proceeding, the initiating party need to file in the Request Form together with a non-refundable processing fee of RM100. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation including required travelling and other expenses of the mediation; the mediator and representative of the MMC and the expenses of any witness and the costs of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless they agree otherwise. The administrative and rental charges and the mediators fees will also be borne equally by the disputing parties. The MMC may prescribe the administrative and rental charges from time to time³³⁷. Rule 21 (b) prescribes that the administrative and rental charges for the first scheduled session shall be paid at least three days prior to the first scheduled session. The balance charges and fees, if any, shall be paid at least three days before the next scheduled session or upon termination or conclusion of the mediation within seven days of receipt of the bill from the MMC.

Mediators Scale of Fees are as follows:

³³⁷ Rule 21, MMC Mediation Rule

Table 3.4: Mediators Scale of Fees (MMC)

Quantum of Claim	Mediators' Fee Per Party
RM100,000 and below	RM500 per day of part thereof
RM100,001 – RM250,000	RM750 per day of part thereof
RM250,000 – RM500,000	RM1,000 per day or part thereof
RM500,000 – RM750,000	RM1,250 per day or part thereof
RM750,000 – RM1,000,000	RM1,500 per day or part thereof
RM1,000,001 – RM2,000,000	RM2,000 per day or part thereof
RM2,000,000 – RM3,000,000	RM2,500 per day or part thereof
RM3,000,000 – RM5,000,000	RM3,000 per day or part thereof
RM5,000,000 – RM10,000,000	RM4,000 per day or part thereof
Above 10,000,000	RM5,000 per day or part thereof

In addition to the above, the parties share the following charges equally:

- i). Administrative charge of RM300 per case (the charge will be prescribed by the MMC from time to time.
- ii). Room rental rates at RM350 for a full day and RM175 for half day which is defined as a period of hours or less.
- iii). Refreshment/ catering.
- iv). Secretarial services.³³⁸

As compared to the litigation services, the charge and fees on mediation is much cheaper. As MMC is a private institution, charging fees is justifiable.

Even though the cost of mediation seems to be cheaper than the litigation costs, the demand and participation for mediation service at the center is not encouraging.

³³⁸ Khutubul Zaman Bukhari, *loc.cit.*

The statistics³³⁹ show that the paid mediation service is not favourable amongst Malaysian litigants. This also could be due to the lack of awareness on mediation amongst them.

3.2.4.3.4 Legal Representation

Rule 9 of the MMC Mediation Rules provides that individuals should attend the mediation in person. In the case of the corporate entities, the parties shall appoint the representatives to the mediation who have the necessary authority to settle the dispute. The parties will supply the MMC and the mediator with the names of the representatives. Rule 14 of the MMC Mediation Rules provides that mediations are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permissions of the parties and with the consent of the mediator.³⁴⁰ Where appropriate, the mediator is authorised to limit the number of representatives from each party.

3.2.4.3.5 Locality of the Services

The mediation session is held at the appropriate office of the MMC or any other convenient location as may be determined by the MMC.³⁴¹

³³⁹ See statistics Section 3.2.4.5, “Analysis on the Effectiveness of Mediation” of this Chapter

³⁴⁰ Informal Interview with Puan Hendon, MMC Mediator, Mediation Seminar, AG Chamber’s, Putrajaya, 25 Oct 2010. Legal Representation is not encouraged at MMC. If the parties are represented, the lawyers will be briefed on the ethics at the mediation sessions”.

³⁴¹ See Rule 10 of the MMC Mediation Rules

3.2.4.3.6 Concluding Period

The Mediation Rules do not specify the concluding period for the mediation session. The rules only provide that the mediator is authorised to end the mediation whenever, in the opinion of the mediator, further efforts at the mediation would not contribute to a resolution of the dispute between the parties.³⁴²

The MMC is the only institution that does not specify the concluding period for mediation. The researcher opines that if there is no cutting-off period, the mediation session may drag and this may cause the parties to incur further costs.

3.2.4.3.7 Termination of Mediation

The mediation at MMC will be terminated on the occurrence of the following:

- i). By the execution of a settlement agreement by both parties.
- ii). By a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or
- iii). By a written declaration of a party or parties to the effect that the mediation proceedings are terminated.³⁴³

Compared to other institutions the expiry of the cutting-off period is not one of the situation that terminate the mediation.

³⁴² Rule 12(iii) MMC Mediation Rules

³⁴³ Rule 18, MMC Mediation Rules

3.2.4.3.8 Settlement Agreement

The MMC has provisions similar to other institutions on the settlement agreement that no settlement is reached in the mediation will be binding until it has been reduced into writing and signed by and or on behalf of the parties.

In summary, the MMC provides a simple and non-complicated procedure for the parties to apply for mediation services at the Centre³⁴⁴ and the fees offered is reasonable. The technical procedure is codified that make the application a structured one. For a convenient proceeding, parties are given a choice to select their preferred mediator on the list. Even though there is no specific cutting off period for the termination of the mediation session, the mediator is authorised to end the mediation whenever he is of the opinion that further efforts would not contribute to any resolution. Thus, it can be said that mediation is a fast and convenient mode of resolution offered by MMC for litigants to settle their disputes.

3.2.4.4. Analysis of Governing Rules on Mediation

The MMC has proper guidelines on the practice of mediation. The Rules and Regulations are compiled in the Mediation Rules, Mediation Agreement and the Mediator's Code of Conduct. The mediator is subject to a Code of Conduct whilst the

³⁴⁴ Except for Drafting the Summary of the case . It might be difficult for laymen to do legal drafting. Help of lawyers might be needed.

parties are bound by the Mediation Agreement that they enter into. The mediator and all parties are subject to the Mediation Rules of the MMC.³⁴⁵

The Mediation Agreement provides for parties to appoint a suitable mediator of their choice or if not, the mediator selected by the MMC. The agreement also provides that the mediation will be conducted under the Mediation Rules of the Centre and requires the parties to act in good faith. This is an important element of mediation. Apart from that, it provides confidentiality to the process.³⁴⁶ Parties that attend the mediation sessions must be cloaked with authority to settle and in the event they do not have the full authority to settle they must disclose to the mediator.

The Mediation Rules provide the process of initiating mediation, appointment of mediators, disqualification of mediators, vacancies, representation, authority of mediator, mode of settlement agreement, privacy and confidentiality, termination of mediator, expenses and the interpretation of the Rules. Generally, the Mediation Rules have 21 provisions under the following subheadings:

- 1). Mediation Process
- 2). Agreement of Parties
- 3). Initiation of Mediation
- 4). Request for Mediation
- 5). Appointment of Mediator
- 6). Disqualification of Mediator
- 7). Mediation Agreement
- 8). Vacancies
- 9). Representation

³⁴⁵Sharifah Suhanah Syed Ahmad and Roy Rajasingham, "The Malaysian Legal System, Legal Practice & Legal Education", *IDE Asian Law Series No.4. Judicial System and Reform in Asian Countries (Malaysia)* March 2001, Institute of Developing Economics (IDE-JETRO), Japan, 28 June 2010, <http://www.ide.go.jp/English/Publish/Download>.

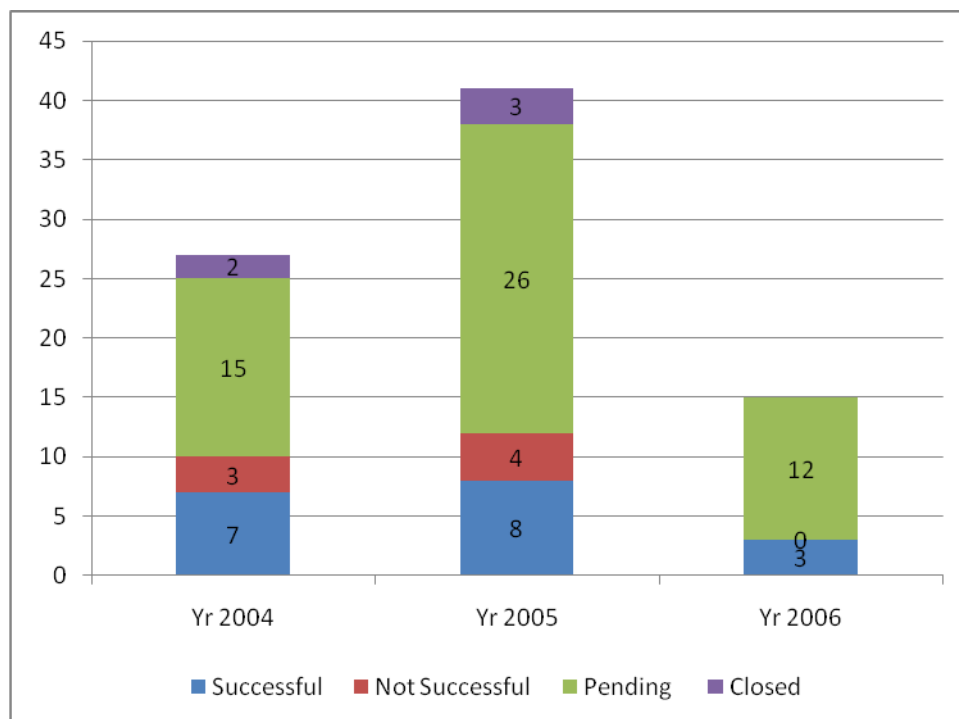
³⁴⁶ Khutubul Zaman Bukhari, *loc.cit.*

- 10). Date, Time and Place of Mediation
- 11). Identification of Matters in Dispute and Exchange of Information
- 12). Authority of Mediator
- 13). Settlement Agreement
- 14). Privacy
- 15). Confidentiality
- 16). No Stenographic Record, Audio-Visual Recording of Formal Record
- 17). Stay of Proceedings
- 18). Termination of Mediation
- 19). Exclusion of Liability (Waiver)
- 20). Interpretation and Application of Rules
- 21). Expenses

The MMC Mediation Rules, MMC Mediation Agreement and MMC Code of Conduct provide comprehensive guideline for the application of mediation at the Centre.

3.2.4.5 Analyses on the Effectiveness of Mediation Adopted

**Statistics 3.5; Cases referred to Malaysian Mediation Centre
For the Year of 2004- July,2006 , MMC**



Cases referred to Malaysian Mediation Centre For the Year of 2004-July, 2006

Year 2004

Total case referred-28	Successful	-7
	Not Successful	-3
	Pending	-15
	Closed	-2

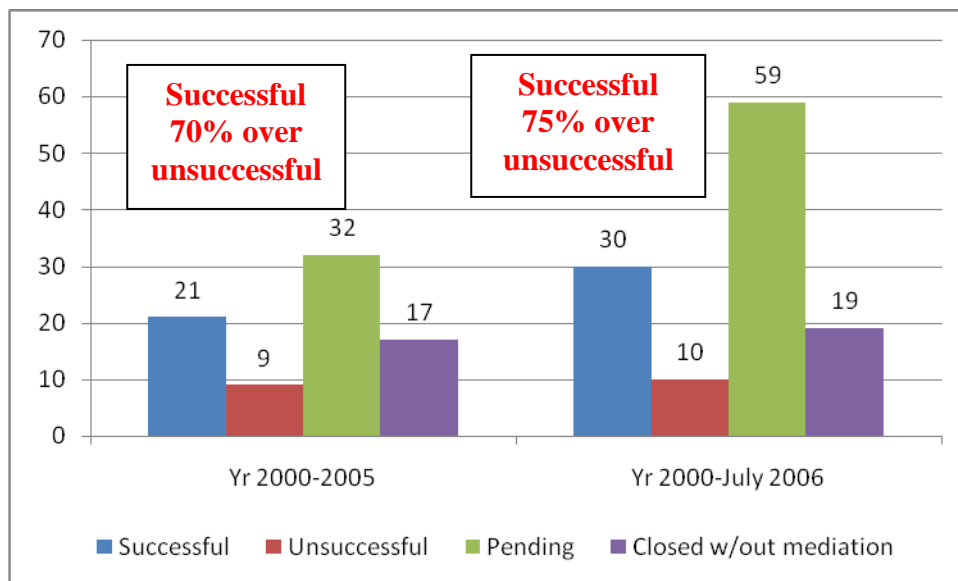
Year 2005

Total Case Referred-8	Successful	-5
	Not Successful	-1
	Pending	-26
	Closed	-3

Year 2006

Total Case Referred-14	Successful	-3
	Not Successful	-Nil
	Pending	-12

Statistics 3.6, Cases referred to MMC 2000-2005, 2000-July2006, MMC



The total case c referred to MMC from the year 2000-July2006	-93
Successful	-30
Pending	-59
Unsuccessful	-10
Files closed without going through mediation	-19
Total case referred to MMC from year 2000-2005	-79 cases
Files closed without going through mediation	-17 cases
Pending files	-32 cases
Successful	-21 cases
Unsuccessful	-9 cases
Percentage of successful cases 21/30	-70%
Percentage of unsuccessful cases 9/30	-30%

The records show an encouraging result with 70% of successful cases from the year 2000-2005. The well-trained mediators with the accreditation requirement might contribute to the success.

Although the statistics reported a high percentage of success, the number of cases referred to MMC is very low. For the five years, only 79 cases were referred to the Centre. It was reported further that from 2000-2007 only 132³⁴⁷ cases were referred to the Centre. For the period of 7 years, 132 cases are considered very low. As compared to FMB, for example, the number of cases referred for one year is more than 1000 cases. The Legal Aid Department receives more than 2000 cases for mediation per year whereas the Tribunal for Consumer Claim receives more than 6000 cases per year.

With the structured rules and guidelines on mediation, the number of cases referred to mediation is not encouraging. This could be due to the low awareness of legal

³⁴⁷ Statistics, MMC

practitioners³⁴⁸ and the disputant parties to the availability and benefits of mediation. At present there are a total number of 297 mediators empanelled on the MMC. However the cases referred to the centre are very few where it was reported that more mediators are available than the cases referred to.³⁴⁹ The issuance of Practice Direction 5 that gives option for parties to opt for judge led or a mediator agreeable by both parties is expected to resolve this issue. However, the Judiciary commented that parties prefer the case to be mediated by court officers as the service is free³⁵⁰. Therefore, the arrangement for referral is recommended to be made between the Judiciary and the Malaysian Mediation Centre.

3.2.5 International Institutions

Under this section, only one institution is analysed i.e;

1). Kuala Lumpur Regional Centre For Arbitration (KLRCA)

3.2.5.1 Introduction of the Institution

The KLRCA was established in 1978 in Kuala Lumpur to offer the best available option for out of court settlement. Under the auspices of the inter-governmental international law body, the Asian Consultative Organisation, the Centre provides a

³⁴⁸ For instance, The Mediation Skills and Training Course that was scheduled in Ipoh by Malaysian Mediation Centre had to be cancelled due to poor response. However, the same programme in Penang in Johor manage to proceed with 17 participants in Penang and 12 participants in Johore. See 2011/2012, Annual Report, www.malaysianbar.org.my, Committee Reports, Arbitration and Alternative Dispute Resolution

³⁴⁹ In Mediation Refresher Course conducted by Malaysian Mediation Centre on 10 Sep 2011, nine senior mediators attended and all of them have not conducted any mediation since being accredited onto the Bar Council Malaysian Mediation Centre (MMC panel). See the Annual Report, *Ibid.*

³⁵⁰ David Wong Dak Wah, “ Court Annexed Mediation”, 2nd AMA Conference, *Rediscovering Mediation in 21st Century*, (Kuala Lumpur, 24-25 February 2011).

neutral system for the settlement of disputes, commerce and investment within the Asia-Pacific Region.³⁵¹

3.2.5.2 Analyses of the Approach of Mediation Adopted

The KLRCA adopts the main feature of mediation that the role of the mediator is to assist the disputing parties to reach an amicable solution and not to impose decision on them.³⁵² At the request or consent of the parties, the mediator may make proposal for settlement in good faith to facilitate the conciliation process, but it will not be binding on the parties.

Mediation at KLRCA is on a voluntary basis. Rule 1 of KLRCA Conciliation/Mediation Rules provides that The Rules apply when the parties agree to conciliate under the auspices of KLRCA.

In observing the confidentiality of the process, Rule 15 of KLRCA Conciliation/Mediation Rules provides that the Conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

In regard to impartiality, Rule 7 provides that the role of the mediator is to assist the parties in an independent and impartial manner in their attempt to reach an amicable

³⁵¹ Kuala Lumpur Regional Centre for Arbitration homepage; 9 May 2008, <http://www.rcakl.org.my/about.htm>.

³⁵² See Rule 7(4) KLRCA Conciliation/Mediation Rules

settlement on their disputes. The mediator will be guided by principles of objectivity, fairness and justice.

KLRCA mediators are selected from attorneys, retired judges and experts in various professions and business fields. Each candidate has either been trained or has long years of related working experience and possesses mediation skills and they are closely evaluated to determine the level of skills attained. The mediators on the panel are chosen to serve on a particular case based on their expertise in the area of the dispute.³⁵³

3.2.5.3. Analyses of the Technical Procedure

3.2.5.3.1 Legal Documentation

In order to initiate a mediation proceeding at KLRCA the party initiating it, needs to submit a written request to the KLRCA that shall contain:

- a) The names and address of the parties.
- b) A reference to the conciliation clause or a copy of the separate conciliation agreement, if any.
- c) A reference to the contract or other legal relationship out of or in relation in which the dispute arises.
- d) A proposal as to the number of conciliators (one or three), if the parties have not agreed upon.
- e) Nature of dispute and the amount involved and/or other remedies sought.

³⁵³ William K.H. Lau, *The Role of KLRCA As Regional Centre For Arbitration and Mediation*, Conference Proceeding *Mediation and Arbitration in Asia Pacific*, (Kuala Lumpur: IIUM Press, 16-18 July 2006)

- f) Registration fee in accordance with the Schedule of fees annexed to the Rules.³⁵⁴

It is not a requirement to fill up a specific form, but there are forms provided by KLRCA for easier registration by the party concerned. Service of the documents will be done by the KLRCA to the party.³⁵⁵ When the other party accepts the request to conciliate, in writing then the conciliation proceedings commence.³⁵⁶ If the other party rejects or the KLRCA does not receive a reply within 30 days from the date the KLRCA send the conciliation request, The KLRCA may treat this as a rejection and inform the other party accordingly³⁵⁷.

Upon the appointment of the mediator or the conciliator, he may request each party to submit a brief written statement describing the general nature of the dispute and the points at issue. In addition, the mediator, if necessary, may request a further written statement.

Other documents involved are the settlement agreement at the end of the session if the parties reach an amicable solution.

³⁵⁴ Rule 2 (1) KLRCA Conciliation/Mediation Rules

³⁵⁵ Rule 2(2) *Ibid.*

³⁵⁶ Rule 2(3) *Ibid*

³⁵⁷ Rule 2(4), KLRCA Conciliation/Mediation Rules

3.2.5.3.2 Fees

The registration fee of US\$50.00 is payable by the party initiating conciliation. A deposit of US\$500.00 towards administrative costs is payable by each party on a reference to conciliation/mediation. This payment is not refundable and will be credited to the portion of the administrative costs paid by each party for the conciliation. The administrative costs for a conciliation/mediation is fixed at one-quarter of the amount calculated in accordance with the Schedule below. In the event that the amount in dispute is not stated, the Director of the Centre will fix at the administrative costs.³⁵⁸

Table 3.7: Mediators Scale of Fees (KLRCA)

Amount in Dispute (\$US)	Minimum	Maximum
Up to 50,000	\$500	7.00%
From 50,000 to 100,000	1.00 %	4.00%
From 100,001 to 500,000	0.50%	2.00%
From 500,001 to 1,000,000	0.40%	1.00%
From 1,000,001 to 2,000,000	0.30%	0.80%
From 2,000,001 to 5,000,000	0.20%	0.50%
From 5,000,001 to 10,000,000	0.10%	0.30%
From 10,000,001 to 50,000,000	0.05%	0.15%
From 50,000,001 to 100,000,000	0.02%	0.08%
Over 100,000,000	0.01%	0.05%

³⁵⁸ See Schedule of Fees, KLRCA Conciliation/Mediation Rules. , 9 May 2008
<http://www.rcakl.org.my/fees2.html>.

In fixing the fee of the conciliator/mediator, the Director of the Centre will undertake consultations with the conciliator/mediator and the parties. The fees are based on the amount in dispute, the complexity of the subject matter, the time spent and any other relevant circumstances of the case.³⁵⁹ It may be high but it is equivalent to the experienced and accredited mediators offered by the centre. As compared to litigation costs, the fees charged by the centre is much lesser.

3.2.5.3.3 Choice of Mediator

The parties decide on the appointment of the mediator from the list of qualified panel of mediators. Upon receipt of the Request for Mediation, the KLRCA will assist the party on the appointment, if the parties fail to reach agreement on the name or names of the conciliator, a party may request the director of KLRCA to recommend the names of suitable individuals or the parties. There will be one conciliator/mediator unless the parties agree to have two or more conciliators.³⁶⁰

As a matter of practice, KLRCA will provide the parties with a biographical sketch of the mediator. The parties are instructed to review the sketch closely and advise the KLRCA of any objections they may have to the appointment. Since it is essential that the parties have complete confidence in the mediator's ability to be fair and impartial, KLRCA will replace any mediator not acceptable to the parties.³⁶¹

³⁵⁹ *Ibid.*

³⁶⁰ See Rule 4 *ibid.*

³⁶¹ See Datuk William K.H.Lau, The Role of KLRCA As a Regional Centre For Arbitration and Mediation, Conference Proceedings, Mediation and Arbitration in Asia Pacific, 16-18 July 2006, IIUM Press

The satisfaction of the parties in the credibility of the mediator chosen seems to be relevant for the convenience of the proceeding at the centre.

3.2.5.3.4 Legal Representation, Locality of the Services and Concluding Period

Rule 6 of the Conciliation/Mediation Rules provides that the parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party, to the conciliator and to the KLRCA. Such communication is to specify whether the appointment is made for the purposes of representation or assistance.

As for the locality, Rule 10 states that the conciliation/mediation shall be held at KLRCA at Kuala Lumpur or any other place chosen by the parties in consultation with the conciliator.

Mediation at KLRCA is to be concluded within three months from the date of commencement of mediation proceedings unless agreed otherwise by the parties and the conciliator.³⁶²

It can be seen here that mediation as offered by the centre aims for a convenience and a fast proceeding. Conclusion period is fixed for a fast proceeding and satisfaction of the parties is of the main concern for a convenience proceeding, even the parties are given opportunity to choose their preferred place.

³⁶² See Rule 16 (1) (e) *ibid.*

3.2.5.3.5 Termination of Mediation and Settlement Agreement

Rule 16 provides 5 situations when a mediation at KLRCA is terminated;

- a). By the signing of the settlement agreement by the parties, on the date of the agreement, or
- b). By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
- c). By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the declaration;
- d). By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration, or
- e). Within three months from the date of commencement of conciliation proceedings unless agreed otherwise by the parties and the conciliator.

Termination can be from the mediator or from the parties, upon the expiry of three months period or with the signing of the settlement agreement. When the parties reach an agreement, they should reduce the terms in writing and sign the agreement. By signing the settlement agreement, the parties put the dispute to an end and are bound by the terms agreed.³⁶³

In summary, it can be said that the mediation as offered by the centre promise a fast and convenient procedure for the parties concerned.

³⁶³ See Rule 14 *ibid*.

3.2.5.4. Analysis of Governing Rules on Mediation

The application of mediation at KLRCA is governed by Rules for Conciliation/Mediation of the Regional Centre for Arbitration Kuala Lumpur. The Conciliation/Mediation Rules provide detail procedures and regulations for mediation services at the Centre for those who agree to conciliate under the auspices of the Regional Centre for Arbitration (KLRCA). The Conciliation/Mediation Rules contain twenty-three (23) provisions together with the schedule of fees at the end.

The Rules provides regulations on the following issues:

- Rule 1; Application of Rules
- Rule 2: Initiation and Commencement of Conciliation/Mediation
- Rule 3: Number of Conciliators
- Rule 4: Appointment of Conciliators
- Rule 5: Submission of Statements to Conciliator
- Rule 6: Representation and Assistance
- Rule 7: Role of Conciliator
- Rule 8: Administrative Assistance
- Rule 9: Communication between Conciliator and the Parties
- Rule 10: Venue
- Rule 11: Disclosure of Information
- Rule 12: Co-operation of Parties with Conciliator
- Rule 13: Suggestion by Parties for Settlement Dispute
- Rule 14: Settlement Agreement
- Rule 15: Confidentiality
- Rule 16: Termination of Conciliation Proceedings
- Rule 17: Resort to Arbitral or Judicial Proceedings
- Rule 18: Costs
- Rule 19: Deposits
- Rule 20: Role of Conciliator in other Proceedings
- Rule 21: Admissibility of Evidence in other Proceedings
- Rule 22: Exclusion of Liability
- Rule 23; Waiver of Defamation
- Rule 24: Schedule of Fees

Thus, it is concluded that the quantum of dispute and the complexity of cases leads to comprehensive regulation of the procedure. As the cases filed relates to international commercial cases, the guidelines on the application should be made clear. As compared to other Mediation Rules, the KLRCA Mediation Rules are more detailed.

There are additional provisions on the following matters:

- 1). Role of Conciliator
- 2). Administrative assistance
- 3). Disclosure of information
- 4). Cooperation of parties with conciliator
- 5). Suggestion by parties with conciliator
- 6). Role of conciliator in other proceedings
- 7). Admissibility of evidence in other proceedings

The complexity and nature of the cases handled at the centre demands for detail provisions of the rules. It is expected that with such detail guidelines and structured application, the KLRCA can offer and deliver quality service of mediation.

3.2.5.5 Effectiveness

The Annual Report of the Asian-African Consultative Organisation (AALCO) 2009 stated that they were only two mediation cases referred to the KLRCA for the year 2009. With the organised and structured rules on mediation, it seems that mediation is yet to be a favourable mode of resolution.

Similar with Malaysian Mediation Centre, the KLRCA, received very few cases for mediation even though it has a structured application with clear guidelines and accredited mediators. It seems that Malaysians do not opt for mediation when there are fees charged to the service. This dissertation identifies that low awareness of the Malaysians on the advantages and significance of mediation could have contributed to the problem. In this regard, the awareness programmes on the significance of alternative dispute resolution particularly mediation are therefore should be emphasised and encouraged.

3.3 Analyses of the Practice of Sulh in Shariah Court: Approach, Procedure, Governing Rules and Effectiveness

This section will analyse the practice of mediation or which is known as ‘sulh’ in the shariah court that has been said to be an effective mode of resolution in the court and speeds up the disposal of cases.

3.3.1 Introduction

In Malaysia matters relating to Islamic laws and Muslim affairs are under the jurisdiction of the Syariah Court³⁶⁴ and this includes family disputes such as divorce, custody, maintenance and matrimonial property. This jurisdiction is well enshrined under Article 121 (1A) of the Federal Constitution where it states that any matter where the Shariah Court has jurisdiction, the civil High Courts shall have no

³⁶⁴ See Federal Constitution Jurisdiction of State Legislature para 1, 2nd List, Schedule 9th Schedule (Matters within the jurisdiction of the State Legislature).

jurisdiction. Hence, there exist side by side two court systems to hear and settle dispute in all matters relevant to each of the court's jurisdiction.³⁶⁵

Sulh was introduced in the Shariah Court in order to reduce the number of backlog as well as to improve the Syariah Court system. Sulh was first introduced in the Federal Territory of Kuala Lumpur beginning in July 2001. This was done via Syariah Court Civil Procedure (Federal Territories) Act 1998 with the introduction of Section 99. The Syarie Chief Judges Meeting agreed upon the introduction of sulh in Kuala Lumpur as a pilot project on 28 June 2001. It was also agreed that it was to be expanded to all other states by July 2002 for states which accept the unification of Islamic laws in the state. In another meeting held by the Department of Syariah Judiciary, it was agreed that a Practice Direction will also be issued by the Department to all Syariah courts in Malaysia relating to sulh. The state of Selangor was the second state that has introduced sulh mechanism as alternative dispute resolutions in an attempt to reduce backlog of cases.³⁶⁶

Procedure

Upon application³⁶⁷ made to the Syariah Court, the Registrar will sort out all applications and determine whether such a case should be sent to the Sulh Council or trial. The assessment whether the case is suitable for sulh or to proceed for trial will

³⁶⁵ Noor Aziah Mohd Awal, "Sulh as an Alternative Dispute Resolution in Malaysia for Muslims", *The 3rd ASLI Conference* (China, 25-26 May 2006).

³⁶⁶ *Ibid.*

³⁶⁷ Upon filing of summons

depend solely on the Registrar's wide experience in the field. Cases that can be settled through sulh are:

- a) breach of promise to marry
- b) applications related to divorce:
 - i) mutaah (consolation payment for divorce)
 - ii) maintenance of wife and children
 - iii) matrimonial property
 - iv) custody of children
 - v) enforcement of Maintenance Order
 - vi) any other matters which the Registrar thinks reasonable and suitable³⁶⁸

Sulh proceedings shall be conducted in Majlis Sulh in the presence of the parties to an action³⁶⁹ and will be chaired by the Sulh Officer.³⁷⁰ The sulh officer will first ask the plaintiff to put forward his or her case and proposals or suggestions as how it should be resolved. The said officer will hear the defendant side of the conflict and his or her suggestions as well. This is done individually or through a 'private caucus'³⁷¹. Thereafter, the sulh officer will map-out the problems or conflict where he will identify the causes of the conflict, limitations to resolutions and other actions that may be taken to resolve the conflict. The sulh officer must be able to sort all information and determine the following:

³⁶⁸ See Noor Aziah Mohd Awal, *Ibid.*

³⁶⁹ See Rule 5, Syariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004

³⁷⁰ At the early stage, sulh is conducted by a registrar who is trained to be a mediator; Interview with Puan Ruzita Ramli, the former Head Of Sulh Unit JKSM, 12 May 2010.

³⁷¹ i.e. Private meeting

- i). issue or the conflict that needs to be resolved
- ii). position of the parties
- iii). interest of the parties
- v). alternative resolutions

After a private caucus, the sulh officer will invite both parties to attend the sulh council. It is during this session that an agreement may be achieved.³⁷²

3.3.2 Analyses of the Approach Adopted

The sulh concepts adopted by the Shariah Court apply the true feature of mediation, that the role of the mediator is to assist the parties to reach an amicable settlement. The mediator will not interfere in the decision-making. Only in a situation where the parties agree on the terms or conditions, which are against the rules or against the Hukum Syarak,³⁷³ only then the mediators may advise the parties and give guidelines that the agreement reached must be in line with Hukum Syarak or the stipulated rules. For example, in the case of Hadhanah or right of custody, in a situation where there is a clear provision that the hadhanah or custody should be with the mother; they should not agree otherwise. The parties should be advised on the provision stipulated under the rules and they may decide on the right of visit by the father. Therefore, the negotiation will not drag longer and this save the court's time.³⁷⁴

³⁷² See Sulh Working Manual,. See also NoorAziah Mohd Awal, *loc.cit.*

³⁷³ i.e. The Shariah Law

³⁷⁴ According to Puan Ruzita Ramli, the former Head of Sulh Unit JKSM, , this method save time as the discussion is more focused. Interview with Puan Ruzita , JKSM Putrajaya, 12 May 2010.

3.3.2.1 Voluntary or Mandatory

Attendance at sulh session is made mandatory on the parties. Where any party fails to appear without any reasonable cause after notice of sulh³⁷⁵ has been served, he/she can be charged for contempt of court.³⁷⁶ The court may commence proceedings for contempt as prescribed under the rules. In practice, there is no case recorded for contempt as sulh can be done at any stage of the proceeding before the case is concluded.³⁷⁷ Even if the party is absent at the sulh session and the case proceed to trial the judge can always refer the case to sulh proceedings, if he is of the opinion that the case is suitable for sulh. The mandatory approach has gained willingness of the disputants to opt for mediation and acknowledge the benefit of the mechanism. The statistics³⁷⁸ show that sulh has been successfully applied in the Syariah Court and managed to reduce the huge backlog of cases.

3.3.2.2 Confidentiality

The rule on confidentiality is found in Chapter 10 of Sulh Working Manual where it provides that the sulh officer shall not disclose any information revealed at the sulh session to any person inclusive of the court after the termination of sulh proceeding except to the extent it is permitted by the Syariah Court Civil Procedure Rules. The element of confidentiality gives confidence to the parties, especially in family matters as some issues are private in nature.

³⁷⁵ Practice Direction No.8 Year 2003 provides that the Sulh Notice is to be served as in accordance with procedure of servicing summons.

³⁷⁶ See Rule 4, Syariah Court Civil Procedure (Sulh)(Federal Territories)Rules 2004.

³⁷⁷ Interview with Puan Ruzita. Supra.

³⁷⁸ See statistics under Section 3.4.4 of this Chapter, 'Effectiveness of Mediation Adopted' .

3.3.2.3 Impartiality of the Mediator

The duty of the mediator to be impartial is covered in the Code of Ethics. The Code of Ethics is divided into two parts; the first part deals with general responsibilities of the sulh officer when holding the post. Among the responsibilities are that he is not to indulge in behaviour that would jeopardize the sacred name of the Syariah Court as an institution of justice. He or she is not allowed to socialize in a suspicious situation where his or her credibility as a person to uphold justice is questioned. The second part deals with special responsibilities for a sulh officer while conducting the sulh process. Among others, the officer is not allowed to conduct the case while he or she is unwell, hungry or angry. He or she is also not allowed to hear any case of his enemies or his friends to avoid bias in facilitating the case.³⁷⁹

In order to ensure the fairness of the process, the court will act on the complaint issued by the mediator or by the parties, that;

- i) the mediator and one of the parties knows each other, or
- ii) one of the parties is not satisfied as the mediator is biased.

In such a situation, the case will be transferred to another sulh officer. In a station where there is only one sulh officer, the Chief Registrar or the Chief Syarie Judge will direct sulh officer from other district to Chair the session.³⁸⁰

³⁷⁹ Ramizah Wan Muhammad, "Sulh (Mediation) in the Malaysian Shariah Court", *Mediation in Malaysia; The Law and Practice*, Ed. Mohammad Naqib Ishan Jan, Ashgar Ali Ali Mohamed, (Malaysia; Lexis Nexis, 2010) at 423.

³⁸⁰ Interview with Rosdi Hanapi, Mediator/Sulh Officer Petaling Jaya Shariah Court, August, 2010.

Sulh Working Manual also gives clear guidelines to sulh officers to conduct the session.

3.3.2.4 Accreditation of Mediator

There is no requirement for sulh officer to be an accredited mediator. In order to maintain the standard and quality of sulh services the sulh officer is scheduled for mediation training from time to time locally or overseas. For internal training, at the first stage of the application, the experts from the Prime Minister's Department will conduct the training. Nowadays, the senior mediators will give the internal training to the juniors officers. As for the international training, the JKSM have signed MOU with the Accord Group from Australia. When the mediators complete their trainings, they are given a certificate of achievement, which is recognised internationally. The mediators³⁸¹ are selected from those who have background in Shariah for easier understanding of the disputes, hukum syarak and stipulated rules.

In summary, sulh as practised in the Shariah Court adopts the true feature of mediation with observation of the elements of 'confidentiality and impartiality'. Instead of voluntary, the practice however, is made mandatory for the benefits of the disputants as well as the court. The mandatory provision meets its objective as the statistics show a high percentage of participation and settlement of cases. Even

³⁸¹ Interview with Puan Ruzita, *Supra*; the appointment is made through JPA with the starting Grade LS41. The seniors may be upgraded to LS44. In Wilayah there are two positions for LS44. The Shariah Court may lose the expert Sulh Officer as there is no such posts for LS48 and above. They might be upgraded to syarie judge or other positions.

though the mediators available are not accredited, they are given sufficient training for a quality service of mediation.

3.3.2. Analyses of the Technical Procedure

3.3.2.1 Legal Documentation

In order to initiate mediation/sulh proceedings at the Syariah Court, no documents need to be filed. The party is required to file in their application, for example, the summons, into court. The registration counter will filter the case, for cases that are suitable for sulh, the sulh date will be given on the date of the registration within 21 days from the date of the filing. The Practice Direction No.3 of Year 2002 provides that sulh should be conducted soonest possible within 21 days after it has been registered. In a Majlis Sulh, the Chairman may take evidence from the parties, may accept any document submitted and may if necessary, adjourn the Majlis Sulh from time to time.³⁸² The document that is required to be filed is the Settlement Agreement at the end of the session if the parties reach an amicable settlement. The document will be recorded as a consent judgment upon the agreement of the parties.

The simplicity of the procedure has encouraged parties to opt for sulh.

³⁸² See rule 5(5), Syariah Court Civil Procedure (Sulh)(Federal Territories)Rules 2004.

3.3.2.2 Fees

Rule 9 of the Syariah Court Civil Procedure Rules 2004 provides that no costs shall be allowed for Majlis Sulh. The only fee applicable is the registration fees when the party file the case in court. Currently, the fee for filing a summons is RM8.00.

Therefore, the parties are not be burdened by extra cost to proceed with the mediation/sulh proceeding.

3.3.2.3 Choice of Mediator

There is no option given to parties to choose the mediator. Only in the situation where there would be a potential bias, the case will be chaired by the other sulh officer. The court will act on the complaint received by one of the parties or the mediator. In the Selangor Syariah Court, there is only one sulh officer appointed for each district and two sulh officers available at the High Court. In the Federal Territories Shariah Court, there are only five(5)³⁸³ sulh officers available. Thus, it is not practical for parties to choose their preferred mediator.

3.3.2.4 Legal Representation

Rule 5(3) of the Syariah Court Civil Procedure Rules provides that the parties shall appear in person, and no syarie lawyer may appear or act for any party and no party shall be represented by any person without the leave of the Chairman. Syarie lawyers are not allowed to attend Sulh Council except with the permission of the Sulh officer.

³⁸³ Two with grade LS44 and three with grade LS41.; Interview with Rosdi Hanapi, Mediator/Sulh Officer Syariah Court Petaling Jaya., August 2010.

This is to allow parties to discuss their problem openly and without influence from anyone else. The resolution to the disputes should come from the parties themselves. Rule 5 (4) further provides that the Chairman, where possible will assist the parties to resolve the dispute and shall give each party opportunity to be heard.

3.3.2.5 Locality of the Services

Special rooms are allocated for Sulh Council in the vicinity of the court. The rooms are provided to create conducive environment, which is more informal and relaxed. Such an environment is important for the parties to feel comfortable and to speak openly without fear or under pressure. For example, a round table is provided.

3.3.2.6 Initiating and Concluding Period

Rule 3 Syariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004 provides that:

After receiving a summon or an application , if the Registrar in of the opinion that there is a reasonable possibility of settlement, he:

- a). Shall not fix a trial date within three months of the receipt of the summons or the application.
- b). Shall fix a date as soon as possible to hold sulh.
- c). Shall serve the notice of the date fixed for sulh on the parties.

Pursuant to the Practice Direction 3 of 2002, the Majlis Sulh is fixed within 21 days after the date the case is filed in court. The interview with Puan Ruzita revealed that it is a common practice that sulh proceeding will be concluded during its first session.³⁸⁴ Only when the case involves five major applications³⁸⁵ or many issues and

³⁸⁴Interview with PuanRuzita, *Supra*.

it could not be concluded in the same session, then the mediator may adjourn the case and fix another date for the second session. The court will fix the next adjourned date on the same day and the fixed date will depend on the suitability of the parties and the mediator. The date may be given on the following week, if the parties and the mediator are agreeable on the date.

If the parties seem not to be agreeable and negotiation is not workable at the first session, the case will be referred on the very day to the court for mention date pending trial.

In most of the cases mediation will take less than 3 months and in fact in most of the cases, which do not involve many issues, can be concluded within the first session which is within the 21 days from the date of its registration.

On that basis, it is submitted that sulh is an efficient mechanism to resolve disputes and dispose cases. The application will not delay the court proceeding. In fact, it helps the Shariah Court to reduce its backlog of cases. The application of e-shariah also helps the efficient running of the application as the mention date is immediately fixed on the day of the Majlis Sulh if the session fails.

³⁸⁵ It relates to applications related to divorce; i) nafkah muta'ah and iddah(consolation payment for divorce),ii) maintenance of wife and children, iii)matrimonial property, iv)custody of children, v) other payment related to liabilities in marriage.

3.3.2.7 Settlement Agreement

If the parties reach an amicable settlement the Chairman will prepare a draft agreement and submit to the parties for their confirmation. The Chairman will then transmit the draft agreement to be recorded as a judgment by admission or consent.³⁸⁶

The draft agreement will be prepared on the very day, and given to the parties to sign.

The agreement will then be brought to the court to be recorded as a consent judgment.

In practice, the parties are required to appear before the judge to satisfy the judge that they agree on the terms and conditions. On this basis, it can be said that the application of mediation in the Shariah Court is efficient, as the settlement will be recorded before the judge on the same day.³⁸⁷

On the contrary, if a lawyer represents any of the parties, the draft agreement may be referred to the lawyer before the agreement is concluded as a consent judgment. The mediators normally do not prefer this way as sometimes the lawyer may advise their client not to agree on the amount and to proceed with trial as they can get more fees. There have been cases where the parties reached agreement or settlement but rejected it after referring the settlement agreement to their lawyer.³⁸⁸

If there is no resolution reached at Majlis Sulh, the sulh officer will report the matter in writing to the court and may append to his writing any note taken in Majlis Sulh and may make such recommendation as he thinks fit. The mediator will liaise with

³⁸⁶ See Rule 6 *Ibid.*

³⁸⁷ According to Puan Ruzita, (*Supra*) The application of e-shariah play a big role in the efficiency of the administration.

³⁸⁸ Interview with Puan Ruzita. *Supra.*

the court staff to get a mention date pending trial on the same day.³⁸⁹The court, which receives the report, shall fix a date for hearing to continue the proceedings.³⁹⁰Thus, mediation cannot be used as a tool to delay the proceedings.

The simple procedure with free service and settlement within 21 days of its filing show that mediation is a fast and convenient proceeding adopted by the Shariah Court.

3.3.3. Analysis of Governing Rules on Mediation

Mediation which is known as ‘sulh’ is brought to the Shariah Court through legislation. Sulh was first introduced in the Shariah Court at Federal Territory through Syariah Court Civil Procedure (Sulh) (Federal Territories) Act 2004. Section 99 provides that the parties of the proceeding may hold sulh at any stage of the proceeding in accordance with the prescribed rules or in the absence of such rules, in accordance with Hukum Syarak. Syariah Court Civil Procedure (Sulh) Rules 2004 was also introduced to govern the application. There are proper guidelines provided on the process and the procedure of sulh.

Section 99 also was introduced to Syariah Court Civil Procedure (State of Selangor) Enactment 2003 and Rules. This section provides that the parties to any proceedings may, at any stage of the proceedings, hold sulh to settle their dispute in accordance

³⁸⁹ See Rule 7 *Ibid.*

³⁹⁰ See Rule 8, *Ibid.*

with such rules as may be prescribed or, in the absence of such rules, in accordance with Hukum Syarak. Similar provisions are provided in the Syariah Court Civil Procedure (Sulh) Malacca Enactment 2004 and Syariah Court Civil Procedure(Sulh) Enactment Negeri Sembilan. It was agreed upon by the Syarie Chief Judges on the meeting on 28 June 2001 that sulh was to be expanded to other states by July 2002 which accept the unification of Islamic laws in the state.

Section 247 of the above Act/Enactment provides:

“The Shariah Court Rules Committee, may make rules, which shall be published in the gazette, for carrying out the provisions of the Enactment, and in particular but without prejudice to the generality of the foregoing; (c) procedure for sulh.”

With the above provision the Shariah Court Rules and Committee has come up with additional rules and guidelines to supervise the application for sulh, i.e.:

- i).Manual Kerja Sulh which gives a detailed procedure for sulh.
- ii). Practice Directions (Sulh
- iii). Registrar’s Circulars (Sulh).

The objective of Manual Kerja Sulh (Sulh Working Manual) is to standardize the practice of sulh by all the mediators in conducting Majlis Sulh and to enforce the application of sulh as stipulated in the Syariah Civil Procedure Mal (Sulh).The manual has ten provisions under the following headings:

- | | |
|-------------------|-----------------------------------------------|
| Section 1(Bab 1) | -Introduction |
| Section 2 (Bab 2) | - Objective |
| Section3(Bab 3) | -Taaruf / Introduction by Sulh Officers. |
| Section 4 (Bab 4) | - Early presentation by the disputing parties |
| Section5(Bab 5) | - Joint Discussion (Perbincangan Bersama) |
| Section 6(Bab 6) | - Meeting with one party (Caucus) |

Section 7 (Bab 7)	- Joint negotiations (Perundingan Bersama)
Section 8 (Bab 8)	- Judgement based on consent
Section 9 (Bab 9)	- Case returned/ referred to court (Kes diserahkan kembali)
Section 10 (Bab 10)	- Confidentiality

The manual directs the Sulh officers on how to conduct the sulh proceedings or Majlis Sulh from the very beginning till the end of the sessions.³⁹¹ For example, to start the Majlis Sulh, the sulh officers should ask the parties to take their seats, to introduce himself, and the parties to recite Surah al-Fatihah, the mediators should inform the parties on the guidelines and the procedures of sulh where the parties then undertake to abide by the prescribed rules. The sulh officer will then ask the applicant to state his/her dispute, its effect, his/her solutions, suggestions or options, to resolve the dispute. The sulh officer will then ask the respondent to do the same. After hearing from both parties, the sulh officer will have to create a conflict map to identify the scope of the dispute and list down the disputing issues, its causes and challenges towards the resolution and actions that need to be taken to achieve the settlement. The manual also direct the sulh officer to organise and administer the information to identify:

- i). the issues or the problems to be resolved,
- ii). the status of the disputing parties,
- iii). their interest, and
- iv). alternative options.

Other examples, can also be seen in Para 6 where it gives detailed discussion on the method to be used by the sulh officer to achieve a settlement, *inter alia*:

³⁹¹ See Sulh Working Manual

- a) To ask suggestion from the parties.
- b) To state in a detailed and an organized manner the problems faced by the parties, to identify and understand and not to blame any party but to state to the parties that the problem is a 'joint problem'.
- c) Based on the conflict map, to do brainstorming to get all the ideas without consider its merit and its suitability.
- d) On certain occasions the sulh officer need to be silent to encourage the parties to give their ideas.

In fact, Section 3 to Section 9 of the Manual, briefs clear steps and procedures to be taken by sulh officers during the proceedings. Even after the case ends, the Manual guides the mediator how to go about the case if the case fails or succeeds. Thus, the Manual provides comprehensive guidelines for sulh officers in handling Sulh. With the issuance of the Manual, the application of sulh at the Syariah Court is standardized.

Besides the Manual Kerja Sulh, the Practice Directions are also issued from time to time to monitor the application of sulh. From the year 2000 to 2007, there were 11 Practice Directions issued with regard to sulh. They are as follows:

Practice Direction No. 5 Year 2000

The direction is with regard to the filing multiple cases. (Kaedah Perbilangan Kes). The cases filed for sulh is considered as one case depending on the main file registered. If there are a few other applications registered, the parties can apply for a consolidation of the proceedings.

Practice Direction No.3 Year 2002

The application of sulh.

Sulh should be conducted soonest possible within 21 days after it has been registered. The terms agreed should be written down and read to the parties and be brought to the court to be recorded as a consent judgment.

Practice Direction No.7 Year 2003

The direction as to how to dispose mediator's note-should be done in accordance with Akta Arkib Negara 2003.

Practice Direction No.8 Year 2003

Procedure of servicing Sulh Notice.

To be served as in accordance with procedure of servicing of summons.

Practice Direction No.11 Year 2005

Jurisdiction of Syariah Lower Court.

The Syariah Lower Court should record the settlement terms agreed, but should not endorse the cases which are within the jurisdiction of the Syariah High Court.

Practice Direction No.15 Year 2005

Withdrawal of Nafkah Iddah, Mutaah, Child Maintenance and Custody.

Practice Direction No.4 Year 2006

The order of Sulh settlement agreement.

The sulh agreement cannot be enforced without obtaining an order from court.

After the parties have agreed, the Sulh officer has to prepare a draft agreement, give to the parties to sign and forward to the court to be recorded as a consent judgment.

Practice Direction No.5 2006

The effect of Sulh Agreement.

The effect of sulh agreement which is in accordance with Hukum Syarak and has been recorded as a consent judgment cannot be withdrawn or appealed by the parties involved in the agreement.

Practice Direction No.3 Year 2006

The order for committal must be obtained first from the Syariah High Court. The execution is enforced in accordance with provision of S. 151 (b)(aa) Syariah States Court Civil Procedure Enactments.

Practice Direction No.6 Year 2007

Details of the Order of Harta Sepencarian(Immovable property).

Practice Direction No.14 Year 2007

The Order of List of Waris liable to pay maintenance (nafkah).

Practice Direction No.15 Year 2007

Reasons for the father to lose its right of his child custody.

6 reasons; as stipulated in the direction.

In order to give guidance the part which is vague, Registrars' Circulars have been issued. The Registrar's Circulars are printed statements issued by the Chief Registrar to explain the uncertainty that is not covered in any provisions or laws on the procedure or policy to be used in the trial proceedings or others.

With regard to sulh, there are three Registrar's Circulars issued in the year 2008.

They are as follows:

Registrars' Circulars No5(2) Year 2008
Affidavit of Service- the Administration Unit need to forward the Affidavit of Service to Sulh Unit.

Registrars' Circulars No.5(3) Year 2008
Fixing of mention date for the unsuccessful sulh case.

Registrars' Circular No 1 (22) Year 2008
Registration of multiple cases at one time to be done in the same court.

The Shariah Court Civil Procedure Act/Enactment has only one provision on Sulh. Section 99 of the Act/Enactment gives authorization for the introduction of sulh in the Shariah Court. However, the Syariah Court Civil Procedure (Sulh) Rules, the Sulh Working Manual, Practice Direction (Sulh) and Registrar's Circulars (Sulh) elaborate the said procedure. Moreover, detailed guidelines provided in the Sulh Working Manual standardise the application of sulh in the Syariah court.

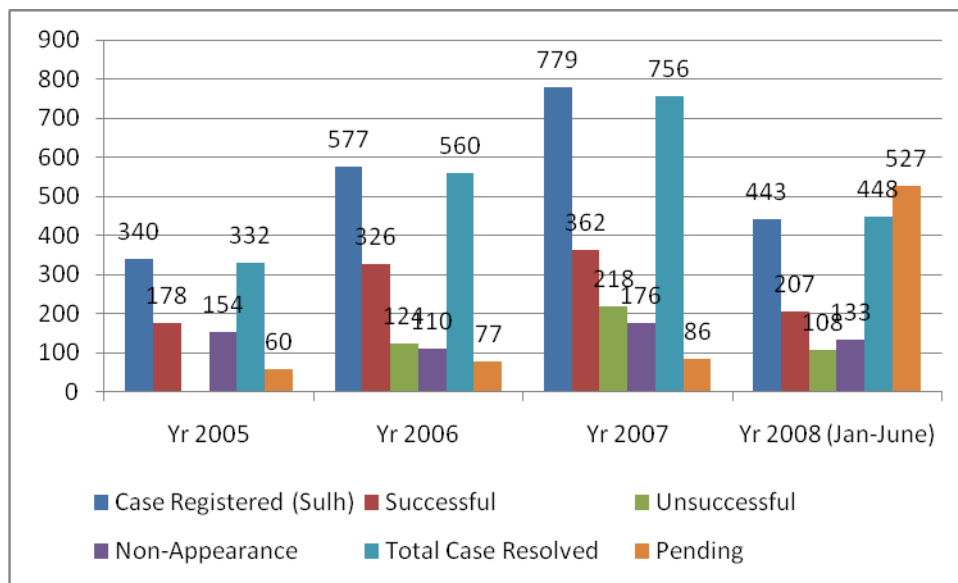
The standardised and structured application of sulh/mediation in the Shariah Court has influenced high participation and settlement of mediation in the court. The application has contributed to the speedy disposal of cases and reduced the number of

backlogged cases in the court. The statistics in the section below give further explanation.

3.4.4. Effectiveness of Mediation Adopted

The effectiveness of the application of sulh at the Shariah Court is provided by the statistics below:

Statistics 3.8; Statistics of Sulh Cases at Shariah Court Federal Territories, from year 2005-Jun 2008



Statistics of Sulh Cases at Shariah Court Federal Territories from year 2005-Jun 2008;

Year 2005

Cases Registered (Sulh)	- 340
Successful	- 178
Unsuccessful	-
Non-Appearance	- 154
Total Cases Resolved	- 332
Pending	- 60

Year 2006

Registered Cases (Sulh)	- 577
Successful	- 326
Unsuccessful	- 124
Non-appearance	- 110
Total Cases Resolved	- 560
Pending	- 77

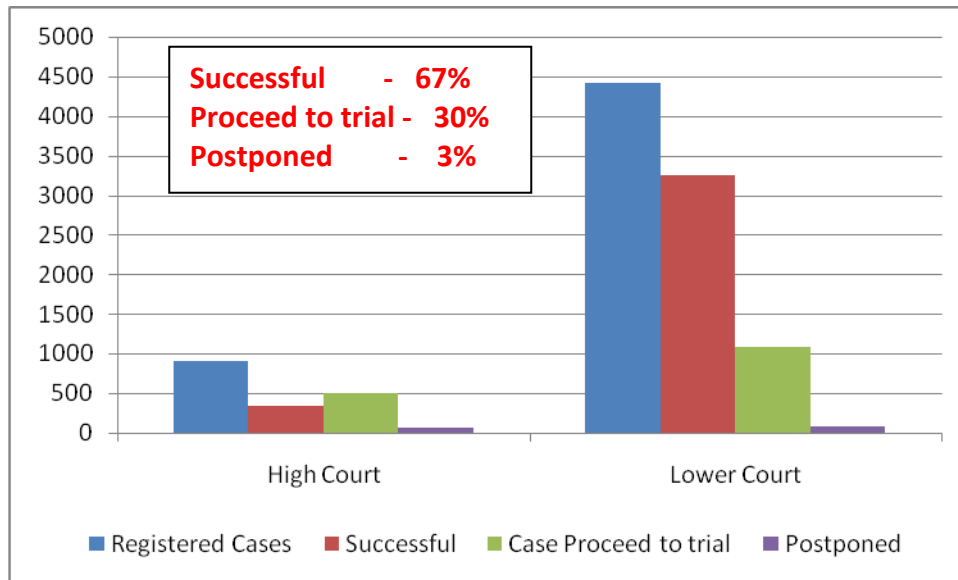
Year 2007

Registered Cases (Sulh)	- 779
Successful	- 362
Unsuccessful	- 218
Non-appearance	- 176
Total Cases Resolved	- 756
Pending	- 86

Year 2008(Jan-Jun)

Registered Cases	- 443
Successful	- 207
Unsuccessful	- 108
Non-Appearance	- 133
Total Cases Resolved	- 448
Pending	- 527

Statistics 3.9; Statistics for sulh cases in all Syariah Courts in Selangor from May 2002- May 2005



The statistics for sulh cases in all Syariah Courts in Selangor from May 2002- May 2005;

High Court

Registered Cases	- 902
Successful	- 342
Case proceed to trial	- 497
Postponed	- 63

Lower Court

Registered Cases	- 4420
Successful	- 3249
Case proceed to trial	- 1090
Postponed	- 81

Total

Case registered	-5322 (100%)
Successful	-3591 (67%)
Case proceed to trial	-1587(30%)
Postponed	- 144 (3%)

Thus, the statistics above show that mediation/sulh could be an effective mechanism to resolve disputes in the syariah court. In Selangor, for example, from the total number of cases registered, some 67% cases were successfully resolved through mediation. In this regard, sulh/mediation is an effective tool to dispose the backlog of cases in the court and speed up the disposal of cases.

In enforcing mediation, the Syariah Court has adopted mandatory approach and simplicity of the procedure with no fee imposed. The application is also supported with proper rules and guidelines. The codification of rules helps the Syariah Court to maintain the standard and quality of the mediation services. The approach adopted has achieved a significant percentage of success in the Shariah Court.

3.4. Summary of the Analyses, Manners in which Mediation is most Attractive and Effective in Malaysia

This dissertation identifies that the following keypoints may influence the participation of Malaysians in mediation;

3.4.1 Low Awareness and Mandatory Mediation

The analysis indicates that there is low awareness of mediation amongst Malaysian. The institutions that adopt voluntary mediation receive very low participation from the disputing parties. For example, the Industrial Court that practise voluntary mediation, only 39 cases underwent mediation out of 1,437 cases referred to the Court in the year 2010. The Malaysian Mediation Centre only received 132 cases for

the period of seven years (2000-2007) after its establishment in the year 1999. Similar with The Kuala Lumpur Regional Centre for Arbitration, received only two cases for mediation in the year 2010. The poor participation also happened to the CIDB.

However, mediation seems to be effective when it is mandated. Some of the institutions that adopt mandatory mediation receive high participation and acceptance of parties. Besides, the statistics of cases that were resolved through mediation were also encouraging. As a result, the related institutions manage to speed up the disposal of cases; thus, preventing the problem of backlog. At the Consumer Claims Tribunal, some 31.3% of cases were resolved through mediation in the year 2009. For the Shariah Court in Selangor, some 67% managed to be resolved through mediation from May 2002 to May 2005. Voluntary mediation is seen to be effective when the parties are made aware of the availability and benefits of mediation. This is the practice of the Legal Aid Department and Financial Mediation Bureau.

3.4.2. Free Service

The analysis indicates the trend that the institutions that offer free service will receive more participation. The Consumer Claims Tribunal, the Legal Aid Department, the Shariah Court and the Financial Mediation Bureau, received high participation of mediation offered the service on free charge basis. The parties only need to pay a minimum fee to initiate the proceedings at the particular institutions. For example, fee for filing summons range from RM2.00 to RM 10.00. In comparison, the private institutions that offer a paid service of mediation, i.e., the CIDB, the Malaysian

Mediation Centre and the Kuala Lumpur Regional Centre for Arbitration receive few participations.³⁹²

3.4.3 Structured Application

The third criteria that attracts more participation and success in mediation are the structured application adopted by the institutions. The structured application of mediation at the Legal Aid Department and the Shariah Court has gained more participation and success as compared to the unstructured application of mediation in the Industrial Court for example. In introducing mediation, the Legal Aid Department has amended its Legal Aid Act 1971 and issued Legal Aid (Mediation) Regulation 2006 that also covers the Code of Ethics for mediators. Similarly, the Shariah Court in introducing mediation has also amended the Shariah Court Civil Procedure Act/Enactment, introduced Syariah Court Civil Procedure (Sulh) Rules and Sulh Working Manual. The Practice Direction on Sulh and Registrar's Circulars on Sulh are issued from time to time to accommodate the practice. By the issuance of the rules and guidelines, the mediators and the parties are more guided on the application.

The private institutions that have structured application however receive low participation. This could be due to the awareness of the public as well as the paid fee imposition as discussed earlier.

³⁹² See the discussion on “effectiveness” in this chapter earlier.

3.5 Summary of the Analyses: Lessons for Mediation in Civil Court

For mediation to be an effective mechanism to speed up disposal of cases and eliminate backlogs with satisfaction of result to the parties, mediation in court should be cost effective, fast and efficient. In striving for the aforesaid, the court annexed mediation should consider the following criterion:³⁹³

3.5.1 Approach

The Court annexed mediation should maintain the basic feature of mediation that the role of the mediator is to facilitate the parties to reach an amicable solution and not to decide. The terms of the agreement must be proposed and negotiated by the parties by the assistance of the mediator. Therefore, the parties may suggest terms that satisfy their needs. With structured negotiation assisted by a mediator, an amicable solution may be reached and agreed by both parties. For Court annexed mediation if the mediation fails, the case should be sent to the court for hearing. Coercion to settle is inappropriate and should be avoided as it will not produce a satisfactory result. If requested and consented by the parties, the mediator may suggest a proposal for settlement, but the proposal should not be binding on the parties. Most of the Mediation Rules for the abovementioned institutions provide the role of mediator to assist the parties to reach an amicable solution.

³⁹³ Based on the finding of the analysis of this dissertation.

In order to maintain the unique solution of mediation, the court should maintain the role of mediator as to facilitate the negotiation between the parties so that they can come up with suggestions and solutions that can accommodate both parties' needs.

All the institutions that adopt this feature commented that the method adopted with the parties designing their settlement terms produced satisfaction and fair results to the parties concerned.³⁹⁴

3.5.1.1 Mandatory or Voluntary

Mediation in court will be more effective if it is made mandatory. If it is not mandated, the awareness program must be properly structured and enhanced, so that the disputing parties and the practitioners are aware of mediation and its benefits.

The mandatory approach adopted by the Tribunal for Consumer Claims gained positive impact on its acceptance and settlement.³⁹⁵ Other institutions that practice voluntary nature of mediation receive poor acceptance except for the Legal Aid Department and Financial Mediation Bureau. It seems that for Malaysians, there is a need for an enforcement mechanism to introduce the application as the awareness on the mechanism is very poor. In order to use mediation as a mechanism to dispose the backlog of cases and speed the disposal in court, the awareness of the mechanism and

³⁹⁴ Interviews with the abovementioned institutions. *Supra*

³⁹⁵ See statistic, *Supra*.

acceptance by the parties are much needed. Therefore, a mandatory or a compulsion order is needed to promote the application and gain acceptance from Malaysians.

In the instance, the mandatory approach as practised by the courts in Australia can be referred to, where most states have provisions for the mandatory referral both proceedings to mediation or ADR processes. Several cases have considered mandatory referral programme. In *Idopot Pty Ltd. v. National Australia Bank Ltd.*³⁹⁶

Justice Einstein referred to amendments that allowed for the referral of matters to mediation without consent and noted that:

“The amendments raised some debate surrounding the appropriateness of mandatory mediation some views this notion as a contradiction in terms, opposing the culture of ADR which generally encompasses a voluntary, consensual process. It is important to note, however, that whilst parties may be compelled to attend mediations sessions, they are nor forced to settle and may continue with litigation without penalty. Furthermore, Part 7B requires that referrals follow a screening process by the Court, and that mediation sessions are conducted by qualified and experienced mediators.”

The lesser approach for mandatory referral is attendance at mandatory mediation orientation session. After attending and evaluating the benefits of mediation, the parties may proceed or withdraw themselves from the proceedings.

This lesser mandatory approach is adopted in the United States where the National Standards for Court Connected Mediation Program, which were developed to guide and inform court interested in initiating, expanding or improving their mediation

³⁹⁶ (2001)NSWSC 427 cited in Sourdin, Tania, *Alternative Dispute Resolution* , (New South Wales:Lawbook Co. 2002) at 98

program, recommend that court program should have mandatory attendance only at initial session.³⁹⁷

It is observed that awareness is the main purpose of the mandatory approach. The Legal Aid Department adopts the voluntary approach, but gain acceptance because the party is briefed and encouraged to proceed with mediation when they register their case at the counter. It can be said that the purpose of mediation orientation session as adopted in the US is in line with the approach at the Department as the aim is to gain awareness and acceptance from the parties concerned.

In order to be an effective mechanism to dispose backlog of cases, it is submitted that mediation should be mandated in cases where it is appropriate. Poor acceptance and participation will not help the court to reduce its backlog and speed up the disposal of cases.

3.5.1.2 Confidentiality and Impartiality

The confidentiality of the mediation conference should be observed by the court. Confidentiality is considered as a “cornerstone” to mediation process as it encourages parties to speak openly without fear. It is observed that all the institutions that have mediation rules, provide the rule on confidentiality of the communication and impartiality of the mediator. Generally, the rule on confidentiality provides that all

³⁹⁷ See Sourdin, T *Id.* at 150

matters, information and communication relating to mediation proceedings shall be kept confidential. The exceptions are given only in the following circumstances:

- i). For Legal Aid Department, when the person offer himself be a witness in court, that person may be compelled to disclose only communication as may appear the court to be necessary to be known in order to explain any evidence which he has given.³⁹⁸
- ii). For CIDB, with the consent and agreement from the parties and where the disclosure is required by the law. Confidentiality extends also to the settlement agreement.³⁹⁹
- iii). For KLRCA, where the disclosure is necessary for purposes of implementation and enforcement. Confidentiality is also extended to the settlement agreement.⁴⁰⁰
- iv). For Malaysian Mediation Centre, the disclosure is allowed when it is required to do so by general law, or with the consent of all parties or if such disclosure is necessary to implement or enforce any settlement agreement.⁴⁰¹

It is noted that Practice Direction No.5 of 2010 has been issued to guide the application of mediation in court on 16 August 2010. The provision on confidentiality is covered with the following provision:

“(a) All disclosures, admission and communications made under a mediation session are strictly ‘without prejudice’. Such

³⁹⁸ See, Section 29E Legal Aid Act 1971

³⁹⁹ See Rule 15, CIDB Mediation Rules

⁴⁰⁰ See Rule 15, KLRCA Mediation /Conciliation Rules

⁴⁰¹ See Rule 4 Code of Conduct, MMC

communications do not form part of any record and the mediator shall not be compelled to divulge such record or testify as a witness or consultant in any judicial proceeding, unless all parties to both the Court proceedings and the mediation proceedings consent to its inclusion in the record or to its other use.”

The exception is given when the parties involved give consent to its inclusion in the record of proceedings or for other use.

All the Mediation Rules or Code of Conduct available for the abovementioned institutions requires impartiality of the mediator in handling the session.⁴⁰² A mediator shall be impartial and fair to the parties and shall be seen to be so. For the Legal Aid Department the element is required in the Mediator’s Code of Ethics which is attached as Fourth Schedule to the Legal Aid Mediation Regulation. It is a responsibility for the Mediators to be bound by the terms in the Mediator’s Code of Ethics as prescribed in the Fourth Schedule.⁴⁰³ For CIDB, the compliance of the element of impartiality by the mediator is provided in the CIDB Code of Conduct. Rule 7 of the Mediation Rule further provides disqualification of mediator if he has any financial or personal interest in the mediation result. Rule 10 of the Mediation Rule then provides that the mediator shall abide by the Mediation Agreement, the CIDB Mediation Rules and the CIDB Code of Conduct.

Rule 2 of Malaysian Mediation Centre (MMC) Code of Conduct provides similar provision on impartiality where the mediator must be impartial and fair to the parties

⁴⁰² It is provided in Legal Aid, MMC, CIDB and KLRC Mediation Rules

⁴⁰³ See Rule 7, Legal Aid (Mediation) Regulation 2006

and seen to be so. The mediator should disclose information, which may lead to the impression that he may not be impartial, including:

- a) he has acted in any capacity for any of the parties;
- b) he has a financial interest(direct or indirect) in any of the parties or the outcome of the mediation; or
- c) he has any confidential information about the parties or the dispute under mediation derived from sources outside the mediation .

Rule 7 of KLRCA Conciliation/Mediation Rule that the provision on impartiality and that the role of the conciliator is to assist the parties in an independent and impartial manner.

It is noted that the Practice Direction newly issued does not mention the impartiality of the mediator. In order to maintain the standard and quality of mediation practised in court, it is proposed that the provision on impartiality is covered as part of the direction. As an option, the dissertation also propose that the judiciary to have a Code of Conduct that covers the duties and liabilities for their mediators as guidelines for them in conducting the session.

3.5.1.3 Accreditation of Mediators

It is observed that for public funded mediation services, accreditation is not a requirement, but the mediators are sent for training from time to time to equip them with mediation skills and techniques. No standard or requirement set up for the

qualification of mediators at the Tribunal for Consumer Claims, Housing Buyer's Tribunal, Legal Aid Department, Financial Mediation Bureau, Industrial Court and Shariah Court. However, they are sent for training on mediation local or overseas before being allowed to handle mediation proceedings. At the Legal Aid Department, for example, after mediation was introduced in 2006, twenty-four mediators were appointed who then were trained by two leading New Zealand's mediators; Mr. Geoff Sharp and Miss Deborah Clapshaw. At the Industrial Court, the Chairman had undergone training conducted by Prof. Dale Bhagshaw in 2004 and consequently, mediation was offered by the court. Although no accreditation status is provided for mediators, the settlement rate is quite encouraging.

It cannot be denied that the quality of the process depends heavily on the quality of the practitioner. If the aims of government are to encourage mediation they need to provide customers with the level of confidence in the quality of services they will receive. It is submitted that the quality of mediators should be considered by mediation service providers in order to offer a degree of protection to consumers.

It is observed that accredited mediator services are offered by CIDB, KLRCA and MMC with paid services. Accreditation status is found in the CIDB Mediation Rules. Only mediators that satisfy the CIDB accreditation requirement will be appointed as listed panel of CIDB Mediators. The stringent membership requirement for potential Mediators at CIDB is to avoid the failure of mediation practices. At MMC, all the mediators must be practising members of the Malaysian Bar of at least 7 years standing. He/she must have completed at least 40 hours of training conducted and

organized by the Centre and must also pass a practical assessment conducted by the trainers.

NADRAC considers that the role of mediation service providers in the context of maintenance of standards requires them to:

- i). develop codes of conduct for mediators.
- ii). have management systems to monitor the performance of mediators.
- iii). provide initial and continuing development training for mediators.
- iv). monitor feedback on mediators from parties in mediation.⁴⁰⁴

Although accreditation is not required in public funded services, it is submitted that certain standards should be set up in order to maintain the quality of services offered. For instance, the mediator should have acquired a certain level of training before he could be allowed to conduct a mediation session.

3.5.2 Technical Procedure

Analysis on the technical procedure suggests some lessons for the improvement of mediation in our court system as follows;

3.5.2.1 Legal Documentation

In carrying out mediation, simplicity of the procedure should be maintained. It is observed that only simple documentation is required in mediation. As observed, basic

⁴⁰⁴ See Boulle, *Supra* at pg. 463

documents involved are the Request Form for Mediation, Consent Agreement to Mediate and the Settlement Agreement.

For the MMC, CIDB and KLRCA, as more cases are filed involving commercial and complex cases, an additional requirement imposed is that the parties need to file in and exchange the statement of case. The purpose is to give the mediator a clear picture on the problem arising in the case. All the Mediation Rules for the above-stated institutions have covered the provision on the exchange of statement of case.

The parties to mediation also should not be bound by rules of pleading and the technical part of the procedure should not delay the proceedings and not burden the parties.

Therefore, guidelines on the application should be made clear to the parties and the mediators.

3.5.2.2 Fees

It is observed that the minimum fee required attracts more applications and receives more responses. The statistics of cases filed and settled at the Tribunal for Consumer Claims, Home Buyers Tribunal, Legal Aid Department and Financial Mediation Bureau are evidence of this. On the contrary, it is also observed that Malaysian Mediation Centre, CIDB and KLRCA that provide paid mediation services receive few applications. It is a trend for Malaysian that cost is a determining factor in choosing the application.

The issuance of Practice Direction 5 of 2010 that gives option for the parties to opt for judge-led mediation or mediation agreeable by both parties conducted by Malaysian Mediation Centre see that the litigants prefer to opt for judge-led mediation as the mediation is free. In this regard, our judge-led mediation or court mediation must be upgraded and enhanced so that mediation offered is a quality mediation Besides, the arrangements may also be made with the Malaysian Mediation Centre for referral of certain category of cases.

3.5.2.3 Choice of Mediator

The choice or the option to choose the mediators available does not determine the success of mediation. The main factor depends on the quality and the efficient services provided by the particular mediator although he is not the choice of the parties. Even though the Board or the tribunal fixes the mediator, what is important is that he can offer a good service and conclude an amicable settlement. Non-paid services available at the Tribunal Consumer Claim Tribunal, Legal Aid Department and Financial Mediation Bureau do not give option for parties to choose their preferred mediator as limited mediators are available. Nevertheless, the successful rate is encouraging.⁴⁰⁵ Therefore, for court mediation, the mediators can be fixed by the court depending on their availability. The mediators available, however, must be qualified mediators since there is no option as compared to paid services.

⁴⁰⁵ See statistics under section “effectiveness’ in this chapter, *Supra*.

It is observed that, with limited mediators there will be a long queue awaiting the mediation session if only one mediator is preferred and chosen by the parties. This may drag the case longer and may cause further backlog. The court therefore must provide quality mediators that have been trained to offer good services on mediation to avoid dissatisfaction of the parties.

For paid services like MMC, CIDB and KLRCA, the customers are given liberty to choose their preferred mediators. Since a pool of mediators is available, the option will not drag the case longer. The option to choose may give more satisfaction to the parties.

3.5.2.4 Legal Representation

The awareness of our lawyers in mediation is still very low. The legal representation in mediation might cause the terms agreed to derive from the lawyers and not from the disputing parties. In this regard, it is proposed that a specific code for lawyers representing clients in mediation be issued. Lawyers should be made clear of their roles and duties when representing clients in mediation. With the absence of such code or clear understanding on mediation, legal representation should only be allowed for certain categories of cases; for example, when it involves commercial and complex cases.

It is observed that in most of the institutions above, legal representation is not allowed and the parties are required to attend the session in person. Strict prohibition is noted at the Consumer Claims Tribunal where S.108 provides that no party shall be represented by advocate and solicitor, no proviso or exception provided to the

section. The Home Buyer's Tribunal also has a similar provision, however Section 16U of Housing Development (Control and Licensing) 1966 provides an exception in case where the matter involves complex issues of law and one party will suffer severe financial hardship if he is not represented. For the Legal Aid Department, no proviso or exception is provided to Rule 5 of Legal Aid Mediation Regulation. The rule provides that no person shall attend a mediation session other than the parties and the mediator who is assigned for the mediation. Lawyers are also not allowed to appear in sulh proceedings in the Shariah Court.

At the MMC, the parties⁴⁰⁶ should attend the session in person, however, representation or assistance is allowed with the permission of the parties and the consent of the mediator.⁴⁰⁷ The name of the representative should be supplied earlier to the Mediator and the Centre. Similarly with the Industrial Court, the representation is allowed with the permission of the Chairman.

The KLRCA and CIDB allow such representation, but the parties shall notify the name and the role of such person in advance to the mediator and to the other party.

It is observed that legal representation or assistance is only allowed in commercial and complex cases at the KLRCA, CIDB and MMC where most of the cases are commercial and complex cases. For community, family and other cases, to have unique solutions to the dispute and to maintain the privacy and confidentiality of the

⁴⁰⁶ For company the party shall appoint representative to the mediation who have the necessary authority to settle the dispute.

⁴⁰⁷ See Rule 9 and Rule 14 of The MMC Mediation Rule

communication the parties must attend the mediation session in person. They can discuss and negotiate without fear and shame. The parties need to give suggestions to the resolution that satisfy their needs and accommodate the other party. With a structured negotiation assisted by the mediator, they may reach an amicable solution.

It is noted that the annexure⁴⁰⁸ to the newly issued practice direction provides:

“Unless agreed to by the parties, the Judge will not see the parties without their lawyer’s presence except in cases where the parties is not represented”

A different approach is adopted in our court annexed mediation. The researcher opines that the representation might help the judges to dispose the case faster and save the court’s time, but the parties might not achieve the true meaning and benefit of the mediation. The advice on the solution might come from the lawyer and not from the parties themselves. It might be difficult to achieve or derive a unique solution if the terms of the agreement proposed come from the representing lawyer and not from the disputing parties. The lawyer may advise and propose or insist the party to accept the highest terms of compensation that might not be the intention of the party or the lawyer may advise his client not to accept the terms and proceed with trial. This may lead to the failure of the negotiation. Only in a situation where the case is complex and complicated, or it might prejudice the parties, then the representation of a lawyer should be allowed. Unless the lawyers are made clear of their roles and duties in the mediation session then representation should be allowed.

⁴⁰⁸Annexure A, para3, Practice Direction 5,2010

The researcher is of the opinion that mediation in the court should not be conducted by the judges, there should be mediators appointed for mediation purpose in court. The perception of the parties towards the judge might be different. To persuade parties that the judge's role is only to assist in negotiation and not to judge is difficult. It is also difficult to change the nature of a judge who is dealing with judicial adjudication to be a neutral person in a mediation session. Furthermore, it is also difficult to change the perception of judges towards the role of lawyers in mediation and in litigation.

3.5.2.5 Locality of Services Offered

The environmental factor could play a role in the success of the mediation. The venue of the proceedings should be taken into consideration. It is observed that the Legal Aid Department, Financial Mediation Bureau, Malaysian Mediation Centre and KLRCA, mediation be conducted at the institution itself where specific room is provided with a friendly sitting arrangement. Studies show that seating arrangements have important implications for the negotiating behaviour of parties in conflict. Comfortable surroundings can assist to ensure that individuals share view about issues as well as values.⁴⁰⁹ Our court annexed mediation therefore should take into consideration this factor.

⁴⁰⁹See the discussion on creating a dispute resolution atmosphere. Sourdin, Tania *Alternative Dispute Resolution*, (New South Wales; LawBook Co. 2002), 45-46.

For the MMC, KLRCA and CIDB, the parties may agree on other convenient location to do mediation. The cost to hire room, however, is at the expense of the parties.

For the judge-led mediation that is provided in our newly issued Practice Direction,⁴¹⁰ the researcher is of the opinion that the judge's chamber is not a proper place to do mediation. The surrounding and the seating arrangement may not induce the parties to speak openly and freely without pressure. The environment seems not to be friendly to the parties. The researcher is of the opinion that the court should provide a specific room which is more friendly arranged, comfortable and conducive to do negotiation in the vicinity of the court.

3.5.2.6 Initiating and Concluding Period

There should be a concluding period fixed to the mediation proceeding so that mediation could not be used as a tool to delay the case. All Mediation Rules for the abovementioned institutions except for MMC stipulate a concluding date for the mediation to finish. The period basically range from 30 days to three(3) months (or 90 days) from the date the case is referred to mediation.⁴¹¹

At the CIDB, the mediators shall use his or her endeavours to conclude the mediation within 42 days from the date of appointment. The period, however, can be extended but not beyond a period of three months with a written consent from the parties. At

⁴¹⁰ Practice Direction 5 2010

⁴¹¹ For Industrial Court, the calculating period is three months from the date of referral to court. For FMB, 3 months from the date of the complaint.

the KLRCA, the finishing period is three months unless agreed otherwise by the parties.

The finding of the analysis shows that the complexity of the case might determine the length of the concluding period. For family and community mediation, the period fixed is 30 to 60⁴¹² days whereas for commercial cases, the period stipulated is 3 months from the commencement of the mediation.

The reference to thirty (30) days and three (3) months period is used in our practice direction on mediation. Para 6.3 (a) and (c) of the Practice Direction⁴¹³ states:

- a). Return date of not more than one(1) month from the date the case is referred to mediation, shall be fixed for parties to report to the Court on the progress of mediation, and in the event the mediation process has ended, the outcome of such mediation.
- c). Except with the agreement of the Court, all mediation must be completed not later than three months from the date the case is referred for mediation.

It is submitted that the time stipulated is within the reasonable period as cases filed in court vary from commercial, family, community and others. It is to be noted that although the concluding period is fixed, amicable settlement could be reached even at the first session of the proceeding.

⁴¹² The approach taken by the Legal Aid Department (30 Days), Industrial Court (30 days) Tribunal for Consumer Claims (45 days), Home Buyers Tribunal (60 days).

⁴¹³ Practice Direction No.5 of 2010 (Practice Direction on Mediation)

Initiating Period

Initiating period or commencement period is not specifically mentioned in the Mediation Rules of the abovementioned institutions. However, in initiating the proceeding certain period is fixed.

For MMC:

- i). Upon the receipt of the Request with the payment of RM100, the MMC will contact all parties involved in the dispute and attempt to obtain a submission to mediation within **fourteen days** from the date the receipt of the Request
- ii). within **twenty one days** from the date of the receipt of the Request, MMC will inform all parties whether mediation can proceed.
- iii). Upon the parties agreeing to submit to mediation, the MMC will forward a list of Mediators on the panel and in the event the parties not having agreed upon a Mediator on MMC' panel within **seven days**, the MMC shall appoint a person on MMC's panel to act as the Mediator.⁴¹⁴

For CIDB, 7 days period is used as a term to response:

- i). The party who receives a Request for Mediation shall notify the other party and CIDB within **7 days** after receipt of the request whether any mediator nominated by the initiating party is acceptable. If such mediator or mediators are not acceptable to the party who receive the Request for Mediation, the parties shall endeavour to reach agreement on the name of an acceptable sole mediator within a further **7 days**.
- ii). CIDB shall write within **7 days** in confidence to the selected mediator sending him or her the names of the parties and their parties (if any) and an outline of the nature of the dispute.
- ii). Where the parties agree on a mediator and the proposed mediator is willing to serve, and is not disqualified they will notify CIDB and appoint the mediator. The parties shall then sign Mediation Agreement, the mediation shall then proceed.⁴¹⁵

For KLRCA:

- i). To initiate a proceeding, a party need to submit a written request to KLRCA. Conciliation/Mediation commence when the other party accepts the request to conciliate in writing. If the other party rejects the request for conciliation or is the KLRCA does not receive a reply within **30 days** from the date on which KLRCA sends the conciliation request, The KLRCA may treat this as a rejection to the invitation.⁴¹⁶

⁴¹⁴ MMC Mediation Rules

⁴¹⁵ CIDB Mediation Rules

⁴¹⁶ KLRCA Mediation Rules

Thus, it can be seen that mediation is to be commenced within 21 to 30 days after the case is referred to the centre or to the Board. Therefore, for our court annexed mediation to have one month period of return date,⁴¹⁷ to report on the progress of mediation is seems reasonable. As compared to court litigation, to have a mediation proceeding within 21 days of the registration date is considered fast and efficient.⁴¹⁸

3.5.2.7 Termination of Mediation

Mediation should not be seen to be a mechanism to delay the proceedings. Situations that may terminate the mediation proceedings should be made clear. If it is seen that the negotiation does not work, the session should not be prolonged, postponed or adjourned as it might delay the case and deprive the right of the parties. The Mediation Rules of the abovementioned institutions have clear provisions on the termination. Generally, the termination will occur on the following circumstances:

- i). a written notice from any party to withdraw from the proceedings;
- ii). execution of the settlement agreement;
- iii). a written notification by the mediator to the effect that further efforts at mediation are no longer worthwhile;
- iv). the time limit specified in the Mediation Rule has expired.

The Legal Aid Department has additional reasons for the termination:

- i). when the party is deemed to have withdrawn by being absent on the fixed date without permission of the mediator or without any reasonable ground acceptable by the mediator;

⁴¹⁷ As provided in Practice Direction 5 2010 (Practice Direction on Mediation)

⁴¹⁸ As compared to litigation where normally it takes almost one year to have a hearing date.

- ii). the mediator decides that he should withdraw from the mediation for any reason stated in the Mediator's Code of Ethics;
- iii). the mediator is directed by the Director General to withdraw from the mediation session.⁴¹⁹

The provision on the termination is not provided in the Practice Direction for court mediation. It seems not clear that after the expiry of 3 months period whether the mediation is terminated or could be extended to a certain period on the consent of both parties. Improvement of this direction is therefore recommended.

3.5.3 Governing Rules on Mediation

The role of the parties and the role of the mediators must also be made clear. The guidelines can either be found in the Mediation Rules, Mediation Agreement or in the Code of Conduct or Ethics of the above stated institutions. Some of the institutions specify the role of the parties in the Mediation Agreement. The parties should read through the agreement, understand their roles, duties and limitation before signing the agreement. The Roles of the mediators are covered most in the Mediation Rules and in the Code of Conduct or Ethics. Liabilities and immunities of the mediators should also be made clear. Most of the Mediation Rules also provide provision on the disqualification of the mediators. The Agreement to Mediate as attached to our Practice Direction does not cover the role of parties as well as the role of mediators at the session. Neither is the provision in the Practice Direction. Furthermore, the

⁴¹⁹ See Rule 6, Legal Aid (Mediation) Regulation 2006

documents are to be signed by the solicitor representing the parties and not the parties themselves. The parties might not understand the proceedings unless their solicitors have clarified them.

In order to gain more acceptance from the disputants and to be used as a mechanism to speed up the disposal of cases, the court should maintain its standard and quality of practice in mediation. Therefore, legal authority for the application should be provided in its Courts Rules. Therefore, amendments to Rules of Court 2012 are recommended to introduce the application. Besides the amendment, the regulation on the procedure should be supplied to guide the parties and the mediators in carrying out their roles and duties at the session. The mediators should also be bound by the Code of Conduct/Ethics that provides liabilities and immunities to the mediators. The researcher believes this approach could maintain the standard of mediation practised in court. Currently, Court annexed Mediation is guided by Practice Direction 5 of 2010 on Mediation. The Direction seems insufficient to guide the application where some basic elements of mediation, for example, the impartiality of mediator is found to be missing. In order to improve the application, improvements need to be done. Without rules and regulations mediation can still be practised, but the standard and quality of practice is not guaranteed. In order to gain acceptance from the disputant the judiciary should be willing to accept improvement. Certain regulations can be added thereto for better quality of the practice.

3.6. Conclusion

The research concludes that mediation adopted by the various bodies, tribunals and institutions in Malaysia are able to dispose cases in efficient manner. Although some of the institutions have their own methods⁴²⁰ in practising mediation, the mechanism adopted are capable of disposing the disputes in a very short period and give satisfaction to the disputing parties. However, to be an efficient mechanism to speed up disposal of cases the application of mediation should be supported with proper guidelines. The governing rules should be codified and code of ethics should be provided to the mediators. In this manner, the standard and quality of mediation services can be enhanced. In commercial and complex cases, more comprehensive governing rules are needed as compared to the community and family matters. As the civil court deals with variety and range of cases, relevant procedures and guidelines may be needed to govern the application. These aspects will be discussed further in Chapter 5.

In conclusion, the findings of this dissertation suggest that the simplicity of the procedure, minimum fees, the quality of the services offered and the structured application may attract the disputants to opt for mediation. In addition, the mandatory approach adopted may also bring awareness of the option and its benefits to the parties. Besides, awareness programmes should also be emphasised and encouraged. All these features may assist mediation to be a mechanism in speeding up the disposal of cases as well as disposing the backlog of cases in court.

⁴²⁰ For e.g, Financial Mediation Bureau has adopted mediation-arbitration approach

CHAPTER 4

PRIVATE MEDIATION / NON-COURT MEDIATION

4.1 Introduction

The growth of Alternative Dispute Resolution (ADR), particularly mediation, has given an impact to the dispute resolution process globally. The growth has indeed decreased the use of court litigation. The inordinate delay and escalating costs of court litigation was seen to be the primary reason behind the surge in the ADR movement. Besides, contemporary mediation offers more than quantitative advantages of time and money. Empirical research also indicates exceeding party satisfaction rates with the mediation process.⁴²¹ In Australia for example, ADR process is used outside the court and tribunal system at all levels of Australian society. T Sourdin commented⁴²² that “often lawyers are surprised that so few disputes are subject to litigation and are resolved prior to any referral to the formal trial- based dispute resolution system.

M Roberson in ADR Research⁴²³ commented that the rise of mediation reflects the need to address the alienating effect of formal law on civil society and the resulting

⁴²¹ NADRAC, *ADR Research: A Resource Paper* (2004), www.nadragov at 34, M Robertson, “The Stamp of Statistical Approval” (2004) 7 *ADR Bulletin* 12” cited in Nadja Alexander, *International and Comparative Mediation*, (The Netherland; Wolters Kluwer, 2009) at 53.

⁴²² Sourdin, Tania, *Alternative Dispute Resolution*, (New South Wales; LawBook.Co., 2002)

⁴²³ NADRAC, *ADR Research: A Resource Paper* (2004), www.nadragov at 34, M Robertson, “The Stamp of Statistical Approval’ (2004) 7 *ADR Bulletin* 12”

loss of social cohesion. Mediation is therefore seen as means to shift the responsibility for dispute resolution back to local communities and to the people involved in mediation.⁴²⁴ Good conflict resolution is not about people making compromises, it is about people negotiating about the things that are important to them, coming up with creative options and designing agreements that they are happy with, and that allow both the parties to get what they want. Whereas compromise usually means that one party or the other parties give up all or part of what they really want which usually leads to someone being unhappy with the outcome.⁴²⁵

Some observations⁴²⁶ made at the Dispute Settlement Centre, Victorian Civil Administrative Tribunal and Family Relationship Centre of Victoria and Singapore Mediation Centre witnessed that Australian and Singaporean communities have diverted most of their civil cases to the ADR centre rather than file their cases in court. The most popular approach of ADR adopted is mediation. This has in fact assisted the court from being overloaded with the bulk of cases which in fact could be settled out of court through negotiation. Further, it helps the community to be more civic and tolerant as the settlement is resolved amicably and peacefully.

⁴²⁴ Include socio-cultural changes such as the decline of the culturally homogenous nation-state, the increasing pluralisation of societal value systems and the changing face of the (international) business community traditional owner to include traditional owners of resources, e-traders, more women and small entrepreneurs. See *Ibid.*

⁴²⁵ Victoria Dispute Settlement Centre, *Information Kit 2009*, at 17, (Victoria: Dispute Settlement Centre, 2009)

⁴²⁶ Observation by the researcher.

In this regard, this Chapter will discuss the importance of non-court mediation for certain areas of cases⁴²⁷ that should be given due consideration. The approaches and experiences by other countries will also be studied as guidelines for the enhancement of private mediation or non-court mediation in Malaysia. Whether the approach is applicable in Malaysia will be further discussed below. The researcher will first explain the application in other countries before giving comments and suggestions for the application in Malaysia.

4.2 Community Mediation

Community mediation is an important aspect of mediation that should be given due consideration in Malaysia. This section is divided into few sub sections that discuss the community mediation and its importance, the application and development of community mediation centres and the approach taken by other countries particularly Australia and Singapore in introducing and improving the same. The last sub section will discuss the situation in Malaysia and the guides for improving the application of community mediation.

4.2.1 Community Disputes and Mediation

“Community” is the means by which people live together. Carl M. Moore illustrates that “communities enable people to protect themselves and to acquire the resources

⁴²⁷ This dissertation gives emphasis on three areas of cases i.e, Community Mediation, Family Mediation and Commercial Mediation.

that provide for their needs. Communities provide intellectual, moral and social values for the purpose of survival. Their members share the same identity, speak a common language, agree upon role definitions, share common values, assume some permanent membership status, and understand the social boundaries within which they operate”.⁴²⁸

Moore further argues that although resolving differences is the key to living in a better community some means of dispute resolution are more likely to jeopardize the community.⁴²⁹ Mediation is becoming increasingly popular as the means of dispute resolution because people figure out that it is a preferable way to enable people to live in better communities.⁴³⁰ Mediation allows the parties to negotiate and create a resolution for their benefit. The process of interaction allows parties to live together in harmony. Litigation as a social form is therefore viewed as suited especially to an age that favoured individualism, as it is an effective device for ascertaining the limits of individual rights. In that sense, it is seen not to be useful for preserving relationships that are critical for creating and sustaining community.⁴³¹

⁴²⁸ M. Moore, Carl, Why do mediate, in Joseph P. Folger, Tricia S. Jones, *New Directions in Mediations, Communication Research and Perspectives*, (United States; SAGE Publications Inc., 1994), 197-198

⁴²⁹ Moore argues that mediation is the appropriate means of dispute resolution as the people nowadays are unhappy with their communities the way they are. They believe they can be better and would like for them to be better. See *Id.*, 199-203.

⁴³⁰ See *Id.* 199-203. In discussing this issue, Moore analyses that complex human problems cannot be solved by rational thought alone as experts do not know enough and can never know enough. Further, they are not responsible for the outcomes that follow from their advice. It is the people with the problems who must determine what solutions are right for them. They can benefit from expert advice, but that is an insufficient basis for making decisions.

⁴³¹ *Id.*, 200-202

It is analysed that mediation provides more communal return as compared to litigation. Further, the process can provide people with a sense of belonging, recognition, or acceptance as being part of the community. This is especially true when the mediator is a fellow citizen, rather than a priest of the law. It is a belief that mediation has a good deal to do with the desire to live in an improved community.⁴³² Therefore, mediation should be a favourable mode of resolution for community disputes.

4.2.2 Community Mediation Centre: The Application and Development

Many authors agree that the development of community mediation and neighbourhood justice centres started in the United States since the 1970s. Australian interest in community mediation followed that of the US.⁴³³ The benefits of such an establishment have influenced other countries like the UK and Singapore to adopt the approach.

It can be traced to the 1970s, where the administration of US President Jimmy Carter encouraged the creation of the first neighbourhood justice centres (NJs) with the goal to provide alternatives to the courts where citizens could meet to resolve their disputes.⁴³⁴ “Those who pioneered community mediation asserted mediation was a

⁴³² See *Id.* 200-202.

⁴³³ See Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997) 317-331,

⁴³⁴ known as ‘community mediation programmes’

more effective process for resolving a wide range of conflicts than adjudication, especially if the parties had an on-going relationship”⁴³⁵.

“In a typical community mediation programme, a cross-section of neighbourhood volunteers was trained to mediate the disputes that arose in their community. The disputes they mediated included those between neighbours, family members, landlord and tenants, consumers and merchants, friends and small businesses.”⁴³⁶

As analysed by Lee,⁴³⁷ the primary characteristics of a community dispute is the basis of the relationship between the parties. Generally, these relationships are of a personal or social nature. While many small merchant or customer disputes may fall into the community dispute category, it is unlikely that the parties became acquainted because of a business relationship. Rather, it is likely that they are neighbours, relatives, friends, or simply they have had some encounter in the community where they live.⁴³⁸

A second characteristic of community disputes is that generally, the dollar value of the dispute is small. Consequently, representation by counsel and/or resolution through litigation is almost too costly⁴³⁹. However, the dollar value of the dispute is not necessarily an accurate indication of the importance of resolution. A few examples of the types of cases which have been handled through community-based

⁴³⁵ Lim Lan Yuan, *loc.cit*

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid*

alternative dispute resolution (ADR) are assault, disorderly conduct, division of property, malicious mischief, harassment, mutual combat, noise disputes, trespass and vandalism.⁴⁴⁰

Nowadays, some of the community mediation centres have expanded their services to include family disputes, workplace dispute, consumer supplier disputes and claims involving non-payment of money.⁴⁴¹

It is viewed that the expansion shows that mediation is suitable and preferable mode of resolution to deal with community disputes. The relationship between the disputants is preserved as the dispute is settled in a harmonious manner without the need to go through the adjudication or court system

Approach by Other Countries;

4.2.3 Community Mediation in Australia

The advanced application in Australia is referred to in this dissertation as guidelines for the betterment of application in Malaysia. The structured application of community mediation in Australia is said to have received high participation and also recorded high settlement of cases.

⁴⁴⁰ *Ibid.*

⁴⁴¹ For instance, Community Mediation of Central Ohio, Dispute Settlement Centre, Victoria, Community Justice Centre New South Wales. *Ibid.*

In Australia, 'community justice programmes' refer to the services established within the administrative branch of government which provide mediation at no charge to the users.⁴⁴² 'Community mediation' has the connotation that a representative group of local people are used as mediators, in contrast to the use of non-representative professionals⁴⁴³. The modern development of ADR in Australia has been traced⁴⁴⁴ to the community justice centres in New South Wales, established by the Community Justice Centres Act 1983 (NSW). In setting up the centres, the New South Wales Government was motivated by the need to find an alternative and effective way of dealing with backyard disputes which 'cause great aggravation and often lead to serious crimes.'⁴⁴⁵

They were inspired by the neighbourhood justice movement in the United States. The aim was to provide a mechanism for the inexpensive, expeditious and fair solution of minor civil (and sometimes criminal) disputes between people in ongoing relationships. Their preferred method of dispute resolution is mediation, although conciliation and dispute counselling services are also provided.⁴⁴⁶

⁴⁴² Boulle, Laurence, Teh Hwee Hwee, *Mediation, Principle, Process Practice*, (Asia; Butterworth, 2000) at 244-246

⁴⁴³ *Ibid.*

⁴⁴⁴ W Faulknes " The Modern Development of Alternative Dispute Resolution in Australia (1990) 1 *ADRJ* 61 See also J Schwarzkooff and J Morgan, 'Community Justice Centres: A Report on the New South Wales Pilot Project, Law Foundation of New South Wales, Sydney, 1982 cited in Boulle L, Teh Hwee Hwee., *Ibid.*

⁴⁴⁵ New South Wales Legislative Council , Parliamentary Debates, 6 March 1980, 5250 cited in Boulle and Hwee, *Ibid.* It was reported that the establishment anticipated benefits through the reduction of resources in the justice system, the freeing of police to concentrate on fighting serious crimes, greater public respect for the justice system, less temptation for persons to take the law into their own hands and lower costs for processing cases

⁴⁴⁶ See New South Wales Law Reform Commission, *Alternative Dispute Resolution, Training and Accreditation of Mediators*, September 1991, Report LRC 67 p 13-21.

The New South Wales model was followed in 1987 in Victoria, where seven Community Dispute Settlement Centres were established,⁴⁴⁷ as part of a pilot project under the auspices of the Legal Aid Commission of Victoria, the separate centres were later replaced by a single centre in Camberwell with state-wide access. In Queensland, the Attorney-General's Department established a Community Justice Programme in 1990 which provides mediation, facilitation and other dispute resolution services throughout the state.⁴⁴⁸ Community mediation services also exist in the Australian Capital Territory and South Australia.⁴⁴⁹

These centres are government funded and are usually under the administrative responsibility of the Attorney-General. The Victorian Dispute Resolution Centres have community management with administrative and policy functions. In other States, centres have been established at the instigation of the local community, or another community legal or advice agency.⁴⁵⁰ Some community-based ADR centres are closely allied to the court and tribunal system.⁴⁵¹

Boulle commented that the statutory-based community justice programmes regulate several features of the mediation process, such as confidentiality, non-admissibility of evidence, and the protection and immunities of mediators. They have some of the most rigorous levels of quality and accountability, in the form of initial training

⁴⁴⁷ In terms of Evidence (Neighbourhood Mediation Centres) Act 1987 (Vic)

⁴⁴⁸ Dispute Resolution Centres Act 1990 (Qld) cited in Boulle, L and Hwee, *Ibid.*

⁴⁴⁹ Boulle, L Teh Hwee Hwee, *loc.cit.*

⁴⁵⁰ New South Wales Law Reform Commission, Alternative Dispute Resolution, *Training and Accreditation of Mediators*, September 1991, Report LRC 67 p 13-21.

⁴⁵¹ Sourdin, Tania, *Alternative Dispute Resolution*, (New South Wales; LawBook Co., 2009), 116-117.

requirements for mediators, continuing training, skills audits, and debriefing protocols. They are re-accreditation requirements every few years. The programmes provide mediation and other dispute resolution services to the public and private sectors, in matters ranging from minor neighbourhood disputes to major public issue disputes.⁴⁵²

With the structured application and observation of quality standards, the community mediation centres has gained confidence of the public to be the best place for resolving community disputes.

4.2.3.1. Emphasis on Some of the Community Mediation Centres in Australia

To have a better insight on the effectiveness of community mediation in Australia, this subsection gives an emphasis on some of the community mediation centres to have some clear directions or guides for a movement of the application in Malaysia.

4.2.3.1.1. Community Justice Centre, New South Wales

Community Justice Centre (CJC) helps people resolve their disputes by providing free mediation and conflict management services throughout New South Wales (NSW). CJC is part of the NSW Department of Attorney-General and Justice, and is fully funded by the NSW State Department. The CJC was first established in 1980 as part of a pilot program. It was made permanent in 1983 with the commencement of

⁴⁵² Boulle, Laurence, Teh Hwee Hwee, *Mediation, Principle, Process Practice*, (Asia: Butterworth, 2000) at 244.

Community Justice Centres Act (NSW). Resolving disputes through CJC is proven to be effective for many disputes types, with a high settlement rate of 79%. The agreements that the parties reach often involve a broader range of solutions than a court is able to provide.⁴⁵³

In 2010/2011, CJC used a panel of 172 highly skilled and trained sessional mediators of various backgrounds. All CJC mediators are nationally accredited under the National Mediator Accreditation System. In addition, CJC employs up to 25 staff that manage, administer and support CJC.⁴⁵⁴ Most of these staffs are mediation advisors who provide advice and assistance to members of the public on resolving disputes, assess whether cases are suitable for mediation at intake; and then make arrangements for mediation service. The centre mediate in dispute where there is an ongoing relationship between the parties, for example neighbours, family members, friends, colleagues, and members of community organizations.⁴⁵⁵

Neighbour disputes continue to represent the most frequent type of dispute in the year 2010/2011 and of the 4826 files opened, 2500 of these (52 %) were disputes between neighbours.⁴⁵⁶ The majority of neighbour disputes are referred from the Local Court.

⁴⁵³ Community Justice Centre, *Year in Review, 2010-2011*, (New South Wales; Attorney General & Justice, 2011), www.cjc.nsw.gov.au

⁴⁵⁴ Through their offices three offices-Paramatta, Campbeltown and Newcastle.

⁴⁵⁵ Community Justice Centre, (NSW), *Year in Review, 2010-2011*. *Ibid.*

⁴⁵⁶ This is an increase of 188 since the previous reporting period.*Ibid.*

**Statistics 4.1: Types of disputes that CJC provided mediation in (2010/2011).
CJC Annual Report 2010/2011**

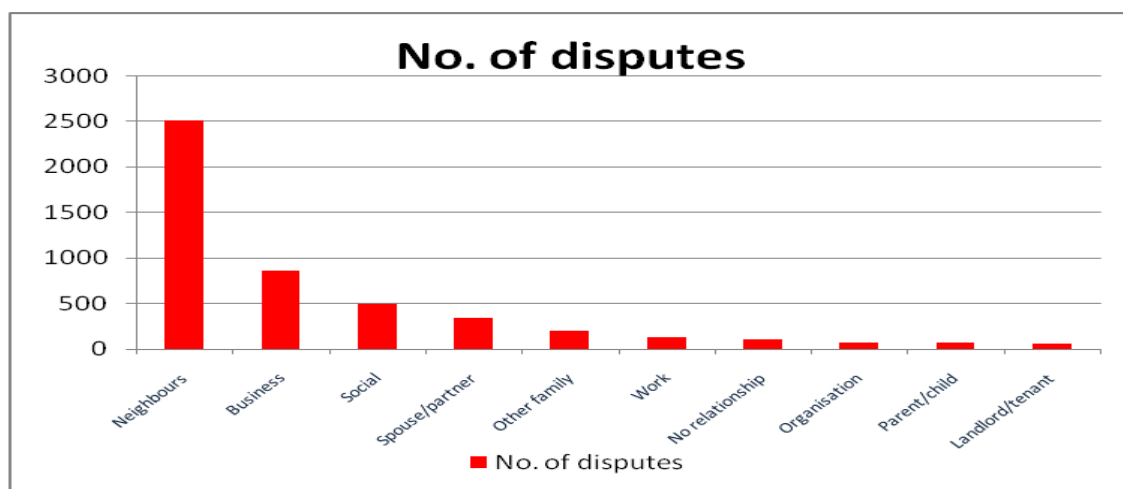


Table 4.2: Types of issues featured in files opened (2010/2011). CJC Annual Report 2010/2011

Complaint Type	2010/2011	2009/2010	Difference
Money / debt	1305	1128	+117
Fence / Retaining Wall	809	609	+200
Invasion of Privacy	770	657	+113
Family, Parenting, Property	769	683	+86
Plants, Trees, Shrubs	734	494	+240
Goods and Services	695	575	+120
Threats of Violence	459	339	+120
Noise	424	443	-19
Animals	402	394	+8
Children – Other peoples' behaviour, nuisance	288	Data not available	N/A
Work	275	193	+82
Motor Vehicle	225	191	+34
Cultural	96	112	-16

CJC accepts referral from multiple sources. As a community mediation service, CJC encourages members of the public to self-refer for mediation. This is done through its

website, promotional material, presentations and stalls at various events.⁴⁵⁷ In addition, CJC works in partnership with the Government and non-Government organizations to encourage referrals from service providers. The largest source of referrals for CJC continues to be from the Courts, with other key sources being self-referral and local Government.

A breakdown of referral sources is included in Table 4.3 below;

Table 4.3: Referral sources for CJC (2010/2011). Annual Report CJC 2010/2011

Referrer	Number of referrals	Percentage of total referrals received
Courts	2009	41.6%
Self-referral	779	16.4%
Local Government	672	13.9%
Previous clients	430	8.9%
Law Access	207	4.2%
Police	166	3.4%
State Government	164	3.4%
Solicitors	143	3%
Other	127	2.6%
Legal Aid / legal centres	105	2.1%
Federal Government	24	0.5%

It is analysed that the establishment of the Centre was formalised with the issuance of the Community Justice Centre Act 1983. In brief, the Act clarifies the purpose of the centre, the appointment of mediators and staff, the establishment of the centre to be part of the Attorney-General Department, and the exclusive term of ‘Community Justice Centre’ or CJC to be referred to the Centre. The application of mediation and

⁴⁵⁷ There has been a significant increase in the amount of self referrals through internet. In 2010/2011, CJC opened 400 files due to parties finding out CJC’s services through the internet, representing an increase of 161 referrals from the previous year. This highlights the importance of the internet as an effective tool to promote the service. *Ibid.*

its process⁴⁵⁸ are discussed in Part 4 of the Act. Part 5 on ‘miscellaneous’ touches, *inter alia*, an evaluation of the Centre, exoneration of liability, the issue of privilege, secrecy and mandatory reporting.

Although the Act is brief, it is comprehensive and clear enough to cover the administration and application of mediation to be carried out at the Centre. Besides the Act, Mediators are also subject to CJC Mediator’s Code of Conduct. The Code of Conduct⁴⁵⁹ outlines the standard of conduct required and responsibility of CJC and its mediators to achieve a workplace where ethics are maintained.

It is clearly stipulated in the Code that, all CJC Mediators are required to adhere to the Code of Conduct. CJC Mediators who are found to be in breach of the Code of Conduct may have their appointment as a mediator revoked. It is to be noted also that the National Mediator Practice Standard is a part of the Code of Conduct.⁴⁶⁰

It is evident from the above that, the structured application with the observation of quality standards and effective awareness programme has influenced the high reference and settlement of cases at the centre. Besides, the effective referral strategies has also contributed to the high volume of cases referred to the centre.

⁴⁵⁸ Section 21(2) of the Act provides that mediations sessions shall be conducted with as little formality and technicality, and with as much expedition, as possible.

⁴⁵⁹ New South Wales, Attorney General & Justice, 2011, *Community Justice Centres Mediators’ Code of Professional Conduct*. www.cjc.nsw.gov.au

⁴⁶⁰ The Practice Standard is attached as *Annexure A* in the *CJC Mediator’s Code of Professional Conduct*. See Appendix B of this thesis.

4.2.3.1.2. Dispute Settlement Centre, Victoria

Dispute Settlement Centre, Victoria is known to be the best place for referral of community and neighbourhood disputes in Victoria⁴⁶¹. The development of family mediation and mediation in other areas, i.e., in the construction industry and industrial disputes has initiated the Legal Aid Commission to fund three-year pilot projects in Victoria in the year 1987 to provide mediation as an alternative to the court system to resolve disputes. In this regard, four centres were established. The main objective of the Centres was to provide a community-based alternative for resolving disputes between neighbours that was accessible, free and which promoted co-operative problem solving.⁴⁶² With a structured negotiation the centre played a role to assist clients to find their own solutions.

The then State Attorney-General's Department assumed responsibility for the program and funded an additional three centres, funding all seven centres for an additional three years.⁴⁶³

In 1993, the Dispute Settlement Centre Program was restructured to a centralized administration which now handles disputes from throughout the whole State of Victoria. This restructure increased the availability of mediation. Whereas previously mediation was available only in the metropolitan and three rural regions, the

⁴⁶¹ Observation by the researcher.

⁴⁶² Department of Justice Victoria, *Dispute Settlement Centre of Victoria Information Kit 2009*, (Department of Justice Victoria, 2009)

⁴⁶³ *Ibid.*

restructure allowed free public access to dispute resolution services at convenient locations around the State.⁴⁶⁴

The roles of the Dispute Settlement Centre of Victoria are to provide informal, impartial, accessible, low cost dispute resolution service to all communities in Victoria, to assist people to be responsible for the resolution and outcome of their own disputes, to provide an alternative to legal action as well as to conduct public education and information sessions about the program and about appropriate dispute resolution practices.⁴⁶⁵

The centre dealing with a wide range of disputes involving trees, fences, noise, behaviour of people and animals, workplace disputes, business disputes, civil/court matters, environmental and planning disputes, public policy facilitation, shared households, club and organizations, some family matters, cultural differences, wills, relationships, division of responsibilities, body corporate and many other disputes⁴⁶⁶. The Centre may also assist individuals, small groups and large groups.

Table 4.4; Types of disputes referred to DCSV from 1/7/2007-30/6/2008.
(Information Kit 2009, DSCV)

Main Types of Disputes	%
Fence	49%
Behaviour	13%
Tree	12%
Other (issues that accounted for less than 2% each)	26%

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Originally the Neighbourhood Mediation Centres were established to assist with disputes involving neighbours, clubs and organization, work colleagues and management and other disputes within the community. Since that time, however the program has broadened the range of disputes that are mediated as above. See the DSCV Information Kit. *Ibid.*

It is to be noted that the centre does not generally deal with Family Law Disputes and is not an accredited Family Law Mediation Service. The cases are referred to the centre from the Local Government, self-referral, the Court⁴⁶⁷, Police and also from Victoria Legal Aid & Community Legal Centres.

**Table 4.6: Sources of referral to DSVC 1/7/2007-30/6/2009.
(Information Kit DSCV 2009)**

Source of referral identified by callers	%
Local Government	70%
Self – by word of mouth, phone book etc.	14%
Courts	10%
Police	2.4%
Victoria Legal Aid & Community Legal Centres	2.4%

The Centre employs approximately 180 sessional mediators who are located in various cities and towns throughout Victoria and mediate in their local area as well as twenty six full-time employees, who manage, train and run the finance and administration of the centre. More than half the full-time staffs are Dispute Assessment Officers, who are employed to provide advice and assistance on

⁴⁶⁷ The Centre has also been involved in a number of pilot programs with the Magistrates' Court, most recently focusing on intervention order applications between neighbours, which could be more suitably resolved through mediation. In 2002, DSCV and the Magistrates' Court implemented some referral protocols to assess suitable intervention order applications for mediation. These cases still had to fulfil usual DSCV requirements for suitability. The parties have to enter into mediation voluntarily and with no fear of violence. Where possible, a DSCV 'mediation liaison officer' would interview clients who had applied for intervention orders and were interested in the diversion option, to ensure the service was appropriate. See *Ibid.*

Cases can come to mediation from court in a number of different ways. Some courts have a formal process of referring or ordering cases to mediation, some courts give the parties the option of choosing mediation. Even where there is no formal process in place, if the people in dispute agree they would like to use mediation they can organize it themselves and then advise the court if the matter is settled. A new pilot program initiated by the Chief Magistrate has been introduced in the Broadmeadows Magistrates' Court that refers all Defended Civil claims under \$40,000 to compulsory mediation. This is in accordance with Practice Direction No.1 of 2009 (Mediation Pilot Program) of the Magistrates' Court of Victoria. See *Ibid.*

resolving disputes, assessing if cases are suitable for mediation and then making all arrangements for mediation, including a thorough preparation for the parties.⁴⁶⁸

The statistics from 1/7/2007 to 30/6/2008 reported that 84% of cases referred to mediation at the centre reached settlement. The figures below give further details;

**Table 4.5: Statistics for Dispute Settlement Centre of Victoria
1/7/2007 to 30/6/2008 (Information Kit DSCV 2009)**

Measure	‘Standard’ Disputes *	Court Related disputes **	‘Special Projects’ Disputes ***	Total ***
Number of Dispute Advisory Service calls received	14,134	1,562	1,241	16,937
Number of Invitation to Mediate Sent Out	1,310	552	225	2,087
Number of Mediations Conducted	181	240	84	505
Agreement at mediation	155	199	68	422
Agreement Rate at Mediation	86%	83%	81%	84%
Expeditious service (files closed in under 40 days)				82%

There is no specific Act issued in the establishment of the Dispute Settlement Centre, Victoria⁴⁶⁹. However the panel of mediators appointed are accredited mediators who are subject to Practice Standards and Approval Standards of Australian National

⁴⁶⁸ See DSCV Information Kit 2009. *Ibid.*

⁴⁶⁹ Interview with David Leonard, Policy and Project Officer, Dispute Settlement Centre, Victoria and Colin Lavars, Acting Manager of DSCV, at DSCV, Victoria on 1st June 2011.

Mediator Standards. It is to be noted also that the Dispute Settlement Centre of Victoria is a Recognised Mediation Accreditation Body under the National Mediator Accreditation System⁴⁷⁰ and has authority to accredit trained and experienced mediators. Information Kit is also issued to give clear information of the Centre, the type of disputes dealt with and how the centre assists people to resolve disputes. A brief description of appropriate dispute resolution processes and styles are also provided. The element on observation of confidentiality is covered by Section 21L-N⁴⁷¹ of the Evidence Act 1958.

Even though there is no specific Act issued regulating the application of mediation at the Dispute Settlement Centre, but since the mediators are qualified and accredited who are bound by the by the Practice Standards and Approval Standards of Australian National Mediator Standards, the quality of mediation offered by the Centre is therefore determined.

It can be seen that, accredited and qualified mediators who are bound by the National Mediator Standards give an assurance of quality mediation service. The high percentage of settlement cases shows that the centre is a suitable place for referral of community disputes. Besides, effective awareness programme and effective referral strategies has influenced high referral of cases to the centre.

⁴⁷⁰ The National Mediator Accreditation System is under the responsibility of Mediator Standards Boards that was established to support and promote high standards by mediators and to enhance the quality of mediation services in Australia. See <http://www.org.au>.

⁴⁷¹ Section 21L states “Evidence of anything said or of any admission or agreement made at, or of any document prepared for the purpose of, a conference with a mediator in connection with a dispute settlement centre is not admissible in any Court or legal proceeding, except with the consent of all persons who were present at that conference.”

4.2.4. Community Mediation in Singapore

This dissertation make a reference to the practice in Singapore as Singapore has moved far ahead in private mediation inclusive its community mediation. The similarities of cultural background with Malaysia may offer some guidelines for improvement of the application in Malaysia.

The impetus for the establishment of a formal institutional structure to provide community mediation started in Singapore in 1996, when an Inter-Agency Committee on ADR (the Committee) was tasked by then Minister of Law, Professor Jayakumar to explore how ADR processes, in particular mediation, could be further promoted in Singapore. The Committee, chaired by Associate Professor Ho Peng Kee, noted that “while litigation would remain the main channel through which commercial claims and civil disputes are settled in Singapore, there was a need to provide ADR processes for Singaporeans to handle those disputes that are more appropriately resolved by means other than litigation. Such disputes include community, family and social conflicts that Singaporeans were generally not inclined to settle through the court process”.⁴⁷²

⁴⁷² Report of the Committee on the Alternative Dispute Resolution, 1997, (Singapore) cited in Gloria Lim, Cheryl Lim and Elaine Tan, Promoting Mediation as an alternative Dispute Resolution Process to resolve Community and Social Disputes- a Singapore Perspective, *1st Asian Mediation Association (AMA) Conference*, (Singapore; 4-5 June 2009).

Lee commented that the concept of resident cohesion and community development is not something unfamiliar. Since achieving independence in 1965, Singapore has strengthened her own nation-building by promoting the active role of citizen within the society. It is a belief that to develop and maintain a good society developing, the local communities are seen to be needed to establish a community which is physically, morally and spiritually healthy. See Lee Lam Yuan, *op.cit.* at 318.

The Committee recommended that Community Mediation Centres (CMCs) should be established to provide Singaporeans with an appropriate avenue for the amicable settlement of such community and social disputes in a way that would be conducive to the preservation of post-conflict relationships.⁴⁷³

Following the Government's acceptance of the Committee's recommendations, an ADR Division subsequently, the Community Mediation Unit (CMU), was set up within the Ministry of Law to oversee and co-ordinate the operation of the CMCs and to promote greater use of mediation in Singapore as the preferred means of resolving social and community conflicts. The CMCs set up, operations and programmes were, therefore, devised with Singapore's distinctive cultural, legal and institutional context in mind.⁴⁷⁴

4.2.2.1.2.1 Emphasis on Community Mediation Centre, Singapore

The Community Mediation Centre was established pursuant to the Community Mediation Centres Act (Cap 49A) (CMSs Act), which came into force as law in January 1998. The Act provides that the Centres may deal with any family, social and

⁴⁷³ Gloria Lim, Cheryl Lim and Elaine Tan, *Ibid.* It was also commented that community mediation has a very crucial role to play in Singapore as the possibility of social friction is necessarily higher since space is limited and people from different races, religion and ethnic backgrounds live in close proximity. In this regard, community mediation may provide the framework for constructive dialogue and problem solving which is the foundation of healthy relationships, whether among friends, colleagues, family members, community members or other larger social groupings. By encouraging people to work together to solve their problems as members of the same, it is believed that community mediation has the potential to instil a sense of belonging and alleviate feelings of isolation or detachment frequently associated with urban societies. See Boule and Hwee, *op.cit.* at 246.

⁴⁷⁴ See Gloria Lim, Cheryl Lim and Elaine Tan, *loc.cit*

community disputes and that do not involve a seizable offence. The aim is to provide an informal and user-friendly forum for conflict resolution.

Cases have been referred to the Community Mediation Centres by the Subordinate Courts since February 1998 and by the Neighbourhood Police Posts since September 1998. Members of Parliament and grassroots leaders also refer cases for mediation. Some disputants approach the Community Mediation Centres directly for help.⁴⁷⁵

Lim commented that in Singapore, during its old days, disputes and conflicts among the members of the community were settled within the community by the village elders or leaders. As time passed and with the influence of the outside world the kinship relationships gradually gave way to more contractual and less friendly relationships. The establishment of community mediation centres is aimed to provide useful avenues for resolving these modern community disputes.⁴⁷⁶

In setting up the Centre, certain variables experienced by the operation neighbourhood centres in the US and Australia have been taken into consideration, namely, the following;

- a). nature of the community to be served
- b). type of sponsoring agency
- c). project office location

⁴⁷⁵ Boule, Laurence & Teh Hwee Hwee, *Mediation, Principle, Process, Practice*, (Asia: Butterworths, 2000) at 245.

⁴⁷⁶ See, Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997) at 319

- d). project case criteria
- e). sources of referral
- f). intake procedures
- g). resolution techniques
- h). project staff
- i). hearing staff
- j). hearing staff training
- k). case follow up procedures
- l). project costs
- m). evaluation⁴⁷⁷

The Community Mediation Centre is established with a proper study on its delivery system and effectiveness. Such an establishment has contributed in enhancing the cohesion in the communities, thus, strengthens the nation for mutual growth and development.

The CMCs Act allows the Minister for Law to establish CMCs at such premises as he may determine. At present, there are three main CMCs established in different parts of Singapore. “In addition, to these three main centres, there are also various satellite locations at community clubs, family service centres and a neighbourhood police post, where disputants can arrange to have their mediation sessions conducted. Generally, however, most mediation sessions take place at the main dedicated

⁴⁷⁷ Lee Lan Yuan, Lee Thiam Leng, *Court Mediation in Singapore*, (Singapore: FT Law & Tax Asia Pacific, 1997), at 193.

centres, which are accessibly located and specifically outfitted with mediation and caucus room facilities”.⁴⁷⁸

The disputes handled by the CMCs are essentially relational rather than legal in nature. Statistics 2008 shows that there were 684 cases handled with 55% involving neighbours, 12% involving family disputes⁴⁷⁹ and 9% are cases involving altercations between friends.⁴⁸⁰

As stated above disputes generally come to the CMCs in three ways: i.e; a). Direct intake, b). Referrals from other public agencies and c). Magistrate referrals

In 2003, the CMCs, conducted an internal analysis of the sources of its caseload and found that as a general trend, a majority of the CMCs caseload came through referrals from ‘other public agencies’ as compared to ‘direct intake’. “It was assessed that this was largely attributable to the fact that members of the public were not familiar with the CMCs, it being at that time, a new institution barely five years old. Moreover, members of the public typically favoured approaching the more visible and established public authorities and agencies such as the Police, the Housing and

⁴⁷⁸ Gloria Lim, Cheryl Lim and Elaine Tan. *Ibid.*

⁴⁷⁹ Such disputes often involve a mixture of relational conflicts and monetary issues. It could be between siblings or between parent and child. See Gloria Lim, *Community Mediation in Singapore*. www.unisa.edu.au.

⁴⁸⁰ A majority of the disputants were working adults within 30-50 year age range. The racial compositions; largely mirrored Singapore’s demographic; 71% Chinese, 14% Malay, and 12% Indian.⁴⁸⁰ Gloria Lim, Cheryl Lim and Elaine Tan. *loc.cit.*

Development Board (HDB), the Subordinate Courts and Members of Parliament at their weekly Meet-the-People sessions, for help in the first instance”.⁴⁸¹

It was also found that while there was legislative provision in the CMCs Act for the Magistrates referrals, cases were not frequently referred to by Magistrates to the CMCs. The reasons were two-fold. Firstly, both parties’ specific consent had to be obtained before a case could be referred to the CMCs. Secondly, physical separation of the CMCs from the Subordinate Court caused inconvenienced for the parties.⁴⁸²

The CMU studied these issues and assessed that targeted measures should be introduced to ensure a more effective and appropriate channelling of community and social disputes to the CMCs. Such measures include:

- i) Measures to deal with community disputes festering within the community but which had yet to escalate to the court. (Category one dispute).⁴⁸³
- ii) Measures to deal with community disputes that had already escalated to the Courts for resolution (Category two dispute).⁴⁸⁴

⁴⁸¹ Gloria Lim, Cheryl Lim and Elaine Tan, *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ Among others; the CMCs embarked on a series of outreach briefings to the frontline officers of key public agencies such as the police which were the first port of call for the parties seeking assistance to resolve disputes. Secondly, referral arrangements along with standard operational procedures and referral forms were worked out and formalized between CMCs and its referral to the CMCs. Thirdly, grassroots leaders and CMC mediators were enlisted, under a novel “Persuaders Scheme”, to visit constituents embroiled in neighbourhood disputes who were unwilling to resolve their conflict with their neighbours through mediation, to explain the advantages of doing so and to encourage them to give the mediation process a try. See *Ibid.*

⁴⁸⁴ To address the shortcoming, a legislative amendment was introduced in 2004 to the CMCs Act, to allow for Magistrates to compulsorily refer cases deemed appropriate for community mediation to the CMCs without the need for parties’ consent. (CMCs Act, Section 15(3). In consistent with that

Indeed, the introduction of the measures has increased the number of referral cases to the centre. The referral system with its strategies played an important role for the centre achieving its objective. With the number of cases referred to and settled, mediation is perceived to be the most effective method in resolving community disputes.

According to its General Manager, the CMCs overall settlement rate of 70-75% bears testimony to the effectiveness of mediation as a useful means of settling community and social disputes. Up to year 2008, CMC have conducted more than 4,100 mediations since its first centre was established.⁴⁸⁵The statistics also show an increasing number of Singaporeans availing themselves of CMCs mediation. The caseload increased from 120 in year 1998 to 684 in 2008. The CMC has played a pivotal role in preserving relationships in the community and thus maintaining a harmonious culture in the society.

It can be seen that the structured application with the issuance of the Community Mediation Act, and the proper strategic planning on its operation inclusive the assessment on its referral strategies has significantly contributed to the effective application of community mediation in Singapore.

amendment, the physical infrastructure was also enhanced by the co-location of a new CMC facility within the Subordinate Courts' premises. See *Ibid.*

⁴⁸⁵ *Ibid.*

4.2.2.1. Situation in Malaysia; Guides for Improvement

It is observed that there has been an increased of community disputes nowadays in Malaysian society as the people are more aware of their personal and legal rights.

Justice YA Suryadi Halim Omar JCA in the case of *Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor*⁴⁸⁶ observed the situation as follows:

“High density of population in popular residential areas in Malaysia is now a norm. Houses may have to be built very close to each other, at time on hilltops, or even hugging those slopes...we are no more society that lives miles apart like the olden days, but in one where likewise unreasonable activities may touch the life of a neighbour. To deny the rights of neighbours, and to allow a wrongdoer to wreak havoc and heartache, would militate the very fabric of modern life and collective ideology of a multi-faceted society. This situation influences the increase of social and community disputes.”

There are many cases that involves community or neighbourhood disputes for example, *Bunga Raya Auto Credit Sdn Bhd v. Atlas Housing Sdn. Bhd. & Ors.*⁴⁸⁷, *Ng Chooi Aw & Anor v. Eng Ah Jam & Anor*⁴⁸⁸ *Lien Chen Fah@ Lian Chen Lee & 3 Ors v. Gimo Holdings Sdn Bhd*⁴⁸⁹ and many others, where plaintiffs and defendants were neighbours. In the case of *Bunga Raya* as stated above, the damage assessed to the plaintiff was awarded more than two years after the case was filed in court.

⁴⁸⁶ (2007) 5 MLJ 13, (2007) 4 CLJ 293, CA. cited in Farheen Baig Sardar Baig, Community Mediation, *Mediation in Malaysia, The Law and Practice*, Mohammad Naqib Ishan Jan, Asghar Ali Ali Mohamed,

(Malaysia: Lexis Nexis ,2010) 156-157

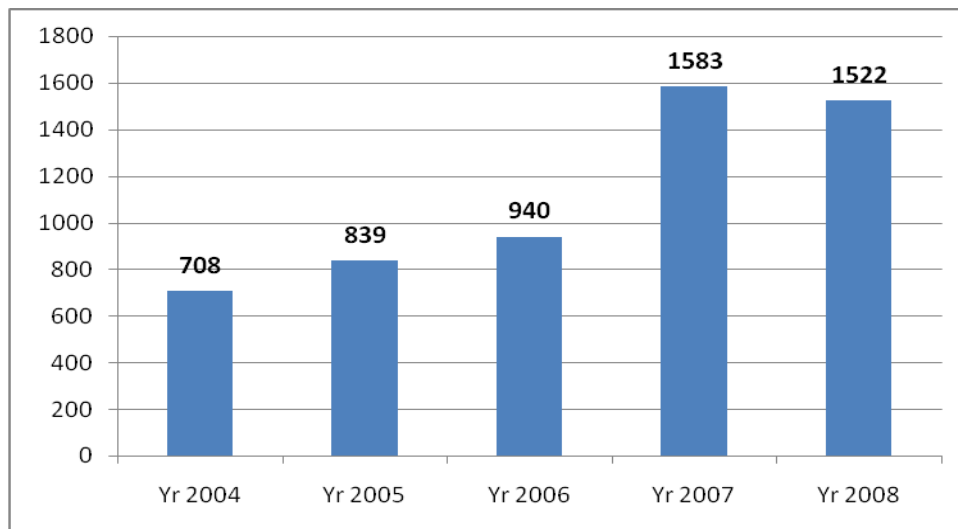
⁴⁸⁷ (2008) 8 CLJ 545

⁴⁸⁸ (2008) 4 CLJ 642

⁴⁸⁹ (2008) 1 MLJ 135

What we can see that once the case is filed in court, the neighbourhood ties or relationship is damaged. As a result, the community is not living in harmony. The situation may become worse if plaintiff and defendant are from different races where it might lead to multiracial disputes. Statistics from the Police Department shows that there are increasing numbers of multiracial disputes cases yearly. Most of the cases started from neighbourhood disputes.

Statistics 4.6, Inter-Racial Quarrels (2004-2008), Source: Royal Malaysian Force



Statistics 4.7, Inter-Racial Quarrels 2004 – 2008, Source: Royal Malaysian Force

Ethnic	2004	2005	2006	2007	2008
Malay/Chinese	254	293	308	451	385
Malay/Indian	161	197	277	384	462
Indian/Chinese	151	178	181	258	283
Various Ethnics	31	44	54	222	104
Local/Foreign	81	89	94	210	223
Foreign/Foreign	26	38	26	58	55
TOTAL	708	839	940	1583	1522

From the observation of the Unity and Integration Department, the multiracial disputes often led to the instability of social integration in the society.⁴⁹⁰ In this regard, mediation is seen as one of the solutions that can be adopted to strengthen social integration in the community. The disputes are resolved amicably and by consensus of the parties. The culture to mediate may contribute to preserve the relationship of parties in dispute, thus maintaining harmony and peace in the society.

At present, the Community Mediation is in its pilot stages of movement under the National Unity and Integration Department. The Department targeted to have 2500 mediators in five years' time starting from year 2009. The mediators trained were leaders of Rukun Tetangga⁴⁹¹ while the rest were officers from the National Unity and Integration Department (JPNIN). The Minister in Prime Minister's Department said that more community mediators were needed to help reduce conflict in Malaysia's multi-racial society. He said currently there were only 419 community mediators in the country, including those who were not well trained.

⁴⁹⁰ Ho Khok Hua, Community Mediation, *Workshop on Empowering Communities Through Mediation in Malaysia*, (Kuala Lumpur, 16-18 June, 2009)

⁴⁹¹ To plan and execute community programs, a community organization (Rukun Tetangga) was introduced, initially in a few areas in the 1970s but gradually throughout the country. Most of these neighbourhood organizations are established in urban areas where crime rates and ethnic diversity are more prominent than those in the rural areas. According to the department, by May 2006, as many as 3146 Rukun Tetangga neighbourhood committees have been set up, staffed by 78,650 committee members serving about 10 million of the urban population. These neighbourhood committees are supposedly non-governmental organizations (NGOs) but the government does play a major role in determining the committee members, mainly to ensure that they are representative to some degree of the various social groups and are also capable of promoting community unity.

The minister further stated: “The number is not sufficient as we have a population of about 29 million. Of course there are leaders and mediators who have skills from attending courses and can perform the task but we need more trained mediators.”⁴⁹²

Table 4.9, Participants of Community Mediation Course, 2007-2009;
National Unity and Integrity Department

YEAR	PARTICIPANTS OF COMMUNITY MEDIATION COURSE			TOTAL
	BASICS	ADVANCED	CASE CONFERENCING	
2007	280	51	-	331
2008	106	141	-	247
*2009	324	122	68	514
TOTAL	710	314	68	1092

Koh said the mediators should be given sufficient training in knowledge and mediation skills to resolve conflicts in a multi-racial society, especially between two families or among the same community, before the differences become a major issue.

At present, there is neither a specific centre on community mediation⁴⁹³ established nor a specific Act on Community Mediation Centre issued. The setting up of Community Mediation Centres adopted by Singapore and Australia is found to be more significant to the community. The structured approach by the issuance of Community Mediation Centre Act, setting out the guidelines for the process of

⁴⁹². Koh Tsu Koon, (Tan Sri Dr.) after presenting letters of appointment to 2012 community mediators organized by the National Unity and Integration Department. *The Borneo Post*, 26 Mac 2012. <http://www.theborneopost.com/2012/03/26/koh-more-community-mediators-needed/>

⁴⁹³ Boulle commented that in UK there more 120 community mediation centre established. There is an increasing of 20% every year.

mediation service at the centre, and preparing strategies to ensure effective and appropriate channelling of cases to be resolved through community mediation has made mediation more acceptable and known to the society.

It is recommended for the JPNIN to have collaboration with the AG, for setting up the legal framework of the centre, as well as for increasing the number of mediators and expanding their service. It seems a difficult task for JPNIN to achieve its aim to expand the training to community leaders, government agencies, non-government agencies and other related organisations.⁴⁹⁴ In expanding mediation, training of mediators is a part that should be given concern as the lack of training facility⁴⁹⁵ will affect the movement of mediation in the community.

In setting up the centre, certain measures must be taken into consideration. Strategies for referral of cases, for example, should not be left out as it determines the successful operation of the centre. As seen above, the community mediation centre in Australia and Singapore have made outreach and collaborative arrangements with related agencies to refer disputes to the Centre. Education and awareness programmes have been held continuously to gain confidence of the public on the mediation offered by the Centre. In Malaysia at present, even the project of 'Rukun Tetangga' is not known⁴⁹⁶ to some of the communities. Therefore, a proper planning in educating

⁴⁹⁴ Ho Khok Hua, "Community Mediation", *Workshop on Empowering Communities Through Mediation in Malaysia*, (Kuala Lumpur, 16-18 June 2009).

⁴⁹⁵ There is lack of expert in community mediation at current. As stated by Mr. Ho, for the training there is only one expert trainer available, that limit the expansion and capacity of training.

⁴⁹⁶ Lack of publicity and social facility are amongst the reasons for the failure some of "Rukun Tetangga" commented by Prof. Dr. Mohd. Taib Hj. Dora in a research entitled "*Kajian*

and promoting community mediation and its suitability should be the main agenda when we decide to open such a centre.

It is also noticed that community mediation centre in Australia and Singapore are funded by their governments. The funding enables the centres to offer free service to the communities. This will attract parties to consider the Centre as a place to resolve their disputes. Besides, specific requirement of training needed for mediators in ensuring mediation is properly conducted to achieve amicable settlement.

It is further observed that community mediation centre in Australia and Singapore as discussed above only engage about 20-30 full time staff to manage the administration of the Centre; whereas, in the same time employs about 160-180 sessional mediators located in various cities and towns who are called when needed. Such arrangements in fact reduce the cost operation of the Centre.

A proper approach and study on the administration, development and achievement reached by Singapore and Australia is recommended for consideration for us to initiate and develop our efficient community mediation service. The approach has gained the confidence of the public to accept that mediation is the best method to resolve community disputes.

4.3 Family Mediation

Due to the increase number of divorce cases and relational issues after separation of husbands and wives yearly, this dissertation of the view that family mediation should be given due consideration in Malaysia.

4.3.1 Family Disputes and Mediation

Family disputes by definition “involve people who will have continuing relationships, even when those relationships are restructured by divorce or divorce or by a child’s leaving home”.⁴⁹⁷

According to R. Singer, families generally operate according to their own rules, either negotiated within the family or imposed by parental decree. They stubbornly resist the imposition of standards by outsiders. When they are dissatisfied, family members often take the law into their own hands. Unhappy teenagers defy parental authority or run away from home. Separated parents deny visiting rights to ex-spouses or fail to pay court-ordered child support.⁴⁹⁸

“Mediation, in which an outsider helps family members to resolve their own disputes, has emerged as a particularly appropriate technique for resolving conflicts which

⁴⁹⁷ R. Singer, Linda, *Settling Disputes, Conflict Resolution in Business, Families, and the Legal System*, (Boulder, Colorado: Westview Press, 1994) at 31.

⁴⁹⁸ *Ibid.*

family members cannot settle themselves”⁴⁹⁹. Interesting part of family mediation is that it focuses on the future and on the continuing relationships among the parties. Mediators help participants find mutually satisfactory solutions to problems, thus avoiding the “win-lose” syndrome of court decision, arbitration or parental decree. Furthermore, the process is private. In some occasions, mediators try to teach people to handle their own conflicts in the future, without the need for calling in an outsider.⁵⁰⁰

The critical importance is in an area where compliance with outside rules is so difficult to secure as participants themselves design the solutions. Thus, they generally have a greater commitment to the resulting agreements than to decisions imposed on them by outsiders. This commitment can and does ensure greater compliance. When separating parents jointly calculate the cost of raising their children, for example, the resulting child support payments seem to be more acceptable and more often paid than those decreed by a court or negotiated by attorneys acting as intermediaries.⁵⁰¹

In this regard, many in the judiciary, such as Judge Susan Strengass of the Wisconsin Circuit Court, stressed that “family law is the prime area where alternatives should not only be tried, but insisted on. “ When divorces involve parties with children, a

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

growing number of courts and state legislatures indeed are insisting that families try mediation before bringing their disputes to court.⁵⁰²

Massey, a solicitor in New South Wales in an article⁵⁰³, classified the benefit of family mediation into three categories: firstly, to the parties, secondly, to the third party and thirdly, to the society in general.

For the benefits to ‘the parties’, they will attain objective legal advice based on joint instructions with a safe environment to express their anger and hurt. The amicable settlement reached is a solution which the parties have devised to meet their individual needs and expectations⁵⁰⁴

The commitment to mediation will overcome any suggestion of favouring one of the parties; they will be more content with their agreement; than with an order made by a court; and mediation will give back to the parties the power to negotiate their own agreement.⁵⁰⁵

As for the benefits of ‘third parties’ or children, they will be more accepting of the arrangements which their parents have negotiated, and these arrangements are less

⁵⁰² *Ibid.*

⁵⁰³ Massey, Vaughan, *Alternative Dispute Resolution, A Private Centre, Alternative Dispute Resolution Proceedings*, (Canberra: Australian Institute of Criminology, 1999)

⁵⁰⁴ Massey, *Ibid.* Massey clarifies that much of the bitterness, stress and frustration felt by people in conflict is ignored. For example, this stress explodes into violence at the Family Court or at the former spouse or the children or all the three.

⁵⁰⁵ *Ibid.*

likely to require review or enforcement than those imposed by a court. The children may even participate in mediation.⁵⁰⁶

The high increase of divorce cases may lead the court to be burdened by backlog of cases. In Australia, for example, the Institute of Family Studies estimates that 40%⁵⁰⁷ of Australian marriages will eventually end in divorce. Therefore, mediation will materially assist the parties by reducing delays and lead to the settlement of a large number of defended matters.⁵⁰⁸ In this regard it may benefit the society in general.

On this basis mediation is a viable dispute resolution mode for family disputes rather than the adversary system.⁵⁰⁹ The experience in the United States shows that mediation is highly effective. The majority of clients both women and men reach agreement, report satisfaction, consider it fair and responsive, and on follow-up, tend to comply with their agreement and resolve difficulties informally.⁵¹⁰ Matrimonial litigation can be long, expensive and exert a significant emotional toll on the parties involved. Instead, mediation empowers the parties to potentially reconcile all issues including but not limited to finances and custody without relying on the complex and confrontational nature of the traditional litigation system.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Statistics in the year 1999, Massey, *Ibid.*

⁵⁰⁸ See Massey, *ibid.*

⁵⁰⁹ *Ibid.*

⁵¹⁰ See Lim Lan Yuan, Liam Thiam Leng, *Court Mediation in Singapore. Supra* at 140

Approach by Other Countries;

Since there is no such a centre yet in Malaysia, this dissertation make a reference to the application in other countries; particularly Australia and Singapore to avoid pitfalls and to have some lessons in introducing the same in Malaysia.

4.3.2. Family Mediation in Australia

The New South Wales Law Reform Commission in a report⁵¹¹ in the year 1991 stated that the consensual dispute resolution services are available for a range of family situation in which conflict can arise: general family and inter-generational conflict, specifically for parent/adolescent conflict, disputes between separating and divorcing spouses, and for ‘de facto’ and homosexual couples. Mediation and conciliation are the dominant processes used, although family law arbitration and private judging are also available⁵¹². Mediation seems to be a favourable resolution mode for the community in New South Wales for a number of years. It was practised in the Family Court as well as outside the court.

Outside the Court, a range of approaches has been adopted. Several private and government sponsored agencies throughout Australia offer family mediation. Many are funded by the Commonwealth Attorney-General’s Department for the mediation of disputes which may otherwise result in litigation through the Family Court.⁵¹³

⁵¹¹ Australia, New South Wales Law Reform Commission, *Alternative Dispute Resolution, Training And Accreditation Of Mediators*, September 1991, Report LRC 67 at 13-21

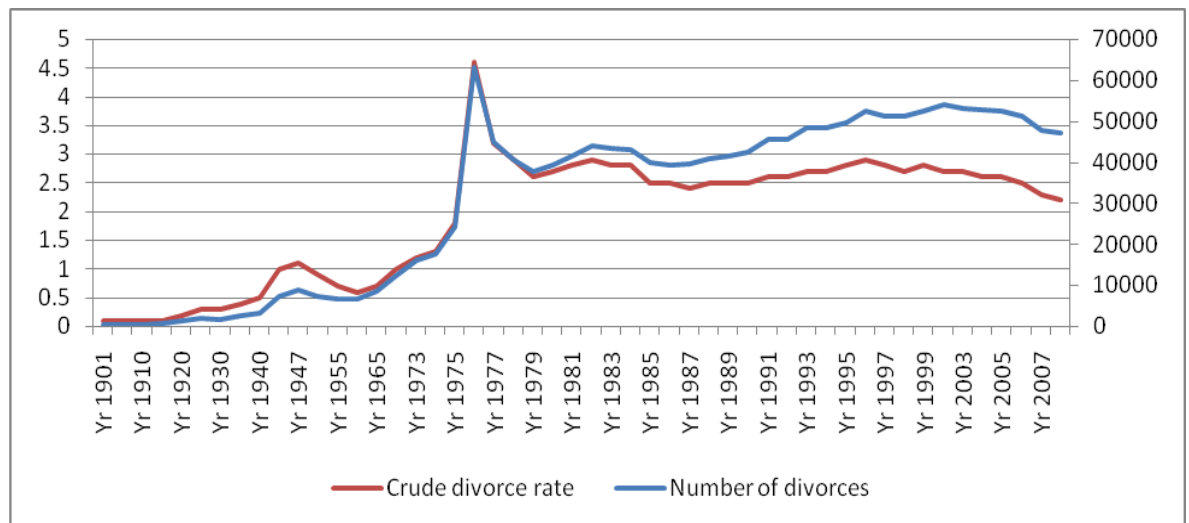
⁵¹² The Commission distinguishes,”for the purposes of this reference, marriage and family counselling and therapy services, none of which is a consensual dispute resolution within the Commission’s description”.

⁵¹³ New South Wales Law Reform Commission Report, *op.cit.* at 14.

The statistics of family fact and figures show that there is a gradual increase of divorce in Australia yearly. In 1995, there were 49,742 cases registered for divorce. Ten years later, in 2005 the number increased to 52,399. The highest increase is recorded in the year 2002 where the number of divorce registered is 54,004. The number of registered marriage in year 1995 was 109,386 whereas in year 2005, the number of marriage registered was 109,323.

However, there is a decrease in the number of divorces in the year 2007, where it was recorded at 47,963 and in the year 2008, the number is further reduced to 47,209. The reduction would be due to the actions taken by the Australian Government to curb the marital conflicts and by introducing various actions and efforts.

Statistics 4.10 (Number of divorces and crude divorce rate, 1901-2008, (Australia)
(Source: Australian Institute of Family Studies)



In the year 2006, for example, the Australian Government introduced a series of changes to the family law system. These included changes to the Family Law Act 1975 (Cth) and increased funding for new and expanded family relationship services, including the establishment of 65 Family Relationship Centres (FRCs) and national advice line. The aims of the reforms were to bring about “generational change in family law” and a “cultural shift” in the management of separation, “away from litigation and towards co-operative parenting”.⁵¹⁴

The Australian Government funds a number of community-based organizations under the Family Relationship Services Program to provide Family Dispute Resolution Services across Australia.⁵¹⁵

The Family Law Act encourages couples to resolve their separation dispute through family dispute resolution or family counselling instead of going to court. From July 2007, before going to court on a parenting issue, the parties must first try family dispute resolution. The court will not be able to hear an application for a parenting order unless a certificate from a family dispute resolution practitioner is filed with the court application. The changes require parents who want to take a parenting matter

⁵¹⁴ Kaspiew, Rae, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, Australian Institute of Family Study, *Evaluation of the 2006 Family Law Reforms; Summary Report* (Australia: Australian Institute of Family Study, 2009). <http://www.aifs.gov.au/institute/pubs/file/summaryreport.html>. The report notes that the 2006 reforms were partly shaped by the recognition that although the focus must always be on the interests of the child, many of the disputes over children following separation are driven by relationship problems rather than legal ones. The report further states that these disputes are often better suited to community-based interventions that focus on how unresolved relationship issues impact on children and assist in reaching parenting agreement that meet the needs of children.

⁵¹⁵ Family Relationship Centre. Brochure Family Relationship Centre; (Australia: FRC Melbourne, 2008), www.familyrelationships.gov.au. (given by Di Moloney after an interview at the Centre on 1/6/2011)

to court, to first attempt family dispute resolution with a registered family dispute resolution practitioner.⁵¹⁶

This requirement to attend family dispute resolution⁵¹⁷ however, does not apply in some cases, such as those involving family violence or child abuse.

In this regard, any parties, who wish to begin parenting actions in the Family Court of Australia, are obliged to provide a Certificate⁵¹⁸ from a Registered Family Dispute Resolution Practitioner explaining how the parties dealt with mediation.

In maintaining the quality standard of mandatory mediation imposed on family mediation, the Australian government has made a stringent requirement for qualification of family mediators; anyone who wishes to mediate in the Family Law field and be eligible to issue a Section 601 Certificate, must go through a process of registration through a government body⁵¹⁹.

Further, it is a requirement for anybody who wishes to be registered as a Family Dispute Resolution Provider to have their training assessed by a governing body to ensure that they have at least the minimum required standards. Only then the mediator will be put on the Register and issued a registration number that must be

⁵¹⁶ *Ibid.*

⁵¹⁷ Family dispute resolution is the name in the Family Law Act for services such as mediation and conciliation that help people affected by separation and divorce to sort of their disputes with each other.

⁵¹⁸ See Appendix C of this thesis.

⁵¹⁹ See Wolf, Vivienne, *Family Mediation is Alive and Well in Australia*, http://www.articlealley.com/print_493193_html.

used on the relevant Certificates. Thus, parties have the innate safeguards that the mediator they choose is not incompetent. Besides, organisations which legitimise mediators by virtue of their employment with them, must undertake the proper checks and balances of their credentials.⁵²⁰

4.3.2.1 Centres offering Family Mediation in Australia

For some guidelines, emphasis is given on some of the centres that offer family mediation;

4.3.2.1.1 Family Relationship Centre (FRC)

The Report on the Evaluation of the 2006 Family Law Reforms states that the changes to the family relationship services system included the establishment of 65 FRCs throughout Australia,⁵²¹ funding for new services, and additional funding for existing services. The FRC's aim is to provide assistance for families at all relationship stages, and offer impartial referral, advice and information aimed at helping families to strengthen their relationships and deal with relationship difficulties. They also provide family dispute resolution (FDR) to separating families to assist with the development of parenting arrangements. The first fifteen FRCs commenced operation from July 2006 and 64 were operational by July 2008. The final centre opened in October 2008.⁵²²

⁵²⁰ *Ibid.*

⁵²¹ The report stated that it was designed to provide a gateway to the system for families needing assistance. Kaspiew, Rae, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, Australian Institute of Family Study, *Evaluation of the 2006 Family Law Reforms; Summary Report* (Australia: Australian Institute of Family Study, 2009).
<http://www.aifs.gov.au/institute/pubs/file/summaryreport.html>

⁵²² *Ibid.*

The Centre has a focus on providing family dispute resolution (mediation) to enable separating families achieve workable parenting arrangements outside the Court System. The Centre may also refer the parties to other services that can help. Funded⁵²³ by the Australian Government, the Centres are staffed by independent, professionally qualified staff⁵²⁴ offering confidential and impartial services in a welcoming, safe and confidential environment. Many of the services are free or are offered on a sliding scale, according to the level of income.

Where families separate, the Centres provide information, advice, group sessions and dispute resolution to help people reach agreement on parenting arrangements without going to court.

The Family Relationship Advice Line also provides free information, advice and referral services. Family Relationships Online provides access to information about the changes to the family law system and about family relationship issues and services available to assist families.

⁵²³ Family Relationship services are funded by the Australian Government via the Family Relationship Services Program (FRSP).see the The Report, *Ibid*.

⁵²⁴ Each Family Dispute Resolution Practitioner has a tertiary qualification in the social sciences field with practical experience in family and relationship support. See <http://www.centacareq.org.au>. According to Di Moloney of FRC Victoria, Family Mediator of FRC must have a basic degree in law, psychology or social science and a diploma in alternative dispute resolution. The teaching of diploma is offered by Relationship Australia. There is a requirement of 20 hours experience with client (with a principal mediator) before being accredited as family mediator at the centre. Interview with Di Moloney at the FRC Melbourne on 1 June 2011.

In regard to mediation⁵²⁵ Family dispute Resolution Services help separated parents and families to resolve disputes in relation to living arrangements, care and parenting of children.⁵²⁶ Dispute Resolution aims to develop mutual agreements after considering a range of options proposed by parents with the help of Family Dispute Resolution Practitioners by facilitating the process.

There is no specific Act or standard issued, but as the mediators are required to have additional diploma in family mediation and a minimum training of 20 hours, it is submitted that the quality of mediation offered is observed. Mediators are also subject to National Mediators Accreditation System.

It is to be noted that the centre is funded by the government and staffed by independent and professionally qualified staff. The free service or minimum fees charged is seen not to give a burden on the parties and the assurance on quality service determines the effectiveness of the application. Thus, it can be said that negotiation and mediation in the family relationship centre, can offer a better place to achieve workable parenting arrangements than arguing and litigating for the same in the court system.

⁵²⁵ The centre also offering Counselling services that are available to discuss issues arising at any stage of the relationship. Counselling aims to help the parties cope with personal issues affecting the parties life and strengthen the parties capacity to deal with these issues (*Achieving positive outcome through Counselling & Mediation*, Family Court of Australia).

⁵²⁶ To note that the mediation process only limit to the interest of child after separation. It helps the parents to work out for the best of the child. The centre has no capacity to deal with the asset or property of the parties after the separation.

4.3.2.1.2 Relationships Australia, Victoria (RAV).

RAV is a community-based, not-for-profit organization, with no religious affiliations. The aim of the Centre is to enhance the lives of families and communities by helping them build strong relationships through the provision of relationship specialist.⁵²⁷

RAV has its roots in the marriage guidance movement which was developed in Melbourne in 1948. The early organizers were community-spirited people, clergy, doctors and professionals; it also includes some persons of high social rank in the philanthropic and charitable areas.⁵²⁸

In the early years in Melbourne, activities were based in the homes of the organisations' members, moving to rented premises as the organization expanded. The name Marriage Guidance Council of Victoria was adopted in 1952 reflecting the organisations' growing state-wide focus.⁵²⁹ The late seventies and early eighties saw increasing professionalization of services. This resulted in the recruitment of paid professional staff, the phasing out of trained volunteer counsellors, and the reluctant closure of some centres because of significantly increased costs.⁵³⁰

The eighties and nineties were a period of growth through successful securing of government funding for new programs including the family dispute resolution

⁵²⁷ RAV provides services from 12 centres in metropolitan Melbourne and regional Victoria. The corporate support team is based in Camperwell. See Relationships Australia, Victoria, Relationships Australia homepage, 22 Feb 2012, http://relationshipsaustralia.com.au/sub_aboutus/aboutus.html

⁵²⁸ *Ibid.*

⁵²⁹ At different times there were regional committees at Albury, Ballarat, Bendigo, Geelong, Gippsland, the Goulburn Valley and Sunraysia. Counselling was provided in these areas as well as at Kew, Coburg, Horsham, Stawell, Doveton-Dandenong and Warragul. See *Ibid.*

⁵³⁰ *Ibid.*

services, specialist family violence services and counselling services for problem gambling.⁵³¹

More recently, family law reform has seen RAV undergo more growth. The Centre successfully tendered for eight (8) Family Relationship Centre (FRC).⁵³² From an organization delivering primarily ‘marriage guidance’ the centre evolved to one that provides a diverse mixture of professional services to suit the needs of an increasingly complex and diverse community.

RAV⁵³³ offers a diverse range of relationship support services, *inter alia*, Relationship Counselling, Family Dispute Resolution, Family Violence Prevention, Relationship Skills Courses, Gambler’s Help Counselling and Community Liaison, Telephone Relationship Counselling, Men and Family Relationships Post Separation Parenting as well as Workplace Services.⁵³⁴

The Centre is also very active in the area of family relationship services through Family Relationship Centres (FRCs)⁵³⁵ established by the Australian Government as part of reform of the family law system in 2005.

⁵³¹ *Ibid.*

⁵³² four as lead agency and four as consortium members- and six early intervention services. See *Ibid.*

⁵³³ There are many other centres that also provide similar services i.e., Centacare, Lifeworks, Anglicare and few others. Lifeworks for example are partially funded by the government. Besides family matters, lifeworks also expands its service to Employee Assistance Programs for organization and their employees.

⁵³⁴ The Centre provide these services from eight centres-Ballarat, Boronia, Cranbourne, a Greenborough, Kew, Shepparton, Sunshine and Traragon. See *Ibid.*

⁵³⁵ Along with the consortium partners in the centres at Ballarat, Broadmeadows, Geelong and Ringwood. RAV is also involved in eight of the 15 FRCs in Victoria, four as the lead agency at Berwick, Greensborough, Melbourne and Sunshine. See *ibid.*

RAV runs accredited training and development Professional Training for those seeking to acquire or enhance their skills to provide relationship support and family dispute resolution services. The Centre is a registered training organization and one of only three organizations in Australia accredited to teach the Vocational Diploma in Family Dispute Resolution.⁵³⁶ To ensure a quality service, RAV employs a dedicated team of highly-skilled and qualified professionals with expertise in counselling, family dispute resolution, skills development and training.

There is no specific Code of Conduct or Ethics issued, but the mediators must have complied with the stringent requirements imposed on family mediators as well as on organizations offering training on mediation. Further, they are subject to the national practice standards and approval standards before being given an accreditation. Thus, the quality service of family mediation in Australia is assured.

Similar with Family Relationship Centre, the law reform, the funding from the government and the observation of quality service has contributed to the success of RAV in promoting family mediation.

4.3.3. Family Mediation in Singapore

The introduction of family mediation in Singapore started with the increasing number of divorce cases yearly. The total number of marriages registered in

⁵³⁶ *Ibid.*

Singapore in 1994 was 24, 654⁵³⁷. As the number of marriages has increased over the years, the number of family conflicts due to divorces has also increased. In 1994, the number of divorces constituted some 15 per cent of the marriages.⁵³⁸

In 1994, a total of 3, 585 divorces were granted, comprising 2,503 marriages registered under the Women's Charter and 1,082 under the Administration of Muslim Law Act. Divorcing couples under the Women's Charter were predominantly Chinese who accounted for 86% of divorces, while Malay couples accounted for 84% of Muslim divorces.⁵³⁹

Due to the increased number of cases, the Family Court was introduced in January 1995. With the aim of bringing all matters involving members of the family under one roof and to improve the efficacy of the judicial system in providing a better and more comprehensive service to the public and to minimize inconveniences, the Family Court was created to take over the functions of the 'former court 25' of the Subordinate Court. With the establishment of the Family Court, mediation was formally introduced. Mediation in family cases concern mainly maintenance and domestic violence issues. With effect from 1 April 1996, divorce cases involving the settlement of matrimonial property and custody of children issues are also heard at

⁵³⁷ Of these, 20, 251 were in respect of non- muslim marriages registered by the Registrar of Marriages.

⁵³⁸ See Lim Lan Yuan, Liam Thiam Leng, Family Mediation in *Court Mediation in Singapore*. (Singapore; FT Law and Tax Asia Pacific, 1997), p 129-130.

⁵³⁹ *Id.* at 130.

the Family Court. Court statistics have shown a success rate of more than 85% in 1995 for cases which have been mediated.⁵⁴⁰

Following this development is the private family mediation, where in 1997, Eagle Mediation and Counselling Centre was then established.

Similar with Australia, it can be seen that the increase of divorce cases is the main reason that influence the movement of family mediation in Singapore.

4.3.3.1. Centre offering Family Mediation;

4.3.3.1.1 Eagles Mediation & Counselling Centre

The Eagles Mediation and Counselling Centre (EMCC) were set up in October 1997. Starting with the name ‘Eagle Communication’, the centre provides mediation, counselling and consultancy services to assist people and organization in conflict. It also provides education and training programmes⁵⁴¹ and engages in research with an aim to advance mediation practice in the region. The EMCC mediates mainly family and marital disputes, as well as divorce cases.⁵⁴² It is a non-for-profit organization⁵⁴³

⁵⁴⁰ See Lim Lan Yuan, Liam Thiam Leng, *Ibid.*

⁵⁴¹“ The first campus mediation centre was set up by the EMCC and the Temasek Polytechnic in January 1998. It is run by the staff from EMCC and provides mediation services for students and members of the public. It also serves as a training laboratory for the Temasek Polytechnic’s Legal Studies students. A 40-hour mediation curriculum has also been developed. The students are taught mediation theories and skills, and are trained to mediate disputes among their peers. They are hence equipped with appropriate mediation skills and are trained to mediate disputes among their peers. They are hence equipped with appropriate mediation skills by the time they graduate to join the workforce as para-legals”. See Boule, Laurence, Teh Hwee Hwee, *Mediation, Principle, Process Practice*, (Asia; Butterworth, 2000), 242-243.

⁵⁴² Boule, Laurence, Teh Hwee Hwee, *Ibid.*

⁵⁴³ It is a private initiative.

that is committed towards enabling people to lead better lives through its range of services.

The centre is a full member of the National Council of Social Service (NCSS) and an approved institution of Public Character (IPC). As one of the region's foremost organizations that pioneered family mediation and training, it has been appointed to provide specialized mediation service at the Tribunal for Maintenance of Parents and the Family Court⁵⁴⁴. EMCC is one of the agencies in the region with expertise to provide integrative services in mediation and psychotherapy.⁵⁴⁵

EMCC is funded through public donations and is given the privilege to issue double tax exemption to its donors. It also receives project funding from NCSC. It is to be noted that EMCC is the pioneer in family mediation and counselling. It was reported that the mediation service offered by EMCC attains a high settlement rate of 80% of success rate.⁵⁴⁶

There are an increasing number of cases yearly. The statistics⁵⁴⁷ shows that in the year 2010, EMCC mediators had conducted 12% more sessions as compared to the previous year. Mediation cases were mainly related to separation/divorce disputes (financial maintenance and child custody matters) and family disputes.⁵⁴⁸

⁵⁴⁴ In 1999, 151 cases were mediated at EMCC, most of which were referred by the Family Court.

⁵⁴⁵ EMCC (Eagles Mediation and Counselling Centre), *Annual Report 2010*, www.emcc.org.sg

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

In addition, EMCC mediators are actively advocating mediation through their equipping courses as well as tasks in various corporations and government agencies.⁵⁴⁹

4.3.3.1.2 Singapore Mediation Centre; Matrimonial Mediation Scheme

The demand of family disputes has influenced the Singapore Mediation Centre (SMC) to develop the Matrimonial Mediation Scheme. The Scheme is designed to help couples who are going through divorce or separation to resolve complicated issues in the dispute. Such issues may include custody of children, spousal maintenance, division of family assets and other financial matters arising from breakdown of the relationship.⁵⁵⁰

The aims of the SMC Matrimonial Scheme are to encourage a constructive and conciliatory approach to the resolution of matrimonial disputes, to resolve matrimonial disputes in an effective and timely way, to reduce emotional turmoil and ensure that proceedings are for all parties involved as well as to ensure that costs are kept affordable for parties.⁵⁵¹

⁵⁴⁹ There is an increasing counseling caseloads by 25%. EMCC has the privilege to promote awareness of counselling through Corporate Workplace Emotional Health Programme in Civil Service College. Besides, EMCC continued to partner with National Junior College and Raffles (Institution) Junior College to provide counselling support programmes to empower students to maximize their potential in both academic and personal goals. See *Ibid.*

⁵⁵⁰ Singapore Mediation Centre, SMC homepage, *Mediation at a Glance*, 27 Feb 2012, http://www.mediation.com.sg/mediation_glance.htm

⁵⁵¹ See *Ibid.*

Other than the highly qualified and skilled Principal Mediators on the SMC panel, SMC has also accredited experienced Family Law Practitioners as SMC Associate Mediators for the Matrimonial Mediation Scheme.

SMC offer parties more time on mediations. SMC mediators will set aside at least one full day to help parties resolve their differences. By investing fully in the mediation process, the potential to obtain solutions that bring about peaceful resolution for the parties can be obtained. The couples in dispute will not meet this type of opportunity in court litigation. About 75% of the cases mediated in SMC result in settlement, and more than 90% of these cases are settled within a day.⁵⁵²

4.3.4. Guides for Family Mediation in Malaysia

It is observed that the establishment of Family Relationship Centres or Family Mediation Centres in Australia and Singapore were due to the high increase of divorce and conflict of interest that caused divorce and separation of parents. The increased number of divorce will lead to increased number of cases pending in the court system. In this regard, mediation has been introduced in the court to expedite the cases as well as to give better solutions to the parties. The effectiveness of mediation adopted by the Family Court⁵⁵³ has influenced the Government and private organizations to offer mediation out of court. Mediation is seen to be one of the ways

⁵⁵² Singapore Mediation Centre, SMC homepage; Mediation, *Family Law Mediation Pilot Project*, 27 Feb 2012, http://www.mediation.com.sg/mediation_family_law_pilot_prj.htm

⁵⁵³ As in Singapore

that could simplify conflict between the parties to negotiate the best interest for their children after separation.

It is also observed that the centres do not offer only family mediation, but also offer a range of services that relates to strengthening family relationship, family counselling, family violence prevention, post separation parenting and few others. Mediation is a part of service offered to enable parties to negotiate for the best interest of their children after the separation. On this basis the centres are known as family relationship centre⁵⁵⁴ rather than a mediation centre.

It is also noted that family dispute mediators need to be equipped with certain skills. Stringent requirements are imposed on family mediators and family mediation operators in Australia. As noted earlier anyone who wishes to mediate in the Family Law field must go through a process of registration through a government body. The basic requirement for a mediator at the Family Relationship Centre is to have a degree in law or psychology or social science and to obtain a diploma in dispute resolution in a recognized and registered Family Dispute Resolution Provider. The training offered by the Family Dispute Resolution provider is assessed by a governing body to ensure that they have at least the minimum required standards. Before being accredited it is a requirement for the family mediator to have practical experience of 20 hours with clients together with the accredited mediator. The stringent requirement

⁵⁵⁴ Besides Family Relationship Centre, there are other centres offering mediation, for example, Relationship Australia, Lifeworks and others. In Singapore, Eagle Mediation and Counselling Centre also provides a range of service as stated above. In Hong Kong, it is known as Family Welfare Centre.

is for the assurance of quality mediation. Mediation is not just merely offered, but with the assurance of quality.

In ensuring the quality of family mediation service, the Singapore Mediation Centre in introducing matrimonial mediation scheme has accredited its highly qualified and skilled Principal Mediators on the SMC Panel as well as experienced Family Law Practitioners as SMC Associate Mediators.⁵⁵⁵ It can be seen that the centres observe the quality in delivering service.

Besides, as noted earlier, SMC offers parties more time on mediation. SMC mediators will set aside at least one full day to help parties resolve their differences. By investing fully in the mediation process, the potential to obtain solutions that bring about peaceful resolution for the parties can be obtained. The parties will not meet with this opportunity in court litigation.

The amendment in the Family Law Act⁵⁵⁶ that requires parties in dispute to obtain a certificate from family relationship practitioner before filing any case in court is seen to be a pushing factor that moves family mediation to be well practised and known in Australia. Further, pursuant to the amendment, initiative from the government to establish family relationship centres is seen to be a platform for family mediation developed, accepted and preferred by the community. Therefore, parties are diverted

⁵⁵⁵ Singapore Mediation Centre, SMC homepage; Mediation, *Family Law Mediation Pilot Project*, 27 Feb 2012, http://www.mediation.com.sg/mediation_family_law_pilot_prj.htm

⁵⁵⁶ In Australia

to resolve their cases in a more cooling manner that could benefit the children most rather than to file it in court and receive whatever judgment given by the judge.

It is further observed that some of the centres are fully funded by the government, partially funded, and there are also institutions that are set up on the initiative of private institutions or individuals. The importance of family mediation and counselling in strengthening the family institutions as well as to dissolve disputes in an amicable manner has influenced the government and the private institutions to set up such a centre. The awareness programme on the importance and relevance of mediation in family mediation therefore needs to be upgraded in the Malaysian society.

Looking at the scenario in Malaysia, the divorce cases are increasing yearly.⁵⁵⁷ In the year 2005, the number recorded was 17,708 for Muslims and 3,804 for non-Muslims. In the year 2006, the number increased to 21,419 for Muslims and for non-Muslims it increased to 5,747. There was a slight decrease in the year 2007, where it was recorded at 20,529 for Muslims and 4,335 for non-Muslims. However, for Muslims, it was further increased in the year 2008 to 22,289. The year 2009 recorded a higher increase where the number rocketed to 27,116.

⁵⁵⁷ Statistics from the Department of Islamic Development Malaysia (JAKIM) and National Registration Department (JPN).

Table 4.10. Statistic of Divorce Di Malaysia Source; Department of Islamic Development (JAKIM) and National Registration Department (JPN)

Year	Muslims	Non-Muslims
2000	13,536	1,613
2001	13,187	3,238
2002	13,841	3,793
2003	15,543	3,318
2004	16,509	3,291
2005	17,708	3,804
2006	21,419	5,747
2007	20,529	4,335

The increasing number of divorce cases will definitely increase the number of cases filed in the court system. Even though the delivery system in the Shariah and Civil Court has been upgraded, with the increasing number of cases filed yearly, the pending cases queuing for judgment will be long lists. On this basis, the researcher submits that the establishment of Family Relationship Centres or Family Mediation and Counselling Centres are recommended. Such centres should not only provide mediation, but also offer a range of services for strengthening family institutions. The centre may provide counselling and guidance to help couples improve, enhance and preserve their relationship. Besides, the centres may also offer mediation for parties in conflict to negotiate in the best manner and resolve their dispute amicably.

In setting up the centre, the recommendations as noted above are to be considered, quality of mediators need to be observed as family disputes involved emotional and relational issues. Family mediators need to be adequately trained. Modules for family mediation training must be properly designed and made available at the institutions or organization offering the training. Specific requirement of practical experience before conducting mediation should also be adhered with as an assurance of quality service. Furthermore, continuous education to the public is needed to increase awareness. Amicable settlement in family dispute will help the separated parties and their children to live more harmoniously.

4.4 Commercial Mediation

Due to the increase number of commercial cases filed into the court system, this dissertation views that the movement of commercial mediation in Malaysia should be looked into.

4.4.1 The development of commercial mediation

The ADR movement in the US has influenced many commercial disputes to be settled by mediation and other forms of ADR. The flexibility nature of mediation is the factor for the mediation to be adapted to businesses of all sizes and complexity.⁵⁵⁸

⁵⁵⁸ Lim Lan Yuan, *The Theory And Practice Of Mediation*, (Singapore; FT Law & Tax Asia Pacific 1997) 243-250

The movement for commercial mediation started in 1979 where the general counsel of several Fortune 500 companies in the US banded together to form Legal Programme to Reduce the Costs of Business Disputes, under the auspices of the Centre for Public Resources (CPR) in New York. Since then, 600 US corporations, representing nearly half of the gross national product, have signed a pledge with CPR to explore alternatives to litigation whenever they have disputes with other signatories.⁵⁵⁹

It was reported that mediation is the most promising among the various techniques. Mediation was termed as the ‘sleeping giant’ of business dispute resolution by a 1985 guide for business executives with legal disputes, potentially as it is the most powerful means of bringing the parties to terms. Since that time, commercial mediation has increased exponentially with a greater use of mediation adopted to resolve conflicts among businesses. The mediation of business disputes may involve only managers, meeting jointly and separately with a mediator; it may involve only their attorneys; or it may involve both.⁵⁶⁰

The growth of commercial mediation is also seen in the court practice where judges routinely refer business disputes on their own dockets to mediation. Others are authorized or required to do so by statutes, such as those in Florida, Texas, Indiana,

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

and experimentally, in North Carolina, or by court rules, such as the civil rule in Washington, DC.⁵⁶¹

Despite the courts' growing success with mediation, it was observed that the greatest potential of mediation for business probably lies in the early stage of a conflict, before disagreements have escalated, before disputants have incurred the costs of preparing a case for trial, perhaps even before they have hired lawyers. This potential can be realized only when the businesses themselves, rather than the courts, begin to take their disputes to mediators.⁵⁶²

Singer commented that in the US, a number of businesses have begun to do so. A group of franchises has formed the National Franchise Mediation Programme, an experiment in resolving disputes between franchisers and their franchisees. Designed and managed by the Centre for Public Resources in New York, the programme offers a multi-step dispute settlement process. The idea is to enable franchisees, whose success depends on their maintaining positive and productive business relationships with one another, to settle most disputes themselves through mediation. Founding members include Burger King, Dunkin' Donuts, Hardee's, Holiday Inn Worldwide, Jiffy Lube, Kentucky Fried Chicken, McDonald's Pizza Hut, Southland, Taco Bell and Wendy's.⁵⁶³

⁵⁶¹ Singer, Linda R, *Settling Disputes*, (San Francisco;Westview, 1994) cited in Lim Lan Yuan, *Ibid*.

⁵⁶² *Ibid*.

⁵⁶³ *Ibid*.

Davis clarifies that in commercial mediation, the person attending from the clients must usually have authority to settle. This may mean that the in-house lawyer brings a senior executive to mediation. This will require the executive to spend a great deal of time understanding thoroughly the issues in the case, reviewing the facts and merits, and deciding what would be acceptable.⁵⁶⁴

The executive in question then devotes at least an entire day to the ADR process, possibly 12 hours or more, with the parties and the lawyers for both sides. This commitment in terms of time and energy will inevitably increase the chances that the decision-maker will resolve the disputes during the ADR process, possibly on terms which might otherwise have been regarded as unacceptable based on substantially less commitment of time and energy.⁵⁶⁵

The decision-maker may form a different, possibly more realistic, view of the merits of the case in light of the representations made by the other side during the mediation or by having the case 'tested' by the mediator. Previously entrenched positions may shift.⁵⁶⁶ This process has made mediation to be a favourable mode to resolve business conflicts. As compared to court litigation it may take such a year to resolve the same issue.

⁵⁶⁴ Davis, Simon, "ADR: What Is It and What are The Pros and Cons", *ADR and Commercial Disputes*, Ed. Russel, (London: Sweet & Maxwell Ltd., 2002), at 5

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid*

On the development of commercial mediation, Boulle and Nesic⁵⁶⁷ commented that the mediation studies conducted in England and Wales confirm enthusiasm for mediation by commerce and industry. For example, Genn's study of the Central London County Court Mediation Pilot indicated that in 45% of the cases mediated, both parties were companies and in 39% of cases, at least one party was a company. In 22% of the latter cases a company was a defendant and in 17% of those cases, the company was the claimant⁵⁶⁸. In addition, Genn revealed that the rate at which both parties accepted mediation was highest when a company was a party. Other evidence was from a survey of 500 West Midland companies by DLA in 1999, indicated that 37% of respondents had considered using mediation clauses. The CEDR MORI poll in 2000 also highlighted that the observations of lawyers and their business clients are driving the impetus. Centre for Dispute Resolution statistics provide an insight into the largest industry users of mediation. The Centre's 2000 statistics show that the construction industry is the largest single user of mediation, followed by banking, law firms, the IT industry and insurers.⁵⁶⁹

Boulle and Nesic also state a number of reasons that have been advanced to explain the enthusiasm for mediation by commerce and industry. On the one hand, ADR provides a cheaper and more expedient dispute resolution mechanism and on the other, it enables business clients to quickly recover monies from other parties. Genns'

⁵⁶⁷ Boulle, Laurence, Miryana Nesic, *Mediation, Principles, Process, Practice*, (London: Butterworths, 2001) at 284-285

⁵⁶⁸ H Genn, *Central London County Court Mediation Pilot: Evaluation Report*, LCD Research Series, No 5/98, at 29 cited in Boulle and Nesic. *Ibid*.

⁵⁶⁹ CEDR, Press Release *CEDR Commercial Mediation Statistics April 1999-March 2000*, CEDR, July 2000 cited in Boulle and Nesic. *Ibid*

research on the Central London County Court Mediation pilot project revealed that ADR allowed businesses to achieve control over the settlement of the dispute. 56% of respondents to the West Midland survey conducted by DLA admitted that they lost control over a matter when litigation began, which was a source of considerable dissatisfaction for them.⁵⁷⁰

The development of commercial mediation in Malaysia, therefore, needs to be looked into, the applications in Australia and Singapore are given emphasis in this dissertation as guidelines for us to have a better look in commercial mediation and improve the application.

4.4.2 Commercial Mediation in Australia

As Sourdin, T commented, the growth in ADR in the business sector has been linked to social-sector ADR growth and increased awareness about ADR benefits. In addition, the growth in knowledge, availability and support of ADR processes has been increasingly focused on reducing risks that impact adversely upon the operation of businesses. Business-continuity management approaches are founded on the notion

⁵⁷⁰ Boulle and Nesic, *loc.cit.* It was further stated that there have been examples of the use by industry in the UK of ADR pledges, non-binding expressions of commitment to ADR, in the insurance and IT industries. For example, Intermediation had developed an Endorsement of Principles, designed to encourage active ADR implementation in industry. By signing the document, organizations:

‘...express...commitment to consider the range of ADR available....and confirm... (an) intention, when....ADR (is used), to do so in good faith and as a serious attempt to resolve the issues concerned.’

that risks is inevitable part of any business and strategies that can accept, transfer or mitigate risks can be employed.⁵⁷¹

It is observed that private sector has played an active role in the development of mediation practice in Australia, in particular, the commercial mediation. There are many organizations that offer such a service, some of the well-known ones include LEADRS in ADR (LEADR), the Australian Commercial Dispute Centre (ACDC), Mediate Today, the Conflict Resolution Network, the law societies and bar associations of the various states, and the Australasian Dispute Centre (ADC) whose members represent other mediation groups as well as stakeholders.⁵⁷²

It is interesting to note⁵⁷³ that these organisations offer a rich variety of mediation services including mediations, panels of mediators who are available to mediate disputes, mediation venues, standard mediation documentation (for example, agreements to mediate, mediation clauses), publications about mediation, and conferences. Mediations conducted by these organizations may take place within the framework of court referrals to an external mediation provider. It is also observed that further expansion is also the result of a growing awareness of the need to manage intra and inter-organisational conflict as part of an overall risk management strategy. In this regard, Sourdin T referred to the formulation of standards for use in the

⁵⁷¹ Sourdin ,Tania, *Alternative Dispute Resolution*, (New South Wales: LawBook Co., 2009), at 120-121.

⁵⁷² See Alexander, Nadja, “What’s Law Got To Do With It?, Mapping Modern Mediation Movements in Civil and Common Law Jurisdiction, *Bond Law Review*: Vol13: Iss. 2Art.5, 2001, <http://epublications.bond.edu.edu.au/blr/vol13/iss2/5>

⁵⁷³ As commented by Nadja, Alexander, *Ibid*.

prevention, handling and resolution of disputes in a business context as evidence of growing importance of mediation in the private sector.⁵⁷⁴

Further, many industries have integrated mediation and other forms of ADR into their dispute management process/grievance procedures without legislative compulsion.⁵⁷⁵

Examples of these disputes management schemes include the Telecommunications Industry Ombudsman, the Life Insurance Complaints Scheme, the Australian Banking Industry Ombudsman and the National Electricity Code. Such schemes are generally focused on resolving consumer complaints through mediation or other ADR processes.

The Law Societies have also played a very important role in the development of ADR and in particular, mediation as a mainstream dispute resolution process. Several programmes were conducted to enhance the mediation practice *inter alia*, the settlement week, the development of training programs, approved mediator schemes, literature on mediation and the promotion of mediation to the wider community. As law societies are professional bodies that represents the interests of their members, that is solicitors, it follows that all mediators who wish to offer services via the law society must also be admitted to practice as solicitors. Australian Bar Associations also offer similar services to their barrister members.⁵⁷⁶

⁵⁷⁴ *Ibid.*

⁵⁷⁵ T Altobelli, "Mediation in the Nineties: The Promise of the Past" *Fifth National Mediation Conference*, (Brisbane, May 2000) cited in Alexander, Nadja, *Ibid.*

⁵⁷⁶ Alexander, Nadja, *Ibid.*

4.4.2.1 Organisations offering Commercial Mediation and Training

4.4.2.1.1 Institute of Arbitrators and Mediators Australia (IAMA)

Founded in 1975 as a not-for-profit company limited by guarantee, the Institute of Arbitrators & Mediators Australia (IAMA) is Australia's largest, independent and most experienced arbitration and mediation service. The IAMA has a strong commitment to multi-disciplinary fellowship and learning. The IAMA aims to serve the community, commerce and industry by facilitating efficient dispute resolution methods including mediation and conciliation. It is Australia-wide, with members represented in all States and Territories.⁵⁷⁷

The IAMA has the following objectives:

- a). to promote, encourage and facilitate the practice of settlement of disputes by arbitration and other forms of non-curial dispute resolution.
- b). to serve the community, commerce and industry by facilitating effective dispute resolution
- c). to afford means of communicating between professional arbitrators, mediators, and other dispute resolvers on matters affecting their interests.
- d). to support and protect the character, status and interests of the dispute resolution profession generally.
- e). to promote the study of the law and practice relating to arbitration and dispute resolution.

⁵⁷⁷ Institute of Arbitrators and Mediators, *IAMA homepage*, 23 Mac 2012, <http://www.iama.org.au/rules.htm>

- f). to disseminate information amongst members on all matters affecting dispute resolution practice and procedure.
- g). to print, publish and circulate such journals, papers, and other itinerary undertakings and to contribute articles to magazines as may seem conducive to any of these objects.
- h). to form a library for the use of members and to provide suitable rooms for the holding of hearings, conferences, lectures and meetings.
- i). to provide means of training and testing the qualifications of candidates for admission to professional membership of the Institute by examination and for such purposes to award certificates, establish scholarships, rewards and prizes.
- j). to establish branches in important centres of the States and Territories of the Commonwealth.⁵⁷⁸

Over the years the Institute has developed a number of Rules and Guidelines⁵⁷⁹ for the conduct of various alternatives dispute resolution. In regard to mediation, the following rules have been issued:

- 1) Conciliation Rules
- 2) Conciliation Agreement
- 3) Mediation Rules
- 4) Rules of Conduct for Mediators
- 5) Rules of Professional Conduct

⁵⁷⁸ *Ibid.*

⁵⁷⁹ See *ibid.*

It can be seen that IAMA does not only offer mediation service but actively involve in promoting and giving training of the same.

4.4.2.1.2 Australian Commercial Dispute Centre Limited (ACDC)

The Australian Commercial Disputes Centre Limited (ACDC) is an independent, not-for-profit organization established in 1986 to introduce and develop non-adversarial dispute resolution processes in Australia. Today, ACDC, stands at the forefront of alternative dispute resolution (ADR) in Australia, promoting and advancing excellence in ADR practice, innovation and education. ACDC promotes the use of ADR procedures, such as mediation, to business, government and organizations across the country through training, advice and consultancy. These procedures are now being adopted as part of the overall approach of business and government to dispute resolution.⁵⁸⁰

The ACDC also provides mediation guidelines and samples clauses online for convenience of companies to refer in drafting and inserting such a clause in the agreement.

4.4.2.1.3 Leading Edge Association of Dispute Resolution (LEADR)

LEADR, formerly known as Lawyers Engaged in Alternative Dispute Resolution (LEADR), is an Australasian, not-for-profit-membership organization formed in 1989 to serve the community by promoting and facilitating the use of consensual dispute

⁵⁸⁰ Australian Commercial Dispute Centre, *ACDC homepage*, 7 Apr 2012, <http://www.acdcltd.au/about-us>

resolution processes generally known as ADR. LEADR is a source for mediators for the business, legal and broad community sectors. LEADR provides training at all level of skills from the basic course through to advanced workshops and continuing professional development.⁵⁸¹

LEADR aims to:

- a). serve the community by promoting and facilitating the development, acceptance and usage of ADR.
- b). promote education and research in ADR.
- c). disseminate information for the benefit of its members and the community.
- d). provide simple and effective access to dispute resolution professionals.
- e). assist organization in developing effective grievance handling procedures.
- f). ensure excellence in the delivery of ADR solutions to the region through training, accreditation and development of a national standard for practitioners.

It can be seen that in Australia, mediation has also been widely accepted in commercial area. This could be due to the vigorous efforts of the abovementioned institutions as well as other private institutions in promoting and educating mediation. All the above organizations not only offer the mediation service,⁵⁸² but also offer training and facilitating the development of mediation particularly in the commercial sector. What can be learnt here is that in enhancing mediation, training and education

⁵⁸¹ LEADR-Association of Dispute Resolvers, *LEADR homepage*, 16 Apr, 2012, <http://www.leadr.com.au/aboutleadr.htm>.

⁵⁸² ACDC do not offer mediation service but the but the training and education on ADR inclusive mediation.

should be at the forefront. The centres also do not limit their service on commercial mediation, but also provide other types of mediations⁵⁸³ as well as a wide range of services on ADR.

4.4.3. Commercial Mediation in Singapore

The development of commercial mediation in Singapore could be referred to the establishment of Singapore Mediation Centre in the year 1997. It started with a pilot project called the Commercial Mediation Service under the Singapore Academy of Law (SAL).⁵⁸⁴ The SMC was launched by the Honourable Chief Justice Yong Pung How on 16 August 1997. With support of the Singapore Judiciary, the SAL, the Ministry of Law (MinLaw) and various professional and trade associations, the SMC has successfully spearheaded the mediation movement in Singapore.⁵⁸⁵ The SMC's main function is the provision of mediation services.

Goh Joon Seng⁵⁸⁶ commented that as mediation becomes increasingly popular as a means of dispute resolution, more and more professional organizations and trade bodies are also providing mediation services. Often these services are meant for disputes between the public and their members. For instance, the Insurance Disputes Resolution Organisation (IDRO) was created by the life and general insurance

⁵⁸³ Such as community mediation.

⁵⁸⁴ See Goh Joon Seng, *Mediation in Singapore : The Law & Practice* http://www.aseanlawassociation.org.doc/w4_sing2. In late 1996, lawyers with suitable cases were contacted to consider having their matters mediated. The first case under this service was successfully mediated on 16 January 1997.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Goh Joon Seng, *Ibid.*

industry to resolve insurance disputes between the insured and the insurer. Other examples would be the Association of Banks in Singapore (ABS) which has a Consumer Mediation Unit which handles disputes between clients of banks and their bank members; the Institute of Estate Agents (IEA) which has a Mediation Board to handle disputes between members of the public and estate agents; and the National Association of Travel Agents in Singapore (NATAS) which has a Consumer Affairs Department which uses mediation to facilitate dispute resolution related to travel industry disputes involving consumers and/or travel agents.⁵⁸⁷ Many of these institutions also maintain institutional ties with Singapore Mediation Centre for the promotion of the proper use of mediation.⁵⁸⁸

The Singapore Mediation Centre has worked together with some of the institutions to put in place a dispute management scheme, for example, the Building and Construction disputes, with the Ministry of Health for healthcare related disputes and with the Singapore Sports Council for sport disputes. It is observed that some professional trade or industry bodies enter an arrangement with the Singapore Mediation Centre on the SMC's resources whenever mediation or ADR services are

⁵⁸⁷ Some other examples: Consumer Associations of Singapore (CASE) has a CASE Mediation Centre to settle disputes between consumers and retailers; Real Estate Developers' Association of Singapore (REDAS) which has a REDAS Conciliation Panel to handle disputes over building defects between private home purchasers and REDAS member developers; Renovation and Decoration Advisory Centre (RADAC) which has the Renovation and Conciliation and Arbitration Procedure Programme (RECAP) which can handle disputes between consumers and contractors; cited in Goh Joon Seng, *Ibid.*

⁵⁸⁸ See Boulle, Laurence, Teh Hwee Hwee, *Mediation, Principle, Process Practice*, (Asia:Butterworth, 2000) at 239.

required. In these instances, the organizations work with the Singapore Mediation Centre to provide mediation services and training to their members.

The Law Society of Singapore also uses mediation to help resolve disputes between its members and their clients. Section 4 of Legal Profession (Inadequate Professional Service Complaint Inquiry) Rules provides that where the Council of the Law Society determines that a complaint of inadequate services be referred for investigation, the Director of the Law Society shall write to the client to determine if he will consent to the mediation of his complaint by a lawyer-mediator appointed by the Council.⁵⁸⁹

At present, mediation is widely known to the business people as an appropriate mode of resolving business conflicts as it saves time, saves cost, is fast and gives a higher compliance to terms agreed by both parties.

4.4.3.1. Emphasis on the Singapore Mediation Centre

The Singapore Mediation Centre is a private ADR institution that provides mediation services as one of its functions. It was incorporated on 8 August 1997 and officially opened by Chief Justice Yong on 16 August 1997. Its mandate was set out in his speech on that occasion⁵⁹⁰:

“The Singapore Mediation Centre aims to develop its expertise in, and standing as, an independent ADR institution specializing in mediation. It will

⁵⁸⁹ *Id.* at 242.

⁵⁹⁰ *Id.* at 230.

take the lead in promoting private; non-court based mediation in Singapore and serves the public sector, professions and businesses. It is the first and only one of its kind in Singapore. This flagship mediation centre will also provide mediation services, train and accredit mediators, maintain a Panel of Mediators (Panel) and eventually, provide consultancy services in dispute avoidance, dispute management and ADR mechanisms, both locally and abroad.”

The Singapore Mediation Centre is a company incorporated under the Companies Act (Cap 50) and limited by the guarantee of the Singapore Academy of Law. It is a non-profit making entity funded in part by the Government through the Ministry of Law. Its mission is stated to be the promotion of amicable and fair dispute resolution and the creation of an environment where people can work together to find enduring solution. It aims to do so by broadening awareness of, and providing access to, constructive means of dispute resolutions.⁵⁹¹

The type of cases referred to the Singapore Mediation Centre is wide ranging. The cases include banking disputes, construction disputes, contractual disputes, corporate disputes, information technology disputes, intellectual property disputes, insurance disputes shipping disputes and tenancy disputes. Besides commercial disputes there are also other cases referred to the centre, for example, employment disputes, family disputes, contested divorce and divorce ancillary claims, negligence claims and

⁵⁹¹ *Id.* at 230.

personal injury claims. At the early establishment of the centre, the construction disputes represent a large percentage of the cases mediated by the Singapore Mediation Centre in the year of 1999 with 36 cases.

Table 4.11, Type of cases referred to SMC in the year 1999, Source; SMC⁵⁹²

Nature of disputes	Percentage of total number of cases referred
Agency, partnership and joint venture disputes	4
Banking disputes and disputes pertaining to financial instruments	1
Company and shareholders' disputes	4
Construction disputes	36
Disputes pertaining to probate, succession, administration of estates and trusts	1
Disputes pertaining to the sale and purchase of property and to the sale and supply of goods and services	17
Divorce, family disputes and disputes between neighbours	9
Employment disputes	3
Information technology related and intellectual property disputes	1
Insurance disputes	2
Personal injury disputes	1
Professional malpractice	1
Renovation disputes	4
Shipping disputes	3
Tenancy disputes	5
Torts (for example, defamation, misrepresentation, assault and battery)	3
Others	5
Total	100

The high referral of cases was a result of a new provision introduced for mediation in the Public Sector Standard Conditions of Contract for Construction Works 1999.

⁵⁹² Cited in Boule and Teh Hwee, Hwee, *Ibid.*

(PSSSCOC 99). The new clause 34.5 requires the parties to consider⁵⁹³ resolving their disputes through mediation at the Singapore Mediation Centre before commencing arbitration or court proceedings.⁵⁹⁴

Another development with respect to mediation of construction matters is this provision: “with effect from 15 December 1999, the standard form sale and purchase agreement for residential and commercial properties was amended to include a ‘non-binding’ mediation clause.” The mediation clause provides that vendor and purchaser shall consider referring any difference or dispute arising from the sale and purchase agreement to the Singapore Mediation Centre for mediation in accordance with the centre’s prescribed forms, rules and procedure before they resort to arbitration or litigation. The clause also provides that neither the vendor nor the purchaser is legally obligated by the clause to attempt mediation. A similar clause was inserted into the standard form sale and purchase agreement for executive condominiums. That insertion took effect from 5 January 2000.⁵⁹⁵

Modern mediation practice at the Singapore Mediation Centre has produced the benefits it promised. A survey that the Centre has been administering since 1997 to gather feedback on its mediation service is an evident to this. Disputants and/or their representatives (collectively “the parties”) are asked to complete the Parties’ Survey Form and their lawyers are requested to complete the Lawyers’ Survey Form at the

⁵⁹³ The clause however, did not make the mediation mandatory but highlights the option of resolving a dispute by mediation, leaving the parties with the option not to attempt mediation.

⁵⁹⁴ Boule and The Hwee Hwee, *op.cit.*, at 234.

⁵⁹⁵ *Id* at 236.

end of the mediation. The survey is still on-going, but as at 31 October 2008, 3447 completed forms were gathered: 1,884 from the parties and 1,563 from lawyers. Eighty-one per cent of the parties surveyed reported that they had saved costs and 85% reported that they had saved time. Some 82% of the lawyers surveyed reported that their clients were likely to have saved costs and 81% indicated that they and their clients were likely to have saved time. Costs and time savings were reported even in cases that were not settled.⁵⁹⁶

As at 31 October 2008, the Singapore Mediation Centre recorded a cumulative total of 1,391 mediation matters, with an average settlement about 74%. The majority of the disputes are commercial in nature, and about 20% involve at least one-domestic party.⁵⁹⁷

It can be seen that mediation is an effective mode of resolution for commercial disputes in Singapore.

4.4.4 Guides for Improvement of Commercial Mediation in Malaysia

There are positive actions taken by some of the organizations in Malaysia in practicing commercial mediation in Malaysia. Further details have been discussed in Chapter 3 earlier. The Malaysian Mediation Centre, Kuala Lumpur Regional Centre

⁵⁹⁶ See Joel Lee, The Hwee, Hwee, “The Quest for an Asian Perspective on Mediation” *An Asian Perspective on Mediation* Ed. Joel Lee, Teh Hwee Hwee, (Singapore; Academy Publishing, 2009) 14-15.

⁵⁹⁷ *Ibid.*

for Arbitration and Financial Mediation Bureau have made a move to introduce and practice mediation. Recent development has seen the Regulations, made under the Capital Markets and Services Act 2007, come into operation 30 December 2010. Under the Regulations, the Securities Industries Dispute Resolution Centre (SIDREC) has been approved as an approved body corporate for the settlement of dispute⁵⁹⁸ or claim⁵⁹⁹ between a client⁶⁰⁰ and a member. The following holders of the Capital Markets Services under the Act shall be deemed to be a member of an approved body corporate: 1). Dealers in securities, 2). Traders in future contracts and 3). Fund Managers.⁶⁰¹

The reference of cases to the commercial mediation centres, particularly, the Malaysian Mediation Centre and Kuala Lumpur Regional Centre for Arbitration, however, is still few and not encouraging.⁶⁰² In this regard, some proactive measures should, therefore, be introduced to further enhance the practice and understanding on mediation. The majority of the Malaysian community are still not fully aware of such availability and suitability of mediation in reducing costs and resolving disputes in an amicable manner.

In Australia, however, the application is well accepted, common and already at the advanced stage for commercial, community and family matters. The organizations

⁵⁹⁸ an eligible dispute as defined in the terms of reference of an approved body corporate

⁵⁹⁹ any monetary claim arising from a dispute referred to an approved body corporate.

⁶⁰⁰ an individual or a sole proprietor who is eligible to refer a dispute to the approved body corporate

⁶⁰¹ MLTIC BANKING AND FINANCE Portal/ Capital Markets and Services (Dispute Resolution... LEGISLATION, *Capital Markets and Services (Dispute Resolution) Regulations 2010*, 07 Jan 2011, <http://malaysianlaw.my/finance/morenews.aspx?id=MLTIC-070111-LG-1&Cateid=6>

⁶⁰² The details have been discussed in Chapter 3 of this thesis.

offering mediation are observed being proactive in giving training, educating, facilitating and enhancing the practice of mediation. This has contributed to high increase of awareness amongst the public on the availability of mediation, its needs and benefits.

Further, the amendment to the law is seen to be a pushing factor that materializes and popularizes the tool of mediation in resolving dispute. For example, the amendment to the standard form of sale and purchase agreement in Singapore to include non-binding clause on mediation has put mediation to be a favourable mode of option when parties facing with disputes with the developer. Whereas, the current provision 7 of Malaysia Sale and Purchase Agreement Schedule H, provides that “The Purchaser shall be entitled on his own volition in his own name to initiate, commence, institute and maintain in any court or tribunal any action...” it seems that the provision is general and the application of alternative dispute resolution particularly mediation is not clearly stipulated. Therefore, certain amendment is recommended for parties to refer to mediation before proceed with any action in court. Besides, provision or clause on mediation is also recommended to be included in any contractual agreements of any institutions as the first option for settlement of disputes before proceed with any action in court.

As discussed earlier the highest number of dispute referred to the Singapore Mediation Centre in the year 2000 was construction matters. This could be due to the clear provision added to Public Sector Standard Conditions of Contract for Construction Works 1999. (PSSSCOC 99). The new clause 34.5 requires the parties

to consider resolving their disputes through mediation at the Singapore Mediation Centre before commencing arbitration or court proceedings. The amendment has resulted in the referral of construction disputes for mediation at the Singapore Mediation Centre.

Therefore, proactive action by the Malaysian Mediation Centre is recommended to enhance public awareness, particularly, the commercial organization on mediation and its benefits. The Memorandum of Understanding between the Malaysian Mediation Centre and the relevant agencies could be one of the ways that can be taken to enhance the practice of mediation amongst the commercial organizations. Any action or proposal to amend the laws could only be initiated when the organizations are fully aware of the benefits of mediation in resolving disputes.

It is learnt from Australia and Singapore that in promoting mediation, training and education should be at the forefront. The training may be provided by the Malaysian Mediation Centre, by the higher educational institutions, government agencies as well as private organizations or professional bodies. However, local trainers need to be trained first before offering such courses to public. At present, there are efforts made by Malaysian Mediation Centre in giving training to the public. Vigorous promotions and trainings are needed to enhance participation of the public in mediation.

It is to be noted that 39%⁶⁰³ of the cases referred to Singapore Mediation Centre are from the Courts. It is submitted that certain type of cases, for example, the complicated cases of commercial matters may be referred to the Malaysian Mediation Centre for mediation since the mediators available are qualified and trained ones. It is analysed that in Singapore, for Supreme Court cases, instead of the Court conducting mediation, the cases are referred to Singapore Mediation Centre for mediation. The agreement and arrangement on this issue may resolve the heavy burden on the court to mediate as well as to hear the case. Besides, this could also resolve the problem faced by Malaysian Mediation Centre of low referral cases for mediation.

As observed earlier, the active efforts of SMC in promoting mediation has attracted the commercial institutions to opt for mediation in resolving their disputes. In this regard, the approach by the SMC may be referred to in enhancing the role of our Malaysian Mediation Centre. In promoting its service, SMC strives to reach out to promote their new scheme and readily willing to sign MOU with any interested groups.

4.5 Enhancing and Developing the Standard and Practice of Mediation

Australia has moved to an advanced stage in mediation practice by the implementation of the National Mediator Accreditation System (NMAS). The

⁶⁰³ Interview with Angela Mitakidis, Manager of SMC and Elliot Goon, Senior Executive of SMC at the Singapore Mediation Centre on 1 Jun 2011.

implementation of NMAS was a result of a NADRAC's Report "A Framework for ADR Standards" in April 2001. On launching of the Report the Attorney-General, the Hon Daryl Williams AM QC MP stated "the quality of ADR services is a critical component in building confidence in ADR". Prof T Sourdin who was a member of NADRAC was tasked to develop the standards for approval and practices as well as requisite documents and policies to implement national mediator accreditation scheme. Draft approval and Practice Standards was circulated in June 2007 and consulted widely across Australia. The system was accepted by stakeholders and commenced operation from 1 January 2008. Besides, National Mediator Accreditation Committee was established to fully implement NMAS.

In support of the committee, an on-going national Mediator Standards Body (MSB) was also set up. The MSB is responsible for the development of mediator standard and the implementation of the National Mediator Accreditation System (NMAS). The creation of one central entity responsible for mediator standards and accreditation is a landmark development in the history of mediation in Australia. The incorporation of the MSB marks the achievements of the NMAC in bringing together diverse groups across Australia that are responsible for accreditation and training of mediators and the organizations which are frequent users of mediation services.⁶⁰⁴

MSB membership is open to a range of organizations as described in the MSB Constitution, including RMABs, education and training providers, professional

⁶⁰⁴ Mediator Standard Board Portal, *Reducing Cost of Justice*, 24 May 2011, <http://www.msb.org.au>

membership or service organisations, community or state based mediation services, government representatives and consumer organizations.⁶⁰⁵

MSB membership provides an opportunity for a broad range of ADR organizations to contribute to the on-going development of quality mediation services within Australia. MSB members attend and vote at general meetings and elect directors of the MSB Board.

Nadja commented that the experience of the US and Australia is different in legalizing the national standard practice of mediation. While the United States has moved towards national standards through the Model Uniform Mediation Act⁶⁰⁶, Australia's National ADR Advisory Council (NADRAC) however recommended against the development of one set of national mediation standards on the basis that such a development would threaten innovation and diversity in the practice of what is essentially a flexible process.⁶⁰⁷

However, Mediation in Australia has developed, not as the result of a regulatory government approach, but in a much more homogenous manner than in the United States. As discussed earlier, National Mediator Accreditation Committee and Mediator Standard Board have been created for the development of mediator standards and the implementation of the National Mediator Accreditation System.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ The Act was passed in 2001.

⁶⁰⁷ Alexander, Nadja "What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdiction" *Bond Law Review*: Vol.13: Iss.2. Article 5, 2001, <http://epublications.bond.edu.au/blr/vol13/iss2/5>.

MSB is responsible for the on-going development and maintenance of National Mediator Accreditation System. For a mediator to be accredited under the Australian National Mediator Standards, he or she must comply with the requirements for National Accreditation System stipulated under the Approval Standards as well as the Practice Standards.

For Singapore, there is no national system or law to regulate the accreditation yet, the quality and standards of mediators nor is there a law regulating the practice of mediation as such in Singapore. As stated by Seng Onn,⁶⁰⁸ the SMC has developed its own system of mediator training and accreditation. The number of Principal Mediators accredited by SMC is limited by the demand for mediation services in order to ensure that all mediators on the Panel of Principal Mediators are regularly mediating.⁶⁰⁹

The SMC's accreditation is limited for a period of one year and is subject to renewal. Re-accreditation will be granted if the mediator engages in at least 4 hours of annual continuing education in mediation and is available to conduct at least 5 mediations per year if requested to do so in order to ensure the maintenance skills.⁶¹⁰

The SMC's Mediation Procedure ensures that mediations under the SMC's auspices are governed by the provisions in the Mediation Procedure. They direct and guide

⁶⁰⁸ Loong Seng Onn is the Executive Director of Singapore Mediation Centre.

⁶⁰⁹ Loong Seng Onn, "Non-Court Annexed Mediation In Singapore," *International Conference & Showcase on Judicial Reforms*, (Philippines, 28-30 November 2005)

⁶¹⁰ *Ibid.* Further, Mediators are subject to SMC Mediation Procedures, Clause . Clause 4 of this Procedure provides that a mediator has to subscribe to the SMC's Code of Conduct. These provisions are binding upon all members appointed by the SMC to mediate.

the mediator through the mediation process with regard to issues such as confidentiality, neutrality and impartiality. Further in determining the clients' satisfaction, the SMC is continuously consolidating feedbacks from disputants and their lawyers by requesting them to complete survey forms at the end of each mediation process at the SMC regardless of the outcome of the mediation. The object is to help the development of theoretical models that are based on actual experience, and reflect the minds of modern Singaporeans.⁶¹¹

Joon Seng⁶¹² noted that save for the CMC Act, no other legislation deals specifically with mediation. In this regard, the common law was sought for guidance on legal principles which govern mediation.⁶¹³

Joon Seng further noted that mediation is now a prominent feature in the Singapore legal, commercial and social landscape. Beginning initially with informal ad hoc mediation for community and relational disputes, and thereafter court-connected mediation, mediation nowadays is institutionalized, formalized and widely recognised as a useful tool for managing even complex commercial disputes.⁶¹⁴

It is observed that although there is no unified Mediation Act for Singapore, mediation in Singapore is well developed and has been accepted by Singaporeans

⁶¹¹ Loong Seng Onn, "Non-Court Annexed Mediation in Singapore", *Conference of Mediation and Arbitration in Asia Pacific*, (Kuala Lumpur, 16-18 June 2006.)

⁶¹² Goh Joon Seng is the Retired Judge, Supreme Court of Singapore.

⁶¹³ *Ibid.* See Goh Joon Seng, *Mediation in Singapore: The Law and Practice*.

http://www.aseanlawassociation.org/doc/w4_sing2. The judges referred to several examples, for instance a common mediation clause that says "to participate in mediation in good faith". As to exactly what amounts to good faith is uncertain.

⁶¹⁴ *Ibid.*

nowadays. What has been stressed is the quality of mediators. In this regard, SMC has played a crucial role in offering training and enhancing the standard of mediation practice. SMC also introduced strict requirement for mediators to be accredited. Rigorous and continuous trainings have been held to upgrade the understanding of the public in mediation.

What can be learnt by Malaysia is that the quality of mediation service must be observed. In this regard, quality of mediators must be given priority. As noted earlier, although there is no national accreditation available in Singapore, SMC has set up its own accreditation system in determining the quality service of mediation. It is, therefore, recommended that each institution offering mediation in Malaysia have certain criteria in accrediting their mediators. Certain requirements of training must be clearly fulfilled before the mediator is allowed to conduct a mediation session.

Besides, the approach taken by Australia to have a national standard on accreditation is highly recommended when mediation has become known and practised by Malaysian. Currently, educating the public and creating awareness should be the main agenda as without knowledge mediation will not be accepted. Continuous training for mediators is thereby needed to ensure quality service of mediation offered.

To have a Mediation Act is an advantage, but to have a national standard for accreditation system is much more relevant for Malaysia. Mediation is still new and developing in Malaysia. The researcher is of the view with Australia's approach,

rather than to have the standard regulated by law; the flexible nature of mediation is much more relevant with the national Practice Standard that can be updated accordingly on the advice of the experts. Furthermore, as mediation is still new and developing in Malaysia, there might be changes occurring from time to time.

It is also observed that institutions or organizations offering mediation in Australia continuously conduct extensive research on the improvement and enhancement of mediation. Conferences and seminars are held from time to time to upgrade the status of mediation and its practice. This can be seen from the activities and programmes conducted by IAMA, LEADRS, ACDC and few others as noted above.

Further, it is impressive to note that the private sectors play active roles in improving the standard practice of mediation. The Law Societies and Bar Associations, for example, have made efforts in developing rules and protocols for lawyers engaged in mediations. Spencer and Brogan commented that the law societies and bar associations in Australia are moving, at various speeds, in developing rules and protocols for lawyers engaged in mediations. The Law Society of New South Wales, for example, has been developing connections to alternative dispute resolution practices for 20 years. Among its initiatives are the developments of rules for the profession.⁶¹⁵ The following extract provides an understanding of the level of professionalism required by one of the major law societies in Australia.⁶¹⁶

⁶¹⁵ Spencer, David, Michael Brogan, *Mediation Law and Practice*, (New York,:Cambridge Univesity Press, 2006) at 37.

⁶¹⁶ Law Society in New South Wales, referred to Spencer and Brogan , *Ibid.*

The Law Society revised guidelines for solicitors who act as mediators - Law Society Mediation Kit.

Prerequisites for specialist accreditation in mediation;⁶¹⁷

Applicants must have a 'substantial involvement' in this area of practice.

Accordingly, applicants must:

1. Have been qualified to practice as a legal practitioner for at least 5 years.
2. Have successfully completed skills based training course in mediation extending over a minimum of 4 days, with an evaluation component or equivalent;
3. Have conducted mediations as a mediator for a minimum period of 3 years.
4. Have undertaken a minimum of 24 mediations as a mediator (each of which has taken not less than 3 hours), within the three year period immediately preceding the application. These mediations should be in the form prescribed in the Law Society Generic Model; and
5. Have undertaken a minimum 12 hour workshop participation and/or trainer/coach involvement over the preceding 12 months.⁶¹⁸

Performance Standards;

In order to qualify as an accredited specialist in mediation applicants must:

- a). demonstrate in the written examination a high level of knowledge of the law and procedure which underpins the performance of tasks to be undertaken by a skilful mediator; and

⁶¹⁷ Law Society revised guidelines for solicitors who act as mediators- (Law Society Mediation Kit), cited in Spencer and Brogan, *Ibid.*

⁶¹⁸ *Ibid.*

b). demonstrate high skill levels and knowledge of each of the phases of the generic model of mediation adopted by the Law Society, a guide to which follows.⁶¹⁹

The role of NADRAC in the enhancement and improvement of mediation practice in Australia cannot be denied. The setting up of such a body or at least a group of committees seems to be important for the future development of mediation in Malaysia.

National Alternative Dispute Resolution Advisory Council (NADRAC);

The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent body which advises the Australian's Attorney-General on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision. NADRAC was established in 1995 and has published a number of reports and discussion papers associated with alternative dispute resolution generally and mediation in particular.⁶²⁰

The NADRAC Charter⁶²¹ contains the general objectives and areas of interest to be examined by the organization. The minimum standard, minimum training and evaluation for the program of ADR offered by any institution is to be supervised and evaluated by NADRAC. The task of NADRAC in the development of ADR in Australia has given a great impact for the improvement and enhancement of

⁶¹⁹ *Ibid.*

⁶²⁰ See Sourdin, T., *Supra*. See also the website of NADRAC

⁶²¹ Attached as Appendix D to this thesis.

mediation in Australia. For Malaysia to have improvements in ADR particularly mediation such a body or committee is highly recommended.

It is also observed that the role in standardising the standard of mediation must not only be done by the government, but also by the private sectors. The issuance of regulations, codes of ethics, performance standards, and continuous training done by various organisations has gained the public confidence on the capability of mediation as a tool for resolving disputes.

4.5 Conclusion

The increase of community disputes, the high rate of divorce cases as well as the increase of commercial claims filed into courts as discussed earlier indicate that there is a need to upgrade and enhance our community mediation, family mediation as well as commercial mediation. In setting up such a centre, certain requirements must not be neglected. Quality mediators with certain requirements of trainings, code of ethics for the mediators, referral strategies, education and awareness program to the public should be given priority in ensuring quality of mediation offered. Further, the enhancement and improvement of the standard practice of mediation with the introduction of national accreditation system and practice standard should also be looked into in the future so as to maintain the standard practice of mediation.

CHAPTER FIVE

COURT ANNEXED MEDIATION

5.1 Introduction

Court annexed mediation was introduced as a means to reduce backlog of cases. The concept was developed by the court in the United States as a possible solution to a perennial problem of backlog and delays in order to be efficient and effective in the disposition of cases.

Boulle and Nestic⁶²² states that mediation is being increasingly used as an aide to the litigation system through procedural changes and case management imperatives. They added that ‘allocation, case management conferences and pre-trial reviews provide occasions and opportunities for case settlement. The court may also discuss with the parties the possibility of referring their case for mediation at these stages.’

This chapter will analyse the application of court-annexed mediation in Malaysia. The study will also examine the perceptions, procedures and provisions of the court annexed mediation from other legal regimes for comparison and guidance. It is hope that such efforts will enhance our court annexed mediation.

⁶²²Boulle, Laurence & Miryana Nestic, *Mediation, Process, Practice* (London: Butterworths, 2001), 90-91.

5.2 Mediation in Malaysian Civil Courts

The provision that can be referred to for the application of the court annexed mediation is Order 34 Rules of High Court 1980. The Order discusses the provisions for pre-trial case management and authorises the judge after conferring with the parties to give orders and further directions of the action that can ensure its just, expeditious and economic disposal. In the instance, a Judge of the High Court, Y.A. Datuk Su Geok Yiam⁶²³ had commented that those who practised the court annexed mediation would be able to dispose cases in a just, expeditious and economical manner.

Order 34 r.4 (1) reads:

“Where the parties to an action appear in person or by an advocate on the return date appearing in Form 63 (hereinafter referred to as” the first pre-trial conference’), then the judge to whom the action has been assigned shall after conferring with them, make such orders and give such directions as to the future conduct of the action to ensure its just, expeditious and economical disposal.”⁶²⁴

The Former Chief Justice, Rt. Hon. Tun Dato Sri Ahmad Fairuz in his keynote address for the “Asia Pacific Conference on Contemporary Trends in Mediation and Arbitration” on 17th July 2006, stated that the Rules Committee chaired by the Federal Court Judge with representatives from the Bar Council and the Attorney-General Chambers was set up to consider the implementation of Alternative Dispute

⁶²³ The ladyship was then a judge at Penang High Court.

⁶²⁴ Order 34 r.4 (1) Rules of High Court 1980. (P.U. (A)/1980)

Resolution (ADR) in case management.⁶²⁵ Recent development showed that Practice Direction 5 was issued to Order 34 RHC 1980 in August 2010 authorising the application of mediation in the court. Before issuance of the Practice Direction, mediation was practised on ad hoc basis at the discretion of individual judges who are aware of its potential in resolving disputes.⁶²⁶

The pilot project for the court annexed mediation in Malaysia started in Penang at the initiative of Y.A. Datuk Su Geok Yiam who was a Judge for the High Court 3 Penang at that particular time. The action was taken following the directive of the former Chief Justice, Rt. Hon. Tun Dato Sri Ahmad Fairuz to all High Court Judges and Judicial Commissioners regarding the disposal of the pre 2000 civil and criminal cases at a meeting on the 7th of November 2003 where the meeting passed a resolution to dispose all the pre 2000 cases before or on the 30th of June 2004. The briefing by the Penang ADR Committee on the success rate of mediation⁶²⁷ had motivated the judiciary to take serious measure to clear the pre 2000 civil and post 2000 civil cases. The Honourable Judge started the pilot project on the court annexed mediation in the Penang High Court with a proper supervision from the Penang ADR Committee and the Bar Council Committee of Malaysian Mediation Centre. The authority for the application was referred to O. 34 r 4(1) RHC 1980. The application shows an encouraging result with the statistics of 70% to 72% success rate as at 20th

⁶²⁵ Ahmad Fairuz, "Keynote Address" *Asia Pacific Conference on Contemporary Trends in Mediation and Arbitration* (Kuala Lumpur, 17 -18 July 2006).

⁶²⁶ See Hendon Mohamed, "The Court Annexed Mediation", *Asia Pacific Conference on Contemporary Trends in Mediation and Arbitration* (Kuala Lumpur, 17- 18 July 2006).

⁶²⁷ Y.A. Datuk Su also been informed that the Honourable Judge Dato R.K. Natahan, judge in High Court 4. (since retired) had directed a number of cases to be referred to the Bar Council Mediation Centre and some of them were successfully settled through mediation.

May 2005. By the 12th of July 2006 the result increased to 75% which means that 70% to 75% cases ordered for mediation was settled successfully.⁶²⁸ With this success rate, Y.A. Datuk Su Geok Yiam was invited by the former Chief Justice, Rt. Hon. Tun Dato Sri Ahmad Fairuz to present a paper at the Council of Judges Conference held in Kota Bharu, Kelantan from the 6th June to 8th June 2005. By the end of the conference, his Lordship expressed full support for the court annexed mediation to be conducted by all courts in Malaysia.

The mode of the court annexed mediation as practised by the Penang High Court is that if a judge after conferring with the parties at the pre-trial conference is of the opinion that the case is suitable for mediation, the said judge shall make an order to refer the parties to settle their dispute with the Bar Council Mediation Centre for such settlement.⁶²⁹ According to the Bar Council Mediation Centre, the Penang High Court constantly refers their cases to the Centre as compared to other states which is very few.

Pursuant to the above directive, the Chief Judge of Sabah and Sarawak, YAA Tan Sri Richard Malunjum also commented that the court annexed mediation has also been practised in Sabah and Sarawak. For example, the Chief Judge of Miri Court had during the period of January to June 2008, mediated 45 cases of which 22 were settled. The success rate for other judges and magistrates were also encouraging. The

⁶²⁸ Su Geok Yiam, "The Court Annexed Mediation", *Asia Pacific Conference on Contemporary Trends in Mediation and Arbitration* (Kuala Lumpur, 17-18 July 2006).

⁶²⁹ *Ibid.*

mode of practice was that the judge or magistrate would exchange the trial cases for mediation. In case where the mediation failed, it would revert to the judge or magistrates who would then proceed to hear in the court. This procedure would avoid the issue of bias from the part of the judge or the magistrate.⁶³⁰

Some judges at Kuala Lumpur Sessions Courts did practise the court annexed mediation. The mode of practice is that the judge would send their cases for mediation to other judges' chamber who will act as the settlement judge.⁶³¹

In the absence of legislation, we can see that the mode of practice of the court annexed mediation in Malaysia differs from one state to another. In Penang, for example, the judge usually refers the case to the Bar Council Mediation Centre, whereas in Sabah and Sarawak the judge or magistrates will exchange cases for mediation and act as the settlement judge.

The issuance of Practice Direction 5 to Order 34 Rules of High Court on the court Annexed Mediation on August 2010 has given strength to mediation. The Direction standardizes and formalizes the ad hoc practice of some judges asking parties in some cases whether they would like mediation.⁶³² As can be seen, the application is still at its infancy stage, further improvements are therefore needed to enhance the practice and to develop a mechanism to reduce backlog of cases in the courts. The Practice

⁶³⁰ Syed Ahmad Idid (Dato'), "Proliferation of Mediation Bodies v. Quality of Mediators." Closing Speech for 4th Asia Pacific Mediation Forum, (Kuala Lumpur, 18 June 2008)..

⁶³¹ Khutubul Zaman Bukhari, "The Court Annexed Mediation", *ADR Conference on Medical Negligence* (Kuala Lumpur (IIUM), 25 July, 2009).

⁶³² Before issuance of the Practice Direction, mediation was only brought up by some judges who believe in the potential and benefits of mediation.

Direction 5 also gives option for the disputing parties to choose either of the court-assisted mediation which is free, if lawyers are not involved (Option A), or to pay up a fee of RM2,150⁶³³ for one day's mediation fee at the Bar Council Mediation Centre (Option B).

According to the Civil Division in Kuala Lumpur, between March and September 2010, as for Option A, some 27% (202) of the cases were settled successfully, some 30% (228) were unsuccessful and some 43% (327) were still pending.⁶³⁴ According to Datuk Seri Raus Sharif, a Federal Court judge, who is also the Managing Judge of the Commercial Division, Kuala Lumpur, all parties in the 228 cases agreed to the court-assisted mediation between March and July 15, 2010 and that some 31% (71 cases) were successfully mediated and disposed of.⁶³⁵

The Malaysian Mediation Centre (MMC), which is categorised under Option B, had 236 mediators on its panel.⁶³⁶ From the year 2000 to 13th of September 2010, a total of 192 cases were referred to the MMC, of which 109 were by the courts. Of the total, some 54 (28%) were successfully mediated, 25 (13%) were unsuccessful, 27(14%) pending and 86(45%) were closed. According to its chairman, the closed cases included defendants not interested in mediation, those resolved with solicitor's assistance after the pre-mediation conference, both parties settling personally prior to

⁶³³The RM2,150 fee comprises of mediator's fees of RM1,500 per day (regardless of the quantum of claim); administrative fees of RM300 per case; and room rental of RM350 if MMC's premises are utilized.

⁶³⁴Shaila Koshy, "CJ pushes for mediation" *The Star online*, 29 October 2010, <http://thestar.com.my/news/story.asp?file=/2010/10/29/nation/7311125&sec=nation>.

⁶³⁵ *Ibid.*

⁶³⁶ As mentioned by its Chairman, Dato' Khutubul Zaman. *Ibid.*

mediation, parties insisting on litigation or those where there was no response from the solicitors although the cases had been referred by the court.⁶³⁷ Since this mode of resolution is still new, there is a need for a proper construction of legal framework, guidelines and regulations of the application to be studied and introduced to ensure the efficiency of the system.

5.3. Court Annexed Mediation

5.3.1 Court Annexed Mediation Defined

The court annexed mediation in the context of the chapter refers to mediation ordered by the court. As discussed in Chapter One, mediation is defined as the act of third party relating to the settling of disputes between the contradicting parties.⁶³⁸ It is an action in mediating the parties as to effect an agreement or reconciliation.⁶³⁹ The Oxford Dictionary defines the word ‘to mediate’ as to ‘reconcile’ and ‘to act between parties’ to effect an agreement, compromise or reconciliation.⁶⁴⁰ The New Shorter Oxford Dictionary defines mediation, *inter alia*, as “mediative action, the process or action of mediating between parties in dispute to produce agreement.”

⁶³⁷ Shaila Koshly. *Ibid.*

⁶³⁸ Sherman, Dictionary of Law, (Golden Books Centres Sdn. Bhd. Kuala Lumpur, 1980), 207.

⁶³⁹ The Macquire Dictionary 2nd Ed., (Australia: Macquire Dictionary Publishers Pty Ltd., 1991) at 1105,

⁶⁴⁰ Most of the dictionaries give the same definition; see Words and Phrases Legally Defined, 3rd Ed. Supplement (UK; Lexis Nexis Butterworths., 2006), The Oxford Encyclopedia English Dictionary, (New York: Clevendan Press), 901; Webster New Twentieth Century Dictionary, 2nd Ed. (UK: Cambridge, Colins Word), 117.

In mediation a neutral third party, the mediator facilitates negotiation among the disputing parties to arrive at an amicable settlement. The process is conducted informally where the parties clarify their strengths and weaknesses of legal positions and generate settlement options. The mediator, who may meet jointly or separately with the parties, serves solely as a facilitator and does not issue a decision.⁶⁴¹ As for the court annexed mediation, the mediation may be based in the court or directed by the court to private mediators.

Generally, “the court annexed mediation means that mediation is available, and may be mandated, as part of the litigation process”.⁶⁴² A mediator is appointed by or upon the initiation of the court to help the parties explore and achieve settlement.⁶⁴³

According to the ‘Model Standards of Practice of the Subordinate Courts of Singapore’, “the court Annexed Mediation is a conflict resolution process in which a court appointed mediator assists the disputing parties to negotiate a consensual and informed settlement”.⁶⁴⁴

In the United States, ‘The Alliance For Education in Dispute Resolutions’ states in its website that “a court mediation program may be based in the court, or may be

⁶⁴¹ Alliance for Education in Dispute Resolution, *What is the Court Annexed Mediation*”, 16 May 2008, at http://www.ilr.cornell.edu/alliance/resources/Resolution;http://www.ilr.cornell.edu/alliance/resources/Basics/the_courtannexedmediation.html.

⁶⁴²”Report of the Working Committee on The Court Annexed Mediation in Civil Matters.(State of Alberta)” *Justice*, 26 April 2002, 16 May 2008, <http://justice.gov.ab.ca/mediation/default.aspx?id=3371>

⁶⁴³ Mackie, Karl, David Miles, William Marsh, Tony Allen, *Commercial Dispute Resolution: An ADR Practice Guide* (UK: Butterworths, 2000), at 18.

⁶⁴⁴Khutubul Zaman Bukhari, “The Court Annexed Mediation”, *ADR Conference on Medical Negligence*,((Kuala Lumpur (IIUM), 25 July 2009).

invoked by the court to outside ADR programs run by bar association, non profit group of the court or private ADR providers”.⁶⁴⁵

Further, ‘The National Center for State Court (NCSC) in its website illustrates: “In the court-connected or the court-annexed mediation, the court may refer parties to roster from which a mediator is selected, a private mediation program, or a particular mediator. In some courts, an alternative dispute resolution coordinator is available to assist parties in selecting mediation program or mediator that suits their needs. Mediators may be in-house court employees, private mediators (who are paid through a grant or contract), or volunteers”.⁶⁴⁶

In Australia, the Supreme Court of New South Wales states that “the court annexed mediation where a registrar or other officer of the court is the mediator. The source states that the registrars and officers who conduct mediations are qualified as mediators. Thus, the parties cannot select which registrars will mediate their dispute.”⁶⁴⁷

Basically the court annexed mediation refers to mediation ordered by the court, but the way it is carried out may differ from one jurisdiction to another. The mediators

⁶⁴⁵Alliance for Education in Dispute Resolution Portal, *The Court Annexed Mediation*, 16 May 2008, http://www.ilr.cornell.edu/alliance/resources/Basics/the_court_annexed_mediation.

⁶⁴⁶National Centre for State Court Portal, *Court Topics; Alternative Dispute Resolution; Mediation*, 20 May 2008 http://www.ncsonline.org/wc/the_courttopics/FAQs.asp?topic=ADRMed.

⁶⁴⁷Supreme Court, The Court of New South Wales homepage, 16 May 2008 (retrieved) <http://www.lawlink.nsw.gov.au/lawlink/Supreme>. The court/scnsf/pages/SCO_mediation It was reported that Registrars conducted approximately 286 mediations during 2006, with 58% settling at the close of the session.

could be from the court officers; the judges or the registrars or outsourced to private mediators.

5.3.2. Structure of Court Annexed Mediation

Justice Ambeng Kandakasi in an article ‘Developing a system of the Court Annexed ADR in an increasingly litigious society, arguments for and against: the PNG Experience’⁶⁴⁸ states that the court Annexed ADR may take either of two ways. The first, may have a CFMS (Case Flow Management System), which may have a judge or the registrar or a deputy registrar of the court who has the duty or responsibility of managing the courts CFMS. The case flow manager would have the power to decide where and when the case is appropriate to be resolved through ADR and make the appropriate order for an ADR process to take place outside the court system.

The second way may incorporate the CFMS, but with a difference in the process. The court could provide a judge or registrar or trained facilitators within the court establishment to conduct the ADR process for the parties once the CFMS’s manager or court decides and refers a case to mediation or an ADR process.⁶⁴⁹

The difference in the two methods is the involvement of the court and the judges in the process. For the first, the mediation is to take place outside the court system

⁶⁴⁸(2007)3 MLJ vii; (2007) 3 MLJA, <http://www.lexis.com>

⁶⁴⁹See *Ibid.*

where no judge or registrar is involved or act as a mediator. For the second, the court officers, either the judge, the registrars or the trained facilitators are the mediators.

In Malaysia, although the application is at the infancy stage, these two methods have been adopted by some judges. The first method has been practiced by Justice Dato Su Geok Yiam in Penang where the mediation is done outside the court environment through mediators from Malaysian Mediation Centre (MMC). The second method is the one adopted by our Sabah and Sarawak courts as well as in Kuala Lumpur Sessions Court where the mediators are the settlement judges. By the issuance of Practice Direction 5 of 2010, these two practices have been formalized.

5.3.3. Views on the Process

There are two opposing views on the involvement of the court and judges in the mediation process. The first view, led mainly by the Australian courts and judges argued that the court and judges should not be involved with an ADR process as the purpose of the court is to hear and determine disputes for the disputing parties and not to divert the parties with their disputes to other less formal systems of dispute resolution.⁶⁵⁰

The second view, led by the courts and judges in the United States, supports the idea of the courts and judges using ADR inclusive of mediation as a case management tool with the view that the court must be seen and be involved as a service institution that believes its mission to help people resolve their conflict. Therefore, the ADR process

⁶⁵⁰See *Ibid*

is a necessary part of CFMS with the ultimate aim of reducing backlog and to enable prompt resolution of disputes going before the courts.⁶⁵¹

To achieve the aim of civil justice system, mediation should be a part of the court process as the main purpose of the court establishment is for dissolution of cases. Further with the assistance of mediation, the backlog burden of the court could also be relieved.

Most authors on mediation and ADR agree that the majority of cases filed in the courts are capable of settlement through a mediation process or ADR. With the assistance of an impartial third party, the disputing parties are capable of reconciling their differences to reach an agreement. The court can, therefore, be relieved of matters where the parties are unable to resolve themselves.

Thus, a settlement of more cases through mediation enables the court to appropriately allocate time and give quality consideration to arrive at a just result or decision in matters where a court decision is required or necessary.

5.3.4. Arguments in favour of the court annexed mediation

The arguments that support the court annexed mediation focus more on the advantages of the application as it can reduce the delays. The court with the limited resources is relieved of hearing public interests and complex cases. Moreover, on the

⁶⁵¹See *Ibid.*

benefits of the litigants, it provides more options for dispute settlement and increased satisfaction in the court system. Several surveys conducted by the court in Singapore suggested that the court annexed mediation had a positive impact on the disputants. The result has influenced the use of the court annexed mediation in other type of cases, including assessment of damages and costs of the civil proceedings. Studies conducted in the United States shows that the users of the court-annexed mediation are satisfied with the process and considered that the process is more personal and the result is fairer.⁶⁵²

5.3.5. Arguments against the application of the court annexed mediation

The conventionalists who are against the application, view that the court should limit its function to adjudication. They argued that ADR should be conducted by a neutral separate body outside the court system. There is also a fear that the judge might form an impression of a case based on incomplete evidence if they actively promotes mediation or other modes of ADR. The argument also concerns that the involvement of judges might prejudice the fairness, independence and impartiality of the judicial system. Surveys done in the court –annexed family mediation in England and Wales reported that parties agreed that “the connection between the court and mediation give a powerful incentive to attend mediation”. Some of the studies even revealed

⁶⁵² Boulle, Laurence & Miryana Nestic, *Mediation, Process, Practice* (UK: Butterworths, 2001), 382-384.

that the parties felt, if they did not participate in the court-annexed mediation, this would be held against them by a judge.”⁶⁵³

Another fundamental objection is mediation will not be as effective as when it is done independently outside the court. The impact for the parties to make decision will also be different if it is done within the locality of the court. Further, it may lead to unnecessary formality that may cause anxiety and intimidation rendering the mediator’s role more difficult. When it is connected with the court, the danger is that ADR may become overly formal⁶⁵⁴.

Although there are arguments on its advantages and disadvantages, the application of the court annexed mediation could help the smooth running and speed up the disposal of cases in the court system.

5.3.6. The importance of court annexed mediation

The adoption of the court annexed mediation by most of countries like the United States, United Kingdom, Australia and Singapore could well reflex the importance of its application. In the United Kingdom, the importance of the court annexed mediation can be seen in the Beldam Report in which the UK Bar Council’s

⁶⁵³See *Ibid.*

⁶⁵⁴See *Ibid.*

Alternative Dispute Resolution Committee concluded that mediation should be offered to litigants at an early stage in the English court process.⁶⁵⁵

Further, the effectiveness of the application has been mentioned in Lord Woolf's Interim Report. According to the report, litigation is not the only means of achieving appropriate and effective dispute resolution. Further, mediation and other forms of ADR have potential to improve access to the English courts. The report recommended, *inter alia*, that (1.) the courts should encourage the use of ADR, (2.) that parties should acknowledge at the case management conference and pre-trial reviews whether or not the parties had discussed the issue of ADR and (3.) judges should take into account a litigant's unreasonable refusal to attempt ADR when considering the future conduct of a case⁶⁵⁶.

In the report, Lord Woolf made reference to ADR development in other jurisdictions with special reference to the United States' multi-door the courthouse concept. The Civil Justice Reform Act 1990 and the Alternative Dispute Resolution Act 1998 are amongst the reference cited in the report. The Civil Justice Reform Act 1990 was introduced with the aim of reducing the costs and delay of civil litigation. The said

⁶⁵⁵ (Bar Council Committee on ADR (Chaired by Lord Justice Beldam), Bar Council Report, 1991, cited in Boule and Nestic, *Id.* 228-229.

⁶⁵⁶ Lord Woolf, Access to Justice: Interim Report (June 1995), 136 cited in Boule and Nestic, *Ibid.* 'The Civil Procedure Rules 1998 explicitly endorse the concept of ADR/ mediation firstly in Rule 1(4) on case management, as a means of achieving the over-riding objective of enabling the court to deal with cases justly, cost effective manner, proportionate to the issues at stake. The ability to stay an action to afford the parties a window of opportunity to attempt to negotiate a settlement is set out in Rule 26(4) and finally, by virtue of s44(3) the unreasonable refusal of a party to engage in negotiations can lead to cost penalties, displacing the traditional rule that cost follow the event. There is a duty of legal advisors to inform clients of the benefits of mediation and to ensure that the client had given the concept due consideration. The list of cases encouraging mediation and extolling its virtues grows even longer.' Nationwide Mediation Academy, 1999/2006, Mediation Methods for Mediators & Party Representatives, *Chapter 4: Mediation as a Court Annexed Service*, www.nadr.co.uk/.../mediatio/...

Act changed the procedures in United States' Federal District Courts, using a range of method, including ADR. The Alternative Dispute Resolution Act that was introduced in 1998 indicated that ADR should be a major part of the court policy. The Act contemplates that each District Court should set up an ADR programme and should encourage and promote the use of ADR.

In Australia, in order to enforce the application of the court annexed mediation, amendments have been made to the court rules. Most of the courts have legislations and rules which empower judges or officers of the court to refer matters to mediators at any time during the litigation process. In some courts that power may be exercised with or without the consent of the parties.⁶⁵⁷

The Federal Court of Australia has adopted the mediation program for alternative dispute resolution since 1987, beginning with a pilot program in the New South Wales District Registry. In June 1991, The Federal of Australia Act 1976 was amended to allow the court, with the consent of the parties, to refer the proceeding or any part to a mediator or an arbitrator for mediation or arbitration. In 1992, the then Chief Justice of the Supreme Court of Victoria, Justice Philips, concluded that delays in the Supreme Court could only be resolved by a "massive and mighty effort using mediation as a vehicle for getting cases resolved."⁶⁵⁸

⁶⁵⁷See North, John, "The Court Annexed Mediation in Australia- an Overview", *Malaysian Law Conference-* ((Kuala Lumpur, 17 November 2005)

⁶⁵⁸ *Ibid.*

The Council of Justices of Australia and New Zealand, in an important move in March 1997, agreed that it is a function of the state to provide the necessary mechanism for the resolution of disputes and that the court annexed mediation was part of that process.⁶⁵⁹ We can see from the advance movement of the court annexed mediation in Australia that the court annexed mediation is needed to reduce backlog of cases and improve the civil justice system.

The advance movement of the court annexed mediation in Australia as seen above indicates that the civil justice system could be improved through the implementation of the court annexed mediation.

Countries in Asia have also taken steps in enforcing the court annexed mediation. For instance, Singapore took the lead by fostering the court annexed mediation at the preliminary stages of the suit. The courts in Singapore have actively encouraged resort to mediation on the recommendation of the Registrar in a court based mediation known as 'Court Dispute Resolution'.⁶⁶⁰

In India, Section 89 of the Civil Procedure Code⁶⁶¹ was introduced in 2002 authorising referral of cases to mediation or conciliation. The provision was passed to reduce the overwhelming backlog of cases suffered by the court system for the last several decades. It was reported that for the civil cases to be adjudicated it takes

⁶⁵⁹ *Ibid.*

⁶⁶⁰ PG Lim, "The growth and use of mediation throughout the world: recent developments in Mediation/Conciliation among common law and non-common law jurisdictions in Asia" (1998) 4 *Malayan Law Journal*, cv, (1998) 4 *MLJ*, 105. <http://www.lexis.com/research/retrieve/y>. Court Dispute Resolution Center was later on renamed as Primary Dispute resolution Center.

⁶⁶¹ The Code of Civil Procedure, 1908 (Act No.5, 1908)

approximately 10 to 20 years. In the state of Tamil Nadu, for example, as estimated by the Chief Justice of Madras, there are about 25 million cases pending, which would take 347 years to adjudicate with current resources.⁶⁶² The court annexed mediation is expected to overcome this grave problem and give satisfactions to litigants.⁶⁶³

In China, the amendment was made to the Chinese Code of Civil Procedure.⁶⁶⁴ Article 6 states that in trying civil cases, the people's court should stress mediation and when mediation efforts are not effective, the courts should issue its decision in a timely manner.⁶⁶⁵

In Thailand, civil court regulations on mediation were introduced in November 1994. A new division for mediation cases was then established. The aim is to reduce the outstanding cases and to promote rapid disposition of cases in the courts. The trial judge will act as the mediator on the authorisation of the Chief Justice.⁶⁶⁶

In Indonesia, the Supreme Court issued the Supreme Court Regulation No. 2/2003 in September 2003 concerning Mediation Procedures within the court system. The

⁶⁶² Ranbir Singh, "The Court Annexed ADR in India", *Asia Pacific Conference on Contemporary Trends in Mediation and Arbitration*, (Kuala Lumpur, 17-18 July 2006).

⁶⁶³ *Ibid.*

⁶⁶⁴ Civil Procedure Law of the People's Republic of China, 1982.

⁶⁶⁵ PG Lim, *loc.cit.*

⁶⁶⁶ See PG Lim, *loc.cit.*

Supreme Court Regulation No. 2/2003 introduces, *inter alia*, that mediation is mandatory for parties in disputes and handling judges.⁶⁶⁷

It can be seen that the court annexed mediation⁶⁶⁸ has been recognised and adopted by most countries. The main trigger factor for the adoption is the heavy caseloads faced by the courts. As mediation can offer a solution, there is no reason why Malaysia should not adopt the practice.

5.3.7 At what stage mediation should be applied?

Most writers are in the opinion that mediation can be done at any stage of the proceedings and more appropriately at case management stage. Mediation process is often linked to the court case management program. At this stage, mediation can be done through a direction from a judge or registrar or other officer of the court. Litigants have the opportunity to be briefed on the advantages and disadvantages of the procedure and decide on its appropriateness to their cases.

Practice Direction 5 of 2010 provides that judges may encourage parties to settle their disputes at the pre-trial case management or at any stage, whether prior to, or even

⁶⁶⁷ Nor Adha binti Abdul Hamid, “‘Win-win Innovation’ Through Alternative Dispute Resolution (ADR): Special Reference to the Practice of Mediation in Asian Countries”. *International Colloquium on Business & Management* (Bangkok: 19-22 Nov 2007)

⁶⁶⁸To note also that not all cases are suitable for the court mediation. Guideline from Justice Ambang could be very useful for the court to identify cases that are not suitable for mediation. (See 2007) 3MLJ vii; (2007) 3 MLJA at <http://www.lexis>. Summarily, when the cases involve legal issues or the cases need a sanction or declaration from the the court, mediation is not a proper forum. The cases should be referred for a hearing before a judge.

after a trial has commenced. It can even be suggested at the appeal stage. A settlement can occur during any interlocutory application for, summary judgment, striking out or at any other stage.

Also in other countries case management procedure is used as a platform to expedite the disposal of cases. In Singapore, for example, the Judiciary has initiated the pre-trial conferences as part of the court's management of civil cases in the courts as early as January 1992.⁶⁶⁹ At this stage the Registrar will evaluate the progress of the court proceedings and give appropriate directions as to how the action can proceed to trial. Further, parties are also encouraged to settle their disputes through negotiation on a 'without prejudice' basis. The registrar may advise the parties on the merits of mediation such as saving of time and costs. Besides, he or she may also discuss the issues and merits of the claim with the parties and their lawyers with a view of facilitating settlement of disputes. He might, at the request of the parties, give advice on the merits and suggests how the dispute might be resolved.⁶⁷⁰

The Honourable J. Clifford Wallace when consulted by Chief Justice of Botswana in implementing mediation program in Botswana, recommended mediation to start with the implementation of case management⁶⁷¹. After a year of implementation

⁶⁶⁹See GP Selvam, *Singapore Civil Procedure*, (Singapore; Sweet & Maxwell, 2003) at 612.

⁶⁷⁰See Ashgar Ali Ali Mohamed, *The Court Annexed Mediation with Reference to the Practice in Singapore, Mediation in Malaysia, The Law and Practice*, Ed. Mohd Naqib Ishan Jan, Ashgar Ali Ali Mohamed, (Malaysia: Lexis Nexis, 2010) at 452.

⁶⁷¹Recommendation was made after spending sufficient time in Botswana talking with judges, lawyers, the court administrators, mediators, visiting the court and studying records. See: Clifford Wallace (Senior Judge and Former Chief Judge; U.S. Court of Appeals); "The Court Leadership: Judicial Reform and Improving Judicial Administration Around the World," *Asia Pacific Court Conference*, (Singapore, 6 October, 2010)

substantial backlog of civil cases in the High Court was decreased by 65%. In October 2010, after two and one-half year introduction of case management, the civil cases' backlog was reduced by 87%.⁶⁷²

On the same note, the Hong Kong Judiciary has also rolled out its Civil Justice Reforms, one of which gives power to the judges, through case management, to encourage the parties to settle suitable disputes by mediation, failing to comply will result in cost orders being sanctioned.⁶⁷³

In New Zealand, the structure of the adjectival of primary court has also been overhauled.⁶⁷⁴ The reform⁶⁷⁵ provides that most cases can and will settle by direct negotiation between the parties unless there is a very substantial impediment to settlement. For those cases where one of the parties is not being realistic, there is direct recourse to a judicial settlement conference, where their expectations, or even their grasp on reality, can receive any necessary adjustment.⁶⁷⁶

⁶⁷²See, the Honorable J. Wallace, *Ibid.*

⁶⁷³ Chan Sek Keong (the Chief Justice), *Launch of SMU-Centre for Dispute Resolution*, Singapore Mediation Centre, Singapore, 16 April 2009. It was also commented by the Chief Justice that the imposition of sanctions to encourage or promote mediation will not work in the long term. Lawyers will just advise clients who do not wish to mediate to pretend to agree to mediation just to avoid costs orders.

⁶⁷⁴By District Court Rules 2009. Russel Shannon, "Promoting Access to Justice; Civil Reform in the District The courts of New Zealand". *Asia Pacific Courts Conference*, (Singapore, 4-6 October 2010).

⁶⁷⁵The reform have been in place since the 1st November 2009 and designed to make the process more accessible, quick and inexpensive. See Justice Shannon, *ibid.*

⁶⁷⁶Those cases which turn on a simple factual finding or point of interpretation are winnowed out to be dealt with as a short trial, and all that with or no judicial intervention to that point. *Ibid.*

The experience⁶⁷⁷ of Supreme Court of New South Wales reveals that mediation is not so effective when it is done at the very early stage of the case. In some of the cases, parties must serve sufficient evidentiary material to enable a settlement to be reached at mediation. Unless other arrangements have been approved by the registrar-mediator before the mediation, the evidentiary material will include:

i) For equity and probate cases-affidavit evidence which discloses material in support of the claim or defence. In mediations under the Family Provisions Act, the defendant must comply prior to mediation date with Schedule J of the Supreme Court Rules.

ii) As for the common law cases-expert reports and valuations, all affidavit served in the proceedings should be supplied as a tender bundle to the registrar-mediator one week before the mediation.⁶⁷⁸

In addition, the experience of Singapore's Syariah Court also reveals the same that in some of the cases, mediation cannot be concluded as the defendant had failed to file in his or her defence before the mediation session. The pleadings need to be filed in before the mediation session for the court mediator to have the basic idea on the suitability of mediation with regard to the case.⁶⁷⁹

It can be seen that judicial conference or case management is used as a platform to discuss the possibility of settlement between the disputing parties. At this stage the

⁶⁷⁷ Interview with, SDR Laurie Walton and SDR Nicholas Flaskas, Senior Deputy Registrars of Supreme Court of New South Wales, on 7 June 2011.

⁶⁷⁸ The Supreme Court of New South Wales Portal, *Mediation*, 3 May 2011(retrieved), http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/11/pages/SCO_mediation .,

⁶⁷⁹ Interview with Puan Kamaria Djourimi, Assistant Manager and Mediator, Syariah Court of Singapore on 20/6/2011.

court may evaluate the suitability of mediation to the case as the pleadings are ready. The session will also give the opportunity for the parties to be briefed on mediation and its benefits.

5.4. Practice Direction 5 of 2010; Rooms for Improvement

5.4.1 Voluntary approach

Direction 5.3 states that a Judge can request the parties to meet in his chamber and suggests mediation to the parties. Mediation will only take place when the parties agree or consent to the said mediation process. The direction provides no compulsion or persuasive direction on the parties to mediate. Even the parties will not be subjected to any sanction in case of failure.

Voluntary approach adopted by the judiciary is consistent with the main feature of mediation that it has to be consensual in nature. There should be no coercion or pressure imposed for the parties to mediate. However, the voluntary basis provides no incentives for parties to adopt mediation as an alternative dispute resolution. As the awareness and acceptance of mediation of the litigant and the lawyers in Malaysia are still poor, the capability of this approach to influence the concerned parties to mediate should be looked into.

In this regard, Justice Datuk David Wong Dak Wah, the judge of High Court of Sabah states:

“As mediation is done on a voluntary basis, there is no incentives for parties to adopt mediation as an alternative dispute resolution ... History teaches us that mind-set of any society takes longer to change if it is on a ‘voluntary basis’. Society is more litigious these days and we must accept that the court alone will not be able to ensure that there will be a ‘just, quick and cheap resolution’ to any dispute.”⁶⁸⁰

Pursuant to this state of affairs, YA Datuk Su Geok Yiam concurred with a comment that even judges are reluctant to introduce mediation if there is no express provision on its application. She opined:

“In absence of such express provision in the RHC (Rules of High Court 1980) providing for the court annexed mediation, most judges in Malaysia are reluctant to introduce it in the court in which they preside in.”⁶⁸¹

If the judges are reluctant to introduce mediation in absence of an express provision, more or less the parties would opt for mediation if they are given option to choose. Awareness of mediation is still poor amongst the legal fraternity and the litigants. Therefore, it seems difficult to persuade the parties to opt for mediation if there is no persuasive direction or compulsion on its application.

For an instance, in England’s Central London County Court Scheme, in which mediation occurred only with the parties’ consent, out of 4,500 cases offered for mediation only 160 mediations took place. By contrast, after England introduced the

⁶⁸⁰David Wong Dak Wah, (High Court Judge, Kota Kinabalu High Court), “The Court-Annexed Mediation”, *Asian Mediation Conference, Rediscovering Mediation in 21st Century*, (Kuala Lumpur,.24-25 February 2011).

⁶⁸¹ Su Geok Yiam. *Supra*.

Civil Procedure Rules⁶⁸² empowering the courts to encourage the use of mediation with cost sanction, the number of disputes referred for mediation increased dramatically by 141 %.⁶⁸³

It could be seen that voluntary usage of mediation is very low. It seems that mediation is not opted if parties are given a choice to participate. This could be due to the lack of awareness of the litigants on the benefits of mediation and its suitability in resolving disputes. Litigation is still perceived as a default mode of resolving disputes. Hence, for mediation to be accepted and perceived as a mode of resolving disputes certain proactive measures need to be introduced.

On that basis, many courts in various jurisdictions have made mediation mandatory instead of allowing parties to voluntarily opt for it. The degree of compulsion in different jurisdiction varies, ranging from compulsory mediation for certain categories of cases to “softer” approaches.⁶⁸⁴

The following continuum prepared by Dorcas⁶⁸⁵ illustrates the range of compulsion which provides better perspective on the states of affairs:

⁶⁸² The Civil Procedure Rules 1998, 1998, No.3132, (L17)(UK)

⁶⁸³“The Lord Chancellor Department: *Alternative Dispute Resolution: A Discussion Paper* (November 1999), Annex B, <http://www.dca.gov.uk/consult/civ-just/adr/annexbfr.htm>. See also, Joyce Low, Dorcas Quek, (District Judges, Subordinate Courts of Singapore), “The ADR Form in the Subordinate Courts: Finding the Appropriate Mode of Dispute Resolution,” *The Singapore Law Gazette*, April 2010, app.subthe courts.gov.sg/Data/Files/The %20ADR%20Form.Pdf.

⁶⁸⁴See Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing of a The Court-Mandated Program*, 5 April 2011 (retrieved) cojcr.org/vollno2/479-510.pdf.

⁶⁸⁵ District Judge, Subordinate Court of Singapore, *Ibid*.

The Continuum of ‘Mandatories in Mediation’⁶⁸⁶

requirement to attend mediation orientation session or case conference to explore mediation			opt out(compulsory discretionary or categorical mediation with provision to be exempted	
1	2	3	4	5
Categorical or Discretionary referral (with no sanctions for Refusal)			“Soft’ sanctions (making mediation a prerequisite for filing a case or obtaining Legal aid;imposing cost sanctions for unreasonable refusal to mediate etc).	“No exemptions (Categorical or discretionary referral with sanctions for non-compliance)

In the diagram above, categorical referral is used when categories of disputes are automatically referred for mediation. Discretionary referral occurs when a judge is given authority to refer to an appropriate case for mediation.⁶⁸⁷

Several Australian states adopt the highest degree of mandatoriness -referral to mediation buttressed by sanctions and with no exemptions. The court in South

⁶⁸⁶ See Dorcas Quek. *Ibid.* Dorcas adapted and modified the continuum from Tania Sourdin, “Making people Mediate, Mandatory Mediation” in The court-Connected Programmes in David Spencer & Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* 148 (2005)

⁶⁸⁷ See Frank E Sander, H William Allen & Debra Hensler, ‘Judicial (Mis) use of ADR? A Debate’ (1996), *27 U TOL L Rev* 885, at 886; Frank EA Sander, “Another View of Mandatory Mediation” (Winter 2007), *Disp Res Mag* at 16 cited in Dorcas Quek, *ibid.*

Australia, Victoria and New South Wales⁶⁸⁸ are empowered by legislation to refer parties to mediation with or without consent.⁶⁸⁹

On the other hand, there can be referral of cases without any sanctions for refusal to mediate. An example for this is the United Kingdom's ("UK") Automatic Referral to Mediation pilot scheme in Central London County Court from 2004 to 2005. Although cases were automatically being referred by the courts for mediation, the disputing parties had the option to express their objections.⁶⁹⁰

Somewhat on the middle of the continuum is the 'opt out scheme' in Ontario Canada. Under this scheme, all civil cases, except family cases, are referred to mediation, but the parties have the option of seeking exemption from mediation by way of motion.⁶⁹¹ The United Kingdom also offers for an example of 'soft sanctions' in the middle of continuum. The UK court encourages parties to attempt ADR, and they take into account the party's conduct-including any unreasonable refusal of ADR or uncooperativeness during the ADR process-in determining the proper costs order.⁶⁹²

⁶⁸⁸For example, on 1 August 2000 Section 110K Supreme Court Act 1970 (New South Wales) was amended to allow for the referral of mediation or neutral evaluation without the consent of the parties. A Practice Note of the Supreme Court issuing on 8 February 2001 set out the basis on which the Supreme Court will consider mediation in civil matters.

⁶⁸⁹ See Dorcas, *Ibid.*

⁶⁹⁰See Dame Hazel Genn, Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vancappa, "Twisting Ams: The court referred and the court linked mediation under judicial pressure, *The UK Ministry of Justices' website* at <http://www.justice.gov.uk/publications/research210507.htm>, also referred by Dorcas *ibid.*

⁶⁹¹See Robert G Hann and Carl Baar, "Evaluation of the Ontario Mandatory Mediation Program Rule (24.1): Final Report-"The First 23 months" 80 (2001), cited by Dorcas *ibid.*

⁶⁹²See Rule 1.4 (e) of the UK Civil Procedure Rules, also cited by Dorcas *ibid.*

Most recently, Hong Kong has introduced mandatory mediation on the highest degree of the above continuum. Since January 2010, all parties involved in civil proceedings in the Hong Kong courts must attempt mediation before resorting to adjudication. A ‘mediation certificate’ has to be filed together with Hong Kong’s equivalent of the summons for direction, stating whether the parties are willing to attempt mediation. Both the solicitor and the client have to certify that the availability of mediation has been explained to the client, and a party who does not wish to attempt mediation has to give valid reasons for the refusal. Following the UK position, the Hong Kong Court has been given the discretion to make adverse cost order against any party who has unreasonably refused to undergo mediation.⁶⁹³

Mandatory approach or voluntary approach with sanction was introduced for the awareness purpose. The method will impose parties to acknowledge the option of mediation and its benefits and thus, evaluate its suitability with their case.⁶⁹⁴

It can be seen that our judiciary has adopted voluntary approach without any sanction or persuasive direction.

⁶⁹³See Hong Kong Practice Direction No.31 on *Mediation*, Hong Kong Civil Reform website, <http://www.civiljustice.gov.hk>, referred to by Dorcas ibid.

⁶⁹⁴In this regard Justice Einstein in *Idoport Pty Ltd v National Australia Bank Ltd* (2001)NSWC 427 at 40 states: “It appears that, perhaps as a matter of tactics, neither the parties nor their legal representatives in a hard fought dispute are willing to suggest mediation or even to indicate that they are prepared to contemplate it. No doubt this could be seen as a sign of weakness. Nevertheless, the parties are content to take part in the mediation conference if directed to do so by a judge. There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category the new power is directed. The same was also cited in Sourdin, Tania *Supra*.

The only guideline is the provision in the Practice Direction that states:

“5.2. If a judge is able to identify issues arising between the parties that may be amicably resolved, he should highlight those issues to the parties and suggest how those issues may be resolved.

5.3. The judge can request to meet in his chamber in the presence of their counsels, and suggest mediation to the parties. If they agree to the mediation then the parties will be asked to decide whether they would wish the mediation to be the judge-led or to be referred to a mediator.”

In this regard there would be possibility that the lawyer may advise his/her client earlier not to agree on mediation. Since the awareness of Malaysian on mediation is very low, certain measures and safeguards must be provided to enhance the awareness and acceptance of the Malaysian litigants and lawyers on mediation.

5.4.1.1 Options?

As discussed above there are few approaches or models adopted by other jurisdictions that can be referred to as guidelines to enhance awareness for the participation of litigants in the mediation process. The suitability of the options are analysed below:

5.4.1.1.1 Costs sanctions

The method has been adopted by the United Kingdom and recently followed by Hong Kong. The U.K. Civil Procedure Rules⁶⁹⁵ encourage the use of mediation for suitable cases. If a party unreasonably⁶⁹⁶ refuse to participate the court will impose cost

⁶⁹⁵Rule 1.4(e) states; “encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating.

⁶⁹⁶In *Hickman v Blake Laphorn* (2006) EWHC 12 (QB) (Eng.) the judge states that reasonableness of refusal include the nature of the dispute, the merits of the case, the extent of to which other

sanction. In determining the cost the court will take into account the parties' conduct towards the refusal.

Dorcas⁶⁹⁷ viewed that this approach faces additional hurdle as the court has to make difficult findings of fact to determine the cost sanction, *inter alia*, the nature of the dispute, the merits of the case or whether mediation has a reasonable prospect of success. Besides, the court also has to evaluate whether a party was uncooperative during the mediation which is not easy to decide.

Caller R. in 'ADR and Commercial Disputes'⁶⁹⁸ contended that "... This decision is probably best left to the parties. Threats by the courts to impose substantial penalties on parties who elect litigation over ADR almost amounts to compulsory ADR. It is our belief that if the courts confuse encouragement with coercion, it will not be long before a discontented party alleges of Article 6 of the Convention of Human Right."⁶⁹⁹

settlement method have been attempted, whether costs of ADR would be disproportionately high, whether any delay in settling up and attending ADR would have been prejudicial, and whether the mediation had a reasonable prospect to ADR.

⁶⁹⁷ See Dorcas, *Ibid*.

⁶⁹⁸ Caller, Russel, *ADR and Commercial Disputes*, (UK:Sweet & Maxwell ,2000), 21-22

⁶⁹⁹The European Convention on Human Right (the ECHR) entered into the UK jurisdiction as from 2 October 2000 as a result of the Human Rights Act 1998. Article 6(1) of the ECHR provides in essence the following:

"In the determination of his civil right and obligations....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". See Mackie, Karl, David Miles, William Marsh, Tony Allen, *The ADR Practice Guide, Commercial Dispute Resolution* , (UK:Butterworths, 2000) at 96. In *Halsley v. Milto Kynes* (2004) ECWA (Civ) 576 (Eng.) the court has ruled out that compelling a party to mediate against his will may unduly restrict an individual right of access to the court which is guaranteed under Article 6 of the ECHR.

It seems that to determine the conduct of the defendant before imposing him the cost sanction is an extra duty for the court that need to be exercised with care. Even though Malaysian's judiciary is not subjected to Article 6 of European Human Right but the right of fair trial is also provided in the Federal Constitution of Malaysia. This view, however, can be contradicted with the argument that even though the parties are made compulsory to attend the mediation session, they are not forced to agree on any terms discussed at the session. They have the right to voluntarily not to agree on the terms proposed and options for the case to be brought for a full trial.

It can be seen here that the task of determining unreasonable conduct is an extra burden imposed on the court. Further, at present our settlement judges, registrars and the representing lawyer are not guarded with specific guidelines or code of conduct when participating in mediation. To be on the safe side, the approach is not advisable to be adopted by our court at present. Unless there is a clear guideline or code of conduct, issued for the parties participating in mediation inclusive of the settlement judge and the representing lawyer, the approach of cost sanction is not encouraged.

Further, at present, our judges' mediators are still lacking in training⁷⁰⁰ and experience in mediation. If the litigant refuses to mediate on this reason, and he or she is ordered to pay cost, the order seems not to be fair and unreasonable. Unless our registrars or judges mediator are equipped with proper training and backed up with a clear code of conduct this approach seems not to be appropriate to be adopted at present.

⁷⁰⁰ As stated by David Wong Dak Wah , *loc.cit.*

Chief Judge of Singapore, Chief Justice Chan Sek Keong viewed that the imposition of sanction to encourage or promote mediation is a self-contradiction since mediation is consensual in nature. Hence, costs orders will not work in the long term. Thus, lawyers might just advise their clients who do not wish to mediate to pretend to agree to mediation so as to avoid the costs orders.

The advice services alliance of UK in its report in 2007 contended that a combination of increasing judicial direction and cost penalties made refusing ADR a risk strategy. For example, some 72 cases were mediated in 1999 as compared to 293 in 2004. At the same time, the settlement rate at mediation fell significantly, from 62% during the 1996-98 pilot projects, to 45% in 2004.⁷⁰¹

Referring to a suggestion by Hazel Genn,⁷⁰² the report states that there is a direct correlation between these two figures: the more pressure you put on people to mediate without regard to whether or not the case is suitable, the less likely they are to settle at mediation. The report further refers to evaluation of other court-based mediation schemes at Exeter and Birmingham. In Birmingham, the voluntary court mediation scheme offered during 1999-2004 had a 60% settlement rate. In Exeter, where judges put considerable pressure on parties to mediate, the settlement rate was 40% and only 30% in cases where judges had directly referred cases⁷⁰³.

⁷⁰¹ASA Briefing September 2007: ADR Update No. 22.

⁷⁰² *Ibid.*

⁷⁰³ *Ibid.*

It could be seen here that to opt for judge direction with cost sanction must be designed with utmost care and sensitivity to address the balance between the direction to mediate and the need for parties to request for exemption. A clear framework must be ready and the court mediators must be well trained before such model can be imposed.

5.4.1.1.2 Mandatory Mediation

The application of mandatory mediation has sparked diverse sentiments. The approach seems inconsistent with the essential feature of mediation that it should be entered with voluntariness and willingness of the parties. The practice of mandatory mediation seems to undermine the basic tenet of mediation-voluntariness.

In the United States, the distinction is drawn between compulsion to enter mediation and compulsion within the mediation and since compulsion to mediate is pressured of the former kind, there should be no objection⁷⁰⁴. The rationale, that even if the parties are coerced to mediate, it is still up to them to participate in the process and to work out the terms of any settlement in the mediation.⁷⁰⁵

The National Standards for the court connected Mediation Programs of the United States Institutes of Judicial Administration suggested that mandatory mediation

⁷⁰⁴ S Goldberg et al *Dispute Resolution: Negotiation, Mediation and other Processes (2nd edn)*, Little Brown & Co. USA, 1992 referred in Laurence Boulle, Miryana Nestic, *Supra* at 372.

⁷⁰⁵ R Ingleby 'The court sponsored mediation: the case against mandatory participation (1993) 56 *Modern Law Review* 441 at 46 cited in Laurence and Nestic, *Supra*.

should be imposed if it was more likely to serve the interests of the parties, the justice system and the public than would voluntary attendance.

Professor Frank Sander has different views that mandatory mediation is needed as a temporary expedient because individuals do not use mediation voluntarily and should be given the opportunity to experience the benefits of mediation. Richard C Reuben viewed that mandatory mediation might have been appropriate in the United States as a remedial measure to get the ADR ball rolling in the 1970s and 1980s, and that the court compulsion is no longer needed since the ADR movement in the United States is more mature.⁷⁰⁶

Mandatory mediation could be a solution if the awareness of the society on mediation is very low. The court mandated mediation may be instrumental in helping them overcome their prejudices or lack of understanding. Studies have shown that parties who have entered mediation reluctantly still benefited from the process even though their participation was not voluntary.⁷⁰⁷

⁷⁰⁶ Richard c. Reuben, *Tort Reform Renews Debate over Mandatory Mediation*, DISPUTE RESOLUTION MAG., Winter 2007, at 13, 15 cited in Dorcas *ibid*. The American report points out that the voluntary low take up of mediation does not necessarily mean the parties are not interested in mediation; it might be due to several reasons; 'including fear of the party to the other side's desire for compromise and, frequently, ignorance by the parties or their lawyers about alternative dispute resolution processes'. Compulsory ADR could therefore provide a way of overcoming these other problems as well. See Mackie, Karl, David Miles William Marsh, Tony Allen, *The ADR Practice Guide, Commercial Dispute Resolution* (UK: Butterworths, 2000) at 71. Mandating mediation would be the solution for the litigants to acknowledge the existence of the option, its advantages as well as its disadvantages. On this basis the parties can determine the appropriateness of mediation in resolving their cases.

⁷⁰⁷ See Jessica Pearson & Nancy Thoennes, "Divorce Mediation: An overview of research results", 19 *Colum. J.L. & Soc Prob* 451 (1985); James a. Wall & Lawrence F. Schiller, "Judicial Involvement In Pre-Trial Settlement: A Judge Is Not A Bump On A Log", 6 *Am. J Trial Advoc.* 27 (1982); Craig McEwen & Thomas Milburn, Explaining a Paradox of Mediation, 9 *NEGOT. J.* .23 cited in Dorcas *ibid*. Mandating mediation through the court rules is the possible way to promote mediation. In

Chief Justice of New South Wales Hon J.J. Spigelman in an address to a LEADR⁷⁰⁸

dinner in November 2000 said:

“We are presently engaged, particularly with respect to compulsory mediation, at the early stage of a long process of gathering experience which will assist us in determining in what circumstances an order...(for compulsory mediation)...would be prove fruitful.”⁷⁰⁹

In Victoria and Queensland⁷¹⁰ the courts have for many years exercised a power of compulsory referral to mediation with almost unbridled enthusiasm. The evidence is mostly anecdotal, but it seems that “mandatory” mediation is accepted in those

New South Wales for example, Amendment has been made to S110 Supreme The court Act 1970 (NSW) on 1st August 20001. The amendment provided for mandatory referral of disputes already in the court system to mediation or neutral evaluation without the consent of the parties. The amendment also provided for a requirement for the parties to participate in the mediation or ADR process in 'good faith'. On 8 February the following year, the Supreme Court issued a Practice Note No118 setting out the basis on which the court would consider ordering mediation in a civil matter. Practice Note 118 provides for an avenue for informing the parties and for them to discuss with the registrar the advantages, disadvantages and the appropriateness of mediation. See Ambeng Kandakasi, “Developing A System of the Court Annexed ADR in an increasingly litigious society, arguments for and against: the PNG experience” (2007) 3 *MLJ* vii; (2007) 3 *MLJA* 7, <https://www.lexis.com/research/retrieve> retrieved on 5/7/2009

87 LEADR is an association of dispute resolvers. It is a not-for-profit membership organization formed to promote and facilitate the use of dispute resolution processes including mediation.

⁷⁰⁹ LC Paper No.CB(2) 1574/01-02(01). www.legco.gov.hk/hkyr01-02/english/panels/ajls/papers/aj.

⁷¹⁰The introduction of court Legislation Amendment Act 1995(Qld) on 29 May 1995 has made mediation enforceable in Queensland. The amendment was made by the recommendation of the Alternative Dispute Resolution Division of the Litigation Reform Commission (Queensland), which presented its report on 29 June 1992. ‘One of the Commission’s main tasks was to examine ways of reforming the existing the court system in a bid to minimizing cost and delay in the disposition of cases. The commission recommended the introduction of a the court-based ADR scheme with the objective that:

‘Successful reference (to ADR) will lighten the burdens upon the court resources and provide an alternative fast track which will avoid or settle many disputes without full adversarial determination by the courts.

‘The Act formally introduced the court annexed ADR in Queensland in terms of providing for mediation and cases appraisal and a framework for the protection of the ADR process in the court system. The Act empowers the courts to give written notice to the parties of referring a matter to an ADR process and specifying the person who will conduct the mediation. The parties have the right to either object or consent to the referral. Where there is an objection, the parties could be required to attend the court for the court to decide on the appropriateness of the referral. Ultimately, the court has power to order referral to an ADR process whether or not the parties consent.’ Ambeng Kandakasi, “Developing A System of the court annexed ADR in an increasingly litigious society, arguments for and against: the PNG experience” (2007) 3 *MLJ* vii; (2007) 3 *MLJA* 7, <https://www.lexis.com/research/retrieve> retrieved on 5/7/2009.

jurisdictions as a useful and valuable part of the landscape in which litigation is resolved. The Chief Justice of Queensland is quite glowing in his assessment of the worth of the mandatory mediation scheme in his court. He commented that:

“I have to say that I am absolutely convinced of the desirability of our approach, with relation primarily of course to the interest of the litigating public, and ultimately addressing the issue of the principal concern: enhancing access to justice.”⁷¹¹

The effectiveness of mandatory mediation could also be seen in the Ontario Mandatory Mediation Program. In January 1999 a Rule was introduced into the Ontario Court Rules for the Ontario Superior Court of Justice (Rule 24.1) that made mediation mandatory except if the court granted leave to the parties to be excused. Rule 24.1 was introduced for a two year test term.

Throughout the first 1 year and 11 months that the Rule was applied an extensive study was conducted using surveys, focus group interviews and a control group of cases not subject to the rule. Over 3,000 mediated cases were studied and controls were in place to make comparisons with cases not subject to mandatory mediation. The study attempts to measure the effects on litigants, the courts and the profession of Rule 24.1.

⁷¹¹ LC Paper No. CB (2) 1574/01-02(01). www.legco.gov.hk/hkyr01-02/english/panels/ajls/papers/aj

The findings⁷¹² of the study are summarized by the researchers as follows:

- a.) Mandatory mediation under the Rule has resulted in significant reductions in the time taken to dispose of cases.
- b.) Mandatory mediation has resulted in decreased costs to the litigants.
- c.) Mandatory mediation resulted in a high proportion of cases (roughly 40% overall) being completely settled (and a large group partially settled) earlier in the litigation process with other benefits being noted in many cases that did not completely settle.
- d.) In general, litigants and lawyers have expressed considerable satisfaction with mediation process under Rule 24.1.
- e.) Although there were at times variations from one type of case to another, these positive findings applied generally to all type of cases to cases in both Ottawa and Toronto.

The parties and lawyers expressed overall satisfaction with the mandatory mediation process. Some 80 % of the lawyers in Ottawa and Toronto expressed satisfaction with the overall mandatory mediation experience, while 82% and 60% of the litigants in the respective states expressed satisfactions. The approach is that mediation is made mandatory for civil and non-family actions, with a provision for the parties to opt-out

⁷¹² Some other findings of the study :

- a) Mediator choice is important. There was a markedly higher success rate for cases where the parties chose their own mediator than from where they had a mediator assigned by the local mediation coordinator.
- b) When cases settle at or soon after mandatory mediation litigants save a substantial amount of money.
- c) Very few mediation sessions lasted more than a day or needed more than one session (2-4%)
- d) In Ottawa where mandatory mediation had been a part of the system prior to the implementation of the rule the results for settlements rates and clients satisfaction were better than in Toronto that had not had the experience. Toronto figures improved as the trial period went by. This suggests that success breeds success and also that the practitioners litigants experience with mediation is a factor in successful settlement and satisfaction.

of filing a motion. The parties in all these cases have to undergo mediation within ninety days after the filing of first defence. The parties in standard cases may consent to an extension of sixty days, but all other extensions have to be obtained through the formal court orders. Mandatory mediation adopted has shown a great success twenty months after its inception.⁷¹³

From the findings it can be said that the mandatory application of mediation has benefitted the disputing parties and also the court. The satisfaction of the parties is the main aim that should be achieved and targeted by the court in its process. If the end result is for the benefit of the parties, there would be no harm to mandate the application. It could be seen here that the success of mandated mediation depends on clear guidelines provided with highly qualified mediators offered.

The experience in Florida could also offer some recommendation for the application of mandatory court annexed mediation. It has been estimated that more than 100,000 cases are diverted from the court process to mediation each year. Florida Rules of Civil Procedure authorises trial judges to refer the action to mediation or arbitration if the judge determines that the nature the action is suitable for mediation that could benefit the litigants.

The Rules of Civil Procedure provided that the mediation session must take place within sixty days of the court referral. Parties may request to be dispensed with by filing a motion.⁷¹⁴

⁷¹³See Dorcas, *Supra*.

⁷¹⁴The grounds for the motion to be granted include :

It is analysed that the success of the application in Florida is attributed to some factors, inter alia:

- 1.) The parties have the freedom to choose their mediator.

In Florida, the parties are given the option to choose any court certified-mediator or any other mediator whom they deemed to be sufficiently qualified.⁷¹⁵

- 2.) Dissatisfied parties have recourse to mediator grievance system.

The Florida Rules for Certified and Court-Appointed Mediators introduced a code of conduct for all mediators, which is enforceable through the right of litigants to file grievance complaints. Once mediation is made mandatory, it is incumbent that the courts ensure the quality of mediation is monitored closely. It is notable that the number of grievances filed compared to the large number has not been particularly high in Florida which seems indicative that the level of dissatisfaction with the mandatory mediation scheme is not great.⁷¹⁶

- 3.) Clear requirements on the obligation to mediate.

Florida has also introduced relatively clear criteria on and when the obligation to mediate is fulfilled. The main requirement is for the parties to appear at the mediation session, and appearance is met when the following persons are physically present:

-
- i) The issue to be considered has been previously mediated between the same parties pursuant to Florida Law.
 - ii) The issue presents a question of law only; or
 - iii) Any other good cause is shown

⁷¹⁵ See <http://www.flthe.courts.org/genpublic/adr/bin/2006%20Compendium.pdf>. The liberty is given to the parties to mutually agree on a mediator.

⁷¹⁶ Dorcas. *Supra*.

- a.) The party or its representative having full authority to settle without further consultation;
- b.) The party's counsel of record, if any.
- c.) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle.

It could be seen here that the mandatory mediation is institutionalized with clear guidelines to maintain the quality and standard of the service. A proper and structured approach of the application had contributed to the success of its application.

Since the awareness of the Malaysian litigants and lawyers is very low, the mandatory approach seems to be a solution to enhance the awareness. Whether our civil courts are ready to adopt this method is to be looked into. The basic framework must be prepared thereto, the mediators must be properly trained and clear guidelines must be ready before the application can be mandated.

The option to choose the court mediators as provided in Florida seems to be inappropriate for our court system. The option may be workable if the parties opt to choose the private mediators offered by the Malaysian Mediation Centre.⁷¹⁷ Our courts have limited number of registrars and judges to conduct mediation, affidavit

⁷¹⁷ As noted earlier our Practice Direction 5 gives the parties the option for the mediation to be done by the court mediators or non-the court mediators. However, the court mediators are the most chosen one since the service is free.

hearing or full trials. Mediation is normally fixed depending on the suitability of any particular registrars or judges. In this situation, the approach of Supreme Court of New South Wales could be an option. Mediation is done by the Senior Deputy Registrars who are assigned only to conduct mediation.⁷¹⁸ The mediators seem to be more experience and focused as their duty is to mediate and not to conduct affidavit hearing or full trial. In contrast, our court mediators have to do mediation, affidavit hearing or full trial matters and also involve in administration work. The approach adopted by Supreme Court of New South Wales has also been practiced by our Syariah court. With specific registrars assigned for mediation the volumes of cases that can be mediated is also high, get earlier date and disposed fast.⁷¹⁹ Other option is the practice of Primary Dispute Resolution of the Singapore Subordinate Court. The manager of the Primary Dispute Resolution Centre will assign the case to be mediated before the court mediator according to its suitability, nature and expertise of the mediator. With this specific arrangement the inclination of the mediation to be successful is also high. Even though the parties are not given option to choose their preferred mediator, they are guaranteed with the efficient service of mediation offered by the court.

The mediator grievance system and the clear requirements on the obligation to mediate as adopted in Florida are recommended to be adopted in our the court as the system may speed up the mediation process and enhance the public trust on suitability and quality of mediation offered by the court.

⁷¹⁸The observation by the researcher at Supreme Court of New South Wales. Interview with Nicholas Flaskas, Senior Deputy Registrar, Supreme Court of New South Wales on 7/6/2011.

⁷¹⁹ Interview with Puan Ruzita Ramli, Sulh Co-ordinator, JKSM on 12 May 2010.

Upon analysing the positive side of institutionalizing mandatory mediation, Lim Lan Yuan and Liew Thiam Leng in an article “The Court Mediation in Singapore”⁷²⁰ state that the institutionalism aids the development of sound practices. It enhances efficiency and consistency, and it encourages the appointment of trained staff. Norms appropriate for specialist areas are fostered, particularly if legislatively mandated. The article further contended statistics of actions settle before hearing indicates up to 90%.

The adoption of mandatory mediation scheme, however, must be designed with proper caution.⁷²¹ The court should first analyse whether the case is an appropriate case for mediation. A clear guideline and code of conduct for mediators, parties and lawyers must be made available. The utmost concern on the success of mandatory mediation depends on the quality of mediators offered. We have to note that an

⁷²⁰ Lim Lan Yuan & Liew Thiam Leng, *The Court Mediation in Singapore*, (Singapore, 1997.)

⁷²¹ Although mandatory mediation may be beneficial, considerable criticism has been levelled against the parties’ self-determination and voluntariness, thus undermining the very essence of mediation. Mediation according to U.S. Model Standards of Conduct for Mediators, is a process that emphasizes voluntary decision making and focuses on self-determination as a controlling principle. (U.S. Model Standards of Conduct for Mediators (2005), cited in Jacqueline Nolan-Haley, *Consent in Mediation*, DISP. RESOL., MAG, Winter 208, at 4,5.

According Sourdin T, in Australia, arguments on mandatory referral objections arise in three areas linked to:

1. Concerns about the possible adverse impact that mandatory referral practices may have upon the process.
2. Questions about how the process should be funded.
3. Concerns relating to the choice of ADR practitioner; this is also linked to training and accreditation issues. (See T. Sourdin, *Supra* note)

In *Idaport Pty Ltd v. National Australia Bank Ltd. (2001) NSWSC 427*. Justice Einstein referred to amendments that allowed for the referral of matters to mediation without consent and noted that:

The amendments raised some debate surrounding the appropriateness of mandatory mediation. Some view this notion as a contradiction in terms, opposing the culture of ADR which generally encompasses a voluntary, consensual process. It is important to note, however, that whilst parties be compelled to attend mediations sessions, they are not forced to settle and may continue with litigation without penalty. Furthermore, Part 7B requires that referrals follow a screening process by the court, and that mediation sessions are conducted by qualified and experienced mediators. “There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed.

improper implementation programme may lead to the failure of its application. Mandatory mediation programme in Detroit is a good example of this. The programme was introduced in Wayne Circuit Court in Detroit in 1971. The mediation was run within the court as an adjunct function to reduce the increasing backlog of civil cases. The programme required the presence of a judge on each panel as a neutral mediator, together with a representative from the plaintiff's bar and a representative from the defence bar. The local Rules in 1971 provided that the matter would be placed on the calendar for trial if the parties to the litigation did not accept the mediation award.⁷²²

This programme was in use for three years and after which mediation fell into disused and was abandoned by the court until 1978. The failure of the programme was analysed due to the following reasons:

- a) It continued to tax the judicial resources of the court in as much as it required a judge on the panel and staff personnel for scheduling and other function.
- b.) The quality of the panels lacked credibility.
- c.) There was no link between mediation and trial.⁷²³

In improving the system, the Wayne Circuit Court in 1978 adopted a new Local Rule 403 which addressed the problems. The Local Rule 403 shifts the running and the administration of mediation to a private non-profit corporation known as Mediator Tribunal Association. It entrusted to the body the authority to select the mediators and

⁷²² Lim Lan Yuang and Liew Thiam Leng, *loc.cit.*

⁷²³ *Ibid.*

to determine their qualifications. Besides, the court adopted Local Rule 301 and forged a link between mediation and trial by settling mediation on the 27th month after filing and trial on the 30th of the month. Each party to litigation is required to affirmatively reject the mediator's award within 40 days, otherwise the award stood as accepted.⁷²⁴

In ensuring the quality of the court mediators, the Mediation Tribunal Association requires the mediators to possess certain minimum qualification including five years' experience as practising attorney and membership in the Michigan Chapter of the American Trial Lawyers Association, or in the Detroit Defence Bar Association.

With the new programme of mediation, the backlog of civil cases of the Wayne Circuit Court decreased to 30 months from filing to trial in 1983 as compared to 48 to 50 months in 1977.⁷²⁵

It could be seen that with a proper framework, mandatory mediation can be an effective means to reduce backlog of cases in the courts. The success and satisfaction of parties must be monitored accordingly to ensure the application achieve its purpose and gain the confidence of the public.

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

5.4.1.1.3 Other approaches

i) Mandating mediation in certain types of cases.

In an attempt to increase awareness on mediation, mandating other approaches may also need to be considered and adopted. Instead of mandating mediation in all type of cases, the application is mandated in certain type of cases; for instance in family and accident cases. The effectiveness of the application may enhance awareness amongst lawyers to advise their client for mediation in other type of cases. In Supreme Court of New South Wales, mediation is made mandatory for family cases. Provision No. 8 of Practice Note No. SC Eq 7 specifically mentions that all proceedings involving family provision applications must be mediated. The experience for mediation with family cases has encouraged lawyers to advise their clients to opt for mediation for other type of cases. As a result⁷²⁶ nowadays, it is common for parties to opt for voluntary mediation in other type of cases on the advice of their lawyers. Another example is the experience of Primary Dispute Resolution Centre, the Subordinate Court of Singapore. The satisfaction for auto referral in accident cases has encouraged lawyers to advise and convince their clients to voluntary opt for mediation in other type of cases.⁷²⁷

Family mediation is said to have a more sensible way of resolving family disputes and considers the impact on the children as paramount. Mediation acknowledges

⁷²⁶Interview with Nicholas Flaskas, Senior Deputy Registrar Supreme Court of New South Wales on 7 June 2011.

⁷²⁷Discussion with District Judge, Joyce Low, Settlement Judges Marveen, Josephine Kang and others, Primary Dispute Settlement Centre, Subordinate Court of Singapore on 28 June 2011.

emotional and personal relationship involved in the dispute solving and private ordering and facilitates communication between the parents to discuss the future of their children. On that basis, for family matters, mediation could offer a better resolution as compared to litigation.

Nevertheless, the use of litigation or adjudication in resolving family issues has been criticized. Pursuant to this, an article written by Dr. Nora entitled “Family Mediation; Its Characteristics and Process” emphasized that mediation is currently regarded as the most widely recognized alternative disputes resolution method in family issues such as marriage breakdown, divorce, maintenance, custody of children and right of access.⁷²⁸ Marital problems are said ‘to qualify on all counts for mediational solutions.’⁷²⁹ Mediation plays important role in marital difficulties. Characteristics of family disputes support the arguments that mediation is more suitable than adjudicatory process in resolving them. The disputes occur in a continuing and interdependent relationship, involve emotional and legal complaints and give frequent impact on other family members such as children who are not legally competent. Besides, the family itself ‘represents the private ordering system’ that has the capacity to resolve its own dispute.⁷³⁰

⁷²⁸Nora Abdul Hak, “Family Mediation, its Characteristics and Process”, (2008) 4 *MLJ* xxxiii; (2008) 4 *MLJA* 38

⁷²⁹Fuller, Lon L, Mediation—Its Forms and Function, (1971) *Southern California Law Review*, 44 at p 330 cited in Nora Abd. Hak, *Ibid*.

⁷³⁰Sander, Frank E, “Towards a Functional Analysis of Family Process,” *The Resolution of Family Conflict—Comparative Legal Perspective*, Eds. Ekelar, J and Katz, SN, (Toronto: Butterworth ,1984) at xii and xiii. Cited in Nora Abdul Haq, *ibid*.

‘Running Down’ cases is said to be the cases that are suitable for mediation. Pursuant to the above, the former Chief Justice Tun Dato Seri Abdul Hamid Mohamad commented that a significant percentage of civil cases in the subordinate courts are running down cases and the cases are quite stereotype⁷³¹. Since the bulk of cases in our Magistrates and Sessions Court involving accident cases and the cases are stereotype the resolution of the cases should not be dragged to a long process of litigation. Through mediation, amicable settlement could be reached without going through a complicated procedure. Further, the court burden of heavy backlog could be relieved and a long queue of cases await trial could then be shortened.

Furthermore, the suffering of the litigants who lost their income or the sole breadwinner for the family due to the accident should be considered. Delay of the proceeding would prejudice their rights and increase sufferings. Therefore, mediation should be opted in running down claim for a better and faster resolution.

ii.) ADR Status Form, Pre-Action Protocol and Allocation Questionnaires

In increasing the awareness of the litigants and lawyers, Primary Dispute Resolution Centre of the Subordinate Court of Singapore has introduced the ADR Status Form where parties are required to complete ADR Status Form at the Summons for Direction stage. This form was introduced through Practice Direction No. 2/ 2010. The approach is said to have successfully inculcate a culture change towards ADR

⁷³¹ Abdul Hamid Mohamad, “Mediation in Asia Pacific”, *4th Asia Pacific Mediation Forum Conference: Constraints and Challenges*, (Kuala Lumpur, 16-18 June 2008).

and mediation. They are two main features in the ADR Form that make parties and lawyers alert about ADR and mediation:

- 1.) Providing information concerning the suitability of a case for ADR-Lawyers will be directed in the form to indicate the salient characteristics about the case. These include the nature and value of the claim and the projected length of the trial.
- 2.) Parties' awareness of ADR options -the parties must also certify on the form that their lawyers have explained to them the various ADR options, and their decisions concerning ADR. The form includes basic information about mediation and arbitration for the parties' reference.

These features correspond with dual purposes underlying form:

- 1.) First, it encourages lawyers and their clients to obtain the relevant information and have meaningful discussions concerning ADR options.
- 2.) Second, the information supplied by the lawyer will be used by the Deputy Registrar hearing the SFD (Summons For Direction) to make appropriate recommendations for the case to proceed on one of three tracks: (i.) the court mediation; (ii) the Law Society Arbitration Scheme (LSAS) or (iii) adjudication in the court. The parties' consent will be required before the case proceeds for options (ii) or (iii).

The application of mediation for personal injury claim at the PDRC Subordinate Court of Singapore is combined with the pre-action protocol and allocation questionnaires. Pre-action protocols can be likened to a code of practice that must be adhered to by all potential litigants. The object of the protocol is to streamline the

management of personal injury claims and promote early settlement of such claims. It prescribes a framework for pre-writ negotiation and exchange of information. The protocol only covers conduct from the time a claimant decides to file a personal injury claim in the court.

Besides, the application also supported with the Allocation Questionnaires. Like pre-action protocols, an allocation questionnaire act as a case management tool encourages openness between the parties. The aim is to allow the parties to have additional information pertaining to the dispute. These questionnaires also provide the court with additional information about the progress that has been made to date by the parties in reaching an amicable settlement.⁷³²

Joyce and Dorcas stated that the approach is to avoid the excessive compulsion and sanctions that have been practiced in many jurisdictions that may undermine the consensual basis of ADR. They viewed that building an “ADR culture” has to be primarily consensual process, with the joint collaboration between the judiciary, the Bar and other major players in the mediation scene.⁷³³

iii.) Awareness Programme for Lawyers

The Subordinate Courts of Singapore are also raising the awareness of mediation amongst members of the Bar through the Associate Mediator Programme. This

⁷³² See the discussion on Allocation Questionnaires by Choong Yeow Choy, *Summary Disposition in The New Procedural Landscape: Proposals for Reform in Malaysia*, (Thesis PhD, University of Melbourne) at 37.

⁷³³ Joyce Low and Dorcas Quek, “The ADR Form in the Subordinate Court. Finding the Appropriate Modes of Dispute Resolution”. *The Subordinate Court Law Gazette*, April 2010, [app.subthe.courts.gov.sg/Data/Files/The%20ADR %20 Form.pdf](http://app.subthe.courts.gov.sg/Data/Files/The%20ADR%20Form.pdf).

scheme, which was launched in 2009, encourages lawyers who have been trained by the Singapore Mediation Centre to volunteer as mediators in PDRC. A greater involvement in the court mediation would facilitate an in depth-understanding of the mediation process awareness of the availability and benefits of ADR. The current Associate Mediators come from a wide spectrum of law firms and backgrounds. With their diverse legal experience, they have been contributing substantially to each case being mediated at PDRC.

In creating awareness of mediation amongst the lawyers, the Chief Judge of Sabah and Sarawak, YA Datuk Richard Malunjum has initiated meetings with lawyers and briefing them on the concept of mediation and their significant in the court process.

iv.) Approach by the High Court of Singapore

High Court of Singapore has close connection with Singapore Mediation Centre. Instead of mandating mediation, the court will send a list of cases that are appropriate to mediate. Upon receiving the list, the Singapore Mediation Centre will call and invite the parties for mediation. The parties will be briefed on the advantages of mediation in resolving disputes. As to the issue of getting the consent of the parties, a mediation date will be fixed and in most of the cases the parties agree for mediation. This could be due to the confidence and trust of the public on the efficiency of mediation service offered by the Singapore Mediation Centre. According to the Singapore Mediation Centre, some 80% of the cases mediated at the Centre referred to them, came from the High Court and some 90% of the cases mediated were

successful.⁷³⁴ It can be seen here that the High Court is relieved from the heavy workload of pending cases.

This approach is recommended because the voluntary element of mediation is observed while the case is being referred for mediation. However, it is to be noted that the arrangement would be much easier in Singapore as the High Court and Singapore Mediation Centre are under the same umbrella of Singapore Academy of Law. The difference is that in Singapore at pre-trial conferences⁷³⁵ and settlement conferences, the parties to the action are encouraged to identify the issues, consider them objectively and to reconsider their respective positions with a view of resolving the dispute amicably. The mediation will be handled by the Singapore Mediation Centre, but whereas in Malaysia, the parties are given option to choose for the court mediator or private mediator.⁷³⁶ In most of the cases parties will opt for the court mediator as the service is free and thus, leaving the Malaysian Mediation Centre with very minimum cases to mediate. It can be seen here that for the High Court case in Singapore, mediation is conducted by highly qualified mediators who are the

⁷³⁴ Interview with Angela Mitakidis, Manager of SMC and Elliot Goon, Senior Executive of Singapore Mediation Centre on 21 June 2011.

⁷³⁵ The pre-trial conference is a session with a registrar of the court, who serves as facilitator, to confirm that all pre-trials matters and applications are dealt with before the matter proceeds for trial. The registrar will evaluate the progress of the court proceedings and give appropriate directions as to how the action is to proceed to trial. Further, he or she will also encourage the parties to settle their dispute through negotiation on a 'without prejudice basis'. Apart from advising the parties on the merits of mediation such as saving of time and costs, the registrar may also discuss the issue and merits of the claim with the parties and their lawyers, with a view of facilitating settlement of the dispute. He might, at the request of the parties, give a tentative evaluation of the merits and suggest how the dispute might be resolved. The pre-trial conference has achieved a fair degree of success in facilitating settlement of the court actions so much so that on 1 April 1996, it was a central part of the litigation process when the said procedure was formalized in the High Court through Order 34A of the Rules of The Court of Singapore (Cap 322, R5). The above Order empowers the court to require the parties to attend the pre-trial conference or to make other orders or directions as it regards appropriate for the just, expeditious and economical disposal of the dispute at any time after the beginning of proceedings.⁷³⁵

⁷³⁶ Malaysian Mediation Centre.

associate members of Singapore Mediation Centre. Therefore, our method of application should be reviewed to see whether there is any need for changes to ensure efficiency in serving the litigants.

5.4.2 Judge as a mediator

The Practice Direction 5 provides that the court annexed mediation may be either by ‘judge-led’ mediation or by a mediator agreeable by both parties. As defined in the Direction⁷³⁷ a “judge” includes a Judge or Judicial Commissioner of the High Court, Judge of the Sessions Court, Magistrates or Registrar of the High Court.

The court mediator in our civil court is seen to have a wider definition to include the judges, judicial commissioners as well as the registrars of the High Court, Judges of the Sessions Court and also the Magistrates at the Magistrate Court.

The involvement of judges in the mediation process has sparked critical arguments and views. YA Datuk David Wong Dak Wah⁷³⁸ commented that the busy schedule of our judges suggest that our judges should be freed from the duty of mediation. A judge sits practically every day and if he or she is lucky to have a non-trial day because of settlement, that free time is taken up with judgment writing. YA Datuk David Wong Dak Wah, stated that in his case, he sets aside Friday afternoons to conduct mediations and this has been accepted by local practitioners in Kota Kinabalu.

⁷³⁷ As defined by Direction 1.1, Practice Direction No. 5 of 2010, Practice Direction on Mediation.

⁷³⁸ David Wong Dak Wah. *Supra*.

YA Datuk David Wong Dak Wah also commented that it is questionable whether the judge is in fact doing judicial settlement or mediation, bearing in mind that mediation in its true sense involves a third party, who is impartial and remains neutral, assisting disputing parties to identify the disputes and to make decisions as to how to deal with the disputes and reach an agreement.

The said judge quoted the remark by De Garis A in “The Role of Federal Court Judges in the Settlement of Disputes (1994) 13 You Tas L Rev 217”:

“I think a judge’s role is to judge. I have no problem philosophically with a judge giving some tentative and provisional indication of his view of the factual and legal issues which assist the litigants in assessing the probabilities and arriving at a settlement. But this has to be done very carefully. The judge has to retain a genuinely open mind, and be seen to do so. Anything that smacks bullying (however suavely and politely done) in the course of a settlement (however reasonable) in inconsistent with judicial function”.

The basis of the Judge’s comments lies on the lack of training given to our judges on the skills of mediation.⁷³⁹ “One must say that not all judges can be mediators as mediation calls for different skills to that listening to evidence and delivering a judgment at the end of the trial. The judiciary should ensure that only suitable judges should conduct mediation”.

Moreover, the experience of High Court of Sabah and Sarawak suggest that the courts are unable to farm out mediation to private mediators. The reason is due to the fact

⁷³⁹ As commented by YAA Dato David Wong Dak Wah, Judge of the High Court of Sabah and Sarawak, “The Court-Annexed Mediation”, *Asian Mediation Conference, Rediscovering Mediation in 21st Century*, (Kuala Lumpur, 24-25 February 2011).

that the public still consider the courts as the avenue for resolving disputes. Further, private mediations will incur cost to the parties whereas the court annexed mediation involves no costs.⁷⁴⁰ A similar situation also happened in other courts in the Peninsular. The Malaysian Mediation Centre has been reported to receive very minimum cases from the courts.

Due to this preference, mediation service offered by the court should be upgraded and improved. The model as practiced by the Supreme Court of New South Wales and Primary Dispute Resolution Centre, Subordinate Court of Singapore could offer a solution. In the Supreme Court of New South Wales, mediation is assigned to the Registrars who specialize in mediation known as the court mediators; that particular registrar is not assigned to conduct any hearing in chambers or full trial. Similarly, with the mediation in Primary Dispute Resolution Centre of the Subordinate Court of Singapore, mediation is done by the Settlement Judge who is only assigned to conduct mediation. Mediation seems to be a professional service conducted by the court that is accepted by all the parties and litigants.⁷⁴¹ Similar approach is also being practiced by our Shariah Court and also the Shariah Court of Singapore⁷⁴². The courts have specialized in-house mediators that are trained to conduct mediation.

⁷⁴⁰ *Ibid.*

⁷⁴¹ Observation by the researcher at the Supreme Court of New South Wales and Primary Dispute Settlement Centre, Subordinate Court of Singapore, June 2011.

⁷⁴² Observation by the researcher.

This approach seems to be adopted and appeared to be consistent in many jurisdictions within Australia. Chief Justice Spigelman contended that there will be no situation where judges of the Supreme Court will be involved in mediations.

In contrast, judicial activism in the settlement process seems to be more acceptable in the United States. It is not considered separate from adjudication, but as part of the same process. It has been said that most American judges participated to some extent in the settlement of some cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work.⁷⁴³

The United States commentators, in particular, have argued that the court annexed mediation should not be considered mediation at all, but as an additional litigation strategy, more aptly described as ‘litigotiation’.⁷⁴⁴ In “connecting” with the courts, mediation became more an instrument to serve the traditional values, goals and interest of judicial system and less a social process in its own right, with its own separate history, traditions, norms and goals.⁷⁴⁵

The active promotion of settlement by judges is however viewed to have dangers, including the risk that parties are pressured to settle by judges who have formed an

⁷⁴³ M Gallantry, “The Emergence of the Judge as a Mediator in Civil Cases”, (1996), V 69, 5 *Judicature*, 257, cited in Sourdin, Tania, *Alternative Dispute Resolution*, (New South Wales: Law Book Co. 2002), at 96.

⁷⁴⁴ M Galanter, ‘Worlds of deals: using negotiation to teach legal process’ (1984), 34 *Journal of Legal Education*, 268, cited in Laurence Boule, Miryana Nestic, *Supra.* at 394.

⁷⁴⁵ Joseph P Folger Et. Al.,, “A Benchmarking Study of Family, Civil and Citizen Dispute Mediation Programs in Florida” (2001). *FLA’s Dispute Resolution Ctr* cited in Dorothy J. Delia Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, *Ohio State Journal on Dispute Resolution*, (Vol.17:3 2002).

impression of the case based on incomplete evidence. One view is that public confidence in the integrity and impartiality of the courts may be reduced by judicial involvement in settlement discussions, particularly if parties are permitted to meet with the judge separately, a procedure that occurred in United States courts and also in Japan.⁷⁴⁶

In commenting against the judicial involvement, Sir Laurence Street was of the views that:

“.. the court that makes available a judge or a registrar to conduct a true mediation is forsaking a fundamental precept upon the public confidence in the integrity and impartiality of the court system is founded⁷⁴⁷. Private access to a representative of the court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of natural justice and absence of hidden influence that the community rightly expects and demands that the court observe.”⁷⁴⁸

The judge further contended that mediation services are needed within the community. But it is for the organizations or persons outside the court system to provide those services.

⁷⁴⁶ See ‘The Courts and Mediation- A Warning (1991) 2 *Australian Dispute Resolution Journal*, 203.

⁷⁴⁷ The Honourable Judge also mentioned that the the courts fill a highly specific role as custodian of the sovereign power of adjudication of disputes and rules of law. Judges are chosen for their perceived qualities and ability to exercise this power of adjudication. The courts are established, staffed and resourced top enable judges to fulfil this responsible role. The judge further contended that adjudication should be the only field for active involvement by the judicial institution in dispute resolution.

⁷⁴⁸ Sir Laurence Street, “Mediation and the Judicial Institution (1997) 71, *Australian Law Journal*, 794-796: cited by David Spencer, Tom Altobelli, *Dispute Resolution in Australia, Cases, Commentary and Materials*, (New South Wales: Law Book Co., 2004), 334-336.

Spencer and Brogan are of the same view on the danger of judicial involvement as illustrated in the case of *Ruffels v. Chilman*⁷⁴⁹ where the trial judge ordered a conference during the trial to be presided over by the deputy registrar of the court. It was alleged that at that conference the deputy registrar stated that in a conversation with the trial judge in his Chambers the trial judge had formed a negative view of the appellant's credit and/ or the appellant's evidence. The court found for the appellant on the basis of the appellant's reasonable apprehension that the trial judge had already reached a conclusion before the end of the trial and quashed the decision of the trial judge and remitted the matter to the District Court for a new trial before another judge. The court's final words are of great significance in this discussion and support the concerns raised by Street:⁷⁵⁰

“Mediation is now a significant feature in this State. The integrity of that process is of critical importance. This requires that there should be no communication between the mediator on the one hand and the judge who either will be hearing, or is hearing, the action. If this requirement is not observed, mediation is likely to be seriously compromised.”⁷⁵¹

Therefore, the integrity of mediation should be preserved. On that basis the researcher proposes that mediation is to be conducted by the court mediators who are not involved in the hearing of the case, but only involve in the mediation process. Mediation is proposed to be done within the court system with the separation of

⁷⁴⁹ (unrep, WASC, FUL120 of 1996), 378,395, 401-404, cited in Spencer, David, Michael Brogan, *Mediation Law and Practice*, (UK: Cambridge University Press, 2006) at 395.

⁷⁵⁰ Spencer, David, Michael Brogan, *Mediation Law and Practice*, (UK: Cambridge University Press, 2006, 395.

⁷⁵¹ *Ruffels v. Chilman* (unrep, WASC, FUL120 of 1996), 378,395, 401-404, cited in Spencer, David, Michael Brogan, *Ibid.*

powers and duties between the court mediators and the trial judges. The court mediators should only conduct mediation and not involved in hearing of any cases. They are also not supposed to assist in any trial judges or under the direction of any judges. The separation of the trial judges and the mediators are needed to ensure that there is no leakage of the information or evidence that may lead the judges to form a bias perception of the case. Besides, the court mediators must be trained and skilled mediators. In order to gain the public confidence of the service, the standard and quality of the mediation service offered by the court must be monitored. The approach adopted by our civil court where the trial judges to conduct mediation should therefore be reviewed. The Direction that give authority for the judges to conduct mediation should therefore be looked into and revised.

5.4.3 Legal representation

Practice Direction 5 of 2010 provides that the attendance of lawyers is mandatory if parties are represented. The said Direction states:

“Unless agreed to by the parties, the Judge will not see the parties without their lawyers’ presence except in cases where the parties are not represented.”

As defined in the Direction, the term ‘judge’ includes a Judge or Judicial Commissioner of the High Court, Judge of the Sessions Court, Magistrates or Registrar of the High Court. It can be seen that the court mediator in our civil court has a wider definition.

The application seems different at the Shariah Court, consumer claim tribunal, homebuyers' tribunal and legal aid bureau where the attendance of the lawyers is strictly not allowed. The interview⁷⁵² with the Shariah Court reveals that the attendance and involvement of lawyers at the mediation session may delay the case. There are cases where lawyers advise their client not to agree on the proposal by the other party and advise their client to ask for the maximum. They have also experienced cases where parties have agreed, but later on changed their mind on the advice of their lawyers. It is to be noted that the cases involved in those mentioned institutions are family cases and consumer matters. As our civil courts deal with variety of cases including commercial matters, representation seems needed to protect the best interest of the parties as some cases involve complex issues. It could be seen that the understanding and acceptance of mediation and its concept is still very low.

There are arguments about the role of lawyers in mediation and dispute resolution processes. In the United States the following question has been asked: Do lawyers facilitate dispute resolution or do they instead exacerbate conflict and pose a barrier to the efficient resolution of disputes.⁷⁵³ These concerns have been raised in respect of widespread involvement of lawyers in mediation and ADR processes. It has been said, at times, ADR processes can be adversely affected by lawyer's involvement. Menkel-Meadow has noted that in the United States, ADR has been 'captured' by the legal profession:

⁷⁵² Interview with Puan Ruzita Ramli and Encik Rosdi Hanafi , Syariah Court Mediator on 10 May 2010.

⁷⁵³ See Sourdin, Tania, *Ibid.*

“ADR was just another stop in the ‘litigation’ game which provides an opportunity for the manipulation of rules, time, information and ultimately, money...ADR has become just another battleground for adversarial fighting rather than multi-dimensional problem solving.”⁷⁵⁴

Other commentators have noted that there has been little focus upon the role that lawyers can play. Instead, a “dominant popular view” has emerged that “lawyers magnify the inherent divisiveness of dispute resolution.” These views have also found favour in some parts of Australia as legislators seek to minimize the role of lawyers in some types of disputes. However, such views are not the only views of the role of lawyers. Many lawyers and others have indicated that lawyers can play a very useful and constructive role in resolving dispute⁷⁵⁵.

With regard to this issue Judge Datuk David Wong Dak Wah commented that the lack of understanding of the concept of mediation by the legal practitioners in Malaysia results in a lack of cooperation of lawyers in mediation. Understandably, it is difficult for legal practitioners to abandon their advocacy when acting for a client in a mediation exercise. Continued training and education to the legal fraternity is seen to be the solution to the problem. Further, a reasonable and attractive fee structure among the legal practitioners must be in place in order to attract the litigants to mediation. Besides, proper guidelines needed to be drafted for lawyers when representing clients in mediation

⁷⁵⁴ See R J Gilson and R H Mnookin, “Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation” (1994) 94 *Columbia Law Review*, 509, See also, Australian Law Reform Commission, Issues Paper 25: *Review of the Adversarial System of Litigation. ADR- Its Role in Federal Dispute Resolution* (ALRC, Sydney, June 1998), cited in C Menkel-Meadow, “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR” (1991) 19 *Florida State University Law Review*, 17.

⁷⁵⁵ C Menkel Meadow, *Ibid.*

In countries where the public are more aware about mediation the appearance of lawyers at the court mediation session is not prohibited but encouraged; however guidelines are provided for the parties when attending the sessions.

In Australia, the professional law societies and bar associations have promulgated rules of professional conduct and guidelines for practice within the context of adversarial processes. Thus, lawyers are expected to comply with their duties to the law, their clients, to fellow legal practitioners, and the law generally. In more recent times the rules of legal professional conduct have been modified to include responsibilities aimed at properly encouraging and facilitating legal work in alternative dispute resolution proceedings.

The Law Society in several of its published guides or codes of good practice has encouraged solicitors to advise clients of the advantages of alternative dispute resolution (ADR) and provides guidelines on the role of lawyers at the mediation session.

The Role of Lawyers at the mediation session is clarified as follows:

4.2.2 Role of Legal Advisers during Mediation

“Essentially the role of the legal adviser⁷⁵⁶ is:

- 1.) To assist clients during the course of the mediation.

⁷⁵⁶ Sourdin, Tania, *Supra* at 217.

- 2.) To discuss with the mediator, with the other party's legal representative and with clients such legal and evidentiary, or practical and personal matters as the mediator may raise or the clients might wish. (It is likely that once the client has heard the other party's version, the legal adviser may need to take further instructions from his/her client and perhaps review the legal advice).
- 3.) To participate in a non-adversarial manner. Legal advisers are not present at mediation as advocates, or for the purpose of participating in adversarial court room style contest with each other, still less with the opposing party. A legal adviser who does not understand and observe this is a direct impediment to the mediation process.
- 4.) To prepare the terms of settlement or heads of agreement in accordance with the settlement reached at the end of the mediation for signature by the parties before they leave."

In the United Kingdom, the conduct of lawyers during the mediation session can be used to penalize parties where they or their lawyers fail to participate reasonably and co-operatively in the mediation process. In an unreported case, the English Mercantile Court judge enquired about the conduct of the lawyers in mediation, on an application for security of cost, which had been adjourned to enable a mediation to be attempted. The mediation was not successful and the judge sought to enquire into the conduct of the parties or their lawyers in the mediation, following an allegation by one party that the other had attended the mediation in bad faith and that the lawyers were obstructive and uncooperative. Although the judge ultimately excluded this evidence for the purpose of determining the application, the case nevertheless shows the potential readiness by English judges to consider lawyer behaviour in mediation.

This may occur more frequently in light of CPR r 44, which provides that the court can take account, when giving consideration to costs, of the conduct of the parties, including during any settlement attempts.⁷⁵⁷

Sammon, Gerard⁷⁵⁸ has noted that there are several duties and responsibilities that apply to lawyers in mediation, namely:

- a.) Acknowledging potential for a conflict of interest.
- b.) The duty to follow instructions, particularly where the lawyer regards a settlement option as inadvisable.
- c.) The duty to explain the mediation process and possible outcomes.
- d.) Whether there is an obligation to attend mediation with one's client.
- e.) Disclosing requested documents.
- f.) Dealing with false representations made by clients.
- g.) Duty to preserve confidentiality.
- h.) Acting only for one party.
- i.) Advising the client on the consequences of any agreement reached in mediation.

In ensuring the success of mediation, to educate our lawyers on their role and duties when representing in mediation should be the main agenda. Lawyers need to be clear on their role so as to ensure the interests of the parties are preserved. Guidelines and ethics, therefore, should be provided and be made available for the lawyers when representing their clients in mediation. The roles and responsibilities of lawyers in

⁷⁵⁷ Boulle, Laurence, Miryana Nestic, *Supra*. At 525.

⁷⁵⁸ Sammon G, "The Ethical Duties of Lawyers Who Act for Parties to a Mediation' (1993) 4(3) *Australian Dispute Resolution Journal* 190, cited in Spencer, David, Micheal Brogan, *op.cit.*, 202.

mediation as provided above can be referred to as guidelines for regulating guidelines or Code of Conduct for our lawyers.

5.4.4 Maintaining Quality and Standards

The Practice Direction 5 of 2010 above has given impetus to the application of the court annexed mediation in Malaysia. However, there are rooms for improvements that need to be looked into. It can be seen that the said Practice Direction issued is so general and brief. Besides, the basic guidelines on the procedure, the Direction only cover the rule on confidentiality. Other elements or regulations on the practice of mediation or the basic needs of the court annexed mediation are found to be missing. As the above direction is the only guideline issued for practice by the court mediators, certain regulations thereto need to be issued to clarify the ambiguity as well as to enhance and maintain the standards of our court annexed mediation.

In regard to this, the approach of other countries can be referred to as guidelines. In Australia where ADR processes are related to the court and tribunal system there has been an additional focus on the need to develop standards. Standards can assist in informing and guiding the implementation, conduct and evaluation of the court-related programs. As recommended by Sourdin, T, to date most standards has focused only on mediation and is primarily directed at the practitioner.

The Access to Justice Advisory Committee (AJAC) recommended that minimum standards for the court and tribunal ADR programs, particularly the court-connected

mediation must be developed. AJAC views that the Government has a special responsibility for the quality, integrity and accountability of the ADR processes provided by the courts and tribunals. This responsibility extends to all ADR programs funded by the government.⁷⁵⁹

With regard to the matters that need to be considered in maintaining the quality and standard we can refer to the proposal as prepared by AJAC.

AJAC proposed that various issues need to be considered in the formulation of such standards:

- a.) Access to mediation services including the costs; the need for policies to account for cultural diversity; and the circumstances in which people should be advised of the availability and nature of mediation programs and the location and hours of operation services.
- b.) The responsibilities of the courts and tribunals (and other mediation service providers) to users and participants, including the provision of information about the program, the person responsible for it and complaints system.
- c.) The suitability of certain types of cases or users for mediators.
- d.) Conduct of a mediation.
- e.) Qualification and ethical standards for mediators.
- f.) Confidentiality of mediation conferences.
- g.) The role of lawyers in mediation.
- h.) The inappropriateness of coercion to settle.

⁷⁵⁹Access to Justice Advisory Committee, *Access to Justice-An Action Plan* (AGPS, Canberra, 1994), 294. cited in Sourdin T. *Supra* at 148-149

- i.) Communications between the mediator and the court, tribunal or other body.
- j.) Funding of programs and compensation of mediators.
- k.) Liabilities and immunities of mediators.
- l.) The enforceability of mediation agreements.
- m.) The need for regular evaluation of programs.⁷⁶⁰

The committee also proposed that the standards, once developed, be incorporated into the court and tribunal charters of service.

As recommended by Sourdin, T., the Australian National Best-Practice Guidelines for the court-connected mediation were proposed in the year 1994. The draft guidelines were developed at a National Best Practice Workshop held in Sydney on 6th -7th August 1994. The guidelines were designed to be broad-based and applicable to all jurisdictions. They are divided into three sections covering the mediation process; the mediator's role; and the participants in mediation.⁷⁶¹

The guidelines relating to the mediation process provide for:

- a.) A definition of mediation being defined as a voluntary and confidential process in which a mediator independent of the disputants facilitates the negotiation by the disputants of their own solution to their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their solution and to reach an agreement which accommodates the interests and needs of all disputants.⁷⁶²

⁷⁶⁰ *Ibid.*

⁷⁶¹ Sourdin, Tania, *Supra.* at 149-151

⁷⁶² In T Sourdin and M Scott, *The Court-Connected Mediation National Best Practice Guidelines-Draft for comment* (UTS, Sydney, 1994), 8; Centre for Dispute Resolution , University of

- b.) Objectives to be broadly stated.
- c.) The mediation process to be voluntary but for attendance at information sessions to be mandatory.
- d.) On-going quality control of any mediation program involving regular user surveys, on-going structured feedback from users and on-going training requirements.⁷⁶³

As for the mediator's role, the guidelines provide for:

- a.) A definition of the mediator's function.
- b.) Each court and tribunal to develop its own complaints-handling guidelines including, for example, providing for the refund of monies or the suspension or removal of a mediator.
- c.) Immunity from civil liability for internal mediators; protection for external mediators is to be developed by individual courts and tribunals and they include protection in defined circumstances or upon the certification of insurance.
- d.) Accreditation and re-accreditation criteria.⁷⁶⁴

The guidelines relating to the participants in mediation provide for:

- a.) All participants to be given guidelines, concerning the process, the guidelines should set out the definition of the process, the mediator's role, information about the process and grievance and evaluation procedures.

Technology: the Centre for Court Policy and Administration, University of Wollongong and the Law Council of Australia, cited in Sourdin Tania, *Supra*. 149-151.

⁷⁶³ Sourdin, Tania, *Supra* at 150

⁷⁶⁴ *Ibid*.

b.) All participants to be advised that they may withdraw from the process at any time and that they must observe rules of courtesy.

c.) Observers to be present if the parties and the mediator agree.⁷⁶⁵

Other guidelines relating to who should attend mediations and the use of ‘shuttle mediation’ are also provided for.

In the United States, the National Standards for Court Connected Mediation Programs⁷⁶⁶ were developed to guide and inform the courts interested in initiating, expanding or improving their mediation programs. The standards were directed at mediation service provision as well as practitioners and recommended that the court programs should:

a.) Provide for access to mediation on the same basis as other court services.

b.) Provide general and process information about mediation to all court personnel, lawyers and users, including information about options.

c.) Establish criteria for when and which cases are referred to mediation.

d.) Have mandatory attendance only at initial session; where mandatory mediation operates, they should operate, they should be evaluated on a regular basis.

c.) Establish criteria for the selection, training, accreditation and monitoring of mediator’s performance.

d.) Establish ethical standards for mediators.

⁷⁶⁵ *Ibid.*

⁷⁶⁶(Developed in 1992, as joint project of the Center for Dispute Settlement in Washington, DC, the Institute of Judicial Administrative (New York) and the State Justice Institute.) cited in Sourdin T, *Supra* at 150-151.

- e.) Have clear written policies on the confidentiality of the mediation process and on communications between mediators and the court;
- f.) Encourage lawyers to advise clients about mediation as an alternative dispute resolution mechanism and allow lawyers to be present at mediation.
- g.) Make mediation available to parties regardless of the parties' ability to pay.
- h.) Provide protection from civil liability for internal court mediators.
- i.) Provide that mediated agreements should be enforceable to the same extent as agreements reached without mediators.
- j.) Monitor and evaluate programs on a regular basis.⁷⁶⁷

In Singapore, the settlement judge is guided by the 'Model Standards of Practice for the Court Mediators of the Subordinate Courts.' This is to ensure his neutrality throughout the settlement and further to maintain the confidentiality. Clause provides that mediators have to comply with the 'Code of Ethics for the Court Mediators of the Subordinate Courts of Singapore.' The Code of Ethics deals with areas concerning impartiality, neutrality, confidentiality, informed consent, conflict of interest, promptness, training and qualification.

It can be seen that there are loopholes in our practice direction issued pertaining to the court annexed mediation. As compared to the countries offering the court annexed mediation our guidelines and code of conduct are far behind. Therefore, the backup guidelines and code of ethics for the court mediators and the parties involved in mediation need to be issued to fill in the gaps. Mediation service offered by the

⁷⁶⁷ *Ibid.*

court must be seen as quality service that satisfies the needs of litigants. Mediation cannot just simply be implemented without any proper guidelines and code of conduct. Parties should not be made to agree to settle because of the pressure imposed on them by the mediator, but rather because they can evaluate the interest and needs of the other party and visualise the case from the other party' perspective. This can only be done through a high quality of mediation service offered. Therefore, maintaining the standard and quality of mediation must be amongst the top priorities of the judiciary. As can be seen in other jurisdictions the application of mediation is brought up with the issuance of proper guidelines and regulations. Thus, the standard of our court annexed mediation must regularly be monitored to ensure quality service.

5.5 Conclusion

The research points out that many other legal jurisdictions have mandated mediation as part of procedure in the civil court. In reforming the court system with the aim to reduce delay and the backlog, as well as to get the satisfaction of the parties in the judgment, mediation has been a part of the agenda. The reform in several jurisdictions reported encouraging results.

The issuance of Practice Direction 5 of 2010 has given an impetus to the application of the court annexed mediation in Malaysia. However, there are rooms for improvements that need to be looked into since the said Direction seems to be brief and general. Further guidelines need to be issued to clarify the ambiguity as well as to enhance and maintain the standard of court annexed mediation in Malaysia.

CHAPTER 6

ANALYSIS OF THE MEDIATION MOVEMENT IN SINGAPORE AND AUSTRALIA

6.1. Introduction

The rapid growth of mediation in Singapore and Australia indicates that the method has been accepted by the public as another process in dispute resolution. The Chief Justice of Singapore, Chan Sek Keong commented⁷⁶⁸ that mediation and Alternative Dispute Resolution (ADR) in Singapore has moved fast and is no longer viewed as “alternatives”. The development of ADR is promising and vibrant in Singapore. Similarly, in Australia, Sourdin commented in her book ‘Alternative Dispute Resolution’⁷⁶⁹ that most disputes in Australia were resolved before entry into the court and the tribunal system. The number of cases that end up in the litigation system is small as compared to the overall disputes in the Australian society. It is enlightening to note that even issues filed within the litigation system are also resolved by the use of ADR particularly mediation.

This chapter presents findings of the analyses on the development of mediation in Singapore and Australia and attempts to see how mediation can be developed and

⁷⁶⁸ Chan Sek Keong, *Launch of the SMU-Centre for Dispute Resolution*, Singapore, 16 April 2009, <http://app.supremecourt.gov.sg/default.aspx?=2841>

⁷⁶⁹ See Sourdin, Tania, *Alternative Dispute Resolution*, (New South Wales: LawBook Co.,2002), 81-82.

expanded progressively in Malaysia. Singapore, in particular, share similar cultural and historical backgrounds with Malaysia, thus it would make an excellent choice of study; whereas Australia with its rapid acceptance of mediation provides insightful precedents to be emulated.

6.2. Analysis of the Application in Singapore

6.2.1. Cultural Background

The cultural background is seen to be one of the important factors that influence the development of mediation in Singapore. Yuan in his article “Impact of Cultural Differences on Dispute Resolution”⁷⁷⁰ refers culture⁷⁷¹ to habits, behaviours and manners of a given people at a given period of development. It comprises of a unique set of attributes relating to an aspect of social life which is acquired through acculturation or socialization by the individuals from that society. It is acknowledged that different communities with different cultural norms will respond differently to a conflict.⁷⁷² Legal culture of a particular society⁷⁷³ may then determine the legal system of that society. In the early days, the indigenous form of mediation and

⁷⁷⁰ Lim LanYuan, “Impact of Cultural Differences on Dispute Resolution”, (1996), *Australian Dispute Resolution Journal*, vol 7, no3, 197-204.

⁷⁷¹ There are various definition of culture, among others; i) “the unique character of a social group; the values and norms shared by its members (that) set it apart from other social groups (AL Lyle, JM Brett & D L Shapiro, “The Strategic Use of Interests, Right and Power” (1999) 15 *Negotiation Journal* 31. ii) the socially transmitted values and beliefs of a community of people that affect their perceptions and therefore behaviour, J Salacuse, “Top ten Ways Culture Affects Negotiating Style: Some Survey Results” <<http://fletcher.tufts.edu/salacuse/top10.html>.

⁷⁷² See analysis by Lim Lan Yuan and Liew Thiam Leng, *Court Mediation in Singapore*, (Singapore : F T Law & Tax Asia Pacific, 1997), at 67.

⁷⁷³ Legal culture may be defined as the values and attitudes which determine the place of the legal system in the culture of the society as a whole. See Friedman, Legal culture and social development (1964) 4 *Law Society Rev* 29 at 34.

negotiation was prevalent⁷⁷⁴ in Singapore. Disputes were often referred to the respected third parties who are normally the community leaders. This culture was then changed by the British colonialists who introduced English Law as the *lex loci*. The application of English Law was practised in a different social and political environment. The British administration introduced litigation as a formal form of dispute resolution. With rapid urbanization and increased exposure to western lifestyle more Singaporeans turned to formal forms of litigation for resolving dispute, thus making mediation to be less significant.⁷⁷⁵

The influx of immigrant to Singapore under the British rule has also influenced the legal culture of Singapore. Singapore becomes a multicultural society with Chinese forming the largest ethnic group. The census of 1990 reported that the population comprised of 78 % Chinese, 14% Malays and 7% Indians. Yuan and Leng⁷⁷⁶ commented that in early Singapore, each community and ethnic group brought its own unique customs and traditions to the colony even though English law was the formal law of the land. Each ethnic community was governed primarily by its own customary or religious practices; for instance, disputes amongst Chinese were generally settled within the community according to its rules and customs without going to the courts. The establishment of a western style form of administrative structure and government has influenced the population to adopt the lifestyles of

⁷⁷⁴ As commented by Joel Lee and The Hwee Hwee, “The Quest for an Asian Perspective on Mediation”, *An Asian Perspective on Mediation*, Eds, Joel Lee, The Hwee Hwee, (Singapore: Academy Publishing, 2009) at 6.

⁷⁷⁵ See analysis by Lim Lan Yuan and Liew Thiam Leng, *op.cit.*, 47.

⁷⁷⁶ *Ibid.*

western societies rather than those of the eastern. However, the basic respect for the authority among the general population still remains strong.⁷⁷⁷

It is observed that the practice of modern mediation easily attracted these communities since the basis of negotiation in mediation is the essence of customary and religious practices of the said local communities in Singapore. For the Chinese⁷⁷⁸, they are influenced by the Confucius teaching that society is based on collectivism with a high emphasis on self-help, self-protection and mutual aid. Notions of harmony, reciprocity, mutuality and holism are valued, as opposed to confrontation, competition, individualism and parochialism. The Confucius teaching emphasises on moral persuasion that prefers ‘friendly negotiation or consultation’ as opposed to litigation. Similarly, with the Malays, the teachings of Islam encourage the disputants to negotiate to reach for amicable settlements. These exhortations can be found in the several verses of the *Quran*⁷⁷⁹. Also the teachings of Hinduism also encourage the parties to negotiate and settle their disputes peacefully. On this basis,

⁷⁷⁷ *Ibid.*

⁷⁷⁸ See Bhagshaw, Dale, “Family Mediation Chinese Style”, (1995) *Australian Dispute Journal*, vol 6, 12, See also Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997) at 364. The same explanation can also be referred to Boulle, Laurence, and Miryana Nestic. *Supra*. Chief Justice Yong Pung How in his Official Opening of Singapore Mediation Centre on 16 August 1997, commented that “Mediation as a form of dispute resolution is not new. In fact, it is deeply embedded in the Asian culture. For example, as observed by academic like Louise Wong and Chang Weining, an important traditional philosophy is that compassion, kindness, duties and reason take precedence over law. Consequently, lawsuits were avoided whenever possible. Disputes were usually dealt with by respected elders or third parties. The parties generally talked over their differences and tried to resolve them in a reasonable and respectful manner. To engage in direct confrontation in court was seen as a ‘loss of face’, amounting to the washing of dirty linen in public. More significantly, it was also regarded as not properly valuing human relationships or according due respect to the other part, as an abandonment of the sense of party”

⁷⁷⁹ See for example, Surah Al-Hujurat, verse 9 says:

“And if two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the Command of Allah, but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just)”

modern mediation that stresses on negotiation was easily accepted by the local communities.

An analysis on the study of Chinese's socialization revealed that although Chinese family patterns had undergone modest changes, nevertheless, they remain different from their western counterpart and their cultural adaptation appears to be very slow. The Chinese migrants who had modernized and those who had migrated to other foreign countries remains distinctively Chinese in outlook. They have adapted in ways that help them to meet the demands of a modern world and foreign cultures. In spite of these adaptations to contemporary life, their pattern of attitudes and modes of childbearing and family life will continue to be identifiably Chinese. They show great concern about the potential loss of their valued Chineseness, but believe that they can modernize without being westernised. They view themselves as 'modern Chinese' as distinct from modern westerners.⁷⁸⁰ This argument can be supported by the existence of cultural traits of the Chinese, the Malay and the Indian communities, despite the modernization of the administration with strong western influence.

Yuan observed that the following Chinese cultural traits are still prevalent in the Singaporean society nowadays especially among the older generations. There are evidences that cultural practices and teachings would influence the legal culture or legal system in a particular society.

⁷⁸⁰ Lim Lan Yuan, *The Theory & Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997) at 365.

The followings⁷⁸¹ highlight some of the important traits of the traditional Chinese culture which are still prevalent in Singapore despite the modernization of the society:

(1.) Trust and friendship are important prerequisites for successful business ventures to the Chinese. The Chinese, in general, feel more comfortable and at ease if they deal with people whom they can relate to and merely to talk with. Thus, obtaining trust from the Chinese disputants will therefore facilitate the process of mediation and negotiation.

(2.) Personal relation, or *kwang-sii* in Chinese, has been said to constitute a key factor in understanding Chinese social and political behaviour. The term 'relations' has a special meaning in Chinese.⁷⁸² It connotes 'relationship' in the sense of a long-term relationship with a friend or acquaintance, but it also connotes 'connection' in the sense of being socially or politically well-connected.⁷⁸³ 'Relationship' plays a crucial part in all aspects of Chinese life, even more important than the part played by 'connections' in the West. Dealing with the top executives of the disputing parties who have strong personal relations may help resolve conflict.

⁷⁸¹ See the analysis by Lim Lan Yuan, *Id.*, 367.

⁷⁸² Macneil, Roderick W 'Contract in China': Law, Practice and Dispute Resolution, (1986), *Stanford Law Review*, vol 38, 85-86, 303 cited in Lim Lan Yuan, *Ibid.*

⁷⁸³ The word is often used when someone does something that might be impossible without the help of the person with whom he has 'relations.' This is much more than friendship in that people standing in a relationship of *kwang-si* with each other are expected to bestow and reciprocate personal favours. See Lim Lan Yuan, *Ibid.*

(3.) Face saving or the fear of shame has operated as a powerful mechanism, which governs how a Chinese behaves in a given society.⁷⁸⁴

Similarly, the Malay cultural traits have also been observed to be preserved in the modern Malay Singaporean society. The Malay society places a great importance on *adat* - the concept of protocol, custom and etiquette.⁷⁸⁵ Like with the Chinese, the Malays strongly emphasise personal contacts and trust. They prefer the personal touch and informality. Many traditional Malays consider a written contract to be nothing more than a formality. It is only to be relied upon when the parties' relationship cannot be salvaged. If things get sour, the parties usually call on the other party to settle their differences. It is not their nature to take arguments to the public courts. Face saving is also an important factor for the Malays. Politeness and consideration for the other party are important in all social and business interactions. There is always the fear of offending the other side and losing face.⁷⁸⁶

The preservation of culture and beliefs of each community seems to be major factor that influence the acceptance of modern mediation as a form of dispute resolution. This view can be supported from the result of the survey conducted on how cultural differences can affect dispute resolution on the three ethnic groups with senior executives from the United States, China and Singapore working in Singapore.⁷⁸⁷

⁷⁸⁴ Goh, Bee Chen 'Understanding Chinese Negotiation', (1993). *Australian Dispute Journal*, vol 4, p 178 cited in Lim Lan Yuan, *ibid.*

⁷⁸⁵ Khoo, Eugene 'Negotiations in Malaysia' (1993), *Australian n Dispute Resolution Journal*, vol. 4, p 93. cited in Lim Lan Yuan, *ibid.* p

⁷⁸⁶ Lim Lan Yuan, *Id.*, 368.

⁷⁸⁷ See Lim Lan Yuan (1996), Impact of Cultural Differences on Dispute Resolutions, *Australian Dispute Resolution Journal*, vol. 38, p 197-204

Some 50 respondents from each group were surveyed. The respondents were asked two specific questions on the followings:

- (a.) Whether the respondents are familiar with the main dispute resolution processes, namely, litigation, arbitration, mediation and negotiation.
- (b) What process the respondents would likely to use the next time they were involved in the three categories of disputes, non-contractual commercial disputes, domestic or community disputes.⁷⁸⁸

In analysing the results of the survey, Yuan drew three general conclusions from the research findings. Firstly, it illustrates clearly that society and culture to influence attitude towards the kinds of dispute resolution mechanism used. Singaporeans, the majority of whom are of Chinese descents are not as litigious as compared to the Americans. However, because of the Western influence, Singaporeans, generally, are more conscious of their legal rights and the court process, as compared with the Chinese, who are more familiar with the arbitration and mediation procedures. Litigation remains the predominant means for resolving contractual commercial disputes for Singaporeans⁷⁸⁹.

Secondly, it is found that all three culture groups are familiar with the negotiation or mediation due to the ADR movement. However, more Singaporeans and Chinese

⁷⁸⁸ See *ibid.*

⁷⁸⁹ *Ibid.*

would use these consensual forms rather than litigation and arbitration for resolving contractual commercial disputes with fellow citizens. The traditional Confucian respect for law and authority among Singaporeans of Chinese descent help to explain their general reluctance to invoke litigation as a mode of dispute settlement⁷⁹⁰.

Lastly, the survey confirmed that in terms of cultural orientation towards dispute resolution, Singapore falls between China and the United States. Although the population is generally more attuned to the lifestyles and practices of Western societies than those of the Orient, the basic respect for law and authority among Singaporeans remains strong. Singaporeans like the Chinese, prefer to settle community or domestic disputes through less formal means than to bring them to court.⁷⁹¹

Therefore it is undeniable to say that culture plays a major factor that influences the acceptance and development of mediation in Singapore.

6.2.2 Analysis on the Development and Application of Mediation in Singapore

Historical factors ensure that indigenous form of mediation was prevalent in the communities. The community leaders were referred to and called upon to settle disputes within their respective communities. Negotiation and consultation were seen to be the form of dispute resolution in the early days of Singapore history. The British

⁷⁹⁰ *Ibid.*

⁷⁹¹ See Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997), 371-372.

rule that enforced English law as the formal law of the land, introduced the court system and litigation as the mode of dispute resolution leaving mediation to be insignificant over the times.

The western mediation movement sees that mediation and other alternative dispute resolution were reintroduced and revived in Singapore in the 1990s. Chief Justice Chan Sek Keong commented⁷⁹² that the ADR movement is less than 20 years old, but it has moved fast that the more established methods like arbitration and mediation are no longer viewed as alternatives. These methods form part of the legal process within the court structure and protocols as different modes or models for resolving disputes.

In commenting the achievement of mediation, the Honourable Chief Judge stated:

“In less than 20 years, we have, I think implanted mediation into the genetic make-up of a large number of our lawyers and also members of the various professional, business and industry groups. We believe that mediation is positive in relieving congestion in the courts, and in providing costs savings, “face” savings and other benefits. In addition, resolving social and community disputes through mediation will bring about a less fractious and more harmonious society. But we cannot succeed in these goals, unless we believe in mediation as a force for good.”

It could be concluded that from the statement the belief that ‘mediation is a force for good’ has driven the administrators to accept, develop and enhance the practice within the communities. It can be seen indirectly that the culture and religious teaching has influenced the administrators to belief and insist that mediation is a force for good.

⁷⁹² Speech of Chief Justice Chan Sek Keong, *Launch of the SMU-Centre for Dispute Resolution*, 16 April 2009, <http://app.supremecourt.gov.sg/default.aspx?pgid=2841>

What are the other factors that influenced mediation to develop fast within the Singaporean communities? The analysis below provides the much needed answer.

6.2.2.1. Initiative from the Judiciary

The judiciary plays a major role in initiating and developing mediation in Singapore. Mediation in Singapore started with the court mediation initiated by the judiciary with the institution of Court Dispute Resolution in the Subordinate Court in 1994. The Court Dispute Resolution gave litigants the opportunity to attend before a settlement judge who would act as a mediator. A year later, in 1995, the Court Mediation Centre was set up to co-ordinate the work of judicial officers, court counsellors, volunteer mediators and others involved in Court Dispute Resolution. Mediation has been actively promoted as a useful method for resolving disputes before going to trial. The court mediation centre was then upgraded and renamed as the Primary Dispute Resolution Centre and offer multiple dispute management and resolution services.⁷⁹³ Chief Justice Chan Sek Keong commented:

“Between June 1994 and December 2008, the Subordinate Courts mediated 80,016 civil cases with a success rate of 90.4% (i.e.72,366 cases). For small claims, and these are additional figures, the number mediated between 2002 and 2008 was 6103, with a success rate of 85.7%, (5229 cases). For maintenance cases, the number mediated between 2000 and 2008 was 3907, with a success rate of 97% (3785) cases). For family violence cases, the number mediated between 2002 and 2008 was 1126, with a success rate of 79 % (891) cases. For other family cases, including Syariah Court maintenance orders, the number

⁷⁹³ See Joel Lee and Teh Hwee Hwee, “The Quest for an Asian Perspective on Mediation”, *An Asian Perspective on Mediation* . Ed. Joel Lee, The Hwee Hwee, (Singapore: Academy Publishing, 2009) at 7, See also Lim Lan Yuan, *Supra*, 31-32.

mediated from 2006 up to 2008 was 1701, with a success rate of 89% (1506 cases). These results are really admirable⁷⁹⁴.

6.2.2.2. Continuous Efforts by the Judiciary

Mediation has expanded rapidly in Singapore with the concerted and determined efforts from the judiciary. The focus is not just on the court mediation, but also expanded to other areas and settlement centres. These initiatives are taken with the belief that mediation should be encouraged and is better and more harmonious than litigation. It should be highlighted that the Chief Justice Chan Sek Keong had mooted the idea⁷⁹⁵ of the establishment of commercial mediation centre in Singapore.

The proposal has led to the setting up of a sub-committee on the Commercial Mediation Centre. Pursuant to this, a study was then conducted to see the practicality and feasibility of setting up a mediation centre that focus on resolving commercial disputes. During that period of time, the sub-committee consulted extensively with the local legal and other professionals, trade organizations and interest groups, to garner their supports for the use of mediations. The consultation resulted in the Association of Banks of Singapore, the Association of Consulting Engineers of Singapore, the General Insurance Association, the Institution of Engineers of Singapore, the Real Estate Developers' Association of Singapore, the Singapore Contractors' Association Limited, the Singapore International Arbitration Centre and the Society of Project Managers each signing a Memorandum of Understanding to

⁷⁹⁴ Chief Justice Chan Sek Keong, *Launch of the SMU-Centre for Dispute Resolution (Speech)*, 16 April 2009, <http://app.supremecourt.gov.sg/default.aspx?pgid=2841>

⁷⁹⁵ At the opening of Legal Year 1996.

support and promote the use of mediation.⁷⁹⁶ It is impressive to see the determined and continuous efforts from the judiciary that lead to the signing of MOUs with these commercial institutions. Consequently, mediation has been actively promoted and made known to the public at large.

By August 1997, some 84 cases were referred to the Commercial Mediation Service and about 75% issues dealt with were settled. Feedback was gathered from the users of the Commercial Mediation Service, viz., the lawyers and the parties who attended mediation, and was generally positive and encouraging. The strong support and the early success of commercial mediation centre had led to the establishment of Singapore Mediation Centre.⁷⁹⁷

Hence, the Singapore Mediation Centre was launched on 16 August 1997. Up to 31 March 2009, it has mediated 1422 disputes with a success rate of 73.77%. Apart from this, there was a large number of ad hoc mediation that regularly took place.⁷⁹⁸

6.2.2.3. Efforts from the Government

The government has taken serious efforts in the realisation of mediation. In the 1996 budget debate, the Minister of Law, S. Jayakumar said Singaporeans must move away from the view that settling disputes through the courts was the best and

⁷⁹⁶ Joel Lee and The Hwee Hwee, *op.cit.*, 7-8.

⁷⁹⁷ See *ibid.*

⁷⁹⁸ See speech of Chief Justice Chan Sek Keong, *Supra.*

preferred way. While litigation was unavoidable in settling some disputes, he said it should be the last resort.⁷⁹⁹

As reported by Yuan⁸⁰⁰ the objectives tendered by the government in promoting mediation are as follows:

- (i.) To check the trend of Singaporeans becoming more litigious.
- (ii.) To provide a less expensive and adversarial method of dispute resolution to suit a range of conflicts.
- (iii.) To help reduce the number of cases handled by recourse to other non-judicial avenues.
- (iv.) To underscore that mediation in settling disputes is more in keeping with the Asian way of life.⁸⁰¹

The high volume of commercial and business activities have propelled Singapore into a highly cosmopolitan society. Business and social interactions have increased along with the conflicts that require resolution. The government perceives mediation to be more suitable as it is less costly, faster and more harmonious. Although, litigation will remain to be an important means of settling these conflicts and disputes, such method is viewed to be costly, time consuming and disruptive.

⁷⁹⁹ Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997), 8-9.

⁸⁰⁰ Lim Lan Yuan, *ibid.*

⁸⁰¹ *Ibid.*

For family and community disputes, it is argued that tensions can build up within society if people do not have or do not know of an alternative means of resolving their day-to-day problems. Pent-up emotions, resentment and ill feelings may explode into serious and violent crimes threatening the social fabric and harmony of a multi-ethnic society.⁸⁰² Further, communications and conflict resolution skills can be acquired and improved through the use of mediation. The promotion of mediation can be seen to help Singapore develop into a more tolerant and civic-minded society. The government believes in mediation as a force for good.

The Community Mediation Centre was set up in 1998 by the Ministry of Law under the Community Mediation Centre Act⁸⁰³ to encourage the use of mediation by local communities in resolving family, social and community disputes that do not involve sizeable offences. The goals include, *inter alia*, the re-kindling of the community spirit and the nurturing of a gracious living environment⁸⁰⁴. The Ministry of Law supervises the CMCs and remains and to be active promoter of mediation and ADR.

Also among other initiatives to impose the mediation as the primary tool of dispute resolution include the recommendation by the Attorney-General Chambers that all government departments should use mediation as their option for dispute and to include a mediation clause for referrals of dispute to SMC in government contracts.⁸⁰⁵

⁸⁰² *Ibid.*

⁸⁰³ Cap 49A, 1998 Ed

⁸⁰⁴ See Lim Lan Yuan, *loc.cit.*

⁸⁰⁵ See Lim Lan Yuan, *loc.cit.*

It is seen later that other government agencies, such as the Insolvency and Public Trustee's Offices and the Tribunal for the Maintenance of Parents also started to offer mediation services.⁸⁰⁶

The establishment of the Singapore Mediation Centre and Community Mediation Centre has given tremendous impetus to the movement of mediation in Singapore. The efforts of the government in the creation of the said centres and regulating the Acts for the application have shown that the government has contributed a major role in promoting mediation in Singapore.

6.2.2.4. Effective Promotion and Awareness Programme

The effective promotion and awareness programmes have made mediation known to the public and their benefits. As seen earlier, before the creation of the Singapore Mediation Centre, the Sub-Committee on the Commercial Mediation Centre had consulted extensively with other legal and professional bodies, *inter alia*, the Association of Banks of Singapore, the Association of Engineers of Singapore, the Real Estate Developers' Association of Singapore, the Singapore International Arbitration Centre and the Society of Project Managers which witnessed the signing of Memorandum of Understanding to support and promote mediation. The MOUs have established links for many professional trade associations to access mediation with the SMC. Thus, indirectly it also broadens the awareness of the commercial institutions on the availability of mediation as a constructive means of dispute

⁸⁰⁶ See Joel Lee and Hwee Hwee, *loc.cit.*

resolution. It was reported that as at 31 May 2011, the Singapore Mediation Centre has mediated disputes worth about SGD \$2 billion.⁸⁰⁷

In expanding its service, besides the commercial disputes, the Singapore Mediation Centre has introduced other schemes, namely, the Small Case Commercial Mediation Scheme, SMC Mediation- SIAC Arbitration Scheme, Council for Private Education, Council for Estate Agents, Medical Mediation Schemes and Family Law Mediation Schemes to promote and enlarge the usage of mediation.

As noted earlier, the Attorney-General has recommended all government departments to use mediation as an option for disputes resolution and to include a mediation clause for referrals of dispute to the Singapore Mediation Centre in government contracts.

In increasing the awareness of lawyers and litigants, the Primary Dispute Resolution Centre of the Subordinate Court has introduced the ADR Status Form for the lawyers to provide the suitability of the case for mediation and also for the parties to certify that their lawyers have explained to them the various ADR options and their decisions concerning ADR.⁸⁰⁸ The Subordinate Court has also raised the awareness of mediation amongst the members of the Bar through the Associate Mediator Programme that encourages lawyers who have been trained by the Singapore Mediation Centre to volunteer as mediators in PDRC. The approach has successfully

⁸⁰⁷ Interview with Ms Angela Mitakidis, the Manager of Singapore Mediation Centre and Mr Elliot Goon, Senior Executive of Singapore Mediation Centre on 21/6/2011

⁸⁰⁸ See further explanation in Chapter 5 of this thesis.

inculcated the culture of change towards ADR and mediation in the Subordinate Courts.

The Singapore Mediation Centre has also received referrals from the High Courts. It was reported that as at 31 May 2011, there were 1,824 cases referred to Singapore Mediation Centre, whereby 708 (39%) cases were referred by the court. From this figure, some 1,670 cases were mediated whereby 660 (40%) of them were referred to by the court⁸⁰⁹. In order to promote the application from the court, the Order 59, Rule 5 of the Rules of Court was introduced in September 2010. The said Order states that: “The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account, *inter alia*, the parties’ conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution.”

The Singapore Mediation Centre, besides having actively involved in the promotion of mediation, also provides training in mediation and negotiation, accrediting and maintaining a panel of mediators and providing consultancy services. It has contributed a significant role in the progress of the mediation movement in Singapore.

Thus, it can be seen the application of mediation in Singapore has the strong support from all quarters, may it be public or private organisations, viz., the government ministries or departments, the judiciary and the mediation centres in enhancing the mediation initiatives. With such active efforts, it can be affirmed that mediation as a dispute resolution mechanism has been accepted by the communities in Singapore.

⁸⁰⁹ Interview with Angela and Elliot, *Supra*.

6.2.2.5. Feasibility Study on The Suitability and Practicality of Mediation as Dispute Resolution.

Before the establishment of Singapore Mediation Centre, a cross committee was formed to study how mediation could be further promoted in Singapore and how to implement mediation beyond the courts. The committee consulted various commercial and trade organization leading to the signing of MOUs for the organization to apply and promote mediation. Another major part of the feasibility study was the launch of Commercial Mediation Service by the Supreme Court and Singapore Academy of Law. Pre-trial conferences were also conducted by the Supreme Court to introduce non-court based mediation and its benefits and to discuss with the parties the possibility of using mediation to resolve their disputes. The concerns of lawyers about the use of mediation and their views on how mediation could be a real alternative to litigation were also actively solicited. By August 1997, 84 cases were referred to the Commercial Mediation Service, of those dealt with, about 75% were settled. Feedback was gathered from the users of the Commercial Mediation Service, namely the lawyers and parties who attended mediation, and was generally positive and encouraging.⁸¹⁰

With the strong support for mediation and the early success of Commercial Mediation Centre, the recommendation for the establishment of the Singapore Mediation Centre was then submitted to the ADR Committee of Ministry of Law leading to the endorsement of its creation at the Singapore Parliament.

⁸¹⁰ Joel Lee, *The Hwee Hwee*, *Supra*, at 10.

A study was also done on the suitability of the creation of the Community Mediation Centre. The result of the survey showed that Singaporeans prefer to settle community or domestic disputes through less formal means than to bring them to court. The establishment of such a centre was then recommended to the Ministry of Law before it was then endorsed at the Parliament.

It is seen that the positive feedbacks of the feasibility study has contributed to the success of the establishment of Singapore Mediation Centre and the Community Mediation Centre of Singapore.

6.2.2.6. Participation from Private Sectors.

Professional, trade and other bodies also began to institute their own mediation services and schemes. Some of the early examples include the Singapore Institute of Architects, the Singapore Institute of Surveyors and Valuers, the Consumers' Association of Singapore, the National Association of Travel Agents, the Renovation and Decoration Advisory Committee and the Real Estate Developers' Association. The more recent ones include the Financial Industry Dispute Resolution Centre, the Ministry of Health Medical Mediation Scheme and the Singapore Sports Council Framework for Alternative Dispute Resolution for Sports⁸¹¹ (more commonly known as "ADR Sports"). There are also many other organizations which offer ADR services, such as the Law Society, CASE⁸¹² and EAGLE⁸¹³.

⁸¹¹ Joel Lee and The Hwee Hwee, *ibid*.

⁸¹² Consumer Association of Singapore.

As noted by the Chief Justice Chan Sek Keong that nowadays Singapore has a plethora of mediation centres and service providers for practically all major areas of commercial and social disputes.

6.2.2.7. Efforts from Academics

On the academic front, mediation and other ADR courses were first offered by the School of Building and Estate Management gained prominence with the advancement of the mediation movement, and have become part of the curriculum of tertiary programmes today.⁸¹⁴ Such courses are being offered by the Singapore Management University and the School of Law at the National University of Singapore in 1992 and 1994 respectively. In addition, the Centre for Dispute Resolution was launched in April 2009 to undertake, *inter alia*, focused research study and the teaching of ADR. The SMU- CDR is aimed to be a centre for studying, teaching, research and promotion of ADR. The SMU-CDR seeks to co-ordinate with universities, professional, governmental, non-governmental and intergovernmental agencies in the promotion of collaborative dispute resolution and access to justice.

6.2.2.8. Education and Training

The Singapore Mediation Centre has played an active and major role in educating and training on mediation. As at 31 May 2011, over 200 mediators have been accredited. SMC has continuously offers training on mediation and enhancing the application of

⁸¹³ Eagle Mediation and Counselling Centre.

⁸¹⁴ Joel Lee and The Hwee Hwee, *Supra*, at 9.

mediation over the jurisdiction. The continuous efforts, training, research and awareness programmes on mediation have made mediation to be acknowledged and accepted by the public at large.

6.3. Analysis of The Application in Australia

6.3.1. Cultural Background

The Australian indigenous tribes have practised consensual form of dispute resolution through their customary law since time immemorial.⁸¹⁵ They have practised consensual form of problem-solving in one form or another over the period and developed a notion of community ownership of disputes and a determined approach to solving them. Due to this, they have been described as superb negotiators and can be counted as one of the many pioneers of consensual dispute resolution.⁸¹⁶

The arrival of Europeans has brought the culture of individualism and conflicts in the Australian community. There was an increased tendency to define personal problems and social troubles in terms of legal rights and obligations. The enforcement of legal rights has made litigation to be more acceptable in the community. The introduction

⁸¹⁵ conservatively between 40,000 and 100,000 years. See the discussion by Spencer, David, Tom Altobelli, *Dispute Resolution In Australia, Cases, Commentary and Materials*. (Sydney: LawBook Co., 2005), 1-3. Astor and Chinkin (1992) point out in their book *Dispute Resolution in Australia*, (cited in Spencer and Altobelli, *ibid.*), that indigenous communities in Australia have used a range of methods to deal with conflict (for example shaming, exclusion, compensation, initiation and training based upon a system of kinship based law) for thousand of years.

⁸¹⁶ See the analysis by Spencer, David, "Mediating in Aboriginal Communities" (1996-97) 3 *Commercial Dispute Resolution Journal* 245 at 245 cited in David Spencer and Tom Altobelli, *ibid.*

of modern ADR in Australia occurred only ten years later⁸¹⁷ after its introduction in the United States, but it moved in much at a faster pace and in a wider scale than it has occurred in the United States. It must be emphasized that the indigenous people has a strong and rich tradition of communal sharing and fellowship that has lent itself to the adoption of these new ADR processes.⁸¹⁸

It is impressive to note that notwithstanding with the mixture of different cultures and races nowadays in Australia, mediation has moved and developed fast. It was reported in the census of 2006 that the make-up of Australia's population has changed dramatically during the past 200 years, from the aboriginal population to a predominantly Anglo-Celtic (by 1900) and to its present mix approximately of Anglo-Celtic (74%), Europeans (19%) and Asian (4.5%). Today, 43% of Australians were born overseas or have at least one parent who was born overseas. Moreover, in recent years, people from over 200 different countries have made their homes in Australia.⁸¹⁹

The discussion below examines the movement of mediation in Australia and the contributing factors to its rapid development.

⁸¹⁷ See the analysis by Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997), 19-23.

⁸¹⁸ See the discussion by Astor and Chinkin, *ibid* and also Spencer, David and Tim Altobelli, *ibid*. As noted earlier the indigenous have a rich history that encompasses range of processes that now identified as ADR innovations.

⁸¹⁹ Australian Bureau of Statistics, *A Picture of the Nation: The Satisfaction's Report on the 2006 Census* (2006) <http://www.abs.gov.au/austats/abs@nsf/mf/2070?OpenDocument>, cited in Siew Fang Law "Culturally sensitive mediation: The importance of culture in mediation accreditation" (2009) 20 *ADRJ* 162.

6.3.2. Analysis on Development and Application of Mediation in Australia

As discussed earlier the Alternative Dispute Resolution including arbitration, mediation and conciliation in Australia has a long and very distinguished history. Spencer and Brogan reported that the ADR movement draws heavily upon the history of collective dispute management, especially in the industrial relations system.⁸²⁰ Megens commented that “conciliation” has been expressly included by the framers of Australia’s federal constitution” as a main mechanism for the resolution of industrial disputes.⁸²¹ He further stated that it was not until the late 1960s to 1970s that significant interests began to focus upon tribunal system and arbitration. The interest in mediation-based approach began in the late 1970s as arbitration, ombudsman and tribunal system do not necessarily provide for self-determination of the disputant parties although they provide alternatives to traditional litigation.⁸²² This concept, however, is the central approach of the mediation programs. Due to this emphasis, mediation had been tied with the rise of communitarian and consumer right ideals and projects that marks the beginning of the modern ADR movement.

The initial impetus was the Community Justice Centre Pilot project funded by the government in 1980 in New South Wales, followed by similar establishment in Victoria in 1987 and Queensland in 1990. The model were based on community mediation services, that was successful in the United States which aimed at providing

⁸²⁰ Spencer, David, Michael Brogan, *Mediation Law and Practice*, (UK: Cambridge University Press, 2006) at 30

⁸²¹ Megens, Peter, *Mediation in Australia*, RICS. 13 October 2005, on 20 June 2006 (retrieved) < <http://www.rics.org/Management/Disputeavoidancemanagementandresolution/Disputeman...>

⁸²² See *ibid.*

services to a long neglected and ill used sector conflict- community disputes. Besides, they also pioneered the use of mediation in public issue disputes, victim offender mediation and family mediation.⁸²³

The Court mediation has its origin in 1979, with the establishment of a Coordinating Committee by Frank Walker, the then Attorney-General. The objective is to test the notion that many disputes which had been unresponsive to court process could be resolved quickly and inexpensively by using a process of informal and voluntary mediation. Yuan commented⁸²⁴ that this pilot project marked the beginning of a system which was carefully planned and implemented, offering an alternative legal system of courts and adversarial processes.

The legal profession then followed the development and established a forum, known as Lawyers Engaged in ADR (LEADR), to promote mediation within the legal system. There were also other law schools which have moved forward by offering ADR or mediation courses. Other professions especially in the environmental planning and human service fields then slowly embraced mediation in resolving disputes.⁸²⁵

The judiciary, banks, insurance and other large institutionalized system have now applied mediation as part of their conflict management strategies. The significant

⁸²³ *Id.* at 31.

⁸²⁴ Faulkes, Wendy, "The Modern Development of Alternative Dispute Resolution in Australia", (1990), *Australian Dispute Resolution Journal*, vol 1, at 61 cited in Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore:FT Law & Tax Asia Pacific, 1997), 19-23.

⁸²⁵ Megens, *op.cit.*, at 31.

indicator of this growth is the emergence of ADR related legislation dealing with the increasing areas of services. Since 1990, there were only a mere handful of Australian statutes referring to mediation, and now there have grown to more than one hundred. The figure does not include legislation that includes references to the legal practices, such as, conciliation, arbitration and case appraisal.⁸²⁶

Family Law area is seen to be one of the largest, fastest, growing and innovative areas of ADR practice. While the Family Law Act has always emphasised the management of disputes by ADR processes, the Family Law Reform Act 1995 reaffirmed the centrality of these alternative processes by designating them “primary dispute resolution”. The related Family Law Regulations contain very comprehensive statutory mediation. There are protocols which deal with issues such as accreditation, standards, duties and obligations.⁸²⁷

The increase use of alternative dispute resolution processes has attributed to the decline of litigation in Australia. Nowadays, most disputes in Australia are resolved by mandatory referred mediation before entry into litigation system.⁸²⁸ The ADR processes are used at all levels of Australian society. Often lawyers are surprised that so few disputes are the subject of litigation and are resolved prior to any referral to the formal-trial based dispute resolution system. In 1989, it was estimated that only 5.7% of all commercial disputes end up within the court system and in 2006 that

⁸²⁶ Megens, *Id*, at 31. For the list of the amended Acts, see Spencer, David, Tom Altobelli, *Disputes Resolution in Australia*, (Sydney: LawBook Co. 2004) at 7.

⁸²⁷ Megens, *Ibid*, The mediation scheme in the Family Court is the most comprehensive in Australia. See Sourdin, Tania “The Use of Mediation in Australia”, in *Global Trends in Mediation*, 2nd Ed. Ed. Alexander, Nadja, 2006), 45-63.

⁸²⁸ See the analysis by Sourdin, Tania, *ibid*.

figure might be lower still.⁸²⁹ Even, once within the litigation system, the traditional trial processes account for the determination of a relatively small number of disputes.⁸³⁰

Sourdin commented that many industries in Australia have developed ADR schemes and many forms of dispute resolution have emerged outside courts in response to the changing way in which community and society is dealing with disputes. Wade, a Professor of Dispute Resolution,⁸³¹ has noted that there is “a world of conflict outside lawyer’s offices”. In the instance, in the banking sector alone it has been estimated that more than 130,000 disputes will be referred to industry-based ADR scheme that are not related to any court or tribunal system in Australia⁸³² The schemes include: Australian Banking Industry Ombudsman (ABIO); Telecommunications Industry Ombudsman (TIO); General Insurance Enquiries and Complaints Schemes; Life Insurance Complaints Service (LCIS); Credit Union Dispute Reference Centre; Financial Planning Association Complaints Resolution Scheme; Insurance Brokers’ Association Dispute Facility; and Complaint Resolution Committee established by the Australian Timeshare and Holiday Ownership Council Limited.⁸³³

⁸²⁹ M. Fulton, *Commercial Alternative Dispute Resolution*, Brisbane: Law Book Company, 1989 cited in Sourdin, *ibid*.

⁸³⁰ See Sourdin, Tania, *ibid*. As illustrated by Sourdin, T those matters that do go to trial are often more complex and involve greater number of parties than was the case two decades ago.

⁸³¹ Cited in Sourdin, T, *ibid*.

⁸³² B Slade and C Mikula, *The use of Industry-based Consumer Disputes Resolution Scheme, Paper*, (Sydney; New South Wales Legal Aid, , November 1997), 2.

⁸³³ Sourdin, Tania, *Alternative Dispute Resolution*, (New South Wales: LawBook Co., 2002), 9-14.

The development of ADR in Australia over the last decade or so is best summarized by Jennifer David:⁸³⁴ “Thinking about the challenge of the future of ADR I was struck by how much we have achieved within Australia during the past decade in gaining acceptance for the movement in setting standards for mediators and in developing within Australia high quality ADR programmes of which we can be very proud.”

6.3.3. The Influential Factors;

Sourdin stated that the fast development of mediation may be attributed to the cultural, historical and other social factors. Supporting this view is Justice Rogers,⁸³⁵ the Chief Judge of the Commercial Division of the Supreme Court (NSW) who stated:

“the philosophical justification for new techniques is quite simply in the perceived wishes of the community and the practicalities of the situation. The reasons why more dispute resolution options are needed include the ever increasing number of disputes, the community requirement that disputes be resolved cheaply and expeditiously and the fact that more sophisticated social and technical matters will be posed for determination.”

⁸³⁴ David, Jennifer, “Designing Dispute Resolution, Complaints Handling and Dispute Preventions System”. *First International Conference in Australia on Alternative Dispute Resolution*, (Australia;1992) cited in Lim Lan Yuan, *Supra*.

⁸³⁵ Rogers, J, “Dispute Resolution in Australia in the Year 2000”, (1984) *Australian Law Journal*, vol 58, 610

The discussion below will expound further the factors that contribute to the fast development of mediation in Australia.

6.3.3.1. Initiatives by the Judiciary

It is without doubt that the judiciary of Australia has played a major role in the movement of mediation. De Garis commented that the Growth in ADR use in courts and tribunal in Australia has been undoubtedly driven by the judiciary who are often keen supporters of ADR processes. Although there has been no substantial research into judicial attitudes towards ADR processes, De Garis supported the view using the analysis of 1994 survey into the attitudes of Federal Court judges towards ADR.⁸³⁶ The results show that most judges believe settlement before trial is preferable to going to trial. Judges generally considered that it was appropriate for them to encourage parties to settle the dispute before trial or to advise them to seriously consider alternative means of dispute resolution. However the judges did not view themselves as having a role in the actual settlement process of settlement.⁸³⁷

In support of the views made by De Garis, Yuan⁸³⁸ quoted the speech of the former Chief Justice of New South Wales, Sir Laurence Street,⁸³⁹ who stressed that the courts are not always the best place to settle disputes and that alternative resolution

⁸³⁶ A DeGaris, "The Role of Federal Court Judges in the Settlement of Disputes (1994) 13 *University of Tasmania Law Review*, 217 cited in Sourdin, Tania, *Alternative Disputes Resolution, op.cit.*, 99-100.

⁸³⁷ Sourdin, Tania, *Alternative Dispute Resolution, ibid.*

⁸³⁸ Lim Lan Yuan, *The Theory and Practice of Mediation*, (Singapore: FT Law & Tax Asia Pacific, 1997), 20-21

⁸³⁹ Street, Laurence, "An Alternative for Dispute Resolution- Setting Up the Australian Commercial Disputes Centres", (20 May 1986), *Law Society Journal*, , also cited in Lee Lam Yuan , *ibid.*

method based on consensus are sometimes better. The former Chief Justice commented:

“The concept of consensus is coming increasingly to be recognized as having significant advantages when compared with the confrontationist antagonistic philosophy that tends to pervade ordinary court cases. The conflict approach that inevitably underlies court proceedings can, not infrequently, at least sour if not destroy mutual trust and confidence between the parties, to their ultimate detriment.”

In his opening address to the Conference on Alternative Dispute Resolution organized by the Australian Institute of Criminology that year, Sir Laurence Street⁸⁴⁰ emphasized the need for a mechanism to enable disputes to be determined at a stage far earlier than the formal hearing of contested litigation.

As a consequent, at the ‘Colloquium on Dispute Resolution in Commercial Matters’ held in Canberra in June 1986, it was recognized that informal methods of dispute resolution were necessary for some disputes, but that the court system would continue to be important for others. It was remarked that formal litigation has become expensive and inappropriate in some areas when cooperation is called for. The colloquium considered that, in the long term, negotiation may become more important than arbitration and that education is essential for ADR to find its proper place in legal practice⁸⁴¹

⁸⁴⁰ Street, Laurence, “Opening Address, Australian Institute of Criminology”, *Alternative Dispute Proceedings*, (Australian Institute of Criminology, 1986), Ed. Mugford J. cited in Lee Lam Yuan, *ibid.*

⁸⁴¹ See Lee Lam Yuan, *Supra.*

6.3.3.2. Continuous Efforts from the Judiciary

The continuous effort from the judiciary has indeed promoted the use of mediation to the public at large. What becomes obvious is that mandatory referral is legalized in almost all the jurisdictions through the amendment of the legislation or by the issuance of the Practice Note. The details are as follows:

(1.) New South Wales

In New South Wales, Section 110K of the Supreme Court Act 1970 (NSW) was introduced to allow for referral of matters to mediation without the consent of the parties. The parties are also required to participate in good faith in the mediation.⁸⁴²

The Practice Note of Supreme Court was also issued on 8 Feb 2001, setting out the basis which the Supreme Court will consider ordering mediation in civil matters.⁸⁴³

Other courts in New South Wales are also increasingly using mediation and other ADR processes. The Land and Environment Court has had a registrar-based mediation system for the past decades and has successfully resolved numerous disputes. Many matters that may be implemented at the local council or other level are resolved by way of mediation prior entry into that Court System.⁸⁴⁴

⁸⁴² Supreme Court Act 1970 (NSW) s. 1101..

⁸⁴³ See Sourdin, Tania "The Use of Mediation in Australia", in *Global Trends in Mediation*, 2nd Ed. Ed. Alexander, Nadja, 2006), at 52.

⁸⁴⁴ *Id.* at 53

The District Court, also made a move in legalizing mediation. In October 2001 Practice Note 33 that deals with the way that the District Court manages its caseload was changed. Para. 10 of the Practice Note was introduced⁸⁴⁵. It states:

“It is proposed to finalise as many matters as possible through alternative dispute resolution system. Most matters will be referred to arbitration or court managed mediation. Cases may be sent to arbitration or mediation at any time”.

(2.) Queensland

The Supreme Court of Queensland Act 1991(Qld) have been amended to legalise the process of ADR.⁸⁴⁶ The Act enables the parties by agreement to refer their disputes to the ADR process. The Act also enables referral to an ADR process to be made by the Court. If a referral order is made by the Court, the Act provides that the parties must attend the mediation or case appraisal and must not impede the ADR convener in conducting and finishing the ADR process.⁸⁴⁷ However, there is no direct reference to consent in the ADR provisions of the Act.⁸⁴⁸

The Courts in Queensland will order ADR without consent where the parties have not voluntarily arranged ADR and filing of an application to the court may trigger

⁸⁴⁵ *Id.* at 54.

⁸⁴⁶ The processes has been said as ‘virtually compulsory for the parties to participate(in). See B.C. Cairns, *Australian Civil Procedure*, 4th ed. (Sydney: Law Book Company, 1996) cited in Tania Sourdin, in Nadja Alexander, Nadja, *Supra*, 54-55 The two primary forms of dispute resolution in use are mediation and case appraisal.

⁸⁴⁷ Supreme Court of Queensland 1991.

⁸⁴⁸ This is the illustration for what is said as “virtually compulsory” There are a number of cases that have dealt with the power to refer to matters to mediation and case appraisal under the Act. see for example *Witcombe v. Jordin & Anor*) 1998 QSC 117, May 26, 1998., cited also in Tania, *ibid.*

referral to an ADR process.⁸⁴⁹ The programs that operate in Queensland courts are regarded as an ‘integral part of the court system’. The costs of mediation and case appraisal are borne by the parties.⁸⁵⁰

The Uniform Civil Procedure Rules (1999) (Qld) have provided a framework for mediation and other ADR processes in Queensland Courts.⁸⁵¹ The Rules allow the court to direct the Registrar to give written notice to the parties that the dispute to be referred to an ADR process. The Rules also allow a party to object to the referral, implying that consent of the parties is not required for a court referral to be made. There are also provisions for settlement conferences.

(3.) Victoria

Victoria has developed a comprehensive mediation program. Initiating the movement, the Chief Justice of the Supreme Court, John Harber Philips said⁸⁵² on 16 August 1995: “The time has come for the organized involvement of mediation in all Victorian Courts.” He added:

“It should be stressed that mediation is not an inferior type of justice. It is a different type of justice. All studies and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.”

⁸⁴⁹Information Fact Sheet (Brisbane: Queensland Courts, 1999), www.courts.qld.gov.au/practice/adr.htm) cited in Sourdin, Tania *op.cit.*.54-55

⁸⁵⁰ See Sourdin, Tania, *op.cit.*.54-55

⁸⁵¹ Uniform Civil Procedure Rules 1999 (Qld) Chapter 9, Part4, particularly ss 319 and 320.

⁸⁵² See Sourdin, Tania, *op.cit.* at 56

The Supreme Court (General Civil Procedure) Rules 1996 (Vic) was amended to provide that mediation can be ordered without the parties' consent.

The County Court's Civil Initiative provides an emphasis on mediation that each case is subject to a direction hearing held subsequent to the filing of an appearance of the defendant. Mediation is encouraged in the great majority of cases, on occasions ordered without the consent of the parties, at the first direction hearings.⁸⁵³

In order to encourage mediation, the Court establishes a mediation centre. This approach has been supported by the Victorian Department of Justice. In addition, the Court has provided accommodation for some mediations and provide for referral of matters to provide mediators.⁸⁵⁴

Also in Victoria the Civil and Administrative Tribunal (VCAT) is empowered to refer matters to mediation with or without the consent of the parties⁸⁵⁵. Besides, the Magistrate Court is also given powers to refer matters to mediation with the consent of the parties.⁸⁵⁶

⁸⁵³ The Victoria County Court Portal, www.countycourt.vic.gov.au, cited in Sourdin, Tania, *op.cit.* at 55.

⁸⁵⁴ See Sourdin, Tania, *op.cit.*, 55-56

⁸⁵⁵ Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 88. See also Sourdin, Tania, *ibid.*.

⁸⁵⁶ Magistrate Court Act 1989 (Vic) s. 108, cited in Sourdin, Tania, *ibid.*

(4.) Western Australia

The Supreme Court of Western Australia has an ADR scheme that provides for the mediation of disputes by Registrars of the Court and others.⁸⁵⁷

(5.) Other States and Territories

For South Australia, mediation is provided for in the Supreme, District and Magistrate' Courts and be ordered without consent of the parties. South Australia is said to have had extensive ADR processes for some years. In Tasmania, mandatory referral has also been allowed. The court will now direct mediation where it appears that there is a good settlement or where it considers that a mediated settlement is preferable.⁸⁵⁸

In the Australian Capital Territory there has been a close focus on ADR and its relationship to the litigation system. The Mediation Act 1997 (ACT) set up a comprehensive regulatory scheme that applies to mediators.⁸⁵⁹

The Federal Scheme;

Australian federal courts and tribunals have been involved and engaged in ADR development for more than a decade. The emphasis in federal courts and tribunals has largely been upon mediation and conciliation processes such as evaluation and

⁸⁵⁷ Supreme Court Act 1935 (WA) s 69. (see Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System (Perth, October 1999). See also <http://www.wa.gov.au/lrc/reform.htm> (18 July 2001). See also Sourdin, Tania, *Id.* at 56-57.

⁸⁵⁸ See Sourdin, Tania, *ibid.*

⁸⁵⁹ *Ibid.* In addition legislation such as the Domestic Relationships Act 1994(ACT) and the Tenancy Tribunal Act 1994 (ACT) have set up referral processes. Legislation in the Northern Territory provides for ADR processes in the Local Court.

arbitration. The Court's staff in the Federal Court and Family Court and members of Administrative Appeals Tribunal has undertaken much of the mediation and conciliation work. Each court and tribunal has constructed an ADR program to meet its own and needs.⁸⁶⁰

(1.) Federal Court

For the Federal Court of Australia, mediation has been ordered without consent of the parties since 1997.⁸⁶¹ Most of mediations are conducted by the Registrar although external mediators have mediated a number of works.⁸⁶²

(2.) Family Court

In the year 2000, the Court commenced a major review of its dispute resolution services. As early as 2000 a decision was made to refer all current PDR (Primary Dispute Resolution)⁸⁶³ processes as 'mediation' and endorse a facilitative model of communication in all processes that were previously referred to as PDR services. Despite this decision most matters continue to be broken down into conciliation, counseling and mediation process for reporting purposes⁸⁶⁴.

⁸⁶⁰ *Ibid.*

⁸⁶¹ Before the amendment, consent is required from the parties. Mediation is conducted by the registrars of the court.

⁸⁶² See Sourdin, Tania, *Id.* at 58

⁸⁶³ Under the Family Law Act (FLA), alternative dispute resolution process are called 'primary dispute resolution methods'(PDR). PDR first.

A range of PDR services offered; mediation, conciliation, counseling, information sessions, parenting programs, children's program and other programs designed to impart life skills to the participants. Case conferences are increasingly being used as a case management and dispute resolution process (A.M. Sikiotis cited in Sourdin, Tania, *op.cit.*, at 58)

⁸⁶⁴ Sourdin, Tania, *op.cit.*, at 58

The mediation scheme that is related to the Family Court has been described as the most comprehensive statutory mediation scheme and encompassing the most detailed mediation legislation, in Australia to date⁸⁶⁵. Apart from prescribing regulations that deal with topics concerning mediator accreditation and training, the regulations also specify processes and case management guidelines.⁸⁶⁶

6.3.3.3. Efforts and Full Support from the Government

The determination of the government for the enforcement of Alternative Dispute Resolution particularly mediation has driven the consensual mode of resolution to be perceived positively by the communities.

The government funded Community Justice Centre Pilot⁸⁶⁷ in 1980 in New South Wales provided the initial impetus followed by similar establishment in Victoria in 1987 and Queensland in 1990. Following this development, other community justice centers were then established, i.e. Dispute Resolution Centre in Queensland,⁸⁶⁸The Conflict Resolution Service in the Australian Capital Territory and Community Mediation Service in South Australia, Western Australia and Tasmania. Such establishment has promoted the use of ADR to resolve community-based disputes.

82 See Altobelli, Tom "ADR Legislation: Some Recent Development" (1996) 3(1) *Commercial Dispute Resolution Journal* 1, 11. See also Sourdin, Tania, *Id.* 58-59.

⁸⁶⁶ See comments by Sourdin, Tania *ibid.* See also (Family Law Regulations 1984, reg. 60 and 61).

⁸⁶⁷ The model were based on community mediation services, that had been successful in the United States of America

⁸⁶⁸ Dispute Resolution Centre Act 1990 (Qld)

The introduction of specific programmes or schemes directed at commercial disputes, family law disputes and community conflicts have influenced the adoption of wider range of ADR in the Australian society. In more recent years there has been considerable growth and interest in dispute resolution process that are facilitative.⁸⁶⁹

There are also non-governmental bodies that offer mediation and counseling service include organizations that may have religious or other affiliations such as Uniform and Relationships Australia, Anglicare, Lifeworks and Centacare and others. Interestingly to note that these agencies have been accredited by Attorney-General's Department to provide family or child counseling or mediation. It can be seen that the government has played a role in ensuring the agencies to offer good service.

Besides, the Commonwealth Government has undertaken funding to these bodies since 1989 in respect of Family and Child Mediation as a distinct service for separating and divorcing couples. In 1997-98 the Commonwealth provided more than AUD \$4.9 million to enable 17 organizations throughout Australia to provide family and child mediation in 59 locations.⁸⁷⁰ In 2005, the Commonwealth Government announced that it would provide a further AUD\$397 million in funding to support a range of dispute resolution services and support services for families aimed at reducing conflict and support family relationships.⁸⁷¹

⁸⁶⁹ See comments by H Astor and C Chinkin, *Dispute Resolution in Australia* (Sydney, Butterworths, 1992).

⁸⁷⁰ (Family and Community Services website www.facs.gov.au.) see also Tania Sourdin in Nadja ibid.

⁸⁷¹ Sourdin, Tania, *Id.* at 46..

The government bodies that are active in the community sector include community justice centres, (as noted above), as well as legal aid entities, ombudsman offices, family and community departments and services and juvenile justice bodies. Other organizations, such as community legal centres, play an important role in assisting parties to negotiate dispute and prepare for mediation. Schemes are also directed at particular categories of disputants or types of disputes.⁸⁷²

In 1995, the Attorney-General announced the establishment of the National Alternative Dispute Resolution Council (NADRAC) to foster the expansion of alternatives to court action in civil matters.⁸⁷³

NADRAC's terms of reference include advising the Attorney-General on issues of effectiveness, efficiency, fairness and standards for alternative dispute resolution services. A number of committees were established and discussion papers were circulated.⁸⁷⁴ The establishment of NADRAC indeed has enhanced the practice and standard of mediation in the Australian society.

6.3.3.4. Establishment of Dispute Resolution Centres

The establishment of Dispute Resolution Centres has fastened the evolvement of mediation in Australia. Yuan reported that the growth of the ADR movement in Australia has been promoted in part with the adoption of the United Nations Commission on the International Trade Law (UNCITRAL) Model Law on

⁸⁷² *Ibid.*

⁸⁷³ *Ibid.*

⁸⁷⁴ *ibid*

International Commercial Arbitration, which was implemented on 12 June 1989, as well as the establishment of the Australian Centre for International Commercial Arbitration (ACICA) in Melbourne in May 1985 and the Australian Commercial Disputes Centre (ACDC) in Sydney in March 1986. The Centre actively promotes ADR techniques and has trained mediators and appraised to provide hands-on assistance to facilitate the resolution of disputes.⁸⁷⁵

The ACDC was the initiative of the former Chief Justice of New South Wales, Sir Laurence Street. It provides an overall ADR service and has facilities in Sydney, Brisbane and Perth. As of May 1987, over 140 companies in Australia had signed ACDC's Declaration of Support in favour of the use of ADR techniques where appropriate. These companies include Union Carbide, Qantas, AMP Society, IBM, Westpact and Transfield.⁸⁷⁶

Among the various services, the ACDC has prepared its Conciliation Rules and the Procedural Notes which accompany them. These Rules and Notes provide a guide as to how ADR processes can be carried out. The ACDC also has model contractual clauses by which ADR processes and ACDC administrative services can be specified.⁸⁷⁷

⁸⁷⁵ See Lee Lam Yuan, *The Theory and Practice of Mediation*, (Singapore FT Law & Tax Asia Pacific, 1997), 21-22 'The function of the ACDC is somewhat different but complimentary. The ACDC is incorporated under the Companies Code and its object include facilitating and its objects include facilitative and managing the resolution of domestic and international commercial disputes by arbitration, mediation and similar techniques'.

⁸⁷⁶ Sourdin, Tania, *Supra*

⁸⁷⁷ *Ibid.*

The fast development has also been assisted by the creation and growth of professional organizations such as the Leading Edge Dispute Resolvers (LEADR), the Australian Commercial Disputes Centre (ACDC), Australian Dispute Resolution Association (ADRA), Conflict Resolution Network, and the Institute of Arbitrators and Mediators of Australia and few others.

Professional bodies such as law societies, institutes and bar associations have fostered ADR processes within the ranks of the legal profession and have been partly responsible for introducing pilot schemes in some courts. Surveys in Queensland and Western Australia have indicated that awareness and use of ADR processes varies among practitioners in different jurisdictions and practice areas. The same studies have indicated that many practitioners support the use of ADR processes and play an active role in encouraging their clients to use of ADR processes.⁸⁷⁸

Peter Megens has summarized the establishment and the role of Dispute Resolution Centres in the movement of mediation as follows:

“In 1986 the Australian Commercial Disputes Government Centre was established to manage major commercial disputes and to divert them from courts. It provides a model that the legal and business communities could relate to and foster as an approach to these types of conflict. This development, coupled with the foundation of such bodies as Lawyers Engaged in Alternative Dispute Resolution (LEADR) and the Institute of Arbitrators and Mediators in 1975 (Australia’s largest ADR body), has provided a focal point upon which the legal profession has developed a creditable ADR response to the emerging movement.”⁸⁷⁹

⁸⁷⁸ Sourdin, Tania. *Supra*.

⁸⁷⁹ Megens., Peter *Supra*

The increasing emphasis upon ADR processes within education at school and tertiary levels has also led to an increasing acceptance and understanding of processes.

6.3.3.5. ADR Education and Training

In Australia, ADR components are being incorporated into law courses or continuing legal education. At the Sydney University Law School, for example, all first -year students are introduced to dispute resolution in the compulsory first –year course, legal institutions and in certain options.⁸⁸⁰ The Bond University has established a Dispute Resolution Centre to act as a national intellectual forum for research, development and teaching in dispute resolution. The Macquarie University has established the Conflict Resolution Foundation to work in a similar area. The University of Technology of Sydney introduced a Master in Dispute Resolution with about 13 subjects ranging through the whole dispute resolution spectrum⁸⁸¹ Other law schools have also moved forward by offering ADR or mediation course.

6.3.3.6. Maintaining Status, Standard and Accreditation of Mediation

The establishment of NADRAC (National Alternative Dispute Resolution Council) has indeed played a major role in the expansion and development of ADR in Australia. Amongst the objectives are to advise the Attorney-General on issues of effectiveness, efficiency, fairness and standards for alternative disputes resolution

⁸⁸⁰ Astor, and Chinkin CM, , “Dispute Resolution as Part of the Legal Education”, (1990) *Australian Dispute Resolution Journal*, Nov, vol 1, no 4, 208.

⁸⁸¹ David, Jennifer, “Integrating Alternative Dispute Resolution (ADR) in Law Schools”, (1991), *Australian Dispute Resolution Journal*, Feb, vol 2, no.1 pp 10-11. See also Lee Lim Yuan, *Supra*.

services. The recent work of NADRAC has addressed many issues relating to training and accreditation. New Draft maintenance and approval standards for ADR practitioners in the family law area indicate that processes that are advisory require different practitioners and approaches to standards.⁸⁸² There are currently two major accreditation projects underway within Australia. One is oriented towards all mediation practitioners.⁸⁸³ The other scheme considers training requirements for family mediation practitioners.⁸⁸⁴ The continuous efforts to standardize mediation have made mediation expanded faster in the Australian society. Interestingly to note that, research and conference on improving the standard of mediation are continuously been done by the AG, NADRAC and the Universities.

Other relevant benchmarks and codes have been developed federally. For example, the Minister for Customs and Consumer Affairs has released benchmarks for industry-based customer dispute resolution schemes to guide industry in developing and improving dispute resolution schemes.⁸⁸⁵ The benchmarks are intended to operate flexibly. It is to be noted that the industries have also established their own benchmarks in enhancing the practice of ADR particularly mediation.

The Australian Competition and Consumer Commission (ACCC) have also published guidelines intended to assist the business community to adopt benchmarks for

⁸⁸² Sourdin, T.T. Fisher & L. Moloney, "Draft Approval and Practice Standards for Family Dispute Resolution Practitioners (Melbourne and Canberra: La Trobe University and Commonwealth Attorney General's Department, 2004)

⁸⁸³ The National Accreditation System Proposal- 2006, www.mediationconference.com.au/html/Accreditation.html, cited in Sourdin T., *Supra*

⁸⁸⁴ (2006) www.ntis.gov.au/cgi-bin/wastml/ cited in Sourdin T., *Supra*.

⁸⁸⁵ Benchmarks for Industry-based Customer Dispute Resolution Schemes (Canberra: Department of Industry, Science and Tourism, 1997), cited in Sourdin T., *Supra*.

avoiding and resolving disputes.⁸⁸⁶ The series of roundtable discussion resulted in the issuance of guidelines and benchmarks.

As a conclusion, the awareness has changed the mentality and perception of people towards disputes and its resolution. Concerted efforts are conducted towards developing the standard becomes the main agenda of the industry in reducing costs, increase productivity and build better relationship between the parties.

6.4. Lessons for the Effective Application of Mediation in Malaysia

In our attempt to see that mediation as a dispute resolution becomes a preferred choice to Malaysians, the foregoing findings on the applications of mediation in Singapore and Australia can serve as models for our guidance and prospective emulation.

6.4.1. Similar Historical Background

From the foregoing analysis, we can deduce that Malaysia shares similar historical background with Singapore and Australia, where the indigenous populations have practised negotiation and consensual form of dispute resolution since time immemorial. The arrival of the British colonialists changed the native's negotiation culture to one of confrontation. The ADR movement introduces structured negotiation which is easily accepted by the modern communities in these countries.

⁸⁸⁶ Benchmarks for Dispute Avoidance and Resolution- A Guide (Sydney: Australian Competition and Consumer Commission, 1997) at 7. cited also in Sourdin T, *Supra*.

Amongst the rationale for this ready acceptance is due to the cultural practice that resolution of the dispute should be negotiated instead of being litigated.

The similarities between Singapore and Malaysia are quite obvious as they are represented by three major ethnic groupings, viz., Malay, Chinese and Indian⁸⁸⁷. The religious backgrounds of these three major groups encourage and insist that disputes should be negotiated and settled amicably. This factor alone greatly influences the fast development of mediation in Singapore.

It is submitted that modern mediation can be easily accepted by the Malaysian communities as the religious beliefs and cultural practices of the three major religions, viz., Islam, Buddhism, Christianity and Hinduism encourage and demand for the harmonious settlement of disputes. The consensual form of resolution is the main essence of mediation and this is already provided for by the religious commandments which have not changed over of time. The main issue revolves around the approach of how modern mediation is to be conducted. Therefore, any adoption of the western concept of negotiation needs to be adapted and modified to be in harmony with the Asian culture of negotiation.

6.4.2. Different Races and Cultures

As reported in the census of 2006, more than 200 different countries have made their home in Australia. It is interestingly to note that despite the diverse races and cultures, mediation has been accepted almost readily by the Australian society. As

⁸⁸⁷ This is in Peninsular. It is to be noted that East Malaysia comprise of many native tribes and ethnics, i.e Bidayuh, Kadazan, Dusun, Dayak and Bajau and many others. This native tribes however highly insist the resolution of disputes by way of conciliation.

compared to Malaysia with only three major races, viz., Malay, Chinese, Indian and other minority races, there is no doubt for mediation to be accepted readily if the correct approach is adopted by the government.

The analysis on the culture indicated that Malaysians prefers 'friendly negotiation or consultation' as compared to their Australian counterparts that are more inclined towards the adversarial or confrontational approach to resolving disputes as practice by the western culture. If mediation as practiced by the Australian communities can readily be accepted by them despite their emphasis on personal and legal rights, there is no doubt that mediation could also work with the Malaysian communities.

As commented by Sourdin T., the decline in litigation nowadays can be in part attributed to an increase in the use of alternative dispute resolution (ADR). The main concern is how best to introduce and approach mediation locally and the efforts to be taken towards its effective promotion and implementation of this new method.

6.4.3. Western Culture versus Asian Culture

The important aspects that should be studied in depth is the different approach of negotiation between Western culture and Asian culture. Modern mediation introduced by the West should be modified in their approaches to suit the Asian culture and values. Such modification would attract more Malaysian communities to adopt and practise mediation. Certain values⁸⁸⁸ should be safeguarded to ensure the smooth

⁸⁸⁸ See the analysis by Joel Lee and The Hwee Hwee, "One Asian Perspective on Mediation", *An Asian Perspective on Mediation*, Eds. Joel Lee, The Hwee Hwee, (Singapore: Academy Publishing,

running of mediation movement in Malaysia. Analysis by Joel Lee and Teh Hwee Hwee in regard to Asian culture towards mediation should be given due consideration, *inter alia*, they are as follows:

6.4.3.1. Prevalence of face saving

In the Asian context, face saving involves the preservation of respect, avoiding shame within one's reference group and maintaining harmony⁸⁸⁹ and more outwardly directed towards social relations.⁸⁹⁰ Not only it is important for oneself, but there is a tendency to act to preserve the face of others and at the same time not bring shame to oneself.⁸⁹¹ In the West face saving is defined in a different context, For example, Fisher and Ury⁸⁹² define face-saving as one needs to reconcile the stand he takes in a negotiation or an agreement with his principles and with his past word and deeds. Another perspective is offered by the proposition that in Australia 'face value is derived from achievements and getting good deal.'⁸⁹³

In this regard there may be some reluctance on the part of Asian parties to initiate mediation as this can be construed as a sign of weakness and consequently losing

2009), 71-108, Lee and Hwee have made a detail and comprehensive analysis on the asian culture towards mediation.

⁸⁸⁹ S Ting Toomey "Cross-cultural Face Negotiations: An Overview, cited in Joel Lee, Teh Hwee Hwee, *ibid*.

⁸⁹⁰ B Wolski, Culture, Society and Mediation in China and the West (1997), 3(2), *Commercial Dispute Resolution Journal* 97 cited in Joel Lee and The Hwee Hwee, *ibid*.

⁸⁹¹ See Joel Lee, The Hwee Hwee, *ibid*. It is observed that, For Confucion, it may lead to the avoidance of face threats, offering of apologies, taking blame, other oriented conversations and an indirect and high-context communication style. See further analysis by R Callahan, "Facework in Mediation: The Need for "Face Time (2005) bepress Legal Series Paper 837. For Malays, maintaining harmonious relationship should be given priority, direct conflicts and open criticism should be avoided., to prevent any loss of face, 'maruah or 'air muka'

⁸⁹² R Fisher & W Ury, *Getting to Yes: Negotiating Agreement without Giving in* (New York: Penguin Books 1983) at 28. See also Joel Lee and The Hwee Hwee, *ibid*.

⁸⁹³ See Joel Lee, The Hwee Hwee, *ibid*.

face. Therefore, mediation centres or providers should be sensitive to this, as especially when approaching or persuading potential parties for the mediation process. By assuming the role of case-persuaders, they will be addressing the parties' 'face-saving' concerns right from the beginning.⁸⁹⁴

6.4.3.2. Mediators should be authoritative figures

In the Asian context, traditional mediators are persons of high standing. The analysis of Joel Lee and Hwee Hwee⁸⁹⁵ see that present day Asian disputants have the same expectations for mediators to be authoritative figures.

Joel Lee and Hwee Hwee further reported that authority may stem from a person's age, gender, social position, professional standing, qualifications and training, expertise, experience, personal connections or membership in the 'right' reference group. It is necessary to consider the circumstances of each case to identify a mediator with the right 'authority' attributes. For example, an elderly grassroots leader who is widely recognized for his work in promoting community welfare may be regarded as an authority figure by quarrelling neighbours at a community mediation centre. He may, however, not be regarded the same way at a mediation of a high-end commercial dispute by corporate executives and their lawyers. In that context, a retired judge with extensive commercial law experience may be more appropriate.⁸⁹⁶ In order to attract parties to mediate, the criteria for mediators should

⁸⁹⁴ *ibid.*

⁸⁹⁵ *Ibid.*

⁸⁹⁶ *Ibid.*

be one of the main concern that need to be diligently looked into by the mediation centres.

6.4.3.3. Mediators should assume leadership role

Unlike a mediator in the Western context who is viewed as a neutral outsider, the mediator in the Asian context is at “the heart of the equation”. The parties look to him for guidance, and are likely to rely on his views on the most sensible way forward. In explaining the role of a mediator, the mediator should not suggest that he is a mere facilitator of communication and negotiation. The mediator can still lead, for example, by acting as a sounding board of sort, and bring his experience and expertise to bear without dictating the issues, judging or deciding on the outcome. The parties expect him to play a direct and active role in seeing them through their problems, and in shaping the process and the outcome decision lies with the parties. It is therefore important for the mediator to emphasise that while the final decision lies with the parties, he will be there to help them every step of the way. In addition, although the outcome of the mediation will have no impact on him, he is keen to see to it that the parties arrive at satisfactory resolution of the matter.⁸⁹⁷

6.4.3.4. Communication should be at an appropriate level of formality

The familiar Western style of formality, such as the use of first names and other casual forms of interaction based on a low power distance and the norm of equality, may be inappropriate in many cases. Although mediation is informal, an egalitarian approach will be out of place where status and behavioral norms are clearly ordered by social hierarchy. A mediator should communicate at a level of formality at this

⁸⁹⁷ As analysed by Joel Lee and The Hwee Hwee, *ibid*.

initial stage to set a tone for the rest of the mediation that is congruent with a context that has respect for hierarchy and authority. Further, the mediator should avoid asking for approval or permission in the course of the opening statement although he is perfectly at the liberty to consult with the parties for their views and preferences on how the mediation should be conducted.⁸⁹⁸

6.4.3.5. Bases of trust in the Asian context

The first requirement seems to be the need in Asian cultures is to feel a sense of connection prior to giving trust. Asian cultures overall are considerably more collectivistic than Anglo-Saxons.⁸⁹⁹ Studies spanning groups from Chinese Malaysians to Cambodian American and Australian aboriginals have shown that in Asian societies, the cultural background of the mediator plays a significant role in the trust of the disputants and their willingness to engage in the process.⁹⁰⁰ In this regard Joel Lee and Hwee Hwee suggest that it will be useful to ‘provide complete information on a proposed mediator to establish him as equidistant insider to the disputants. The goal is to broaden possible senses of identification and thus, to create a connection with the disputants.’⁹⁰¹

⁸⁹⁸ Analysis by Joel Lee and The Hwee Hwee, *ibid*.

⁸⁹⁹ G. Hofstede, *Cultures and Organisations* (NY: McGraw Hill, 1997) at 9, cited in Joel Lee, The Hwee Hwee *ibid*.

⁹⁰⁰ C Honeymoon, B C Goh & L Kelly, “Skill is not enough : Seeking Connectedness and Authority in Mediation” (2004) 20(4) *Negotiation Journal* 489 cited in Joel Lee and The Hwee Hwee, *ibid*.

⁹⁰¹ The analysis by Joel Lee and The Hwee Hwee, *ibid*. Lewiski has defined that three type of trust: calculus-based trust (based on a sense of control over the other party), knowledge based trust (based on a sense of control over the other party), and identification-based trust (a true sense of connectedness. Providing plenty information about a mediator, beyond mere qualifications, can contribute both to knowledge based and identification based trust. As Asians tend to be concerned with general experience and qualifications, including education, positions held, honours received, age, family status other affiliations, there will be a bonus by doing this. Explanation by Joel Lee and The Hwee Hwee, *ibid*. See also RJ Lewiski & B Bunker, “Trust Relationship” : A Model of Trust Development and

Therefore the modern western concept of mediation needs to be modified accordingly⁹⁰² to meet the values of the Asian culture. With this modification, Malaysians would easily be attracted to adopt mediation.

6.4.4. Precedents from Singapore and Australia

The Malaysian authorities should consider adopting the following precedents from Singapore and Australia:

6.4.4.1. Initiative and efforts of the judiciary.

In Singapore and Australia, the judiciary has played a major role in initiating and developing mediation. Mediation has expanded fast with the continuous and determined efforts from the judiciary. The belief that mediation should be encouraged and is better and more harmonious than litigation has mooted the judges to encourage the parties to mediate. Australia is more aggressive as most of the states had introduced provisions mandating mediation.

It is seen here that to change the attitude of judges towards mediation must be given top priority. Our judiciary officers is the first group that need to be educated on mediation and its needs. As what we can see earlier, the survey into the attitudes of federal judges in Australia show that most judges believe that it was appropriate for

Decline” in *Conflict, Cooperation and Justice* (B Bunker & J Z Rubin eds. (San Fransisco: Jossey-Bass, 1995) at 133-173.

⁹⁰² See further analysis on the Asian Perspective of Mediation by Joel Lee The Hwee, *ibid.*

them to encourage parties to settle the dispute before trial or to advise them to seriously consider alternative means of dispute resolution. There is a belief amongst the judges that settlement before trial is preferable to going to trial. It cannot be denied that nowadays our judiciary has organized seminars and conference on mediation. Therefore, the understanding of our judiciary officers on mediation need to be enhanced.

6.4.4.2 The Establishment Of Advisory Council Or Committee On The Enhancement Of ADR

The establishment of NADRAC (National Alternative Dispute Resolution Council) in Australia and Singapore Mediation Centre in Singapore has indeed enhanced the movement of mediation in Australia and Singapore. NADRAC was established by the Attorney-General of Australia to foster the expansion of alternatives to court action in civil matters. NADRAC's terms of reference include advising the Attorney-General on issues of effectiveness, efficiency, fairness and standards for alternative dispute resolution services. A number of committees were formed and discussion papers were circulated. The setting up of A Sub-Committee on the Commercial Mediation Centre by Singapore Academy of Law has led to the establishment of Singapore Mediation Centre. Since its inception in 1997, the SMC has evolved into a reputable accreditation body for mediators, adjudicators and neutral evaluators. In addition, it promotes Singapore as a Centre for Mediation and Conflict Management in

Singapore and dispute resolution in Asia.⁹⁰³ As reported earlier up to 31 March 2009, SMC has mediated 1422 disputes with a success rate of 73.7%.

It is recommended that if such an advisory council or ADR committee is set up by our Attorney-General with a broader scope of function on expansion and standardizing the ADR practice particularly on mediation, there is no doubt that mediation will be expanded and moved fast within our community.

6.4.4.3. The Establishment Of Dispute Resolution And Training Centres

As noted earlier that there are plethora of mediation centres established in Singapore and Australia that offer mediation service, training and awareness programme. As compared to Malaysia, we only have a few centres, viz., Malaysian Mediation Centre, KLRCA and a few others with very few cases referred for mediation. As reported by Hendon, a mediator from the Malaysian Mediation Centre, there are more mediators than the referred cases for mediators at the said Malaysian Mediation Centre. The strategic planning programme of Singapore Mediation Centre is worthy to be studied in this issue. Before the establishment of the Singapore Mediation Centre, the Sub-Committee has consulted extensively with legal and other professions, trade organizations and interest group, and garnered their support for the use of mediation leading to the signing of MOUs with these commercial institutions. Even at present, SMC strives to reach out to promote their new scheme if issued and readily willing to sign MOU with any interest groups.

⁹⁰³ Singapore Academy of Law Portal, http://www.sal.org.sg/content/LI_ADR_SMC.aspx

It can be seen that the effective mode of promotion and awareness programme has led to a fast development of mediation in the society. A proper planning in educating and promoting mediation and its suitability adopted by the Community Centres in Australia and Singapore should also be considered. Education and awareness programme is needed to gain confidence of the public on the mediation offered by the Centres. Any action to adopt mediation or proposal to amend the laws could only be initiated when the organizations are fully aware of the benefits of mediation in resolving disputes.

6.4.4.5 Local Universities To Offer Compulsory Courses On ADR And Mediation

It is to be highlighted that the universities in Australia and Singapore have offered compulsory courses on mediation for their LL.B undergraduate programmes. Such a move has yet to be implemented by our local universities. At current, ADR subject is offered as alternative subject or course. Continuous research at the postgraduate level should also be encouraged.

6.4.4.4. Full support from the government

It is no doubt that to ensure the success of the application, full support of the government is required, as noted earlier in Australia, there are non-governmental bodies including organisations that may have religious or other affiliations, such as Uniform and Relationships Australia, Anglicare, Lifeworks and Centacare that offer a range of counseling and mediation service in some areas. These agencies are accredited by the Attorney-General Department to provide family and child

counseling or mediation. The Commonwealth Government has undertaken funding⁹⁰⁴ of these bodies as a distinct service for separating and divorcing couples. Accreditation and support from the government are therefore needed in ensuring the efficiency and smooth running of the mediation service.

6.4.5. Conclusion

From the foregoing analysis, it can be concluded that mediation can be well received by Malaysians and its fast development can become a reality with the Malaysian society. However, the correct approach should be taken by the government and all interested parties, whether it be the commercial organizations, non-governmental bodies, private agencies, universities and others. Participation from all levels of interested parties with full support from the government will ensure the effective and efficient running of the mediation initiatives and the ADR in the communities.

⁹⁰⁴ In 1997-98 the Commonwealth Government provided more than AUD \$4.9 million to enable 17 organisations throughout Australia to provide family and child mediation in 59 locations. In 2005 The Commonwealth Government announced that it would provide a further \$AUD397 million in funding to support a range of dispute resolution services for families. <http://www.facs.gov.au>. See Sourdin, Tania. *Supra*.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

This thesis aims to achieve the objectives as discussed earlier in the first chapter. The overall discussion of the thesis presents the following findings:

7.1 The Suitability Of Mediation To Be Adopted As A Culture In Resolving Disputes For Malaysian Society.

The census by the statistics department reported⁹⁰⁵ that as at 2010, Malaysia's population stands at 27.5 million. Malays were the largest ethnic group in the country comprising 50.1 %. This is followed by the Chinese with the percentage of 22.5%, non-Malay Bumiputeras at 11.8 %, Indians at 6.7 % and others, 0.7 %. With regard to religion⁹⁰⁶ about 60.4% are Muslims, 19.2% are Buddhist, 9.1% are Christian, 6.3% are Hindus, Confucianism, Taoism and other traditional Chinese religions comprise 2.6% and other or unknown is 1.5% and those with no religion is about 0.8%.

In determining the suitability of mediation, cultural and religious background of the participant would be of the main concern. The culture and religion of the three major races in Malaysia, i.e., Malays, Chinese and Indians, the other minority races and the natives tribes in the Peninsular and East Malaysia highly insist on the settlement of

⁹⁰⁵ Chief Statistician, Dr. Abdul Rahman Hassan, reported by Yow Hong Chieh, "Census: Population hits 27.5m mark", 22, Dec 2011. *The Malaysian Insider*, 22, Dec 2011. <http://www.themalaysianinsider.com/malaysia/article/census-population-hits-27.5m-mark>,

⁹⁰⁶ See travel portal to exotic Malaysia; http://gotravelmalaysia.com/tour_malaysia/m_states.htm

dispute with harmony. For the Malays, the teachings of Islam encourage the disputants to negotiate to reach for amicable settlements. These exhortations can be found in the several verses of the *Quran*. The Chinese, they are influenced by the teaching of Confucius that society is based on collectivism with a high emphasis on self-help, self-protection and mutual-aid. Notions of harmony, reciprocity, mutuality and holism are valued, as opposed to confrontation, competition, individualism and parochialism. The Confucian teaching emphasises moral persuasion that prefers ‘friendly negotiation or consultation’ as opposed to litigation. The teachings of Hinduism also encourage the parties to negotiate and settle their disputes peacefully. On this basis, modern mediation that stresses on negotiation is viewed to be suitable and could be accepted as culturally compatible by the local communities. In support of this effort are the religious commandments that insist on settlement with peace. This has not changed over of time.

The analysis on the application of mediation in Singapore indicates that the religious believes and cultural practices seem to influence the fast development of modern mediation in Singapore since the administrators and the people believe that mediation is as a ‘force for good’. As Singapore shares the same cultural and historical background with Malaysia it is submitted that mediation could also be accepted as a culture for Malaysians in resolving their disputes if the government make efforts to implement it.

Further analysis and comparison with the application of mediation in Australia indicates that Malaysians prefer ‘friendly negotiation or consultation’ as compared to

their Australian counterparts that are more inclined towards the adversarial or confrontational approach to resolving disputes as practised by the western culture. If mediation as practised by the Australian communities can readily be accepted by them despite their emphasis on personal and legal rights, there is no doubt that mediation could also work with the Malaysian communities.

Further, Malaysia comprises with only three major races, viz., Malay, Chinese, Indian and other minority races, as compared to Australia that comprises hundreds of races and cultures. As noted earlier the census of 2006 reported that people more than 200 different countries have made their home in Australia. Despite the diverse races and cultures, mediation has been accepted almost readily by the Australian society. There is no doubt that mediation could also be accepted by the Malaysians if the correct approach is taken by the government.

However, we have to note that modern mediation practice is different from indigenous form of mediation because it carries the influence of the ADR movement and practices overseas, particularly, the United States. The ADR movement brings along the western values and modern concepts of negotiation. The suitability of this new concept of negotiation should be looked into to meet the Asian values and culture. The emphasis by Joel Lee and Hwee on the Asian values should be given due consideration by the administrators if mediation is to be adopted. They are, *inter alia*:

(i) Prevalence of face saving.⁹⁰⁷

On this regard, there may be some reluctance on the part of Asian parties to initiate mediation as this can be construed as a sign of weakness and consequently losing face. Therefore, mediation centres or providers should be sensitive to this, especially when approaching or persuading potential parties for the mediation process. By assuming the role of case-persuaders, they will be addressing the parties' 'face-saving' concerns right from the beginning;⁹⁰⁸

(ii.) Mediators should be the authority figures.⁹⁰⁹

In the Asian context, traditional mediators are persons of high standing. The analysis of Joel Lee and Hwee Hwee⁹¹⁰ indicates that the present day Asian disputants have the same expectations for mediators to be authoritative figures. The authority may stem from a person's age, gender, social position, professional standing, qualifications and training, expertise, experience, personal connections or membership in the 'right' reference group.

(iii.) Mediators should assume leadership.⁹¹¹

The parties expect him to play a direct and active role in seeing them through their problems, and in shaping the process and the outcome decision lies with the parties. It is, therefore, important for the mediator to emphasise that while the final decision lies with the parties, he will be there to help them every step of the way.

⁹⁰⁷ See further discussion in Chapter 6 of this thesis.

⁹⁰⁸ Joel Lee and Teh Hwee Hwee, *Supra*.

⁹⁰⁹ *Ibid.*

⁹¹⁰ *Ibid.*

⁹¹¹ *Ibid.*

(iv.) Communication should be at an appropriate level of formality.⁹¹²

The familiar Western style of informality, such as the use of first names and other casual forms of interaction based on a low power distance and the norm of equality, may be inappropriate in many cases. Although mediation is informal, an egalitarian approach will be out of place where status and behavioral norms are clearly ordered by social hierarchy.⁹¹³

(v.) The need of a feeling of a sense of connection prior to giving trust.⁹¹⁴

The first requirement seems to be the need in Asian cultures to feel a sense of connection prior to giving trust. It is also important to note that the way Asian views relationship is different from the Western. K Leung commented that ‘in individualist societies, the distinction between out-groups and in-groups is relatively unimportant, and self-sufficiency is emphasised more. In collectivist society, behaviour toward in-group members may be markedly different from behaviour toward out-group members, and values such as interpersonal harmony and group solidarity are more emphasised.’⁹¹⁵ This value should also be considered by the administrators in implementing mediation.

Due to the globalization nowadays, and the exposure to western education and culture, it is submitted that the implementation of modern mediation would not be difficult in the Malaysian modern societies. With the observation of Asian values and

⁹¹² *Ibid.*

⁹¹³ *Ibid.*

⁹¹⁴ *Ibid.*

⁹¹⁵ K Leung, “Some Determinants of Reactions to Procedural Models for Conflict Resolution : A Cross-National Study” (1987) ,*Journal of Personality and Social Psychology*::; 53 (5): 898-908, at 899.

culture, Malaysians will be more attracted to this option and gradually adopt the method as their mode of resolving disputes.

The discussions in Chapter 2 and Chapter 6 of the thesis answer the first research objective of the thesis to determine the suitability of mediation practice in Malaysia.

7.2 The Problem of Backlog Cases

The increasing number of cases filed yearly in the court system indicates that there is an increasing volume of cases pending order and judgment before the court. And if the cases are not disposed as fast as the cases are registered it will result in backlog. As the Annual Report shows the increasing number of new cases yearly, it is submitted that the volume of cases would be reduced if the disputants have other avenues of resolving disputes. This will curb and monitor the number of cases entered into the court system yearly. Therefore, if cases are mediated and settled before they enter the court it will help the court from being loaded with bulk of cases.

Besides, the serious problem of backlog reported from year 2001 to year 2008 indicates that the problem must be monitored in an effective manner. The aggressive actions taken by the judiciary that resulted in a high reduction of cases should be encouraged further and enhanced. A structured approach of court annexed mediation in the court system, therefore, needs to be improved in order to have a better result.

The experience of other countries showed that the introduction of mediation in civil justice reforms managed to resolve the internal problems in the court system. The backlog of cases was reduced and the courts managed to speed up the disposal of cases. In the UK, US and Singapore for example, mediation reduced the number of cases reaching trial stage by 90%.

The discussions in Chapter 2 also answer the second research objective to determine the need for the introduction of mediation in resolving the problem of backlog and speed up the disposal of cases.

7.3. The Manner Mediation Is Most Attractive And Effective For Malaysians.

The researcher has made analyses on the application of Mediation by some of the institutions in Malaysia, viz., the Tribunal for Consumer Claim, the Housing Buyers' Tribunal, the Industrial Court, the Legal Aid Department, the Financial Mediation Bureau, the Construction Industry Development Board, the Malaysian Mediation Centre, the Kuala Lumpur Regional Centre for Arbitration and the Shariah Court.

The analyses are focused on the mode of mediation used, the procedure applied, the guidelines issued and the effectiveness of the application. Some of the institutions have been practising mediation without any guidelines issued and proper training on mediation. The objective is to see how mediation should be applied effectively and in what manner it would attract Malaysians to adopt this option.

The analyses in Chapter 3 answer the third research objective that by using mediation these institutions are able to dispose cases in a fast manner. Although, some of the institutions have their own way⁹¹⁶ of practising mediation, the mechanisms adopted are capable of disposing the disputes in a very short period and give more satisfaction to the disputing parties than litigation. However, to be an efficient mechanism to resolve disputes, the application should be guided with proper guidelines. The governing rules should be codified and an ethical code should be provided to the mediators. In this manner, the standard and quality of mediation services can be maintained. In commercial and complex cases more comprehensive governing rules are needed as compared to community and family matters. As the civil court deals with a variety and range of cases, relevant procedures and guidelines are needed to govern the application.

Further, the simplicity of the procedure, minimum fees and the quality of the services offered may attract the Malaysian disputants to opt for mediation. Besides, the mandatory approach adopted may bring awareness of the option and its benefits to the parties. All these features may assist mediation to be the mechanism to speed up the disposal of cases.

The application of mediation/sulh at the Shariah Court may be referred to. Sulh is an effective mechanism to resolve disputes in the Syariah Court. In enforcing mediation, the Syariah Court has adopted a mandatory approach and a simplicity of the procedure with no fees imposed. Besides, the application is also guided with proper

⁹¹⁶ For e.g, Financial Mediation Bureu has adopted mediation-arbitration approach

rules and guidelines. The codification of rules helps the Syariah Court to maintain the standard and quality of the mediation services. The approach adopted has gained a significant percentage of success in the Syariah Court, thus reducing the backlog of cases in the court.

7.4 Proposals for Effective Application of Private Mediation in Malaysia

Observation and interviews at the Dispute Settlement Centre of Victoria, Family Relationship Centre, Melbourne and Victoria Administrative Tribunal of Melbourne saw that disputants diverted the resolution of their civil cases to these centers rather than to file them at the civil court. This has in fact assisted the court from being loaded with the bulk of cases which in fact could be settled out of court through negotiation. Further, it helps the community to be more civic and tolerant as the settlement is reached amicably and in peace.

The discussion in Chapter 4 states that there has been an increase of community disputes nowadays in the Malaysian society as people are more aware of their personal and legal rights. The observation by Justice YA Suryadi Omar JCA in the case of Kris Angsana as discussed earlier in the chapter is worthwhile reproducing: “High density of population in popular residential areas in Malaysia is now a norm. Houses may have to be built very close to each other, at time on hilltops, or even hugging those slopes...we are no more society that lives miles apart like the olden days, but in one where likewise unreasonable activities may touch the life of a neighbour. To deny the rights of neighbours, and to allow a wrongdoer to wreak

havoc and heartache, would militate the very fabric of modern life and collective ideology of a multi-faceted society. This situation influences the increase of social and community disputes”. In addition to the community disputes, the rate of divorce cases is also increasing.

On this basis the community mediation and family mediation are recommended to be absorbed in the society to maintain harmony as disputes are resolved amicably and by consensus of each party. The culture of mediation will then reduce number of cases filed into the court system.

At present, Community Mediation is in its pilot stages of movement under the National Unity and Integration Department. The Department set a target of 2500 mediators in five years’ time starting from year the 2009. The mediators trained were leaders of Rukun Tetangga while the rest were officers from the National Unity and Integration Department.

The setting up of Community Mediation Centres adopted by Singapore and Australia is analysed to be more significant to the community. The structured approach by the issuance of Community Mediation Centre Act, setting out the guidelines for the process of mediation service at the centre, and preparing strategies to ensure effective and appropriate channeling of cases to be resolved through community mediation has made mediation to be more accepted and known to the society. The outreach and collaborative arrangement with related agencies has increased the number of cases referred to the Centre.

A proper planning in educating and promoting mediation and its suitability adopted by the Centres should also be considered. Education and awareness programme is needed to gain confidence of the public on the mediation offered by the Centre. Besides, specific requirement of training needed for mediators in ensuring mediation is properly conducted to achieve amicable settlement.

It is also noticed that community mediation centres in Australia and Singapore are funded by their governments. The funding enables the centres to offer free mediation service to the communities. This will attract parties to consider the Centre as a place to resolve their disputes. As noted earlier in Chapter 3, Malaysians are more attracted to opt for mediation when the service is free. The researcher is in the opinion that funding from the government will move forward the practice of community mediation in the Malaysian society.

With the increase of divorce cases, the researcher submitted that the establishment of Family Relationship Centre or Family Mediation and Counselling Centre is recommended. Such a centre should not only provide mediation, but also offer a range of services for strengthening family institutions. The centre may provide counselling and guidance to help couples improve, enhance and preserve their relationship. Besides, the centre may also offer mediation for parties in conflict to negotiate in the best manner and resolve their dispute amicably.

In setting up the centre, the quality of mediators needs to be observed as family disputes involved emotional and relational issues. Family mediators need to be adequately trained. Module for family mediation training must be properly designed and made available at the institutions or organization offering the training. Specific requirement of practical experience before conducting mediation should also be considered as an assurance of quality service. Furthermore, continuous education to the public is needed to increase awareness. Amicable settlement in family dispute will help the separated parties and their children to live in a more harmonious state.

In enhancing the commercial mediation in the society the role of the Malaysian Mediation Centre needs to be upgraded, the active efforts of SMC in promoting mediation has attracted the commercial institutions to opt for mediation in resolving their disputes. The approach by the SMC may be referred to in enhancing the role of our Malaysian Mediation Centre. In promoting its service, SMC strives to reach out to promote their new scheme when issued and is readily willing to sign MOU with any interested groups.

Further, the amendment to the law is seen to be a pushing factor that materialises and popularises the tool of mediation in resolving disputes. For example, the amendment to the standard sale and purchase agreement in Singapore to include non-binding clause on mediation has placed mediation as a favourable mode of option when parties face disputes with the developer. In this regard, the researcher proposes that certain relevant and related laws need to be revised and looked into to include the provision for mediation. For instance, the construction disputes that normally take a

long period for disposal in the high court could be disposed in a short period if they are directed to mediate first at the Malaysian Mediation Centre⁹¹⁷.

As discussed earlier in Chapter 4, the highest number of disputes referred to the Singapore Mediation Centre in the year 2000 was construction matters. This could be due to the clear provision added to Public Sector Standard Conditions of Contract for Construction Works 1999. (PSSSCOC 99). The new clause 34.5 requires the parties to consider resolving their disputes through mediation at the Singapore Mediation Centre before commencing arbitration or court proceedings. The amendment has yielded the referral of construction disputes for mediation at the Singapore Mediation Centre.

Therefore, proactive actions by the Malaysian Mediation Centre are recommended to enhance public awareness, particularly, the commercial organisations on mediation and its benefits. The Memorandum of Understanding between the Malaysian Mediation Centre and the relevant agencies could be one of the ways that can be taken to enhance the practice of mediation amongst the commercial organizations. Any action or proposal to amend the laws could only be initiated when the organizations are fully aware of the benefits of mediation in resolving disputes.

⁹¹⁷ Or other mediation centres, for.eg. CIDB or KLRCA

7.5. Enhancement of Court Annexed Mediation

The Court Annexed Mediation in Malaysia is recognized by the issuance of Practice Direction 5 to Order 34 Rules of High Court 1980. Before the issuance of the said Direction, mediation was practised on ad hoc basis at the discretion of individual judges who are aware of its potential in resolving disputes. The findings in Chapter 5 suggest recommendation for the betterment of the application.

At present, the Practice Direction direction adopts the voluntary approach, where mediation is done with the consent of the parties. Since the awareness of Malaysians on mediation is very low, certain measures and safeguards must be provided to enhance the awareness and acceptance of the Malaysian litigants and lawyers on mediation. The approach by Primary Dispute Resolution Centre of the Subordinate Court of Singapore may be referred to. The parties are required to complete ADR Status Form at the Summons for Direction stage. The approach has been said to have successfully inculcated a culture change towards ADR and mediation. They are two main features in the ADR Form that make parties and lawyers alert about ADR and mediation:

- 1). Providing information concerning the suitability of a case for ADR.

Lawyers will be directed in the form to indicate the salient characteristics about the case. These include the nature and value of the claim and the projected length of the trial.

2). Parties' awareness of ADR options.

The parties must also certify on the form that their lawyers have explained to them the various ADR options, and their decisions concerning ADR. The form includes basic information about mediation and arbitration for the parties' reference.

Besides, the Subordinate Courts are also raising the awareness of mediation amongst members of the Bar through the Associate Mediator Programme. This scheme, which was launched in 2009, encourages lawyers who have been trained by the Singapore Mediation Centre to volunteer as mediators in PDRC. A greater involvement in court mediation would facilitate in depth-understanding of the mediation process and enhance the awareness of the availability and benefits of ADR.

The application of mandatory mediation in some of the jurisdictions has given a significant success to Court Annexed Mediation. In Australia, for example, most of the jurisdictions mandate court mediation. The mandatory applications have enhanced the awareness of the legal fraternity and the litigants on the existence of mediation and its advantages and therefore, influence the acceptance on mediation throughout Australia. The application of mandatory application in Florida and Ontario also has shown a great success.

If we are to adopt this approach certain guidelines are recommended to be adhered to:

1). Clear requirement on the obligation to mediate.

For example, the court in Florida has introduced relatively clear criteria on when the obligation to mediate is to be introduced. The main requirement is for the parties to appear at the mediation session, and appearance is met when the following persons are physically present:

- a.) The party or its representative having full authority to settle without further consultation.
- b.) The party's counsel of record, if any or
- c.) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle.

2). Dissatisfied parties have recourse to mediator grievance system.

For example, the Florida Rules for Certified and Court-Appointed Mediators also introduced a code of conduct for all mediators, which is enforceable through the right of litigants to file grievance complaints. Once mediation is made mandatory, it is incumbent for the courts to ensure the quality of mediation is monitored closely.

The adoption of mandatory mediation scheme, however, must be designed with proper caution. The court should first analyse whether the case is an appropriate case for mediation. A clear guideline and code of conduct for mediators, parties and lawyers must be made available. The utmost concern on the successful mandatory mediation depends on the quality of mediators offered.

To enhance further the application of court annexed mediation, this dissertation suggests that mediation is to be conducted by the 'court mediator' who is not

involved in the hearing of the case, but only involve in the mediation process. Mediation is proposed to be done within the court system with the separation of powers and duties between the court mediators and the trial judges. Court mediators should only conduct mediation and not involved in hearing of any cases. They are also not supposed to assist any trial judges or under the direction of any judges. The separation of the trial judges and the mediators are needed to ensure that there is no leakage of the information or evidence that may lead the judges to form a biased perception of the case. Besides, the court mediators must be trained and skilled mediators. In order, to gain the public confidence of the service, the standard and quality of the mediation service offered by the court must be monitored. The approach adopted by our civil court where the trial judges conduct mediation should therefore be reviewed. The Direction that gives authority for the judges to conduct mediation should, therefore, be looked into and revised. The observations⁹¹⁸ at the Supreme Court of New South Wales, Primary Dispute Resolution Centre Subordinate Court of Singapore, Shariah Court of Singapore and Shariah Court of Selangor indicate that the ‘court mediators’ are more focused, skilled and efficient. Further, the mediators are not rushing to conclude the case, since they are not occupied with the schedule of hearing and trials.

In ensuring the success of mediation, to educate our lawyers on their role and duties when representing parties in mediation should also be the main agenda. Lawyers need to be clear on their role to ensure the interests of the parties are preserved. Guidelines and ethics should be provided and be made available for the lawyers when

⁹¹⁸ The observation by the researcher.

representing their clients in mediation. The roles and responsibilities of lawyers in mediation as noted by Sammon in Chapter 5 of the thesis can be referred to as guidelines for regulating guidelines or Code of Conduct for our lawyers.

Maintaining standard and quality of mediation must be amongst the top priority by the judiciary when enforcing court mediation. Mediation service offered by the court must be seen as quality service that satisfies the needs of litigants. Mediation cannot just simply be implemented without any proper guidelines and code of conduct. Parties should not agree to reach settlement because of the pressure imposed on them by the mediator, but because they can evaluate the interest and needs of the other party and visualise the case from the other party's perspective. This can only be done through a high quality of mediation service offered. The guideline as developed at a National Best Practice Workshop held in Sydney as cited by Sourdin, the recommendations by the Access of Justice Advisory Committee (AJAC) of Australia, and the recommendations proposed by the National Standard for Court Connected Mediation of the United States as referred to in Chapter 5 of the thesis may be referred to as guidelines for the issuance of our proper guidelines and standards on court annexed mediation.

7.6 Enhancing and Developing the Standard and Practice of Mediation

The quality of mediation service must be observed. In this regard, quality of mediators must be given priority. As noted earlier, although there is no national accreditation available in Singapore. SMC has set up its own accreditation system in

determining the quality service of mediation. It is, therefore, recommended that each institution offering mediation in Malaysia have certain criteria in accrediting their mediators. Certain requirements of training must be clearly fulfilled before the mediator is allowed to conduct a mediation session.

Besides, the approach taken by Australia to have a national standard on accreditation is highly recommended in the case where mediation is widely known and practised by Malaysian. Currently, educating the public and giving awareness should be the main agenda as without knowledge mediation will not be accepted.

To have a Mediation Act is an advantage, but to have a national standard for accreditation system is much more relevant for Malaysia. Mediation is still new and developing in Malaysia. The researcher is of the view with the Australia's approach, rather than to have the standard regulated by law; the flexible nature of mediation is much more relevant with the national Practice Standard that can be updated accordingly on the advice of the experts. Furthermore, as mediation is still new and developing in Malaysia, there might be changes occurring from time to time.

It is also observed that institutions or organization offering mediation in Australia continuously conduct extensive research on the improvement and enhancement of mediation. Conferences and seminars are held from time to time to upgrade the status of mediation and its practice. This practice is recommended to enhance the standard of mediation practice in Malaysia.

It is worthy to note that the private sectors play active roles in improving the standard practice of mediation in Australia and Singapore. The Law Societies and Bar Associations in Australia, for example, have made efforts in developing rules and protocols for lawyers engaged in mediations. Spencer and Brogan commented that the law societies and bar associations in Australia are moving, at various speeds, in developing rules and protocols for lawyers engaged in mediations. In order to enhance the practice in Malaysia, the private sectors must also play an active role in participating and improving the standard of practice.

7.7 Key Precedents from Australia and Singapore

7.7.1 Initiatives And Efforts Of The Judiciary.

In Singapore and Australia, the judiciary has played a major role in initiating and developing mediation. Mediation has expanded fast with the continuous and determined efforts from the judiciary. The belief that mediation should be encouraged and is better and more harmonious than litigation has motivated the judges to encourage the parties to mediate. Australia is more aggressive than other countries as most of the states had introduced provisions mandating mediation.

It clear that to change the attitude of judges towards mediation must be given top priority. Our judiciary officers are the first group that need to be educated on mediation and its needs. As what we have earlier, the survey into the attitudes of federal judges of Australia show that most judges believe that it was appropriate for them to encourage parties to settle the dispute before trial or to advise them to

seriously consider alternative means of dispute resolution. There is a belief amongst the judges that settlement before trial is preferable to going to trial. It cannot be denied that nowadays our judiciary has organized seminars and conference on mediation. Therefore the understandings of our judiciary officers on mediation need to be enhanced.

7.7.2 The Establishment Of Advisory Council Or Committee On The Enhancement Of ADR.

The establishment of NADRAC (National Alternative Dispute Resolution Council) in Australia and Singapore Mediation Centre in Singapore has indeed enhanced the movement of mediation in Australia and Singapore. NADRAC was established by the Attorney-General of Australia to foster the expansion of alternatives to court action in civil matters. NADRAC's terms of reference include advising the Attorney-General on issues of effectiveness, efficiency, fairness and standards for alternative dispute resolution services. A number of committees were established and discussion papers were circulated. The setting up of a Sub-Committee on the Commercial Mediation Centre by Singapore Academy of Law has led to the establishment of Singapore Mediation Centre. Since its inception in 1997, the SMC has evolved into a reputable accreditation body for mediators, adjudicators and neutral evaluators. In addition, it promotes Singapore as a Centre for Mediation and Conflict Management in Singapore and dispute resolution in Asia.⁹¹⁹ As reported earlier up to 31 March 2009, SMC has mediated 1422 disputes with a success rate of 73.7%.

⁹¹⁹ Singapore Academy of Law Portal, http://www.sal.org.sg/content/LI_ADR_SMC.aspx

It is recommended that if such an advisory council or ADR committee is set up by our Attorney-General with a broader scope of function on expansion and standardizing the ADR practice particularly on mediation, there is no doubt that mediation will be expanded and move fast within our community.

7.7.3 The Establishment Of Dispute Resolution And Training Centres

As noted earlier that there are a plethora of mediation centres established in Singapore and Australia that offer mediation service, training and awareness programme. As compared to Malaysia, we only have a few centres, viz., Malaysian Mediation Centre, KLRCA and a few others with very few cases referred for mediation. As reported by Hendon, a mediator from the Malaysian Mediation Centre, there are more mediators than the referred cases for mediators at the said Malaysian Mediation Centre. The strategic planning programme of Singapore Mediation Centre is worthy to be studied in this issue. Before the establishment of the Singapore Mediation Centre, the Sub-Committee has consulted extensively with other legal and professions, trade organizations and interest group, and garnered their support for the use of mediation leading to the signing of MOUs with these commercial institutions. Even at present, SMC strives to reach out to promote their any new scheme when it is issued and readily willing to sign MOU with any interest groups.

It can be seen that the effective mode of promotion and awareness programme has led to a fast development of mediation in the society. It is learnt from Australia and Singapore that in promoting mediation, training and education should be at the

forefront. The training may be provided by the Malaysian Mediation Centre, by the higher educational institutions, government agencies as well as private organizations or professional bodies. However, local trainers need to be trained first before offering such courses to public.

7.7.4 Local Universities To Offer Compulsory Courses On ADR And Mediation.

It is to be highlighted that the universities in Australia and Singapore have offered compulsory courses on mediation for their LL.B undergraduate programmes. Such a move has yet to be implemented by our local universities. At present, ADR subject is offered as alternative subject or course. Continuous research at the postgraduate level should also be encouraged.

7.7.5 Full Support From The Government.

There is no doubt that to ensure the success of the application, full support of the government is required. As noted earlier in Australia, there are non-governmental bodies including organisations that may have religious or other affiliations, such as Uniform and Relationships Australia, Anglicare, Lifeworks and Centacare that offer a range of counselling and mediation service in some areas. These agencies are accredited by the Attorney-General Department to provide family and child counselling or mediation. The Commonwealth Government has undertaken funding⁹²⁰ of these bodies as a distinct service for separating and divorcing couples.

⁹²⁰ In 1997-98 the Commonwealth Government provided more than AUD \$4.9 million to enable 17 organisations throughout Australia to provide family and child mediation in 59 location. In 2005 The Comonwealth Government announced that it would provide a further \$AUD397 million in funding to

Therefore, accreditation and support from the government are needed in ensuring the efficiency and smooth-running of the mediation service.

Thus, it is submitted that the said findings have answered all the six research objectives presented by this dissertation. It is hope that the suggestions and recommendations will enhance and ameliorate the practice of mediation in the country.

support a range of dispute resolution services for families. <http://www.facs.gov.au>. See also Tania Sourdin. *Ibid*.

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APPENDICES

- Appendix A Statistics for total number of civil cases registered, disposed of and pending in the Sessions Courts and the High Courts (2000-2007)
- Appendix B Practice Standard (Australian National Mediator Standard)
- Appendix C Certificate of Attendance (Family Relationship Centre, Australia)
- Appendix D NADRAC's Charter

“APPENDIX A”

“APPENDIX B”

“APPENDIX C”

“APPENDIX D”