

Mediation/Conciliation in the Malaysian Courts: With Emphasis on Settlement of Labour Disputes*

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Introduction

1. Generally, members of the legal fraternity are potently aware of the timeworn cliché ‘justice delayed is justice denied’. However, the economic consequence of this is a reality to those who seek justice. Delay, which is the common reason for public dissatisfaction, invariably causes various hardship and loss to these people. Therefore, disputes must be settled speedily to ensure that justice is carried out for every purpose it was intended for.

2. Unfortunately, however, this is not possible due to serious backlog of cases. In the administration of justice, the courts are faced with the serious problem of backlog and accumulation of cases. Over and above old backlog, new backlog is created and continues to grow until it is found that there are over a hundred thousand cases pending.

3. In Malaysia, the backlogs in the civil courts have reached a critical level. The table below elucidates the backlog of cases in the civil courts in Malaysia as of 30th June 2005.

Courts Cases	Brought forward from previous year	Reported in the current year	Disposed off in the current year	Total cases pending
The Magistrates' Courts¹				
(a) Civil Cases	130,305	109,861	106,451	133,715
(b) Criminal Cases	335,512	529,224	498,267	366,469
The Sessions Courts²				
(a) Civil Cases	88,380	53,600	48,047	93,933
(b) Criminal Cases	5,887	4,825	4,244	6,468

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¹ Total number of Magistrates throughout Malaysia is 129. As a whole, all Magistrates hear both civil and criminal cases except in certain places where Magistrates were assigned to hear specific civil or criminal cases only.

The High Courts³				
(a) Civil Cases	74,262	27,785	27,469	74,578
(b) Criminal Cases	3,667	1,791	1,679	3,779
The Court of Appeal	7,196	1,138	822	7,512
The Federal Court	318	151	111	358

(Source: “The Palace of Justice”; <http://www.kehakiman.gov.my>)

4. Lengthy and convoluted court procedures have been identified as the main reason for the delay in the disposal of cases in the civil courts. These are apart from the frequent requests for adjournment by the advocates of the parties for various reasons.

5. Another reason attributed to the delay, is that criminal cases would be given priority over civil cases (“CJ out to clear backlog” New Straits Times, August 6, 2004 at p 1.). Recently, it was reported that some 12,000 criminal offenders were on remand in the Malaysian prisons, 914 of whom have been kept behind bars for more than two years, 2,223 offenders between six months to two years and finally 8,646 for less than six months.

6. The judge-to-citizens ratio is 1:322,225 and this represents undue stress on the judicial process (“Easing the strain on our judges is a good cause”, The Star Online, August 8, 2004).

7. With the insufficient number of judges, and growing number of cases, a concerted effort ought to be considered to eliminate the problem. Many steps have been taken to ensure faster and more efficient disposal of civil cases so as to reduce the backlog, including the recent setting up of the courts of two streams, namely, the ‘Fast Track’ and the ‘Normal Track’⁴. The steps taken were hoped to reduce the backlog of cases but it does not guarantee a speedy hearing.

8. Mediation is therefore considered as a viable alternative in alleviating backlog of cases. Mediation can be resorted to in civil and commercial disputes, divorce and family disputes, among others. Mediation is principally aimed at exploring options for settlement, and to facilitate negotiations between the parties for amicable settlement of the dispute. As it is generally known mediation is an effective and affordable complement to litigation and ensures speedy settlement of disputes. It is an excellent tool for the resolution of conflicts and for solutions that are invested in the parties who take part in the mediation.

² Total number of Sessions Court Judges throughout Malaysia is 81. All Sessions Court Judges hear both civil and criminal cases except in certain places where judges were assigned to hear specific civil or criminal cases only.

³ All High Court Judges hear both civil and criminal cases except in certain places where judges were assigned to hear specific civil or criminal cases only. There are 44 Judges who hear civil cases, of which 13 Judges in Kuala Lumpur High Court and 2 Judges in Selangor High Court handle civil cases exclusively. Meanwhile, 33 Judges hear criminal case, of which 3 Judges in Kuala Lumpur High Court and 3 Judges in Selangor High Court respectively, handle criminal case exclusively.

⁴ The ‘Fast Track’ court will deal with all legal applications involving affidavit evidence, whereas the ‘Normal Track’ court will deal with all legal applications involving oral hearings. See New Straits Times, 2002, 14 September, at p. 1.

Mediation in Civil Courts

9. To eliminate backlog of cases in the civil courts, the former Chief Justice of the Federal Court, Tun Eusoff Chin proposed the introduction of mediation to assist in the disposal of cases in the courts (*The Star* Newspaper, 12 May 2000). Again, in late 2004, the current Chief Justice of the Federal Court, Tun Ahmad Fairuz Sheikh Abdul Halim, again encouraged the mediation process in civil matters. According to His Lordship the disputants must go through mediation before the case may be listed for adjudication in the court. The Attorney-General of Malaysia, Tan Sri Abdul Gani Patail, had also proposed mediation as preferred process of addressing civil claims or issues. He suggested that lawyers should address civil claims through mediation instead of bringing everything to court (“A-G: Try mediation first”, *The Sunday Star*, 20 January 2005 at p. 16). In other jurisdictions, for example Singapore, the courts have actively encouraged parties to use court-based mediation - known as Court Dispute Resolution - at the preliminary stage of a suit, and have succeeded in reducing backlog of cases. It was reported that more than 77% of the cases referred for mediation were settled amicably (see *Singapore Mediation Centre Yearbook*, at p 21).

10. Unfortunately, however, in Malaysia, till to date the proposal remains a proposal and has not been made compulsory. It is merely being practiced on a voluntary basis, with the consent of the parties. Being voluntary, the parties seldom resort to mediation. Instead, they prefer the traditional litigation process. In short, mediation has not been formally introduced into the civil courts of Malaysia.

11. It would be worthwhile noting that in matrimonial disputes, before the presentation of a petition for divorce, the petitioner shall have recourse to the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation between parties to a marriage who have become estranged (Law Reform (Marriage and Divorce) Act 1976, s 55(1). Section 106 of the Act further provides that no person shall petition for divorce, except for dissolution by mutual consent (s. 52) and under s. 53, unless he or she has first referred the matrimonial difficulty to a conciliatory body known as a Reconciliation Tribunal.

12. In other words, reconciliation is a prerequisite for the filing of a divorce petition in court. The dispute would be referred to a conciliatory body and the members of this body consist of laymen who are usually distinguished leaders of the community. The body will initiate attempts to resolve the matrimonial difficulty to the satisfaction of the parties. If the body is unable to effect reconciliation, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit in relation to maintenance of wife and children, custody of the children (if any), on division of property, and other matters related to the marriage. Section 106(5)(c) of the Act further provides that no advocate or solicitor shall appear or act as such for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

13. The success rate of amicable settlement of matrimonial disputes in the Reconciliation Tribunal is however, not entirely satisfactory. This is largely because members of the tribunal who are either volunteers or appointed by the government, are not properly trained as marriage counsellors or mediators in reconciling the estranged couples. To engage untrained personnel to conduct counselling for reconciliation could well backfire if the delicate matrimonial problems

are not dealt with carefully. It is therefore suggested that serious attention be paid for the improvement of this Reconciliation Tribunal. The task of reconciliation ought to be undertaken by trained personnel as counsellors or mediators. Necessary training should be provided for effective conciliation. Apart from that, it is suggested that retired government servants be appointed especially those with such backgrounds relevant to such task. Further, it would worthwhile giving incentives to the Tribunal members by showing more appreciation for their successful efforts. Concerted efforts should be taken to publicise the positive values of this Tribunal instead of reducing it into a mere rubber stamp to qualify estranged couples to file the divorce petition in court. It is also suggested that the Ministry in charge urgently embarks on a programme to train mediator/conciliators to help reduce the number of divorces.

Conciliation (*Sulh*) in the Syariah Court

11. Settlement of disputes out-of-court is highly commended in Islam. There are many Qur'anic verses and the traditions of Prophet (peace be on him) on the adoption of conciliation (*Sulh*) in the settlement of disputes. For example, in the Qur'an, Allah (swt) proclaimed; *"If two parties among the believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond the bounds against another, than fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace (Sulh) between them with justice, and be fair: For Allah loves those who are fair (and just). The believers are but a single brotherhood: so make peace and reconciliation (Sulh) between your two (contending) brothers; and fear Allah, that ye may receive mercy"*(*Surah Al-Huju'rat* (49), verses 9 and 10). From the above verse, the Qur'an stresses on the enforcement of the Muslim brotherhood and therefore, disputes or quarrels between the parties or groups of the believers should be settled peacefully in accordance with perfect justice and fairness.

12. Further to the above, there are many traditions of Prophet (peace be on him) on *Sulh*. For example, the implementation of *sulh* by Prophet (peace be on him) could be seen in the case of the making of the Treaty of *Hudaibiyah* where it was narrated by Al-Bara Bin Azid that when Prophet (peace be on him) made the peace treaty with the people of *Hudaibiyah*, Ali Bin Abi Talib wrote on the document and stated in it 'Muhammad, Allah's Apostle'. The pagans asked not to write 'Muhammad, Allah's Apostle', for if he is an apostle, they could not fight with him. Prophet (peace be on him) then asked Ali to obliterate the same, but Ali refused to do so, then the Prophet (peace be on him) himself erased and later made peace with them"*(Sahih al-Bukhari, Vol 3, para 858 (English translation by Dr. Muhammad Muhsin Khan), (Lahore: Kazi Publications, 1986) at p. 536.)*. The Madinah Constitution which was enacted by Prophet (peace be on him), included in it provisions on conciliation to settle any disputes emanating from the groups of people in Madinah. Based on *ijma* (consensus of opinion), Muslim scholars unanimously hold that conciliation is lawful due to its benefit of amicably settling disputes. Hence, judges must persuade the litigants to settle their disputes peacefully.

13. Its implementation could be seen in the Syariah Courts in Malaysia, particularly in the Federal Territories⁵. It is provided in the "Syariah Court Civil Procedure (*Sulh*) (Federal

⁵ It would be worthwhile noting that Malaysia is divided into thirteen states, - Perlis, Kedah, Penang, Kelantan, Terengganu, Perak, Selangor, Negeri Sembilan, Malacca, Johor, Pahang, Sarawak and Sabah - and three Federal

Territories) Rules 2004 (PU (A) 18/ 2004), made pursuant to the Syariah Civil Procedure (Federal Territories) Act 1998, section 247(1)(c).

14. The Rules came into force on 8 January 2004 and it is applicable in all civil matters except in an application for divorce. The reason for the exclusion in marital disputes is because in such a situation, the Qur'an sanctions the institution of *hakam* (arbitration), where arbiters, one from each side, should be appointed to resolve the dispute. Allah (swt) proclaimed: “*If you fear a break between them two, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause them reconciliation: for Allah has full knowledge and is acquainted with all things*” (Surah An- Nisa (4): verse 35).

15. Rule 3 of the Syariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004 provides that where, after receiving a summons or an application for any cause of action, the Registrar is of the opinion that there is reasonable possibility of a settlement between the parties to the action, the Registrar shall – (a) not fix a date for the trial of the action within a period of three months from the receipt of the summons or the application; (b) fix a date, as soon as practicable, for the parties to hold *sulh*; and (c) serve the notice of the date fixed for *sulh* on the parties.

16. Where any party, to whom a notice under Rule 3(c) has been served, without reasonable cause, fails to appear on the date fixed for *sulh*, such non-appearance shall be treated as a contempt of court and the court may commence proceedings for contempt of court in accordance with section 229⁶ of the Act.

17. The court may in such proceedings, make an order of committal for a period not exceeding six months or may impose a fine not exceeding RM2,000. The court may exercise the power so long as the contemnor is given the opportunity of being heard, and the proceeding has complied with the procedural tenets of natural justice.

18. Rule 5 deals with the procedure for *Sulh*. It provides that;

- (i) *Sulh* shall be conducted in a *Majlis* (or Council) (also known as *Majlis Sulh*) in the presence of the parties to the action;
- (ii) *Majlis Sulh* shall be chaired by a Registrar or any public officer appointed for such purpose by the Chief Shariah Judge;
- (iii) In a *Majlis Sulh*, every party shall appear in person and no *Syarie* lawyer may appear or act as such for any party and no party shall be represented by any person without the leave of the Chairman;
- (iv) The Chairman shall, where possible, assist the parties to resolve the dispute concerning the subject matter of the *Sulh* and shall give each party an opportunity to be heard;
- (v) In a *Majlis Sulh*, the Chairman may take evidence from the parties, accept any document submitted and may, if he thinks necessary, adjourn the *Majlis Sulh* from time to time.

Territories - Kuala Lumpur, Labuan and Putrajaya⁵. Each of these states have their own Shariah courts for the administration of Islamic law. These courts are an integral part of the court system in Malaysia and are distinct from the civil courts as to their function and jurisdiction.

⁶ Section 229(1) of the said Act provides; “The Court shall have the jurisdiction to commence proceedings against any person for contempt of Court and may, in such proceedings, make an order of committal for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit”.

19. Where the parties have reached an agreement to settle the action, wholly or partly, the chairman shall prepare a draft agreement and submit it to the parties for their confirmation and signature and, thereafter, the chairman shall transmit such draft agreement to the court to be recorded as a judgment by consent under section 131 of the Act⁷.

20. If however, the action is unable to be resolved in a *Majlis Sulh*, the chairman shall report the matter in writing to the court and may append to his report any note taken in the *Majlis Sulh* and may make such recommendation as he thinks fit⁸. The court, that receives the report, shall fix a date for hearing, to continue the proceedings for the purpose of disposing the case⁹. It must be noted that no costs shall be allowed for conciliation before the *Majlis Sulh*¹⁰.

21. Although conciliation is compulsory as a first step process before the case could be listed for hearing, the success rate of settlement of disputes is however not easily determinable because the jurisdiction of the Syariah Court in Malaysia is restricted. The bulk of the cases in this court deals mostly with family matters and does not cover other matters that represent the bigger bulk of the work.

Conciliation/mediation in Industrial Court

22. In relation to labour matters, particularly involving dismissal claims, the dispute may be referred to the Industrial Court through the Minister [of Human Resources and Manpower]. In *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 3 CLJ 777, the Court of Appeal aptly described the stages a claimant will have to go through before his allegation of unfair dismissal may be adjudicated in the Industrial Court; “First, there is the conciliatory level. Here, all that the Director-General of Industrial Relations is concerned with is whether the parties are able to settle their differences. All that is required to activate the conciliatory jurisdiction is a complaint under s. 20(1) of the Act. Consequently, there is no question of there being any wider jurisdiction at this stage. Second, the reporting level. Once the Director-General of Industrial Relations finds the dispute irreconcilable, he merely makes his report to the Minister. If it is found that he has exceeded his powers, his action is liable to be quashed in certiorari proceedings...Third, the referral level. When the Minister receives notification from the Director-General that the dispute cannot be settled, he must decide whether to refer it to the Industrial Court. He is not to refer all disputes to the Industrial Court. The question he must ask himself is whether, having regard to the facts and circumstances of the given case, the representations made by the workman is frivolous or vexatious... All that is required to call for an exercise of power by the Minister is the existence of a notification that a ...dispute - as defined by the Act, which is the sense in which that expression is employed in this judgment - cannot be settled. There is therefore no question of any wider jurisdiction existing at this stage. But the act of the Minister making the reference has, as will be seen in a moment, jurisdictional consequences. The decision

⁷ See Rule 6 of the Syariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004. A consent judgment is where the parties mutually agreed to the compromise and the court shall settle the terms of the agreement as a judgment or order. Where the judgment is made by consent of the parties the judgment shall bind the parties. The Qur’anic injunction provides; “O you who believe, fulfil all obligations” (*Surah Al Maidah* (5): verse 1).

⁸ *Ibid.*, Rule 7.

⁹ *Ibid.*, Rule 9.

¹⁰ *Ibid.*, Rule 9.

to refer or not to refer a dispute is therefore a separate and distinct act that may be questioned in judicial review proceedings. Fourth and last, the adjudicatory level. It is important to observe that, save in very exceptional cases which are not relevant to the present discussion, the Industrial Court, unlike the ordinary Courts, is not available for direct approach by an aggrieved party. Access to it may only be had through the three levels earlier adverted to. The Industrial Court is therefore empowered to take cognisance of a...dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction”.

23. As seen from the above observation, the representation for dismissal without just cause or excuse must be filed with the Industrial Relations Department (IRD) for conciliation before the same can be referred to the Industrial Court.

24. At the conciliation proceedings, only the parties and their authorised agents are allowed. An advocate, adviser, or consultant cannot represent the parties to the dispute. At the conciliation meeting, the conciliation officer acts as a facilitator where he will persuade and induce the parties to come to an amicable settlement of the matter in dispute. His task is essentially to convene the parties to resolve their differences, to find points of common interest and defuse tension. He will allow the parties to express their views, will examine the statement of the case made by the parties, and deliver an opinion as to the best or most likely outcome of the dispute. He will also explain to the parties the applicable practices and principles of law, with a view that the parties are aware of their rights and liabilities. With that advice, it is probable that the parties would be able to resolve their differences and come to an amicable settlement.

25. The parties however, retain the right to say whether they do or do not accept any suggested settlement. The conciliation officer will continue to offer advice and suggestions throughout the process. He will not take the side of either party to the dispute and remains impartial at all times; neither will he make a decision on the merit of the case or recommend any possible acceptable solution to the dispute. It is entirely up to the parties concerned to reach a final agreement on any proposed settlement.

26. Where the parties have amicably arrived at a settlement, a memorandum setting out the terms of the settlement is drawn up and signed by both the parties, or by their representatives. The legal effect of the agreed settlement is that it shall bind the parties, and any decision recorded in the memorandum of settlement becomes part of the contract of employment. Henceforth, the parties to the settlement would be barred from denying the agreed terms by a writ of certiorari.

27. If, however, the conciliator were unable to arrive at an amicable settlement, he would then submit a report of the dispute to the Minister, who will then decide whether the case merits reference to the Industrial Court¹¹. The Court will only hear disputes referred to it by the Minister. There is no legal requirement that merely because representations are made to the Director General, they must automatically be referred to the Industrial Court.

¹¹ The conciliator merely notifies the Minister that there is no likelihood of settlement but he need not submit a complete report of the circumstances leading to there being no settlement.

28. It must be noted that proceedings before the Director General are held on a ‘without prejudice’ basis. Section 54(2) of the IRA provides that no evidence shall be given of any proceeding before the Director General under section 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference.

29. It is further noted that there is no specific period within which the Director General or his authorised officer should conciliate between the parties, although prior to 1980, 30 days was ascribed to the Director General to reach at a decision (see Industrial Relations (Amendment) Act 1980 (Act 484).

30. Having seen the conciliation process at the IRD, it would be worthwhile looking at the success rate of conciliation settlement. The table below provides the statistics of the number of cases referred to and settled through conciliation proceedings at the IRD for the period from 2000 to 2004.

CLAIMS FOR REINSTATEMENT DEALT (2000 – 2004)

SUBJECT	YEARS				
	2000	2001	2002	2003	2004
Cases brought forward from previous year	4,512	5,298	6,926	8,614	9,761
Cases reported	4,778	5,502	6,429	5,663	5,390
Cases dealt	9,290	10,800	13,355	14,277	15,151
Total Cases Resolved	3,992 (43%)	3,874 (35.9%)	4,741 (35.5%)	4,516 (31.6%)	7,116 (47%)
METHOD OF SETTLEMENT					
Resolved through conciliation	2,590	2,554	2,941	2,774	2,280
Referred to Industrial Court	1,235	970	1,395	1,581	4,643
Not referred to Industrial Court	167	350	405	161	193
Total	3,992	3,874	4,741	4,516	7,116

(Source: Industrial Relations Department Malaysia, <http://www.mohr.gov.my>)

31. As from the above table, settlement through conciliation has not been very successful and is in need of urgent and serious attention. The ineffectiveness of the conciliation process has been attributed partly to the fact that the conciliation officers of the IRD who are civil servants subject to inter departmental transfer, and partly because of the mounting number of labour disputes filed in the IRD as compared to the shortage of conciliation officers. Since the conciliation process is a fine art of assisting both parties to be flexible in the approach to their differences and the skill of conciliation is developed through years of experience, the conciliator should have the requisite skill and experience for expeditious settlement of the representation and this would be possible if the conciliators are permanently appointed for that purpose.

32. Where the conciliation fails, the aggrieved workman cannot directly invoke the jurisdiction of the Industrial Court to adjudicate his grievances¹². The Court only derives its jurisdiction from the reference of the dispute by the Minister. Section 20(3) of the IRA provides that “the Minister may, if he thinks fit, refer the representation to the Court for an award”. The subjective formulation of the provision shows that it is for the Minister to be satisfied upon considering the facts that were made available during the conciliation proceedings, disclosing serious questions of fact or law that requires adjudication. The law does not require the Minister to refer every matter to the Industrial Court.

33. Once the Minister has made a reference to the Industrial Court, the Court cannot decline jurisdiction unless there are any jurisdictional defects in the reference¹³. Many writers have suggested that the Minister should cease to be a conduit to refer unresolved disputes to the Industrial Court. However, the Ministry is not receptive of the suggestion for the main reason that the automatic reference would only shift the backlog from one system to another.

34. The primary objective of the establishment of the Industrial Court is to provide speedy, fair and just resolution to differences between parties to contracts of employment. This Court is not subject to technical and legal form. In other words, the proceeding in the Court is less formal and not subject to the shackles of legal technicalities and defects common in an ordinary court. The scope of the enquiry of the Industrial Court is not only restricted to the law, but to a broader aspect of equity and good conscience with the view of promoting social justice.

35. Having said that, it would be worthwhile noting that the backlog of cases in the Industrial Court is increasing yearly and the main reason is that the Court has become comparable to a court of law of general jurisdiction. One often hears complaints that the Industrial Court is overly legalistic, the presentation of the trials being adversarial in character, and cases are being decided judiciously, which is often time consuming.

36. There is now formality of proceedings, and the procedural rules and evidence with which lawyers are accustomed to, are freely used in the Court. The law on procedure and evidence commonly used in civil trials is freely followed in the Court, such as subjecting parties to pleadings, requiring parties to submit bundles of documents, examination of witnesses and submission of the case, among others.

37. Legal representatives who are freely allowed to represent the parties in the Court largely contributed to the legalism. As a matter of interest, legal representation before the Industrial Court, unlike the civil court, is only a privilege and not a right (See *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67). It follows that a party to any proceedings before the Industrial Court, who wish to be legally represented, must first obtain the permission of the president, or the chairman of the Court.

¹² Reference from the Minister to the Industrial Court is the source of the jurisdiction of the Court for a claim for dismissal without just cause and excuse (see *Kurnia Insurance (Malaysia) Bhd v Clara Tai Saw Lan and Anor* [2000] 2 All MR 1694, 1703 (HC)).

¹³ In *Kesatuan Pekerja-pekerja Kenderaan Sri Jaya v The Industrial Court and Ors* [1970] 1 MLJ 78, it was stated that once the Minister referred the dispute to the Industrial Court, “the Court is at once invested with jurisdiction and is obliged to decide one way or another”.

38. Furthermore, with the liberalisation of judicial review, the Court is obliged to exercise the adjudication function in accordance with the law and cannot ignore altogether agreements or existing obligations for any reason whatsoever. The Court is bound to give a full reasoned judgment in the nature of an award.

39. Where the Court committed an error of law, this *prima facie*, enables the party affected by the award to seek remedy by way of a prerogative writ of certiorari to quash the Industrial Court's award. The above undoubtedly contributed to the delay in the adjudication of cases referred to the Court.

40. In a bid to overcome backlog of cases, which is hindering justice for workers and employers, the Ministry [of Human Resources and Manpower] has proposed mediation process in the Industrial Court to be conducted by chairman. The Minister was quoted as saying, "for every case referred to the Department, the Industrial Court chairman will first convene the case as a mediator. As a mediator, he will be able to tell the parties involved merits of the case. Hopefully, the parties will pick up the hints and resolve the case themselves" ('Mediation first for Industrial Court cases', The Star, 20 May 2004, at p 12.). Unfortunately however, mediation in the Industrial Court is not made compulsory. It is only practiced on a voluntary basis and thus not often requested by the litigants unless suggested by the Court.

Effective implementation of mediation in Industrial Court: The proposals

41. The employer/employee relationship is "comparable with matrimonial relationship in that what matters between the parties is not who is right but what is right for their harmonious relationship to continue" (Per K.Somasundram, in "Settlement of Trade Dispute" [1981] 1 MLJ lxxiv, at p. lxxxvii). Therefore, mediation is highly commended in the settlement of labour disputes as it can assist the disputing parties to re-establish trust and respect, and help to prevent damage to an ongoing relationship.

42. However, the apparent obstacle of effective implementation of mediation in the Industrial Court is that the Court has limited jurisdiction and powers. As noted earlier, the Court derives its jurisdiction from the reference of the dispute by the Minister, when the latter is satisfied upon considering the facts that were made available during the conciliation proceedings, disclosing serious questions of fact or law that requires adjudication. The law does not require the Minister to refer every matter to the Industrial Court. Further, in the adjudication of disputes, the Court has no power to order payment of cost of the proceedings. And its contempt power is also very limited.

43. It is suggested that the existing procedure of dispute settlement, as noted earlier, should be restricted only to disputes involving trade unions and their employers. In the above situation, the Minister's intervention for speedy settlement of the dispute is essential to avoid strike and lock-out, among others, in the interest of industrial harmony. However, for dismissal claims, were the conciliation at the IRD fails to bring about an amicable settlement, the dispute should automatically be referred to the Industrial Court. This is mainly because such disputes would

usually involve questions of law and fact, thus, the proper forum to adjudicate the dispute would be the Court. Furthermore, the Court would also be the proper forum to filter out frivolous or vexatious cases. It would exercise its power only in plain and obvious cases and only where it can clearly be seen that the claim is, on the face of it, obviously unsustainable. The current practice of referring dismissal cases to the Industrial Court at the discretion of the Minister, besides causing unnecessary delay of dispute settlement, only overburdens the Minister with its heavy workload since more than 90% of the disputes referred to the Minister are forwarded to the Industrial Court for adjudication.

44. It is further submitted that the Legislature must promote the use of mediation as a means of resolving disputes between the parties. They ought to look into the possibility of amending the Industrial Relations Act with a view of making mediation an integral part of the court system. The mediation assistance shall be made a prerequisite to adjudication by the court. Alternatively, the judiciary could also play an important role in fostering disputants to use the mediation process as a means of resolving their disputes. It may be possible by issuing a Practice Direction to encourage parties to refer disputes to mediation i.e. the court is to be empowered to encourage parties to use mediation for settlement of disputes. For the reasons noted hereinafter, it would be much to the benefit of the disputing parties if a second informal attempt of mediation is carried out by the chairman of the Industrial Court.

45. Vide the proposed amendment, the litigants must take their disputes to a third party, preferable a chairman of the court instead of a qualified private mediator, who will first convene the case as a mediator. The chairman has no coercive power to bring about a compromise but he has 'suitable means of persuasion' to facilitate settlement which would promote a more rapid disposition of cases before the court. As a mediator, he will be able to tell the parties involved the merits of the case. It is hoped that the parties will pick up hints and resolve the dispute themselves.

46. If the mediation fails, another chairman would convene the case as a hearing. For example, assuming there are four courts, the chairman in Court A will try to get the case disposed of by mediation. If he fails to resolve the matter through mediation, then the case will have to go to another Court and be heard by another chairman, since the chairman in Court A cannot hear the case again, because there will be allegations of prejudice and bias. Thus, this case will go to Court B for litigation, and be heard by the chairman in that Court. At the same time the chairman in Court B would have tried to do some mediation with other cases. If he had failed to bring about a settlement, the cases would be heard in Court A, C or D. In other words, where a case is filed in court, the Registrar of the court may refer parties to the chairman for mediation. If this fails, the parties are at liberty to proceed to litigation.

47. Where the parties have reached an agreement to settle the action, wholly or partly, the chairman shall record the terms reached as consent award. The parties may then enforce the award in the same way as the award of the Court.

48. It is further submitted that the mediation among the disputing parties should be done as early as possible. This is because the longer the parties are distant, the more difficult it is to bring them together. Therefore, there should be a fixed period for mediation, for example within three

months from the date of reference for mediation, which may be extended only in cases where the mediator considers that a settlement is very likely within a short additional timeframe.

49. Apart from the above, the Industrial Court should be conferred the contempt power. Where, if a party has been served notice to appear for mediation, without reasonable cause, fails to appear on the date fixed, such non-appearance shall be treated as a contempt of court and the Court should be able to commence proceedings for contempt of court. The Court may, in such proceedings, make an order of committal or impose appropriate fine. The Court may exercise the power so long as the contemnor is given the opportunity of being heard, and the proceeding has complied with the procedural tenets of natural justice.

50. Furthermore, the Court should also be conferred with the power to order such costs as the Court thinks reasonable. This is because it would encourage the parties resort to mediation as a mode of dispute settlement, which is cost effective, rather than the traditional litigation where the losing party bears the cost of the winning party. It is therefore suggested that if the chairman, who conducted the mediation, after evaluating the substantive complaint, were to find in favour of either of the disputing parties, he should advise the defaulting party to amicably settle the dispute. If however, the defaulting party objects or refuses to settle, the chairman shall make a note that, should at the trial of the proceedings an award be made against him, the defaulting party shall be liable to pay the other party the cost of the proceedings. However, the current practice is that the parties to the proceedings bear their own costs of the proceedings.

51. It is further submitted that the adversarial 'hired-gun' mindset has to be corrected. The law school curriculum must move away from the adversarial nature of teaching and training lawyers by emphasis on integrating dispute resolution systems. It should stress on lawyers' problem-solving (instead of problem-making) skills i.e., emphasis on dispute settlement as opposed to litigation. Therefore, law students ought to be taught the basic concept of mediation, its methodological and practical aspects. It is suggested that in Malaysia, every law faculty must teach alternative dispute resolution as part of their LL.B programme so as to expose law students to the useful alternatives at the earliest stage of their legal education. Further, to encourage the maximum use of the mediation process, the mediation skills can be integrated into substantive law subjects and reflected in the curriculum, teaching and examination. By having such a programme it is hoped that the would-be lawyers should be imbued with a mindset of problem solving and not just acquiring the skill of advocacy in litigation.

52. Legal advisers can also play an important role in encouraging parties in litigation to consider the mediation option at the preliminary stages of a suit as this would reduce the workload on the courts. They ought to place clients' interests ahead of their own and have to discard their litigation mindset and promote mediation though it may lead to less revenue. Undoubtedly, individual lawyers – who earn his living from the fee he charges the client - will be apprehensive that there will be a lesser role for them if mediation is implemented. Here comes the role of the Bar Council, where it should encourage its members to support mediation. Workshops could be organised to train lawyers for a proper understanding of the role, functions and responsibilities of a mediator.

53. Mediation would also work best if disputants have a genuine desire to resolve differences by adopting a give and take attitude, being prepared to discuss their problems and willing to work towards finding a solution. They should be made aware of its beneficial effects such as, the transactional cost savings of mediation and its potential for repairing relationships, among others. Steps should be taken at the grassroots to increase public awareness and knowledge of mediation, via the mass media, specific programmes organised by the legal fraternity and other organisations. Through this mode, the disputants would be self-empowered to find better ways to deal with their dissatisfaction and needs.

54. Further, in ensuring the success of mediation, the role of the mediator must be emphasised. The mediator must guide the negotiation process, advising, listening, and helping parties to reach a win-win solution or one that all parties can live with. A mediator has to have the requisite skill and knowledge in terms of understanding the parties desire, collecting information, facilitating communication, facilitating agreement and ability to manage cases and documents, among others. His ability to be creative, to be able to deal with strong emotion, sensitivity, reasoning, emotional stability, analytical skills, interviewing techniques, and a sense of commitment to the whole exercise of mediation is equally important.

Mediation/ conciliation services out of court

55. **Mediation in the construction industry.** Apart from the above, in the construction industry, arbitration is preferable to litigation because it helps the parties to maintain a pleasant business relationship. Recently, however, the Dispute Review Board made inroads into the settlement of disputes. The Board adopts mediation and advisory approaches in conflict resolution. The disputes referred to the Board are resolved speedily and in an informal manner. The decision of the Board is not binding on the parties who retain their right to refer the dispute to arbitration. The decision of the Board is however, admissible as evidence in any subsequent dispute resolution proceedings and this would certainly reduce time used in adducing or evaluating evidence at the subsequent proceedings. What is certainly apparent is that the mediators are nominated by agreement of both parties who are experts in the industry and their appointment itself is costly.

56. **Banking Mediation Bureau:** The Banking Mediation Bureau was established in 1996 as a company limited by share capital to deal with disputes involving the banking industry. All corporations that are licensed under the Banking and Financial Act 1989 may acquire membership. It provides dispute-resolving services for the benefit of their customers. Customers may refer their claims to the Bureau if they have any dispute involving monetary loss arising out of banking services provided by banks. For example, charging excessive fee, interest and penalty, misleading advertising, unauthorized ATM withdrawals, unauthorized use of credit cards and unfair practice of pursuing actions against the customer as a guarantor, among others.

57. **Insurance Mediation Bureau:** The Insurance Mediation Bureau was set up in 1991 to resolve disputes pertaining to insurance claims. It provides the consumers with an additional channel to redress their insurance related grievances.

58. **Bar Council Mediation Centre:** In 1999, the Bar Council set up the Mediation Centre to cater for all types of commercial and matrimonial disputes in the country. This centre is open to all parties.

59. Only qualified and accredited mediators are allowed to handle dispute resolution by way of mediation process. However, the apparent disadvantage of mediation provided by the above organisations are, (i) the award of a mediator, unlike an arbitration award, is not subject to be reviewed by the Court nor enforceable in the same manner as a judgment or order of the Court; (ii) the settlement arrived at is merely reduced to a contract binding on the parties. If the agreed settlement is ignored, the only recourse of the innocent party is to file an action in court for breach of contract and this certainly defeats the aim of a speedy resolution of a dispute.

60. In short, the mediation, in Malaysia, is still in its adolescent stage. However, the initiative taken to make the mediation/conciliation process mandatory before the case is listed for hearing in courts is highly desirable in settling disputes because of its potential of reducing the backlog of cases. It is an excellent tool for the resolution of conflicts and for solutions that are invested in the parties who take part in the mediation. It is an effective and affordable complement to litigation. Unlike in a lawsuit, where there would be a winner and a loser, mediation/conciliation helps the disputants to find mutually acceptable solutions. Only if the parties are unable to resolve the matter, will the dispute be referred to the court for adjudication. Mediation however, is not and should never be assumed to be a substitute for the judicial system. The mediators/conciliators must be equipped with necessary skills in negotiation to handle disputes and all the issues involved. Last but not least, they should be given a time frame to complete the settlement process for example, three months from the date the dispute was referred to them. **It is hoped that mediation will be used widely and the society would value compromise, negotiations and a sense of goodwill and harmony in resolving problems**

