

**COURT-ANNEXED AND JUDGE-LED MEDIATION IN CIVIL
CASES: THE MALAYSIAN EXPERIENCE**

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ABSTRACT

This thesis maps the present situation of court-connected mediation in Malaysia. Such mediation takes two forms: court-annexed mediation undertaken by a private mediator and judge-led mediation undertaken by a judge. It traces the growth and development of mediation in Malaysia; investigates the factors that impact upon the success of mediation in other jurisdictions; and identifies the barriers and the enablers to the uptake of court-connected mediation in Malaysia. It examines in this context theories of mediation, justice and change management. It reviews the literature on these and on the development of mediation in selected common law jurisdictions. Its findings are drawn from that literature and also from two empirical studies: a survey of lawyers in Sabah and Sarawak and interviews with selected interviewees in East and West Malaysia, including judges. The findings identified that the use of mediation has been driven by: its utility in reducing court backlogs; increasing knowledge of the benefits of mediation; leadership by the judiciary, professional associations and government; training and exposure; and traditional practices of mediation. The findings also identified that three key stakeholders have resisted mediation: judges, lawyers, and the public. This is related to their attitudes and prevailing professional cultures. Judges fear a loss of judicial authority. Lawyers fear losing income. The public lack knowledge of mediation and see judges as the appropriate decision makers to decide their disputes. The thesis also reveals that a sizeable minority of lawyers feel they do not have a significant role in advising their clients to mediate. This is identified as a key barrier to the greater use of mediation in other jurisdictions. The implications of the findings are that if mediation is to play a greater role in the Malaysian civil court system then a greater emphasis on education and awareness of the importance of mediation and its benefits amongst stakeholders is required. It makes a number of recommendations for the more effective use of court-connected mediation including consideration of mandatory mediation.

DECLARATION

“I, Alwi Abdul Wahab, declare that the PhD thesis entitled *Court-annexed and Judge-led mediation in Civil Cases: The Malaysian Experience* is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work”.

Signature _____

Date:

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CHAPTER 1

INTRODUCTION TO THE THESIS

1.0 Introduction

The rising backlog of civil court cases in Malaysia has led to calls for court-connected mediation. The importance of mediation has been recognised with the recent introduction of *Mediation Act 2012* in Malaysia. This Act, however does not apply to the practice of mediation in the court. In the absence of a national stance on backlog issues, regional courts have progressed their own solutions with some implementing court-annexed mediation (cases referred by the court to the mediation centres) and others utilising judges as mediators (judge-led mediation). Reactions to these forms of court-connected mediation have been mixed in the country. This thesis examines the current challenges to mediation as an alternative to litigation in Malaysia in light of the history of mediation in the country, developments internationally and from the perspectives of Malaysian judges and lawyers.

Mediation has become one of the most prevalent alternative dispute resolution (ADR) processes in recent years. It has been considered a dispute resolution mechanism based on the *interests* of the parties (their underlying needs) rather than the *rights* of the parties (their legal entitlements). An ‘interest-based’ solution is also said to be much more desirable if the parties have an on-going relationship (Lim & Xavier 2002). This is attributed in part to the dispute being resolved in confidence and with mutuality and thereby reducing ill-will or animosity as sometimes occurs, in litigation (Abraham 2006). Further, the focus in mediation on joint problem solving turns the disputants’ attention towards a costless process of integrative bargaining rather than an adversarial attack (Jahn Kassim 2008). Whilst the use of mediation in tribunal settings has a long history, it is now appearing as an alternative to litigation in the courts either through referral to a private mediator or by mediation performed by the officers of the court (the registrars or the judges themselves).

Courts almost everywhere, and no less so in Malaysia, find it almost impossible to cope with the ever increasing number of cases (Sangal 1996). Mediation compared to

traditional litigation is said to be cheaper, quicker, more informal, flexible and can lead to creative and long lasting settlements (Drummond 2005). It is no surprise that mediation has been increasingly focussed on in the legal systems of many countries for its ability to resolve conflicts between parties, thus reducing backlogs of court cases as well as reducing overall legal costs (Rifleman 2005 quoted in Hak 2008). Its acceptance and uptake in the Malaysian courts, however, has been mixed. It is in this context that this thesis outlines a research strategy to investigate the attitudes of stakeholders in Malaysian court-annexed and judge-led mediation in light of the development of the theory and practice internationally. This study examines the challenges to mediation as an alternative to civil litigation in Malaysia in light of its history of mediation and compares it with similar movements in United States, Australia and the United Kingdom.

This first chapter discusses the wider perspective of this research, considers the background to and introduces the context of the research. This chapter also clarifies the focus of this study by defining and explaining the purpose and objectives of the research as well as its significance.

1.1 Background to the research

It has been said that ‘as a rule, a court can never resolve as many cases in one day as parties or their lawyers can file’ (Zalar 2004a). Certainly, as an illustration of this, the number of civil cases before the courts in Malaysia as in many parts of the world has been increasing steadily and consequently, the court system faces a serious backlog. The court structure in Malaysia is similar to that found in other common law jurisdictions in the British Commonwealth. The Malaysian courts system is made up of the Superior Courts and the Subordinate Courts. The Superior Courts comprise the Federal Court (the highest court), the Court of Appeal and the two High Courts of coordinate jurisdiction and status: the High Court of Malaya for West Malaysia and the High Court of Sabah and Sarawak for East Malaysia. The Subordinate Courts consist of the Sessions Court and the Magistrates’ Court. In December 2000, there were 297,727 active civil cases in the Malaysian Magistrates’ Court, Sessions Court and High Court (Syed Ahmad & George 2002). The number of civil cases pending

rapidly increased to 369,743 by December 2007 (Anbalagan & Vasudevan 2008). The overall number of unresolved cases including criminal prosecutions has been reported to have reached over than 900,000 cases in the lower courts and over 91,000 cases in the High Court. The statistics on backlogs of civil and criminal cases in Malaysia as of December 2007 is depicted in table 1.1. A stocktaking exercise (involving the physical counting of every file) for systematic planning was carried out nationwide under the former Chief Justice, the Rt Hon Justice Tun Zaki Azmi who took office in October 2008, to determine the exact number of civil cases backlogged in each court. Different figures were revealed though less than what was reported in May the same year (see Table 1.1) but still the number of cases was staggeringly high at 57,715 cases in the High Courts, 96,098 in the Sessions Courts and 153,935 in the Magistrates Courts (Zakaria 2010). This exercise also led to other discoveries which explained the difference between the numbers reported. For instance, there were files in which the validity of the summons had expired and of cases had been disposed of, but which had remained as active in the courts' registries. The reasons for these were said to be due to erroneous reporting by the courts' staff (Azmi 2010).

**Table 1.1: Backlog of Civil and Criminal Cases in Malaysia
(Up to December 2007)**

Courts	Civil	Criminal	Total
High Court	87,156	4,546	91,702
Sessions Court	117,174	8,770	125,994
Magistrates Court	165,413	612,290	777,703

Source: New Straits Times May 9, 2008

Nevertheless, the number of civil cases in the backlog is very high and there are a host of reasons for this. First, due to economic growth and increased education in Malaysia, cases have been brought to courts related to the increased trading and commercial activities and their commensurate increased contractual duties and responsibilities, or as a result of greater awareness of rights among citizens (Syed Ahmad & George 2002). Secondly, the backlog tends to reflect the lack of timely preparation of cases or the availability of lawyers to appear reflected in applications for adjournments by

parties and their lawyers. A one-month study in West Malaysia revealed that 80% of case postponements of hearings were applications by the accused, lawyers and the prosecutors (the Star Online March 19, 2009). Another month long study on postponements of civil cases at the Kuala Lumpur Sessions Court in July 2010 showed that 98% of the postponements were caused by lawyers (Azmi 2010). Some effort has been made to overcome this problem where lawyers are advised to avail themselves at a fixed date of trial and not apply for postponement unless a valid reason is provided. With frequent postponements of hearings, including adjournments initiated by the courts, cases which could have been disposed of instead remained in the court registry files as active files (Syed Ahmad & George 2002). Delays caused by parties in getting their cases ready for trial has also contributed to the backlog through interlocutory applications and in appealing against most orders made (Mohamad 2008). The Rt Hon former Chief Justice of Malaysia Tun Abdul Hamid Mohamad, in his opening speech at the 4th Asia Pacific Mediation forum, explained the situation:

“While the proceedings in the interlocutory applications and appeals are pending, they would make applications for a stay of proceedings. Those applications will have their own sets of appeals. The trial is stayed, even if temporarily, it means delay. The process continues even during the trial. After the main judgment is given there will be another round of appeals. Even while the main appeals are pending, at almost every stage, there will be new applications, for stay of proceedings, stay of execution etc. followed by their own set of appeals. Even when all the avenues for appeals have been exhausted, in the last few years, they have ingeniously resorted to the so-called “inherent jurisdiction” of the court to review its own decision as well as the decision of the Court of Appeal, where no further appeal is allowed by law. Even in review, when one application fails, they would try again, hoping that the new panel would somehow allow their applications. Of course, if that were to happen, it would be the other party’s turn to apply for a further review”(Mohamad 2008)

Thirdly, the courts' strict adherence to rules and procedures has made the litigation process very formal. As those rules and procedures are not easily understood by the laypeople, the services of lawyers are increasingly sought to file cases; draw up a statements of claim or defence; file affidavits; explain the legal language used in most commercial contracts; and, to present and argue the case before the judge (Syed Ahmad & George 2002). This has also resulted in increased legal costs.

Furthermore, access to the court becomes difficult without a lawyer as the proceedings are in English, particularly in the higher and appellate courts. In the lower courts in Sabah and Sarawak, parties do have the option of using the national language. The complex procedural and evidential requirements in the adversarial system has led to a dependency on lawyers who, as indicated, are often responsible for delays and costs (Auerbach 1984; Jolowicz 1996). The recent statement by the Bar Council's president that the legal fees for litigation are expected to increase by 300 to 400 percent due to increased operating costs has caused much concerns to the public (Gunasegaram 2011).

Finally, whilst the number of cases filed in the court registry is rapidly growing, the number of judges appointed and new courts established has not matched the increased workload. Judges' workloads have been increasing reportedly to the point of strain (Tan 2008). This has been exacerbated by the transfer of judges and magistrates to other regions. Partly heard cases remain on file because they must be heard by the same judicial member who must then balance those cases with the newly listed cases from the region to which the member has been transferred (Syed Ahmad & George 2002).

Tun Abdul Hamid Mohamad (2008) has been one of many to note that the current system is not able to cope with disposing of the ever-increasing cases within a reasonable time and cost, and has called for greater use of court-annexed mediation. He noted this has been a solution in many developed countries including the United States, United Kingdom, Australia, Canada, New Zealand, Singapore, and Hong Kong and which have long since adopted mediation as a method of settling litigation. The

prevailing reason for introducing court-annexed mediation in those countries has been to reduce the burdens on the judicial system. This was the basis of the *Woolf* reforms to civil procedure in the United Kingdom in 1999 and the 1990 *Civil Justice Reform Act* in the United States (Genn 2002). Some of these countries have either adopted mandatory mediation for all types of cases or for particular types of cases such as family matters while others have adopted processes to encourage the use of voluntary mediation.

Additionally, another imperative for Malaysia to adopt court-annexed mediation is the success of the pilot programs in the country. In Penang, for example, consent orders resulted in 80% of cases referred to mediators (Damis 2007). These initiatives have been taken up by senior members of the Malaysian Judiciary such as the Rt Hon Tun Ahmad Fairuz, the former Chief Justice of Malaysia, whose major activity after taking office in early 2003 was to clear the backlog of cases. He urged the Malaysian Bar to be more active in encouraging clients to use mediation. The impetus for greater use of mediation was given a further boost when the Malaysian judiciary proposed a Mediation Act in its 2005/2006 Annual Report to enable the superior and subordinate courts to implement court-annexed mediation. A committee comprising a Federal Court judge and representatives from the Bar and Attorney-General's Chambers were assigned the task of reviewing a draft Mediation Act to provide for voluntary and court directed mediation (Koshy 2006b).

However the initial momentum has slowed until the *Mediation Act 2012* was passed by the Malaysian Senate on 7 May 2012. It is now awaiting the enforcement date from the Minister charged with legal affairs in the Prime Minister's Department. The judiciary, however, has tried to maintain pressure on parties and lawyers to mediate. This had led to the issuance of a Practice Direction No. 5 of 2010 (PD) to empower Judges to direct parties to facilitate settlement by way of mediation. This Practice Direction which came into force on 16 August 2010, envisages two types of mediation available namely judge-led mediation and mediation by parties-agreed non-judge mediator (Low 2010). As noted earlier, this Act does not apply to court-connected mediation to avoid the possibility of it stifling the practice of court-connected

mediation by the court through the PD (Lay Choo 2012). A copy of the PD has been provided in ‘Appendix PD’.

Other solutions in Malaysia to the problem of court backlogs, in recent years, have included the computerisation of the court records system and the introduction of case-management (Syed Ahmad & George 2002) and specialised courts which include the New Commercial Court (NCC), Intellectual Properties Court (IPC), Muamalat Court [dealing with Islamic banking disputes], and the Admiralty Court. Cases in these courts are tried by judges who have the expertise and knowledge in those areas of law (Zakaria 2011). The computerised record system involved e-filing, Queue Management System (QMS), Case Management System (CMS) and Court Recording and Transcription (CRT) (MLTIC 2011b).

Whilst there appears to be acknowledgement within the Malaysian legal profession that court backlogs are now a serious concern, not everyone has been supportive of the solution posed by installing court-annexed mediation. For instance, many judges have been reported to be reluctant to exercise their power to refer cases to mediation in the absence of an express provision in the *Rules of the High Court 1980(RHC)* providing for court-annexed mediation (Geok Yiam 2006).

An attempt to amend Order 34, rule 4(2) of the *RHC* was to include a paragraph (q), which would give clearer power to the court to refer disputes to a mediator but this initiative was eventually abandoned. The proposed amendment led to mixed reactions. It was argued that a reference to a mediator by a rule of court in the proposed paragraph (q) of Order 34, rule 4(2) of *RHC* would be invalid as there is no clear provision for a judge to abdicate the function of a judge and to refer the dispute to a mediator in the *Courts of Judicature Act 1964* (Abu Backer 2005). According to Abu Backer (2005), this argument is reinforced by the reference to s 24A of that Act to ‘special referees’ or ‘arbitrators’ but not mediators.

In the latest development of the Malaysian civil case system, the *Rules of Court 2012* was introduced by the Rules Committee set up under s 17 of the *Courts of Judicature*

Act 1964 and s 3 of the *Subordinate Courts Rules Act 1955* chaired by the present Chief Justice Tun Ariffin Zakaria. It combines the *Rules of the High Court 1980* and the *Rules of Subordinate Court 1980*, streamlining procedures in civil cases in the High Courts and the Subordinate Courts. This new *Rules of Court 2012* which came into effect on 1st August 2012 made some significant changes to the existing rules of court including the amendment to Order 34 which provides for pre-trial case management. Specifically, Order 34 rule 2 (2), provides the court with the power to make appropriate orders and directions including mediation to secure the just, expeditious and economic disposal of the action. The mediation process under this Order 34 rule 2 (2) of the *Rules of Court 2012* refers to the mediation in accordance with the Practice Direction No. 5 of 2010 currently being issued. With the insertion of mediation formally into the courts' rules, it is now part of the civil justice system. The practice direction reaffirms the overriding objective outlined in the procedural rules [Order 34 rule 2 (2) of the *Rules of Court 2012*] which empower judges in both the High Court and the Lower Court to give directions including mediation to secure the just, expeditious and economical disposal of the case (Low 2011).

Lawyers have proved resistant to the move to mediation and often failed to recommend it to their clients (Peters 2011). The general attitude among the lay members of public is that lawyers know what is best for their cases and their advice to litigate (rather than to mediate) is completely justified (Othman 2002). Lawyers in Malaysia were said to be the stumbling block to mediation for the fear that their income might be affected (New Straits Times June 25, 2007). These concerns about court-annexed and judge-led mediation are not unique to Malaysia. When court-annexed mediation was introduced in Virginia in the United States, lawyers and judges opposed it, fearing a drop in legal fees and loss of authority (Zalar 2004b). The author reported that it may be confusing for parties who may see judge mediators as providing an evaluative form of mediation rather than facilitating a resolution to their dispute. It also may not be compatible with the traditional role of the judge with the possibility that 'judicial dispute resolution or mediation has the potential to threaten public confidence in the integrity and impartiality of the court and the judge' (Street 1991). The debate has continued in Australia over this issue (see the discussion in Section 3.6.2).

Despite the lack of express provision under the *RHC* in Malaysia prior to 2012, some regions took up the challenge to introduce court-connected mediation but have done so using different sets of rules and standards and this has led to significant differences in practices such as the referral of cases for mediation to the Malaysian Mediation Centre (MMC) in the High Court in Penang (West Malaysia) and the approach taken by judge-led mediation in the Sabah and Sarawak courts (East Malaysia courts). Malaysia is comprised of two main regions separated by the South China Sea: West Malaysia (Peninsular Malaysia) which lies on the Malay Peninsular and shares a land border with Thailand in the North. To the south is the island of Singapore. East Malaysia consists of the states of Sabah and Sarawak and the Federal Territory of Labuan located on the island of Borneo to the east of Peninsular Malaysia. The locales referred to in this thesis are Georgetown, the capital of the state of Penang, on the North West coast of West Malaysia, Kuala Lumpur in the Federal Territory in central West Malaysia, and Kuching and Kota Kinabalu which are the capital cities of Sarawak and Sabah, the two states in East Malaysia. In judge-led mediation, the judge (acting as mediator) initiates mediation in cases deemed suitable. It has become more prevalent in West Malaysia when judges were encouraged to use mediation in running down cases (personal injury resulting from accident cases). It was then extended to cover other areas when the PD was issued. In West Malaysia, court-annexed mediation is practiced in the states of Selangor, Penang, Johor, Negeri Sembilan, Malacca, Perak and Kelantan (Geok Yiam 2006). Table 1.2 shows the number of cases referred by these states to the MMC from year 2000 until 2005. The Penang court has the highest record of referral to mediation: 75 out of the 120 cases lodged nationwide from 2000 until 12 July 2006 (Koshy 2006a). The success rate for court-referred mediation in civil cases as at 12 July 2006 was recorded at 75%, an improvement in the success rate of between 70% to 72.7% from 2000 up to 20 May 2005 (Geok Yiam 2006; Koshy 2006a). The referral of cases to MMC has reduced gradually in recent years with the emergence of judge-led mediation (see Table 2.1 in Chapter 2 and Table 3.1 in Chapter 3).

Table 1.2: Cases referred to the MMC by the courts in West Malaysia from year 2000-2005

YEARS	REGIONS			Total Cases Referred
	KL/SELANGOR REGION	PENANG REGION	OTHER REGION (JOHOR/N.S/MALACCA/ PERAK/KELANTAN)	
2000			2	2
2001	10	14	2	26
2002	3	1	3	7
2003	5	2	1	8
2004	3	24	1	28
2005		7	1	8
Total	21	48	10	79

Source: Adapted from a conference paper, 'Court-Annexed Mediation' by Justice Su Geok Yiam (Geok Yiam 2006).

Despite the resistance to court-annexed mediation on one hand and its uptake on the other hand in Malaysia there is a dearth of research on the subject in the country. Elsewhere a body of discourse has identified a number of criticisms of court-connected mediation which need to be addressed in any formal move to install it into the court system. For example, the possible violation of disputants' right to trial before a judge due to compulsory mediation (Astor & Chinkin 2002); the possible injustice to less powerful or inexperienced individuals due to a power imbalances which may be exacerbated in the absence of representation (Hofrichter 1982; Singer 1979); the lack of procedural safeguards given the flexibility and reduced rules around the mediation process and the lack of reliance on precedent (Boulle & Nesic 2001); and, the confidentiality and the private nature of mediation which prevents a public precedent being set or public scrutiny of the process leading to the outcome of the dispute (Fiss 1984; Imbrogno 1999). It follows that the mediation process may be inappropriate in public interest cases where a binding legal precedent would be beneficial and public norms would be generated. At one extreme, these concerns have led some legal scholars to refer to mediation as second class justice (Astor & Chinkin 2002; De Maria 1992; Fulton 1989).

Despite these words of caution, the progressive adoption of court-annexed and judge-led mediation in Malaysian courts follows the successful implementation of court-connected mediation in other jurisdictions such as the United States, the United Kingdom and Australia which have substantially reduced court backlogs. The experiences in these jurisdictions may be useful in determining why court-connected mediation can be successful, how potential problems may be avoided or reduced and how those factors may be embedded in a system of court-connected mediation which fits with concepts of justice and fairness embedded in the Malaysian civil court system.

1.2 Purpose and research objectives

The main aim of the thesis is to examine stakeholders' perceptions of court annexed and judge-led mediation in Malaysia. Specifically, the research objectives are to:

- To trace and explore the development and growth of court-annexed and judge-led mediation in Malaysia;
- To determine the key factors which have made court-annexed and judge-led mediation successful in other jurisdictions;
- To identify the barriers and enablers to court-annexed and judge-led mediation in Malaysia; and
- To make recommendations for the use of court-annexed and judge-led mediation in Malaysia.

1.3 Justification and contribution of the research

The findings of this research will have an important impact on the growth and further development of mediation in Malaysia as it will provide new insights from the perspectives of key stakeholders in relation to court-annexed and judge-led mediation practices adopted by the courts. Specifically, this thesis makes a significant contribution to knowledge in four key areas.

Firstly, this is the first large scale study of court-annexed and judge-led mediation in Malaysia, hence it is a pioneering study. It traces the growth and development of mediation in Malaysia and assesses the readiness of stakeholders to accept this new practice. This will contribute to a better understanding of these forms of mediation in Malaysia. It will also establish some baselines for future research.

Secondly, it will contribute generally to theories of mediation and to a greater understanding of their application to court-institutionalised mediation. It examines the legal issues and challenges raised against mediation in terms of rights of access to courts, power imbalances, procedural safeguards, confidentiality and enforceability of the mediated settlement agreements. The shift to mediation also impacts upon the development of case law and the role of courts in a common law system which relies on precedent and stare decisis (Ward 2006). The thesis will contribute to an evidence based discussion of these issues.

Thirdly, it will contribute to theories of justice and fairness and how these relate to the field of court-annexed and judge-led mediation. It examines the extent of the mediator's participation and intervention to effectively managing the dispute in mediation with regard to the concepts of neutrality and impartiality.

Fourthly, the thesis examines the theories of change management and in particular its application to the understanding of the barriers and enablers to change in a court management setting. It considers some strategies to minimise resistance to change and reduce any adverse impacts associated with change (Lewin 1947).

1.4 Significance of the thesis

Due to the applied nature of this research, its findings are suitable for addressing practical and existing problems. It focuses on the general understanding of mediation practices in Malaysia and the factors contributing to its growth and development in the light of its success in other jurisdictions. The findings of this study will be used to generate recommendations of practices using mediation which may alleviate pressing and perennial case backlogs.

In fulfilling these objectives, this research will make two practical contributions to the operation and implementation of mediation in the court system. Specifically, it will be beneficial in its contribution because:

- it provides a better understanding of the mediation process within the court system as well as the barriers and enablers to court-annexed and judge-led mediation in Malaysia; and
- it generates recommendations and practices for the effective use of mediation which may reduce backlogs of civil cases in Malaysian courts.

1.5 Limitation and scope

For the purpose of this study, the investigation into court-connected mediation is limited to civil cases. This is because the main purpose in introducing mediation into court practices in Malaysia has been to reduce backlogs of civil cases. Mediation in criminal cases has not yet been explored in the country although there is already a plan to implement a system of plea bargaining to increase pleas and reduce backlogs in criminal cases. Settlement of criminal cases in this way involves the consideration of public policy and issues of justice not found in civil cases.

1.6 Approach and Methodology

The three research questions for the study are:

Research Question 1: **What are the key factors that have led to the growth and development of court-annexed and judge-led mediation in Malaysia?**

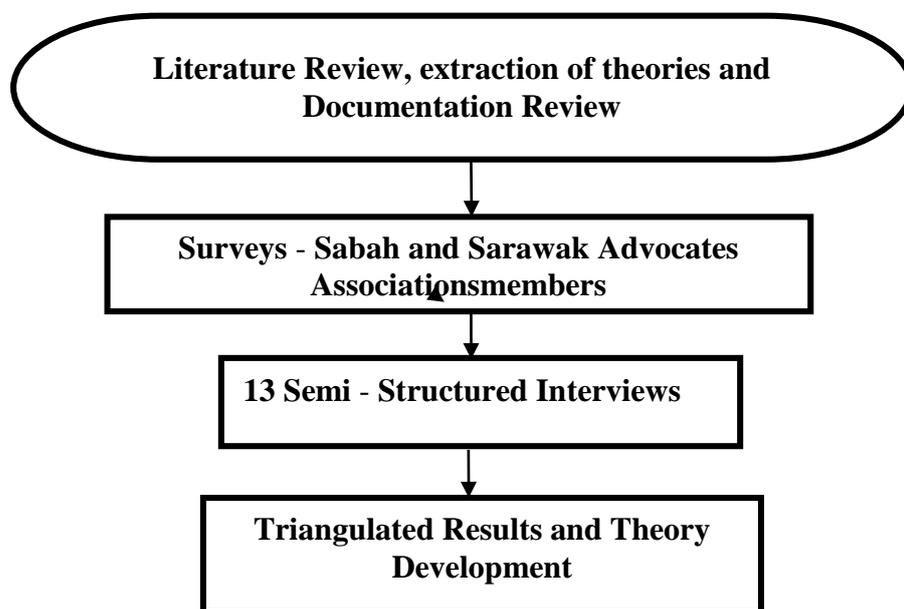
Research Question 2: **What are the key factors that have made court-annexed and judge-led mediation successful in other jurisdictions?**

Research Question 3: **What are the key factors that have caused barriers to court-annexed and judge-led mediation in Malaysia?**

In order to operationalise the research questions, this thesis employs several methodologies comprising of three stages, namely the reviews of the available international literature, surveys of lawyers in Sabah and Sarawak, and, interviews with

judges, officers from the judicial and legal services, and, academics as described in Figure 1.1. With both a qualitative and quantitative approach to data collection the study is a triangulated investigation of perceptions of court annexed and judge-led mediation. Figure 1.1 demonstrates the triangulation process. At each of the levels of the research, the data is triangulated with the other levels resulting in theory generation including the extent theories that evolved from the literature reviews at the first stage.

Figure 1.1: Methodological Approach



1.7 An Overview of the thesis

This thesis is organised into eight chapters. Chapter 1 has outlined and justified the research topic for this thesis, its objectives and methodologies. The thesis presents the first large-scale investigation of court-annexed and judge-led mediation in Malaysia, particularly to assess its potential to reduce the increasing backlog of civil cases.

Chapter 2 reviews the key concepts related to the study. It focuses on literature related to the development of alternative dispute resolution particularly mediation in the USA, UK and Australia. The success of mediation practiced in these jurisdictions is used as a benchmark to assess and compare how far this practice is progressing in Malaysia.

Chapter 3 provides an overview of the literature to build the theoretical and conceptual framework of the thesis. First, the theories of mediation and some of its major concerns are examined. The reasons for and against the use of mediation, including the diversity of mediation practices, are explored. Next, the chapter describes and examines the nature of mediation practices in the Malaysian civil courts. Second, the theories of justice and how these relate to court-annexed and judge-led mediation is explored. Third, the reform of existing judicial systems in the direction of accepting mediation is discussed based on change theory and its application to understanding the barriers to change in a court management setting.

Chapter 4 provides the methodologies used to undertake the research and the reasons for their use. As described earlier the thesis adopts an exploratory approach using both qualitative and quantitative methods to probe stakeholders' attitudes and opinions on the growth and development of court-connected mediation. The surveys were distributed between January to April 2010 and 100 lawyers responded. There were 13 interviews (seven judges and six non-judges) conducted from 5 February to 8 March 2010.

Chapter 5 addresses the first research question to identify factors impacting upon the growth and development of mediation in Malaysia by analysing the findings of the survey to practicing lawyers. First, the findings suggest that the surveyed lawyers reacted positively to the benefits of mediation and believe that mediation is an effective alternative to litigation to ease court backlogs. Second, the chapter finds that lawyers do believe that mediation provides justice if parties are given the opportunity to participate and present their views and their views have been considered (procedural justice). Further, they believe that the parties' perception of justice is further enhanced, if they were treated with respect and dignity by the mediators (interactional justice). Third, the chapter finds that lawyers are in agreement with the proposition that the disputants' demand for a quick and early resolution of their case at minimum costs requires a change in court procedures. However, the lawyers do not seem to believe they had a role as advisors to clients in directing disputants towards court-connected mediation.

Chapter 6 provides the findings from the interviews on the broad three research questions relating to the key reasons for the growth and development of court-connected mediation in Malaysia; and their opinions on its success in other jurisdictions; and the barriers to its uptake in Malaysia. First, five key factors were identified as reasons for the growth and development of court-connected mediation: the realisation of the benefits of mediation; the prevailing court backlogs; the support and encouragement from the senior members of the judiciary; the exposure to, and training of mediation; and, the cultural use of mediation in the traditional Malaysian society. Second, five key factors which led to the success of court-connected mediation in other jurisdictions were uncovered: the high costs of litigation; the increased level of awareness; government policy and intervention; and, the cooperation from the bar. Third, the key factors that have caused barriers to court-connected mediation in Malaysia were identified as arising from the attitudinal and behavioural characteristics of the three groups of stakeholders: judges; lawyers; and, the public including the disputants.

Chapter 7 synthesises the preceding findings from the surveys and interviews into a Discussion chapter which also draws upon research conducted by scholars in court-connected mediation drawing from the literature discussed in Chapters 2 and 3. The chapter considers the uptake of mediation in other jurisdictions, the factors behind its success in implementing court-connected mediation and the ways to overcome some possible hindrances in its implementation.

Chapter 8 concludes and sums up the research drawing together the main findings arising from this study, the key points from each of the main sources of empirical evidence presented in the thesis and suggest ways in which it may inform the best practice of court-connected mediation in Malaysia. Briefly, the main recommendations considered in this chapter include: the need to have the structure for an effective implementation of court-connected mediation including possibly mandating mediation to overcome the resistance; continued education and awareness programmes to be undertaken on the benefits of resolving disputes by way of court-connected mediation; mediation training for mediators and judges to equip them with mediation skills; the

setting up an independent mediation centre to dispel the disputants' perceptions of possible bias by lawyers mediators sourced from the MMC; and, to consider the practice of mediation in the Malaysian Syariah Courts where mediation was conducted by a *sulh* officer, a trained and qualified mediator employed by the court.

1.8 Chapter Summary

This chapter has set the foundations of the thesis. The practice of mediation in court-annexed and judge-led mediation in resolving disputes in civil cases in Malaysia was discussed. The success of this process in other jurisdictions to ease their backlogs highlights the need for research to know the key factors for an effective practice of mediation. This chapter has also explained the background of the research, its contributions and significance, an overview of the research methodology, its limitation and overview of the whole thesis.

The next chapter provides a review of the literature relevant to understanding the context of the study. It focuses on literature related to the development of alternative dispute resolution particularly mediation in the USA, UK and Australia before discussing the development of mediation in Malaysia.

CHAPTER 2

THE GROWTH AND DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION

2.0 Introduction

The previous chapter outlined the aims and objectives of this thesis. This chapter deals with the evolution and the development of alternative dispute resolution (ADR) in selected jurisdictions where it has become part of a civil justice system. It also provides an overview of the growth and development of ADR, particularly mediation, in Malaysia and investigates the key factors behind this growing search for alternatives to adjudication to resolve disputes.

This chapter commences with an overview of the key concepts of ADR before discussing the pattern of the growing development of ADR in the US, UK and Australia mainly as the result of dissatisfaction with civil litigation which has caused congestion in burgeoning courts' lists. The chapter then discusses reforms in the Malaysian legal system related to ADR.

2.1 What is ADR?

In the 1990s ADR came to be commonly used as an acronym for 'Alternative Dispute Resolution' which meant the resolution of disputes by mechanisms other than judicial determination (Attorney-General's Dept 1990). It is now used as a generic term to refer to a range of processes, notably mediation, in which an impartial third party assists those in a dispute to resolve the issues between them (NADRAC 2002b). The description given to ADR as an alternative to litigation has been criticised by some on the basis that disputes can only be resolved through adjudicative or determinative processes (French 2009).

As a general rule, judges conducting hearings and the impartial third party in the ADR process have different functions in the approach taken to resolve the disputes. Whilst it is the duty of the judges to *adjudicate* disputes, it is the parties in ADR process who *resolve* the issues by a more consensual interaction (Street 2008).

Unhappiness over the use of the word 'alternative' in ADR continues. For instance, some writers feel that the definition given to ADR is too simplistic by confining it to a contra distinction between litigation and ADR (Newton 1987). This can be seen across existing literature where ADR is defined on the basis of whether the process is formal or informal; fast or slow; participatory or non-participatory; expensive or inexpensive; coercive or consensual; binding or non binding; party control led or third party control led. These give an impression that one process is better than the other (Astor & Chinkin 2002). Some of these distinctions arise from different types of ADR although have been noted to overlap (Menkel-Meadow 1997). Others have taken the view that the boundaries of ADR are fixed by the third party neutral person (Othman 2002) either in a single method or a combination of various methods so long as it is not a form of adjudication (Hassan 2006). The use of a combination of different procedures under the banner of ADR is described as 'hybrid processes' (Astor & Chinkin 2002). The ADR hybrid process offers parties a wide range of processes aimed at stimulating them to reach a settlement. For instance in Med-arb, the mediator takes on the role of an arbitrator if mediation fails to resolve the disputes and, as such hands down decisions (Dewdney 2006).

ADR has been redefined to make it more meaningful. For instance, the Federal Court of Australia and the Administrative Appeals Tribunal use the term 'assisted' dispute resolution while others use 'appropriate' or 'additional' dispute resolution (Menkel-Meadow 2009; Sourdin & Matruglio 2002). The term ADR may indicate that it is a mechanism preferred by the parties to explore available options to resolve their disputes which are best suited to their interests (NADRAC 2002a). According to Gutman (2009) labelling ADR as 'alternative' can now be challenged because of the mainstreaming of ADR processes such as mediation, conciliation, arbitration and conferencing which can be independent or part of a court process. It is therefore misleading to use the word 'alternative' implying ADR as an exceptional process separate from the formal adjudication system (Federal Court 2007; Mnookin 1998). Callinan (2006) observed that ADR compliments litigation and the courts, but ultimately relies on the courts for its effectiveness.

This raises the issue whether there is a need for standard definitions or descriptions in ADR processes. There are some potential benefits in defining ADR with common elements or descriptions, for example, to ensure that those who use, or make referrals to ADR services, receive consistent and accurate information about what to expect in such processes (NADRAC 2007). This may be in conflict with the objectives underlying ADR which are not only its function as a dispute resolution process but also its managing grievances and complaints, consensus-building, interest-based approaches, collaborative decision-making, dispute avoidance, dispute prevention, dispute system designs, peace-making and conflict management. Thus, ADR cannot be monopolised by any specific category of practice but rather a range of diverse processes which share a common set of values, goals and objectives (Street 2008).

The National Alternative Dispute Resolution Advisory Council (NADRAC) indicated that it is hard to precisely define ADR (NADRAC 2012) and may be better to describe it by the variety and flexibility of techniques and hybrids available under the banner of ADR. NADRAC's descriptions of ADR connote a series of assumptions how particular processes are used. NADRAC has classified ADR processes into three categories and as this thesis is concerned with mediation it is useful to consider how mediation fits into the three categories of ADR before exploring its techniques more closely.

2.2 The categories of ADR

NADRAC, established in 1995 to provide policy advice to the Australian Attorney-General on the practice of, and ADR issues, found that dispute resolution processes fall into three categories: facilitative, advisory and determinative (NADRAC 1997). These categories are defined by third-party techniques used to resolve a dispute, and particularly the extent to which the third party intervenes.

2.2.1 Facilitative ADR

NADRAC (1997) defined facilitative processes as those dispute resolution processes which rely on a third party's assistance but with no advisory or determinative role in the content of the dispute or its resolution. The least interventionist technique in the

facilitative category is facilitation itself. Facilitation is basically a supervised form of negotiation (Chaykin 1994) chaired by a facilitator (the third party), who exercises a minimal degree of intervention. Facilitation is also described as a process where the facilitator assists the parties to reach a consensus over the most appropriate process to resolve their dispute. A facilitator's role is much like chairing a meeting and ensuring that all the participants have a fair opportunity to have their say. Mediation is often considered a slightly more interventionist technique although many practitioners and researchers denote differences between facilitative mediation (non-interventionist) and evaluative mediation. Often facilitation is used to commence the dispute resolution process with the facilitator switching to different roles including that of a mediator or conciliator should the parties wish that to occur. According to Swacker et al (2000) the main purpose of the third party is to provide an avenue for the disputants to have a meaningful dialogue and to increase chances of a potential settlement.

In mediation, the mediator helps the disputants to reach a mutually acceptable settlement of their own dispute (Mnookin 1998). Theoretical concepts of mediation are further discussed in Chapter 3.

The most interventionist technique in the facilitative category is conciliation (or sometimes referred to as evaluative mediation) (Sourdin 2008). Conciliation is a process in which a third party attempts to induce the disputants to resolve a dispute by improving communications and providing technical assistance by making suggestions and providing examples from previous cases handled (Stone 2005).

Sourdin (2008) reported that conciliation and mediation are often regarded as one and the same. Some writers considered the distinction between these processes as a continuum depending on the degree of intervention and authority exercised by the third party (Van Gramberg 2006). Similarly, Brooker (2007) highlights the misunderstanding between mediation and conciliation in the UK, where they have sometimes been used 'interchangeably'. Whilst, the general usage of the terms 'mediation' and 'conciliation' are used to cover a huge and overlapping range of processes (Douglas 2006), NADRAC (1997) has developed benchmark definitions of

both processes by making a clear distinction: the mediator has no advisory or determinative role over the contents of disputes or the outcomes while the conciliator may have an advisory role in these. Generally, conciliators have more roles than a mediator as they are required to actively encourage the disputants to reach a settlement and make recommendations on the settlement terms (Abu Backer 2005). Due to the multiple roles of the third party in conciliation, some commentators feel that this process does not fit under the facilitative category of ADR (NADRAC 2002a). The Australian National Mediation Standards describes mediation as primarily facilitative but acknowledges that mediators may use a ‘blended’ process involving mediation and other advisory processes.

2.2.2 Advisory ADR

In advisory processes, the third party has a more active role in advising the disputants about the issues and range of possible and desirable outcomes and the ways to achieve these intended outcomes (NADRAC 1997). Some techniques that may be deployed include fact-finding, mini-trials and early neutral evaluation. Fact-finding is a process of clarifying and determining the salient facts of the matter in disputes. The fact-finder, who is the third party, hears the arguments and evidence presented by the disputants but makes no determination unless the disputants agree to shift the fact-finding process to mini-trial or advisory-arbitration. At the conclusion of the process, the fact-finder prepares a report outlining the salient facts of the case and the circumstances in which the dispute arose. This may include an evaluation of the strengths and weaknesses of the disputants’ respective case and how each disputant would fare if the case were to progress to arbitration (Astor & Chinkin 2002).

Mini-trials involve a procedure in which the disputants engage in a truncated, non-binding trial before a third party who provides a verdict. In the US, this process often utilises the service of a former retired judge but arbitrators with different backgrounds can also preside (McDermott & Berkeley 1996). In a mini-trial, the testimonies of the essential witnesses each party would want to present at trial are summarised and shortened (Plapinger & Stienstra 1996). The procedures are kept informal with relaxed rules of evidence and evidence is limited to the most relevant (Berman 1994). At the

conclusion of the process, the third party may issue an advisory opinion which injects a realistic tone into the dispute and provides the parties with a preview of a likely outcome should the matter proceed to litigation. The goal of a mini-trial is to induce the parties to settle their dispute (Stone 2005).

Early neutral evaluation (ENE) is a non-binding ADR process where a third party helps the disputants to arrange for efficient and early discovery and also provides an evaluation of the strengths and weaknesses of each disputant's case as well as the likely outcome should it proceed to trial (Mnookin 1998). The primary purpose of ENE is to assist with settlement prospects, helping to focus on the claims and defences and to improve case planning and narrowing the issues (Plapinger & Stienstra 1996). Where the judges are the evaluator in the ENE, they will take no further part in the case neither the hearing of applications nor as the trial judge unless the parties agree. In England, although a commercial court guide contemplates a judge being appointed to provide ENE, the practice is beginning to develop whereby a senior practitioner (often a senior counsel) fulfils the same function by agreement with the parties (Kallipetis & Ruttle 2006). Some writers suggested that ENE could helpfully be used in situations where one party to the dispute needs to obtain an opinion from an experienced neutral party before he or she is prepared to settle a dispute on onerous terms. In the US, the use of ENE is considerably widespread as a settlement device and resembles evaluative mediation (Plapinger & Stienstra 1996).

2.2.3 Determinative ADR

In determinative processes the third party holds an evidentiary hearing and issues a final and binding decision such as in an arbitration proceeding (Stone 2005). In arbitration the disputants agree to submit their dispute to an arbitrator who often has specialised expertise in the dispute subject matter. Arbitration is a creation of contract, and the terms of the parties' particular agreements are generally controlling. In an arbitration proceeding, the procedural rules may be designed by the parties in any manner they like in their agreement. Depending on the parties' own agreement, the arbitrators may or may not be asked to justify their decisions but often arbitrators are simply free to announce the award without any explanation. In the US, for example,

where the *Federal Arbitration Act* (amended in 1954, 1970, and 1990) which provides for judicial facilitation of private dispute resolution through arbitration is silent on whether arbitrators need to give reasons for their awards. The decision of the arbitrator however is non-appealable but can be subjected to judicial review if parties can show that the arbitrator has committed fraud or corrupt practice or acted outside the scope of the jurisdiction conferred by the parties' agreement (Mnookin 1998).

From the above discussion, it is clear that ADR is a collective term for a range of dispute resolution processes and techniques which differ in terms of the degree of intervention and the participation of the third party in the process. However, they all share attributes in common: the flexibility in procedure allowing a quicker resolution; minimal and less cost; contribute to the maintenance of ongoing business or family relationships; guarantee confidentiality; and, in most cases, greater participation of the parties than in litigation (Othman 2002). As a general rule, ADR is considered to be another method available to the disputants to resolve their disputes other than litigation. The next section discusses the main differences between the facilitative ADR processes and adjudication in the ordinary civil litigation.

2.3 Facilitative ADR versus adjudication

Certain contrasting features stand out very clearly between facilitative ADR processes and adjudication whilst there is more similarity between determinative arbitration and adjudication. As this thesis is concerned with mediation, the discussion provided here focuses on the facilitative processes of ADR: facilitation, mediation and conciliation and the extent to which they differ from adjudication. An important distinction is the function of a judge in a formal judicial system and a third party in ADR. Adjudication is a process where a judge appointed by the state sits and rules in judicial proceedings which are structured with formal rules and procedures. A judge's decision is constrained by legislation and precedent and is limited by narrow concepts of what is relevant or irrelevant (Fiadjoe 2004). The decision will generally have one party as a winner and the other a loser. Facilitative ADR on the other hand is a process in which a third party employing facilitation, mediation or conciliation, assists parties to settle their disputes by consensus. Both parties are said to play on a level field guided and

facilitated by an impartial third party who in turn brings parties to a mutually satisfying situation. This process can be informal but it can also be more formal and more structured if the third party exerts more authority, for instance, where it is set in a court-annexed forum or associated with a legislative regime.

Whilst judicial proceedings are generally open to the public, facilitative ADR is not. The parties' own negotiation and resolution of their disputes is a confidential process (Kandakasi 2006). It allows parties some control over the procedures and techniques and gives parties a greater involvement and participation in the process. It is unlike the formal or adversarial hearings dominated by the 'abstruse procedures and recondite language of the law' (Fiadjoe 2004, p. 33).

Clearly ADR has more advantages than litigation in terms of public expenditure as well as the workload of the courts. As it is often cheaper and faster than litigation, it helps to contain increasing legal costs and eases the burdens on the courts (Fiadjoe 2004). As ADR is an interests-based process, the settlement outcome may not be solely a victory for one party and a defeat for the other as it is for litigation (Lindblom 2008). In essence, both parties may feel that they have gained something and at the same time they could avoid the procedural risks, costs and possible negative publicity related to a hearing. For the business community, for practical reasons, ADR may have an ability to restore the commercial relationship which litigation may not be able to address (Wallgren 2006).

The above overview gives some background to the concept of ADR (particularly the facilitative processes) and how they differ from a formal trial. It is useful to frame the debate in terms of this dichotomy to understand the philosophical foundations of both methods of dispute resolution.

The next section looks at the development of ADR, particularly mediation and its uptake in other jurisdictions mainly the US, UK and Australia. ADR is now incorporated extensively into their legal systems. As case backlogs are not unique to any particular judicial system, these jurisdictions too have experienced this problem.

One of the main driving forces for ADR is the growing dissatisfaction with traditional litigation which is blamed for an increase in costs, delays and court overload (Fiadjoe 2004).

2.4 Development of ADR in USA

While it can be said that the contemporary ADR emerged and developed in the United States (King et al. 2009; Wallgren 2006), the origins of ADR is the by-product of dispute processes used in traditional societies and in other cultures long before the advent of the nation state. For instance, societies in Africa, Asia and Far East historically practice non-litigious means to resolve their disputes (Fiadjoe 2004). The practice of mediation has existed for at least two millennia in China, Japan, Korea and Sri Lanka, under the influence of Confucianism (Bagshaw 2008). Confucian values emphasise the restoration of social harmony and the maintenance of the continuing relationship (Barnes 2007). Mediation continues to be practiced in China and is deeply rooted in its culture through the institution of People's Conciliation Committees in both rural and urban parts of the country (Folberg & Taylor 1984).

The emergence of the ADR movement in the United States began in between 1960s and 1970s (King et al. 2009) although it was noted above that some religious groups, communities and voluntary associations in the United States utilised various forms of mediation (Stone 2005). For instance, mediation was used by the first US colonists in Massachusetts Bay to manage their conflicts and to achieve reconciliation (Auerbach 1984). There is also evidence of it being practiced by the Cheyenne Native in the US (Cairns 1942). The system of dispute resolution was similar to mediation used to preserve order according to Cheyennes' custom (Twining 1968).

The contemporary concept of US citizens is that they are overly litigious (Villareal 2006). They are seen to routinely turn to courts for relief for a range of personal distresses and anxieties (Burger 1982). The rapid increase in litigation is indicated by the number of civil dispositions in the state courts and federal courts. They have shown a remarkable increase between 1976 and 2000 of well above 100%: 168% in the state courts and 144% in the federal courts (NCSC 2005). The growth in litigation has been

accompanied by a corresponding growth in the costs of litigation due to the increasing costs of discovery and lawyers (Villareal 2006).

The groundswell for reform of dispute resolution began to emerge from the late 1970s. In 1976, Chief Justice Warren Burger convened the National Conference on the 'Causes of Popular Dissatisfaction with the Administration of Justice', known as the Pound Conference. It commemorated the 70th anniversary of Roscoe Pound's 1906 speech to the American Bar Association. Pound had urged the Bar Association to push for judicial reform. Similarly, Burger noted the archaic nature of court proceedings, the expense of trials, delays and the emphasis on procedural technicalities rather than the merits of the case (Burger 1976). One of several suggestions for reform was to divert litigation into other methods of dispute resolution including the increased use of ADR. At the same conference, another speaker, Sander, also made a historic proposal for the 'multi-door courthouse', featuring a broad range of dispute resolution processes including mediation, arbitration and fact finding (Sander 1979). Sander (1979) observed that a variety of processes might provide more effective dispute resolution. Levin (2006) later noted that such a model would provide more flexible and effective ways to resolve disputes. Disputes could be efficiently designated to the different mechanism best suited to the parties and the issues involved (McAdoo & Welsh 2004). Menkel-Meadow (1997) argued that the multi-door courthouse represents the duality of purposes associated with ADR in its potential to clear backlogs and to achieve tailor-made solutions and better justice. The proposals made at the Pound conference were later included as recommendations by a task force, chaired by US Attorney-General Griffin Bell, for implementation and became a blueprint for the federal justice system in the US (Erickson & Savage 1999).

A survey by the National Center for State Courts suggests that American citizens were receptive to court reforms as they want quick relief of their dispute and lower costs (Yankelovich et al. 1978). Not surprisingly, Sander's (1979) multi-door courthouse was greeted with enthusiasm by the American Bar Association's Committee on Dispute Resolution and it set up a pilot multi-door courthouse programs in Tulsa, Houston and Washington DC in 1985. Later, the other pilot programs were set up in

New Jersey in the same year, followed by another one in Cambridge, Massachusetts in 1989 (Gray 2006). The programs were designed to function as an integral part of the administration of the courts and to divert cases to the most appropriate 'door' using screening criteria suggested by Sander. The number of courts which integrated various ADR options in dispute resolution processes expanded rapidly. By 1998, 51 federal District Courts in the US, had court-annexed mediation and 14 had early neutral evaluation. Another 25% of the federal district courts and 50% of all state courts had either mandatory or voluntary arbitration programs as part of their judicial process (Stone 2005). The greater use of ADR also increased rapidly in the private domain. The American Arbitration Association had 92,000 arbitration requests filed in 1998, an increase of 21% since 1994. JAMS (Judicial Arbitration and Mediation Service), a for-profit ADR provider that utilises primarily retired judges to hear arbitration cases, had handled over 20,000 cases in 30 cities in 1996. Over 350 neighbourhood justice centres offered mediation services for smaller disputes including landlords-tenants, consumers-merchants and disputes between neighbours (Stone 2005).

The ADR movement in the United States is claimed to be partly the result of the active involvement of courts in aggressively focussing on ADR and, to some extent, of the federal government in taking the lead to develop the ADR framework. In 1983, *Rule 16 of the Federal Rules of Civil Procedure* was amended to provide judges with a specific authority to actively manage the preparation of cases and to discuss issues in dispute at the pre-trial conference to facilitate the settlement of cases. Further expanding ADR in the US, Congress in 1998 authorised the courts to use arbitration. This was the first statutory provision for ADR in the federal courts, but was initially limited to 20 districts (Plapinger & Stienstra 1996). The impetus for ADR was further reinforced with statutory mandates under the *Civil Justice Reform Act 1990* which required all federal district courts to develop, a district-specific plan to reduce cost and delay in civil litigation by considering any forms of ADR (Ward 2006). Consequently, from 1993-1994, many Federal District Courts began to mandate some form of ADR as part of the pre-trial process. In Connecticut, for example, judges were permitted to act as mediators, even though they remain on the bench and can have cases referred to

them by other judges. This seems likely to produce possible conflicts of interest, but it is indicative of judicial perception of the success of ADR (Gumbiner 1995).

In the series of further ADR developments in the federal jurisdiction, Congress passed into law the *Alternative Dispute Resolution Act of 1998* which specifically requires every federal District Court to use ADR procedures in civil actions through a neutral third party appointed by the courts. This includes mediation, ENE, mini-trial, and arbitration. Section 652 (a) of the same Act empowers Federal District Courts to require parties to use ADR but this provision is limited to mediation and ENE.

Partly in response to the dissatisfaction with the formal legal system, US federal and state agencies have also been encouraged to utilise mediation and arbitration to resolve disputes. For instance, the *US Administrative Dispute Resolution Act 1990* requires the federal and state agencies to consider these methods of dispute resolution. Several federal and state agencies began to use ADR to manage their caseloads including the Equal Employment Opportunity Commission, the US Department of Labour, the state human rights departments, and local consumer protection departments (Stone 2005). As ADR drew recognition from all levels of the US population, the public, legal scholars, judges and lawyers as well as the state and federal government, it has now become entrenched as part of a legal system (McManus & Silverstein 2011).

The Pound Conference was a tipping point in the development of ADR and its historic importance is increasingly recognised (Menkel-Meadow 1997). The developments and experiences in the US on ADR impacted on ADR in the UK through the Heilbron/Hodge Report and the two Woolf Reports which introduced the reformed *Civil Procedure Rules* (CPR) (Clarke 2010). The development of ADR in UK is discussed in the next section.

2.5 Development of ADR in UK (England and Wales)

ADR has a long history in England. From at least the Norman Conquest, legal charters and documents indicate that legal disputes especially over private rights were often resolved by a highly respected male member of the community in informal or quasi-

adjudicatory settings (McManus & Silverstein 2011). In trade law, the law merchant (*lex mercatoria*) prevailed. It consisted of rules and customs common to merchants and was used by them to regulate their dealings until the 17th or 18th centuries when it became integrated into the common law. It emphasised contractual freedom and the need for quick and effective settlements while avoiding legal technicalities in resolving disputes (Spencer & Brogan 2006).

In the UK, the growing interest in ADR and the influence of the US experience grew from concerns about costs and delay which had long been recognised as problems in litigation (Brooker 1999; Holdsworth 1924, reprint 1966). Potential litigants, especially those in business, would litigate if forced to but preferred not to for the time spent in the court could be better used by them to make money (Kallipetis & Ruttle 2006). Those who did litigate and who were ultimately successful, would often see up to half of the amount recovered absorbed by fees and expenses (Burger 1976).

The high costs and long delays led to other methods of dispute resolution including mediation and arbitration being used (Gottwald 2002). Although arbitration grew in popularity by the 1990s, its adversarial approach meant that it resembled litigation (Flood & Caiger 1993). In turn, the awareness of the potential benefits of mediation as a dispute resolution process was emerging. Consequently, a reference to ADR in England and Wales is generally understood as being a reference to some form of mediation by a neutral third party (Kallipetis & Ruttle 2006).

The development of ADR in the UK crystallised when Lord Woolf was appointed in 1994 by the Lord Chancellor, Lord Mackay of Clashfern, to review the civil procedure rules for England and Wales with the aims of improving access to justice, reducing the costs of litigation, reducing the complexity of the rules and removing the different practices and procedures between the High Court and County Courts. His two-year inquiry into civil justice resulted in a report '*Access to Justice*'. Based on this report, the Lord Chancellor's Department (the governmental department responsible for the civil justice system) published a further report in December 1998, '*Modernizing Justice*'. This led to the introduction of the *Civil Procedure Rules* (CPR). The CPR

came into effect in 1999. They were the catalyst for the radical change in the administration of civil justice in England and Wales.

The CPR governs the procedures in civil litigation in England and Wales. In relation to ADR, the CPR employs judicial case management to monitor and control the adversarial practices of the legal profession (Woolf 1996). For example, Rule 1.4 (1) of the CPR requires the court to actively manage cases for an early settlement. Notably, Rule 1.4 (2) (e), requires the court to encourage the parties to use ADR if the court considers that it is appropriate. Rule 1.3 of the CPR also places the duty on the parties and their lawyers to assist the court in the furtherance of the overriding objective of early settlement. An active pursuit of ADR is further encouraged by Rule 26.4(1) and (2) of CPR which enables parties to make a written request for a stay of proceedings or the court on its own motion may make such order if it considers such a stay would be appropriate while settlement using ADR is attempted.

As part of the CPR, a number of pre-action procedures have been introduced, including procedures requiring the disputants to consider ADR as a means to resolve their disputes before resorting to litigation although under the CPR there is no compulsion to mediate or to enter into any kind of ADR. ADR, especially mediation, has become an integral part of the civil justice system in England and Wales. Any party who unreasonably refuses to engage in mediation risks suffering costs and penalties at the conclusion of a trial. The use of reasonableness protects plaintiffs who have a good prospect of securing a summary judgment and defendants of striking out baseless claims. The financial risk of refusing ADR was shown in the first decision on the issue in the Court of Appeal, in *Dunnett v Railtrack PLC* [2002] EWCA Civ 302. The defendant (Railtrack) declined an offer by the Court of Appeal to mediate the dispute but eventually succeeded in the appeal. The court had to consider whether the defendant's conduct was relevant in deciding against order for costs which would otherwise be made to the successful litigant. Lord Justice Brooke in his judgment held as follows:

‘...It is to be hoped that any publicity given to this part of the judgment of the court would draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in Part 1 of the Rules and to the possibility that, if they turn down out of hand the chance of ADR when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences’

The judgment in *Dunnett* underlines legal professionals’ responsibility to advise their clients properly about ADR and to warn them about the consequences of failing to adopt it. In a following case, *Halsey v. Milton Keynes General NHS [2004] EWCA Civ 576*, the Court of Appeal provided a definitive judgment on two issues: whether the court can order parties to mediate against their consent and whether the court can impose costs on a successful party who refused to mediate. On the first issue, the Lord Justice Dyson stated:

‘It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their rights of access to the courts’.

This decision demonstrates the voluntary nature of mediation uptake in the UK that the parties cannot be ordered to mediate without their consent. Lord Justice Dyson in *Halsey* suggests that ‘compelling’ the parties to mediate may contravene their right of access to a court provided by Article 6 of the European Convention on Human Rights. The second issue considered by the court was whether it would be appropriate to make a costs order against a party who has refused to take up ADR. It stated:

‘The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. The factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not

limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.

The decision in this case also demonstrates the principle that disputants who refuse mediation have to provide a coherent explanation based on the guidelines in the case in order for the court to determine an appropriate order for costs. The use of costs as a penalty may have caused mediation to surge. Some have criticised the use of costs as counter-productive as it may undermine the justice system (Fleming 2004a). The imposition of costs for refusing mediation is thinly veiled mandating of it, which also means the denial of the right of access to the court. This is further discussed on p 62.

In another case, *Lewis v Barnett* [2004] EWCA Civ 807, which was decided after *Halsey*, it was held that if the court thinks the disputants should mediate, it should have no hesitation in making it clear that they should do so regardless of their wishes. This ruling on the court's power to order disputants to mediate has had a significant effect on the court's role in encouraging rather than compelling disputants to mediate. Some writers claim that mediation would have remained 'in the shadows' if it was to be purely voluntary without any encouragement or requirement from the courts for parties to at least consider it at the pre-trial stage (Kallipetis & Ruttle 2006). Pilot mediation projects where an element of compulsion has been required have not proved particularly successful in the UK (Genn 2005), but it is one route that policy-makers may wish to explore in the light of more favourable findings from other jurisdictions (Edgeworth 2008).

The commitment of the UK Government to the development of ADR is evident in its adoption of the recommendations in Lord Woolf's '*Access to Justice*'. Judicial endorsement in case law has contributed to the acceptance and legitimisation of ADR techniques including mediation and has paved a path for the more extensive use of

these processes. Despite the courts' encouragement, mediation's potential remains largely untested in the country. Genn (1998) and later Brooker & Lavers (2000) reported that the growth of mediation in UK was restricted by the lack of enthusiasm from the legal practitioners either due to their ignorance of this procedure or concerns about loss of income.

2.6 Development of ADR in Australia

Mediation practices have existed in Australia for many thousands of years amongst the Indigenous People (Astor & Chinkin 2002). The ancient ceremony of Mawul Rom practiced by the Yolgnu people, in eastern Arnhem Land is said to partly resemble western mediation practices. The elders in the community, with the communication skills and status to act as neutrals, encourage resolutions centred on a joint decision-making processes (Lavelle 2005; Spencer & Brogan 2006). As with the US, ADR (particularly arbitration and mediation) were part of the commercial and social customs which immigrants brought from Britain to Australia. It has been more commonly used since the late 1970s with the establishment of Institute of Arbitrators and Mediators Australia (IAMA).

An earliest organised ADR service was started as a pilot project in 1980 with the opening of Community Justice Centres in New South Wales to provide dispute resolution and conflict management services, including training of mediators and the promotion of ADR. They became a permanent feature in 1983 (Faulkes 1990). This model of community type mediation services has been adopted and followed elsewhere in Australia, including the Dispute Resolution Centres, a state-funded community ADR service in Queensland and the Dispute Settlement Centre in Victoria (King et al. 2009).

The push for the use of ADR in Australia is driven again by the widespread dissatisfaction with the high cost of litigation and the inefficiency of the civil justice system. The use of ADR also is in response to mounting caseloads in the courts which has led to a greater support for its use by the courts (Aibinu et al. 2010). Other reasons

for the success of ADR in Australia include the perceived benefits inherent in its processes and the support by the government and the judiciary (Gutman 2009).

ADR was actively pursued by the then Chief Justice of New South Wales, Sir Laurence Street, when he persuaded the NSW government to fund the establishment of the Australian Commercial Dispute Centre (ACDC), to advance the practice and quality of ADR services in Australia. ACDC was renamed the Australian International Disputes Centre (AIDC) in 2010 and given more financial assistance by the Federal and NSW governments in an attempt to establish it as an international centre for commercial dispute resolution. The enthusiasm and the personal commitment of Sir Laurence Street with the backing of the NSW government quickly established ADR as a practice in Australia and popularised as a mechanism to resolve disputes (Limbury 2011). Similarly, the importance of ADR within the Australian legal framework was endorsed by former Chief Justice of the Supreme Court of Victoria, John Phillips. He stated:

“It should be stressed that mediation is not an inferior type of justice. It is different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements”
[quoted in Alexander (2006)]

Over the years since the establishment of the ACDC, other ADR organisations have been set up to promote the use of ADR. They include:

- The Australian Centre for International Commercial Arbitration (ACICA) was established in 1985, to promote and facilitate the efficient resolution of commercial disputes in Australia and internationally by arbitration.
- LEADR (Lawyers Engaged in Alternative Dispute Resolution) which was formed by a group of lawyers in 1988. It later changed its name to LEADR Association of Dispute Resolvers when it opened its membership to non-lawyers;

- The Victorian Bar Mediation Centre set up by the Victorian Bar which aims at helping disputants to resolve their disputes without going for trial;
- The Law Institute of Victoria which keeps and maintains a directory of mediators as a reference source for litigants to look for a suitable mediator in the area relating to the dispute;
- The Institute of Arbitrators and Mediators; and,
- NADRAC established in 1995 which provides policy and advice on the practice and ADR issues.

These organisations have played an important role in integrating ADR processes into the Australian legal system (Spencer & Brogan 2006). The ADR Committee of the Law Council of Australia, the national body representing lawyers in Australia, adopted and published Ethical Standards for mediators which has been updated twice (in 2000 and 2006). In 2007, they adopted and published a comprehensive Guideline for Lawyers in Mediation which covers issues on: the role of lawyers in mediation; the ethical issues of confidentiality and good faith; the appropriate time to mediate; selection of mediators; and, the preparation before the mediation commences, during the mediation and the post-mediation. A Mediation Kit was also published by the Law Society of NSW in 2006 and later updated in 2008 containing guidelines to assist lawyers in getting involved in mediation practice (Limbury 2011).

The various important events for establishing ADR in Australia include:

- **The National Mediator Accreditation System (NMAS)**

This scheme was set up and commenced its operation on 1 January 2008 principally aimed at enhancing the quality of national mediation services and to provide a base level of accreditation for all mediators irrespective of their field of expertise;

- **The Victorian Law Reform Commission**

The Commission published a Civil Justice Review report in May 2008 containing 177 recommendations to make civil litigation in the State simpler, cheaper and fairer; and

- **The ‘ADR Blueprint’ discussion paper**

This paper was published by the NSW Attorney-General in 2009 to provide a framework for the delivery of ADR services in NSW.

As the result of the several recommendations proposed by NADRAC on ways to encourage greater use of ADR in civil proceedings, the *Civil Dispute Resolution Act, 2010* was introduced into the Federal Parliament. Under this Act, it is the lawyers' duty to advise and assist their clients to resolve disputes prior to the commencing of the proceedings in both the Federal Court of Australia and Magistrates Court. Lawyers who fail to fulfil their obligation may be ordered to pay costs out of their own pocket. The parties are also required to file a statement indicating what 'genuine steps' they have taken to resolve their dispute and if they have not taken any steps, they have to give reasonable explanations. In other words parties must not unreasonably refuse to participate in genuine and good discussions as the court will consider their explanation for objecting to ADR for the purpose of determining the appropriate orders to make regarding costs. It is noted that the requirement for the disputants to justify their refusal for mediation seems to follow the practice in England and Wales in *Halsey* (Limbury 2011).

Following the move by the Federal Parliament to introduce the *Civil Dispute Resolution Act 2010*, the Victorian Parliament also introduced a *Civil Procedure Act, 2010* which is designed to reform the litigation culture in that State. Similarly, the Victorian Act requires parties to take 'reasonable steps' to resolve their disputes before litigation commences. This includes clarifying and narrowing the issues, exchanging documents and considering options without the need for trial. Later the same year, NSW government also approved the drafting of a similar Act (Limbury 2011).

As discussed earlier, the Australian courts have contributed to the growth and development of ADR. Sourdin (2008) reported that various ADR processes have been introduced by the courts and that they are incorporated as part of the internal case-management process to respond to inefficiencies in the court system. According to Spigelman (2006), case-management procedures are geared towards improving the efficiency of courts, particularly in regard to delays. In the Federal Court, the bulk of court-annexed ADR is by way of mediation (French 2009). The ADR programme was adopted by the Federal Court in 1987 (North 2005) when it commenced as a pilot study in the Principal Registry in Sydney and the programme was later extended nationwide.

Under this programme, the judge may refer the matter to a registrar of the court for mediation in appropriate cases. Registrars were trained and given delegated power to conduct mediation and were able to give whatever directions were considered necessary under s 35A of the *Federal Court Act 1976*. If mediation was unsuccessful, the parties did not lose their right to trial before a judge. If the mediation was successful, the parties could have their agreement embodied in a consent judgment. In some circumstances, it may have been appropriate for a judge to conduct mediation. A Practice Note (Practice Note No. 8) was further issued by the then Chief Justice on 7 May 1990 which offered litigants a system of Court-annexed mediation or an Assisted Dispute Resolution. Under this Practice Note, the parties were able to request mediation or it may have been suggested by the judge. The Practice Note coincided with the introduction of Order 10 r 1(2) (g), in the early 1990s, into the Federal Court Rules to provide the court with the authority to order the disputants to attend before a registrar or a judge for mediation or otherwise to clarify the substantive issues in dispute so that appropriate directions may be made for the speedy disposal of cases. It is to be noted that the Federal Court's system of ADR then, and later after the Practice Note, did not force mediation on the parties. An amendment to the *Federal Court of Australia Act 1976 (Cth)* in 1997 has been said to have changed the underlying philosophy of court-annexed mediation. The consent of the parties was originally required for a case to be referred to mediation. This was removed by the amendment [s 53A of the *Federal Court of Australia Act 1976 (Cth)*] (Wood 2004). Gottwald (2002) reported that this has led to a dramatic change in the attitudes of the disputants and their lawyers in using mediation before commencing litigation as they became aware that judges may order them to go to mediation.

In the Supreme Court of NSW, participation in mediation sessions was voluntary initially and mediation would only take place if the parties consented to the process. In August 2000 s 110K (1) was introduced into the *Supreme Court Act 1970*. It provides for the court to refer any civil proceedings to mediation with or without the consent of the parties to the proceedings concerned, in cases considered appropriate. In 2005, this was repealed and re-enacted in the *Civil Procedure Act 2005 (NSW)*. Section 27 of the *Civil Procedure Act 2005 (NSW)* allows judges to refer matters to mediation without

the consent of parties and provides that parties must act in good faith in trying to resolve the dispute. Similar provisions which empower the courts to refer cases for mediation regardless of consent by the parties can also be found in s 34 of *Federal Magistrates Act 1999* and s 102 of the *Supreme Court of Queensland Act 1991* and Rule 50.07 of the *Supreme Court Rules 1996* (General Civil Procedure) of Victoria. Some legislation even requires ADR to be attempted by the prospective litigants before any claims are filed. For example, s 68(1) of *Retail Leases Act 1994 (NSW)* stipulates that a retail tenancy dispute may not be the subject of proceedings in any court unless and until the Registrar has certified in writing that mediation has been unsuccessful otherwise the court has to satisfy itself that mediation is unlikely to resolve the dispute.

Although courts in most Australian jurisdictions may refer a dispute to mediation without the consent of the parties, compulsory mediation may have no negative effect on the outcome of the process. For instance, in his personal memoir, Hamilton (2005) noted where disputes are referred to mediation without the parties' consent, they have generally changed their attitudes at the commencement of mediation and most of these mediations have been successful. In Australia, parties may be mandated to attend mediation but they are not forced to agree with any terms of settlement. As such the voluntariness of ADR is preserved and parties still have their right to litigate maintained. This is what is referred to by Menkel-Meadow (1997) as 'presumptively mandatory' as the parties may opt out after ordered to ADR. In other words, mediation may fail at the will of the parties (*Idoport Pyt Ltd v. National Australia Bank Ltd* [2001] NSWSC 427).

Whilst historically, the US Pound Conference signified the beginning of the modern ADR movement in common law jurisdictions, ADR is an old concept. The non-confrontational approach to dispute settlement has been at the heart of the teaching and practices of eastern cultures, but, ironically, the west is said to have brought a new ideology of ADR in civil litigation to the world (Abdul Hamid 2010). Part of that world is Malaysia.

2.7 Development of ADR in Malaysia

In Malaysia, ADR has roots in the religious traditions and cultural practices of its different ethnic communities (Hickling 1987). Mediation has been used since 1600s or earlier (Bastin & Winks 1966). Disputes were brought to respected members of the community, usually the elders or the *Penghulus* (village heads) in the capacity of a ‘middleman’ (Abraham 2006; Syed Hassan & Cederroth 1997). They were consulted due to their perceived wisdom, standing in society and experience as mediators (Othman 2002). Normally, the village head handled community disputes and the *Imam* (a person who leads the Muslim prayer) was in charge of family related disputes (Wan Muhammad 2008). Although traditional-based mediators may have had no technical expertise, their status and persuasive presence gave them the authority to lead the disputants to an outcome consistent with the community norms (Alexander 2008). Rashid (2010) argued that the role of traditional mediators is more interventionist and authoritative rather than to facilitate and develop options. Cultural norms embedded in the society are a powerful force motivating the disputing parties to mediate where third party’s role in dispute settlement is sanctioned by the society. Wall, James & Standifer (2001) include this phenomena in their ‘cultural efficacy theory’.

Much of the literature on traditional societal mediation relates to disputes in villages rather than the cities. This can have anomalous results. Chinese tend to live in cities whereas Malays and Indians usually live in villages and rural areas (Wall Jr & Callister 1999). For the Malay majority, mediation practice is consonant with its cultural approach of good deeds comprising of *adab* (showing courtesy in word, deed and action towards others) and *rukun* (encouraging social harmony in the family, community and society) (Barnes 2007). Due to the rising standards of socio-economic status over the last decades and the practice of partisan politics, the process of appointing village heads has been undermined and those holding these positions are seen as less legitimate (Othman 2002). This development results in a loss of the community’s confidence in this traditional dispute resolution system making resort to general courts more common (Othman 1996; Yaakob 1982). Nevertheless, the Penghulu’s Court is still in existence and is the lowest in the hierarchy of Malaysian courts to hear claims not exceeding RM50 (Ameer Ali 2010). In Sabah and Sarawak,

there is a Native Court using customary laws and practices of different groups and tribes to settle disputes outside the normal court system (Syed Ahmad & Rajasingham 2001).

Although mediation has its own history in Malaysia (Othman 2002), another form of ADR, arbitration, has been frequently resorted to especially in commercial disputes (Natkunasingam & Sabaratnam K 1998). It was governed at first by the *Arbitration Act, 1952*(Act 93) and later the new *Arbitration Act 2005* (Act 646), which came into effect on the 15 March 2006. The *Arbitration Act 2005* adopts most of the broad principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law. Certain provisions in the *Arbitration Act 1952* were either reformed or removed. For example s 6 of the *Arbitration Act 1952*, which gave the court a discretionary power to stay court proceedings in favour of arbitration, has been removed. Under the *Arbitration Act 2005*, the court must stay the proceedings arising from a matter which is the subject of an arbitration agreement unless if it finds that the agreement is null and void, inoperative or incapable of being performed or, if there is in fact no dispute between parties over the matters to be referred [s 10(1)]. The special provisions of s 34 of the *Arbitration Act 1952*, which excluded the supervisory jurisdiction of the High Court over arbitration held under the Kuala Lumpur Regional Centre for Arbitration (KLRCA) Rules, the UNCITRAL Rules 1976 and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965, have also been removed. The *Arbitration Act 2005* now gives the High Court a wide discretion to make interim orders for relief on an application by either party before, or during, arbitration [s 11 (1) of the *Arbitration Act 2005*].

The principal feature of the *Arbitration Act 2005* is the distinction between the dual regimes of international and domestic arbitration. The former is defined as when one of the parties has its place of business outside Malaysia or the seat of the arbitration is outside Malaysia. The latter is defined as any arbitration which is not an international arbitration [s 2(1) of the *Arbitration Act 2005*]. This was a specific attempt to encourage international arbitration in Malaysia. The parties to an international arbitration are free to decide whether the arbitrator's award can be subject to review

by the Malaysian Courts (Rajoo 2011). Similarly, parties to a domestic arbitration can choose to refuse the court's intervention. This freedom ensures the parties' autonomy in the arbitration proceedings (Abraham 2006).

The *Arbitration Act 2005* was recently amended by the Arbitration (Amendment) Act 2011 which came into effect on 1 July 2011. This Act introduces a new s 11(3) which empowers the Malaysian court to make orders for any interim relief even though the seat of arbitration is outside Malaysia (Rajoo 2011). The *Arbitration Act 2005* was also amended to include enforcement provisions for an award from an international arbitration that is made in Malaysia [s 38 (1) of the *Arbitration Act 2005*].

The Malaysian Courts have generally followed English practice, in recognising the validity of agreements made by the parties to submit their disputes for arbitration. Whilst there is a mandatory requirement that the arbitration agreement should be in writing, there is no specific format for it as it can be in the form of an arbitration clause in an agreement or in the form of a separate agreement (s 9 of the *Arbitration Act 2005*). In that way, it leaves parties the freedom to agree on the wording of such clauses (Abraham 2006). Generally the procedural rules adopted for arbitral proceedings are a matter for the parties to agree provided such procedures do not contravene the principles of natural justice (Abraham 2006). Often, this procedure simply mirrors court processes but the rules of evidence are not strictly adhered to by the arbitrators (Abraham 2006).

2.7.1 ADR Institutions in Malaysia

A number of specialised ADR institutions and tribunals have also been established in Malaysia to provide for the settlement of specific disputes outside of the general court system. These include the Industrial Court (*the Industrial Relation Act 1967*), the KLRCA (KLRCA Rules is based on the *UNCITRAL Arbitration Rules 2010*), the Tribunal for Consumer Claims (*the Consumer Protection Act 1999*), the Tribunal for Homebuyer Claims (*Housing Developers (Control and Licensing) (Amendment) Act 2002*), the Financial Mediation Bureau (a company limited by guarantee), the Copyright Tribunal (*the Copyright Act 1987*), the Special Commissioners of Income

Tax (*the Income Tax Act 1967*), Co-operative Tribunal (*the Co-operative Societies Act 1993*) and a special court constituted under the *Land Acquisition Act 1960*. The latest in the series is the government's plan to introduce another tribunal to solve apartment housing disputes under the proposed *Strata Management Act* (the Star online December 14, 2011). These tribunals do not function as courts do, although they have been given quasi-judicial powers and functions. Most of these ADR institutions and tribunals have established their own procedures. Their decisions are generally subject to judicial review by the High Court (Syed Ahmad & Rajasingham 2001). A selection of these ADR institutions and tribunals is discussed in the next sections.

- ***The Industrial Court***

The Industrial Court in Malaysia is an arbitration tribunal established pursuant to Part V11 of the *Industrial Relations Act 1967* (Act 177) (*IRA 1967*) to deal with disputes occurring between employers and employees and their unions in the private sector. It had an earlier existence from 1940 under the Industrial Court of Inquiry Rules but its function was hindered by the Japanese occupation of Malaysia from 1941 to 1942 (Industrial Court of Malaysia 2010). The procedure and conduct of arbitration proceedings in the Industrial Court was aptly described in the Court of Appeal in *Telekom Kawasan Utara v. Krisnan Kutty Sanguni Nair & Anor*(2002) 3 CLJ 314 by Abdul Hamid Mohammad (JCA), as he then was,

“... It is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court of law. The Industrial Court should be allowed to conduct its proceedings as a ‘court of arbitration’, and be more flexible in arriving at its decision, so long as it gives special regards to substantial merits and decides a case in accordance with equity and good conscience”

Although the *IRA 1967* does not describe the Industrial Court as a court of arbitration, the courts, as this observation shows, have described it as such (Sithamparam 2010).

In practice the processes in the industrial Court, in many cases are generally adversarial, with lengthy examination of witnesses and cumbersome procedures (Sithamparam 2010; Syed Ahmad & George 2002). Whilst applications to the Industrial Court are generally by referral from the Minister for Human Resources rather than directly, parties can appear unrepresented or use their relevant union or employer association advocates. The procedural rules are at the discretion of the court (Natkunasingam & Sabaratnam K 1998). Section 30(5) of the *IRA 1967* provides that its proceedings should be conducted according to equity and good conscience and the substantial merits of the case without regard to the technicalities and legal form. The remedies too are broad with s 30(6) providing that the court may award any suitable remedy given the particular circumstances before it. In this way, Ali Mohamed and Hui (2007) have argued that the Industrial Court promotes social justice and establishes harmony in the relationship between the employers and the employees.

Although an arbitral award handed down by the Industrial Court is conclusive and final with no provision for appeal under the *IRA 1967*, any questions of law arising out of an award may be referred to the High Court for review (s 33A of the *IRA 1967*). Whilst judicial review is a welcome development of administrative law, it has had an adverse effect on the proceedings in the Industrial Court, contributing to delay in the settlement of the disputes and increased legalism surrounding the industrial adjudication (Syed Ahmad & George 2002).

Voluntary mediation has been practiced in the Industrial Court since 2004 but only a small number of cases have gone through this process due to the low level of awareness of the public and lawyers about its advantages (Mohd. Sham 2011). Another ADR process known as ‘an early evaluation of the case’ was also introduced in 2010 at the pre-hearing stage for matters referred to the Industrial Court pursuant to s 20(3) of the *IRA 1967* relating to the unlawful dismissal of workers. Under this process, the Industrial Court Chairman evaluates the merits of the case based on the pleadings and advises the parties on the probable outcome of the case with a view of encouraging settlement (Menon 2010; Sithamparam 2010). In 2010, the Industrial Court settled 18 cases by way of mediation (Mohd. Sham 2011).

- ***Kuala Lumpur Regional Centre for Arbitration (KLRC)***

The KLRC was set up in 1978 by the Asian-African Legal Consultative Committee (AALCO), an inter-governmental organisation, in cooperation with, and with the assistance of, the Malaysian government (Keang Sood 1990). It is a not for profit and independent institution providing facilities for arbitration, both domestic and international, within the Asian region. Although the goals of this organisation focus on arbitration, it also offers mediation, conciliation and domain name dispute services. It has its own rules of arbitration, the KLRC Rules, based on the *UNCITRAL Arbitration Rules 2010* with modification made on 15 August 2010 replacing the *UNCITRAL rules of 1976*. The KLRC rules allow a great deal of flexibility in the conduct of proceedings and leaves a wide discretion to the parties on the choice of arbitrators, the place of arbitration and the procedural rules (KLRC 2010; Rajoo 2011). The KLRC imposes administrative charges, advises parties on the applicable rules, appoints arbitrators (where there is a default in appointment), decides on the arbitrators' fees, and, collects deposits (Rajoo 2012). The mediation practice at KLRC is governed by its Conciliation/Mediation Rules which incorporated many of the provisions of the *UNCITRAL Conciliation Rules 1980*.

- ***The Tribunal for Consumer Claims***

The Tribunal for Consumer Claims was established under the *Consumer Protection Act 1999* (Act 599) (*CPA 1999*). Before the establishment of the Tribunal, consumers have had no avenue for redress or compensation from errant suppliers or manufacturers unless they are willing to take them to the civil court which is costly and time consuming process especially when the amounts claimed are small (Shaari 2003). The Tribunal provides an alternative to the civil courts in relation to consumer claims. Although hearings do take place, the procedures involved are simplified and less cumbersome for the benefit of consumers. Consumers only need to lodge a claim in the prescribed form and pay a prescribed fee (Syed Ahmad & Rajasingham 2001). The time taken to resolve disputes is reduced, and the costs involved are minimal as legal representation is not required unless the parties involved in the hearing are corporation or an unincorporated body [s. 108(2) of the *CPA 1999*] It has jurisdiction to hear and determine the amount of claim not more than RM 25,000 (s 98 of the *CPA 1999*). The

subject matters of the claims allowed under the *CPA 1999* are in respect of goods and services, supplied and offered to one or more consumers in trade [s 2(1)].

Principally, the function of the Tribunal is to adjudicate consumers' claims; however, s 107(1) the *CPA 1999* expressly empowers the Tribunal to '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'. Thus the spirit of resolving a dispute through negotiation rather than the strict letter of the law is expressly encouraged in the Act (Loong Thye & Boon Leng 2003). The ADR mechanisms employed by the Tribunal favours conciliation and negotiated agreements between the parties (Abraham 2006). There is no appeal from the decision of the Tribunal, making it the final and binding arbiter of the dispute in question.

- ***The Tribunal for Homebuyer Claims***

The Tribunal for Homebuyer Claims was formed under the *Housing Developers (Control and Licensing) (Amendment) Act 2002 (Act A1142)* to hear complaints by purchasers against developers relating to disputes over housing matters (Abraham 2006). Its establishment made it easier for purchasers to make claims against housing developers. It is limited to claims not exceeding RM 25,000 unless both parties agree in writing that the Tribunal shall have jurisdiction to hear and determine the claim above its jurisdiction [s 16O of *Act A1142*]. The proceeding before the Tribunal are simple as it does not involve the ordinary court process and the presence of lawyers (Abdul Latif 2002). The homebuyer, however, may proceed to file the claim in court if he or she wishes. Section 16T of *Act A1142* imposes an obligation on the Tribunal in appropriate circumstances to assist homebuyers and housing developers to negotiate to reach agreed settlements. Where the parties reach such agreement, the Tribunal must approve and record the settlement as if it were an award of the Tribunal. While ADR proceedings are generally confidential, the proceedings in the Tribunal for Homebuyer Claim are open to public. The awards of the Tribunal must be supported by a statement of reasons (s 16AA of *Act A1142*). It is final and binding on all parties to the proceedings but a reference on a point of law can be made to the High Court (s 16Z of *Act A1142*).

- ***Financial Mediation Bureau (FMB)***

The FMB is set up to resolve disputes between the financial services providers and insurance companies which are members of the FMB and their customers. It deals with consumers issues related to banking, other financial or insurance matters including *Takaful* (Islamic insurance) (FMB 2011). Prior to the establishment of the FMB there existed two Bureaus: the Insurance Mediation Bureau (IMB) established in August 1991 and, following its perceived success, the Banking Mediation Bureau (BMB) was established by the banking industry in June 1996. The two Bureaus were merged in 2004 into FMB, a company limited by guarantee, to provide as a one-stop centre for the public to seek formal redress as an alternative to litigation against the financial institutions and insurance companies (Segara 2009). The two Bureaus, before merging, were modelled on the UK industry ‘ombudsman system’ where a neutral third party conducts an independent fact finding investigation with the goal of correcting abuses and injustices (Natkunasingam & Sabaratnam K 1998).

The role of a third party in FMB is basically to encourage communication between parties and to facilitate settlement. In practice, the third party may acts either as mediator or arbitrator especially when there is deadlock, the mediator changes his or her role to that of an arbitrator and decision maker (Segara 2009). The neutral third party may also make an award if no settlement is reached between the complainant and the financial or insurance firm. The award is binding on the members of industry under an ‘unwritten gentlemen’s agreement’. However, the complainant may either accept or reject the award. If the complainant decides to reject the award, either party may commence litigation (Segara 2009). According to Segara (2009), although members of the industry have so far abided by the above ‘gentlemen’s agreement, legislation may be necessary to give legal status to the FMB and give certainty to current practices.

As the idea of ADR began to gain ground with the establishment of these tribunals and forum for dispute resolution, invariably they help to take some cases away from the court system. Loong Thye & Boon Leng (2003) observed that as these alternative forum are outside the court system they would not be effective in addressing the issue

of backlogs and providing speedy justice to disputants. Court-connected mediation centers were established. These include the Bar Council's Malaysia Mediation Centre (MMC) and the recent innovation to have mediation services available within the Kuala Lumpur courts' building, Kuala Lumpur Court Mediation Centre (KLCMC) which was set up in August 2011.

- ***The Malaysian Mediation Centre (MMC)***

The mediation movement was given official recognition by the Bar Council of Malaysia when it set up the MMC in 1999 (Loong Thye & Boon Leng 2003). The objective in its establishment was to promote mediation as an alternative means to resolve disputes, and to provide a proper avenue for its success (Lim & Xavier 2002). The mediation services offered by MMC cater for a wide sphere of commercial and civil disputes as well as matrimonial disputes. The mediation process conducted by the MMC is governed by its own Mediation Rules which include the process of initiating mediation, appointing mediators, disqualifying mediators, modes of settling agreements, and confidentiality.

MMC also provides mediation training for mediators. It accredits and maintains a panel of mediators (Hwang *et al.* 2006). The mediators are subject to a Code of Conduct, which provides for strict impartiality and confidentiality. Mediators should be members of the Malaysian Bar with at least seven years of practice. They must also have completed at least 40 hours of training conducted by the MMC, and pass a practical assessment (Hwang *et al.* 2006). Up to October 2010, the MMC had 236 mediators on its panel (Koshy 2010a).

The fee charged for one day's mediation at MMC is RM2,150 comprising the mediator's fee of RM1,500 regardless of the quantum of the claim, RM300 administrative fees and RM350 for room rental if the MMC's premises are utilised. From 2000 to September 2010, a total of 192 cases were referred to MMC, of which 109 were from the courts. Of the total only 54 were successfully mediated, the rest were unsuccessful, pending or closed (Koshy 2010a). Table 2.1 shows the number of cases that were referred by the court to the MMC between 2005 and 2009.

It was claimed that mediation conducted by judge is more successful than mediation conducted at the MMC because parties are more confident when judges become their mediators (the Star online February 25, 2011). Referral of cases to the MMC by the court was said to be unpopular among the disputants resulting in the court to reconsider its practice (Zakaria 2010). According to the former Chief Justice of Malaysia, the Rt Hon Tun Zaki Azmi, of the two types of mediation practices in Malaysia pursuant to the Practice Direction No. 5 of 2010 (PD) (Chapter 1) - mediation by independent third party who is trained mediator and judge mediators - the latter is preferred by the courts as it is more economical and time saving (Azmi 2010). Legal commentators have also argued that independent mediation outside the supervision of a court does not work well (Anbalagan 2008).

Table 2.1: Cases referred to the MMC by the court as at 10.3.2009

Years	Number of cases referred
2005	30
2006	19
2007	11
2008	3
2009	4
Total	67

Sources: Adapted from the Bar Council of Malaysia

- ***Kuala Lumpur Court Mediation Centre (KLCMC)***

The KLCMC was established in August 2011 to run a pilot project providing court-annexed mediation using judge as mediators. According to the former Chief Justice of Malaysia, the Rt Hon Tun Zaki Azmi, the centre was set up in the Kuala Lumpur Courts' building to reflect the seriousness of the judiciary in integrating mediation into the court process. He added that this idea was to send a strong message to litigants and lawyers alike that mediation is encouraged as part of the civil litigation process (MLTIC 2011a). With the establishment of this centre, mediation will no longer be conducted in a judge's chambers. This may remove the element of pressure on the parties to settle and create a friendly atmosphere (MLTIC 2011a). The mediation

service provided by the centre is free of charge and at no cost to the parties (Gomez 2011). The mediators at this centre comprise judges of the High, Sessions and the Magistrates Courts. Its first 28 civil cases were referred from the High Court on its establishment (MLTIC 2011a).

2.7.2 ADR in the construction industry

In Malaysia, arbitration is perceived to be the most appropriate and well established dispute resolution technique for settling construction disputes (Ameer Ali 2010; Rajoo 2003). This can be seen from the standard forms of construction or building contracts produced by four Malaysian construction industry institutions or organisations namely the Construction Industry Development Board (CIDB), The Malaysian Institute of Architects (PAM), The Institute of Engineers, Malaysia (IEM) and Jabatan Kerja Raya (JKR) which all have arbitration clauses (Chee Kheng 2002).

Mediation has not been embraced in any significant manner in the construction industry (Ismail *et al.* 2008) as only PAM 2006 and CIDB (2000) Standard Form of Building Contracts provides for this process. Under the CIDB contract (2000), the disputing parties must attempt to resolve their dispute by mediation first before arbitration but mediation is voluntary in the PAM contract 2006 (Chee Kheng 2002). Chee Kheng (2002) reported that mediation has made little progress in the construction industry due to an acute shortage of experienced mediators.

The relative frequency of the use of ADR techniques in the above ADR institutions can be observed in table 2.2 below.

Table 2.2: Arbitration and mediation cases registered with various ADR institutions between 2000 and 2008

ADR institutions	Number of Arbitration and Mediation cases registered
PAM	518 arbitration cases (No mediation cases)
KLRCA	126 arbitration cases (No mediation cases)
IEM	15 arbitration cases (No mediation cases)
MMC	155 mediation cases
CIDB	No reported cases but CIDB is involved with at least 5 cases acting as mediator for both government and private disputed projects

Source: Adapted from a conference paper, 'Mediation: the best private dispute resolution in the Malaysian Construction Industry' by Ismail et al. (2009)

2.7.3 Other statutory provisions relating to ADR practices

The *Legal Aid Act 1971(Act 26)* governs legal aid in Malaysia. The mediation provision has been included into *Act 26* through the *Legal Aid (Amendment) Act 2003 (Act A1188)*, which came into force on 29 May 2003, to provide for mediation services in the Legal Aid Department (previously known as the Legal Aid Bureau before its name changed on 16 January 2010). The Department is formed under the Legal Affairs Division of the Prime Minister's Department to provide legal aid and advice to facilitate legal representation in courts to those who are eligible and also, since 2003 under *Act A1188*, provided mediation services (Abraham 2009; JBG 2011). Section 29A of *Act 26 (via amendment of Act A1188)* provides that the Minister may authorise the Director General of Legal Aid to provide mediation services to legally aided persons. Mediation services provided by the Legal Aid Department include the determination of the terms of the joint dissolution of marriage, the division of matrimonial assets and of the settlement of, motor accident claims and consumer claims (JBG 2011). Participation in the mediation is purely voluntary and either party may withdraw from the mediation sessions at any time [s 29C of *Act 26 (via amendment of Act A1188)*].

Provision for conciliation as a mode of settling disputes can be found in the *Law Reform (Marriage and Divorce) Act 1976 (Act 164) (LRA 1976)*. Pursuant to s 106 (1) of the *LRA 1976*, parties must refer their disputes to a conciliatory body known as a Reconciliation Tribunal before submitting a petition for divorce in court. Hui and Ali Mohamed (2006) reported that the process of reconciliation in the Reconciliation Tribunal is not entirely satisfactory largely due to the lack of experience and training of the members of the tribunal as marriage counselors or mediators.

The *Industrial Relation Act 1967 (IRA 1967)* also provides for conciliation proceedings by the officers of the Industrial Relations Department (s 18 of the *IRA 1967*). The conciliation process by the officers of the Industrial Relation Department has not been very effective and is in need of reform partly because these officers are civil servants and their number is limited compared to the high volume of disputes referred to the department (Hui & Ali Mohamed 2006).

There are a handful of other statutes which include the *Trade Union Act 1959* (ss 44-56), the *Workmen's Compensation Act 1952* (ss 3, 27-42), the *Cooperatives Societies Act 1993*, and the *Employment Act 1955* (ss 69, 75 and 86) which have statutory provisions relating to some form of mediation under various terms: 'inquiries' or 'conciliation' (Syed Ahmad & Rajasingham 2001).

Although ADR, particularly mediation is practiced in the Tribunal and the ADR institutions above, there is no uniformity and consistency in its use as each of these institutions has their own provisions offering mediation services to their customers (for instance, the Conciliation/Mediation Rules of the KLRCA and the MMC Rules). Further, the provisions under some legislation are not comprehensive particularly in reference to the Tribunal for Consumer Claims and Tribunal for Homebuyer Claims. Although both the *Consumer Protection Act 1999* and the *Housing Developers (Control and Licensing) (Amendment) Act 2002* expressly empowers the Tribunals to assist the parties to negotiate an agreed settlement, there is no further provision relating to how the negotiations for settlement are to be conducted. The introduction of the

Mediation Act 2012 may provide a solution to uniform and wider the general application of mediation in these institutions.

2.7.4 ADR under the Syariah law in Malaysia

British rule in Malaysia has been claimed as being responsible for the introduction and application of English Law which have prevented the further development of Islamic law (or Syariah law) as the law of the land (Wilkinson 1971 quoted in Ahmad and Rajasingham 2001). Nevertheless, there is a system of Syariah courts (Hickling 1987). Malaysia operates a dual legal system consisting of the civil law and the Syariah law, where the latter is particularly aimed at personal and family matters of persons professing the religion of Islam which includes inter alia: succession, marriage, divorce, maintenance and adoption (Article 74, Schedule 9 (2nd list) of the *Federal Constitution*).

Amicable settlement of disputes away from the court is highly recommended and encouraged under Syariah law (Hui & Ali Mohamed 2006) which originates in the *Quran* and *Hadith* [the traditions of the Prophet (peace be on him)]. There are some texts in the *Quran* which emphasise the settlement of disputes through reconciliation (*sulh*) and arbitration (*tahkim*) (Rashid 2000). For instance *Surah Al-Huju'rat (49), verse 10 of the Quran* says:

“The believers are but a single brotherhood, so make peace and reconciliation (*sulh*) between your two (contending) brothers”.

In disputes between spouses, the Quran recommends arbitration where it says:

“If you fear a breach (break) between them two, then appoint (two) arbitrators: one from his family, and the other from hers. If they wish for peace, Allah will cause their reconciliation...”
[*Surah An-Nisa (4), verse 35*]

Besides *sulh* and *tahkim*, the other ADR processes recognise under the Syariah law are *Muhtasib* (Ombudsman), Med-arb (a combination of *sulh* and *tahkim*), informal justice by the *Wali al-Mazalim* (chancellor) and *Fatawa of Muftis* (expert determination)

(Rashid 2004). According to Rashid (2004), these ADR processes are considered as the ‘basic tenets’ of the civil justice system under the Syariah law.

The term ‘*sulh*’ literally means to end or cut off a dispute and is achieved through obtaining an agreement between the disputing parties rather than through imposition of a decision (Muneeza 2010). In this sense it closely resembles a form of mediation and is widely believed to be an appropriate form of dispute resolution for those in ongoing relationships. While *sulh* is not strictly practiced in divorces, it is generally used for disputes arising out of divorces including claims such as maintenance or *mut’ah* (property payable by a husband to his wife due to their separation), joint acquired property and custody of children (Safei 2009).

The importance of *sulh* as an alternative method for settling disputes amicably (particularly in family matters) has not been unnoticed by the Malaysian Syariah courts. The Federal Territory Syariah Court in Kuala Lumpur carried out a pilot project using *sulh* in 2001 (Wan Muhammad 2008). This was followed by the Selangor Syariah Courts when they introduced *Majlis Sulh* in 2002 (Safei 2009). After only 18 months of *Majlis Sulh* being practised (from May 2002 to December 2003), the settlement rate in Syariah cases recorded an increase of 68%, representing 1,748 cases out of 2,555 cases registered in the Selangor Syariah Courts (Azahari 2004).

There are two structures of mediation under the Malaysian Syariah law. First, the *Majlis Sulh* in Selangor Syariah Courts is a court-annexed mediation model. Here, mediation is conducted by *sulh* officers who are court officials and they are juniors in rank and position than syariah judges. They are governed by *Sulh Officers Code of Ethics* and a *sulh* manual formulated by the Syariah Justice Department as their guidelines in conducting *sulh* (Abu Bakar 2011). Second is the practice of *sulh* conducted by officers of the Legal Aid Department under the provision of *Legal Aid Act 1971(Act 26)* or by *Syarie* counsel (private Syariah lawyers). The difference between these two structures of mediation is that in the court-annexed mediation process of *Majlis Sulh*, parties are bound to go for mediation once ordered by the court while in *sulh* by the Legal Aid Department and *Syarie* counsel the process is outside

of the court's purview and the parties are free to withdraw from the mediation process at any stage (Bureau 2008).

Rule 3 of the *Syariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004*, has a provision for a compulsory mediation. Under this provision, the registrar must fix date as soon as practicable, for the parties to hold *sulh* if he or she thinks that there is a reasonable possibility of settlement on receiving a summons or an application for any cause of action.

2.8 Chapter Summary

The reform in civil litigation with the increasing use of ADR (mainly mediation) in the US is considered as an American way of dealing with court backlogs but it is a problem not unique to this country (Brown & Marriott 1999). Other common law countries such as UK, Australia and Malaysia have similar problems. The US is seen as a pace setter in the development of ADR particularly in the shaping of mediation within the court justice system copied by both UK and Australia. Malaysia is a late starter to embrace mediation although traditionally it was long embedded in the cultural practices of a multiracial society where disputes are resolved and settled with the help of neutral third parties.

The increasing backlogs resulting in long delays in cases being heard has been a motivating factor for these countries in turning to mediation as a means of settling disputes. The spiraling cost of litigation has also led to a search for cheaper and quicker dispute resolution mechanisms. However, not all have taken the same approach towards compulsory mediation. In the US and Australia, there is specific legislation to empower the courts to direct the disputants to mediation with or without their consent. Both in the UK and Malaysia, parties are encouraged to use mediation to resolve disputes without trial. In the UK, however, parties are subject to costs and penalties if they refuse to mediate without reasonable cause through the development of case law. Under the CPR in England and Wales, courts must actively manage cases for early settlement and this includes encouraging parties to use mediation.

The practice of ADR, particularly mediation in the tribunal and ADR institutions in Malaysia is found to be not consistent as a result of different rules adopted to govern its practice. Despite these evidences of mediation practiced in tribunals and other ADR institutions, its associations with the court system is a recent development. The slow uptake of court-connected mediation is attributed to the lack of express provisions relating to these practices (Chapter 1). The only provision providing for the mediation practice is the PD issued in 2010 where the judges may ask the parties whether they would like to use mediation either by judge mediators or trained mediators sourced from the MMC or any other private mediators chosen by the parties themselves (Chapter 1). This practice of voluntary mediation continues until now with the introduction of the *Rules of Court 2012* which further the developments of court-connected mediation in Malaysia.

Finally, the role of government in taking the lead to develop the ADR framework is obvious in the US, UK and Australia while in Malaysia the pressure mainly comes from the court themselves to overcome the backlog. The next chapter will discuss the theoretical aspects and concepts of mediation, justice theories and the change management theories which form the backbone of this study.

CHAPTER 3

THE THEORETICAL AND CONCEPTUAL FRAMEWORK

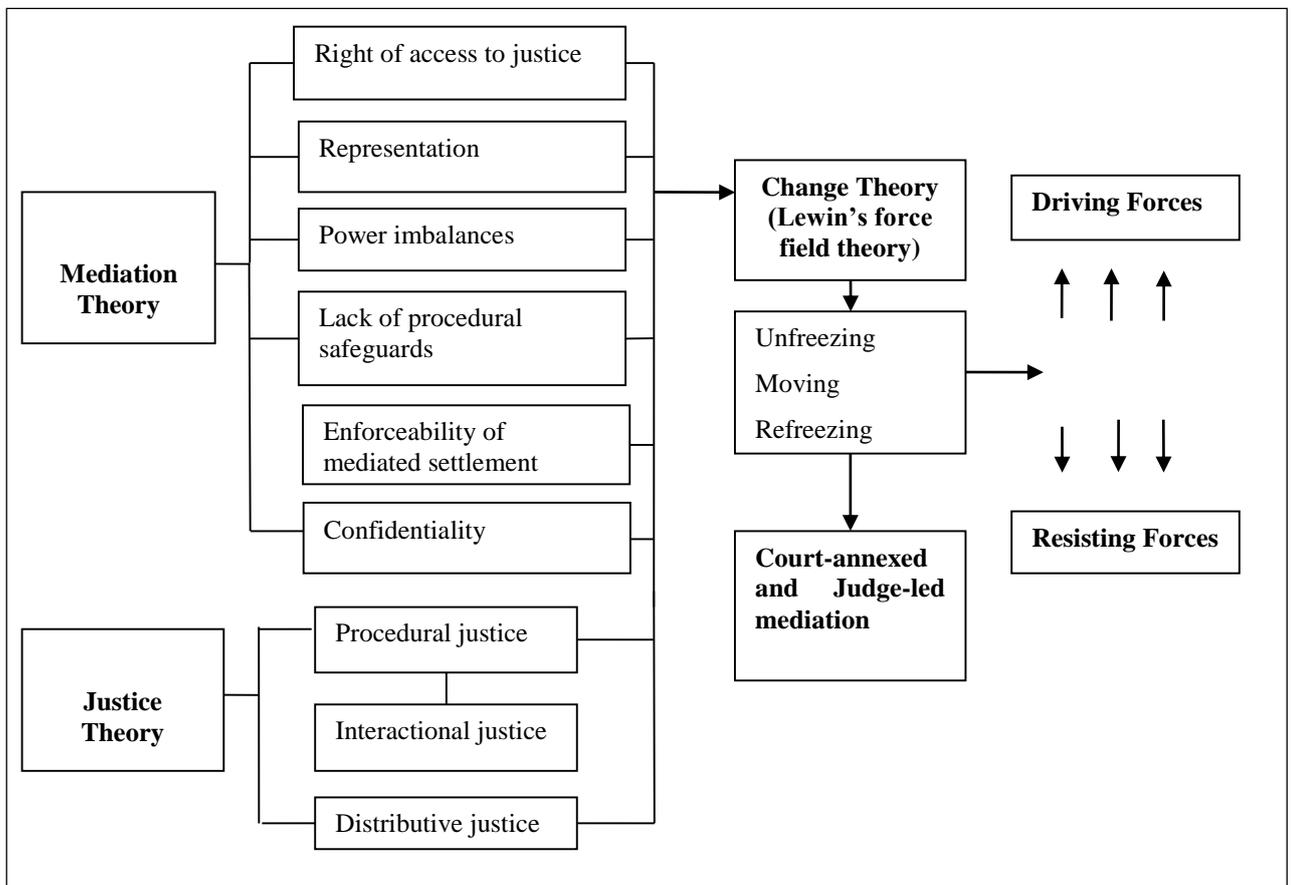
3.0 Introduction

This research is informed by three theories: mediation theory, justice theory and change theory. As discussed in Chapter 2, there has been a move to use mediation in court processes in many jurisdictions particularly, in the US, UK, Australia and Malaysia, as a solution to the increasing backlog of civil cases. However, mediation should not be considered the panacea for all the ills of litigation as it poses some tough challenges when compared to the existing processes of courtroom litigation. This chapter first turns to the literature to examine the theories and assumptions behind the use of mediation which have given rise to some debate about key issues. Some of these include the disputants' right of access to justice, right of representation in mediation, power imbalances, lack of procedural safeguards, enforceability of mediated settlement agreements, and, the confidentiality and private nature of mediation which prevents creating and using precedents. As these concerns go to the heart of justice, the chapter then turns to consider justice theories and the extent to which mediation can be said to afford justice to disputants. Two of the key challenges for court-connected mediation are whether it can afford disputants the same level of justice as they would expect in formal litigation proceedings and, if this can be overcome, whether it can be used in Malaysia in civil cases. The chapter then moves to a consideration of the change management literature as a framework for understanding the polemic and dynamic concepts of change, the need for change, and the forces driving and resisting change using Lewin's force field theory.

3.1 The Conceptual Framework

The key themes underpinning the conceptual framework for this research as discussed above comprising of theories of mediation, justice and change management are depicted in figure 3.1 and discussed below.

Figure 3.1: Conceptual Framework



3.2 Mediation Theory

Chapter 2 described mediation as part of the facilitative processes of ADR using NADRAC's (1997) definition. Generally mediation has been defined as a dispute resolution process where parties agree to voluntarily refer their disputes to an independent third party acting as a facilitator who encourages the parties to come to their own resolution. For instance, MacFarlane (1997) defined mediation as a process that is overseen by a non-partisan third-party, the mediator, whose authority rests on the consent of the disputing parties. Kressel and Pruitt (1985) defined mediation as the assistance by a third party, who has no authority to dictate an agreement, to two or more conflicting parties. While Moore's (2003) definition of mediation emphasised the third party's impartiality and neutrality in facilitating communication and negotiations between the disputing parties, Noone (1996) observed that mediation in essence requires an intervention of an experienced, independent and trusted third party

to help parties to settle their conflict. Similarly, Street (1994) described it as a concept that focuses on the resolution of disputes through consensus. What is common to these definitions is that the third party does not impose a solution on the disputants to end the dispute.

Over the years many definitions of mediation have been put forward, and many of these purport to prescribe the process of mediation as conducted by the mediator. Moffitt (2005) argued that the host of definitions given to mediation has not been helpful in identifying its boundaries. He found that the definitions are either prescriptive or they conceal an assertion based on empirical research. He gives as examples statements that: 'Mediators are impartial'; 'Mediators facilitate communication and negotiation'; and, 'Mediators never evaluate or provide legal advice'. Moffitt argued that those who assert that 'Mediators never do Z' are not saying, 'Those who hold themselves out to be mediators never engage in practice Z, according to my research' (Moffitt 2005, pp 70-1). He concluded that those who offer prescriptive definitions merely put forward their own understanding (Moffitt 2005). Others have expressed a similar view. For instance, Folberg & Taylor (1984) argued that mediation falls along a spectrum of meanings which depend on the specific nature of the dispute, the parties who are in dispute, the mediator and the mediation setting. This was echoed years later by Spencer and Brogan (2006) who noted that mediation is a fluid concept and far from settled.

Despite the difficulties in crafting a definition, the two most accepted and influential definitions in Australia and the US, are respectively those by NADRAC (2003) and Folberg and Taylor (1984):

Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the

process of mediation whereby resolution is attempted (NADRAC 2003).

Mediation can be defined as the process by which the participants together with the assistance of a neutral person or persons, systematically isolates dispute issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs (Folberg & Taylor 1984).

These definitions assume a theory of mediation based on a process which is primarily a facilitative and non-evaluative form of supervised negotiations, where the third party imposes no decision, but encourages the parties to agree on their own solution. A number of other aspects of the theory of mediation have given it strong support as a dispute settlement mechanism particularly in place of adversarial litigation explain how mediation has spread worldwide and continues to attract attention (Drummond 2005). In addition to its benefits there are criticisms of mediation in the literature. These benefits and disadvantages are considered now before moving to a discussion of whether mediation can be considered to afford justice.

3.2.1 The advantages of mediation

As can be seen from the definitions of mediation above, its advantages are perceived to lie in the involvement of a third party (mediator) in assisting the disputants to achieve a mutual settlement. The essence of the mediators' role is their non-alignment with either party in acting as a neutral intermediary to facilitate progress towards settlement (Roberts & Palmer 2005; Street 2003). Although mediation is primarily used to benefit the parties and the courts in resolving disputes quickly, it may also assist in reviewing and narrowing the issues for trial if it fails (Aibinu et al. 2010). In addition, the disputants can develop a better appreciation of their own case and that of their opponents (Zakaria 2010). Some of the notable major benefits of mediation are discussed below.

Confidentiality and privilege

One advantage of mediation for parties is its confidentiality. It allows for a restricted sharing with the mediator of the party's case including the revealing of embarrassing and potentially damaging information. This is done on the basis that nothing is to be disclosed to the other party without express authorisation, the confidential receipt of such information from both sides can help the mediator to facilitate a mutual settlement (Armstrong 2007). This setting is conducive for parties to make concessions without concerns over its divulgence should mediation fail (Bingham 2008; Parke & Bristow 2001). The negotiations for a settlement in mediation are wholly on the basis of without prejudice (Street 2003). The law governing settlement privilege is given statutory recognition in almost all jurisdictions. Particularly, *s. 23 of the Malaysian Evidence Act 1950* envisages that no evidence is relevant in civil cases, if it is made upon an express condition or by necessary implication or inference that parties in disputes agreed that such evidence shall not be given. Consequently, it is generally assumed that any protection applicable to settlement negotiations under the common law and existing rules regarding compromise and settlement should be similarly applied to protect the confidential communications in mediation which is vital to its effectiveness (Brown 1991). Nevertheless, in some circumstances, confidentiality itself may work injustices that would undermine the integrity and viability of mediation (Macturk 1995). This issue is discussed in the section which deals with the argument against mediation.

Party Empowerment and self-determination

Mediation is also considered beneficial as it is said to empower the parties compared with other forms of dispute resolution. It allows parties a greater involvement and engagement in the process and in exploring various possibilities in the outcomes. It seeks to restore the central decision-making role to the disputants whose problem it is (Loong Thye & Boon Leng 2003). According to Sturrock (2010), the parties' control in mediation is about the democratisation of justice. The extent of the parties' control includes the power to choose their mediator, the procedures that will apply, the venue, and, the means to ensure confidentiality (Barbee 2007). It is argued that the greater

control that the parties have over their dispute and the greater participation they have in decision making leads to greater commitment to the resolution (Faulkes 1986).

Flexibility and informality

It is also argued that the outcome of mediation is durable and flexible because it accords to the needs of the parties as it arises from their own efforts, freely and without coercion (Nicholson 1991). As the agreement reached is based on mutual consent in an informal and friendlier environment, it helps to preserve and improve the parties' relationships (Sussman 2009).

This is particularly so for those people who prefer a less intimidating process where they have some freedom and opportunity to voice their concerns and those who want their disputes to be resolved by them informally without compromising their relationship (Fiadjoe 2004).

3.2.2 The Arguments against mediation

While the rhetoric behind mediation is widely acknowledged and strongly supported by a number of distinguished mediation scholars, judges and mediation practitioners, there are important criticisms of mediation which should be considered to provide a more comprehensive account of the theory and its assumptions. The criticisms suggest that there are concerns about fairness including violating the right of access to justice, issues of representation, inadequacies in addressing inequalities between disputants, lack of procedural safeguards, confidentiality, lack of precedent, the phenomenon of the repeat user, and mediation as a form of second class justice. These issues will now be discussed.

Denial of Access to Justice

It has been argued that mandating or compulsory mediation denies parties' right of access to justice which means the right to have a dispute resolved by a court (Stein 1998). On the other hand, it has also been argued that ordering parties to mediate does not prevent them the right to a trial as it merely imposes a short delay to allow an opportunity for settlement (Lightman 2007). At the same time, it could have a far

reaching effect as it could direct and put parties together to the table of negotiation and often ending in a result more favourable than a trial (Abrams 2000). Compulsory mediation creates a safe environment where neither party has to suggest it since a proposal for mediation may be interpreted as a sign of weakness by an opponent (Bergin 2007). Mandating mediation for parties who are unrepresented may pose some challenge to justice issues due to the imbalance of power (McAdoo 2007) which is discussed in a later section at p 64.

Whilst it has been recognised by some legal scholars that disputants (including their lawyers) will only consider mediation if it is imposed on them by mandating it, some others believe that its effectiveness and legitimacy will depend on their consensual agreement to participate in it in good faith (Mack 2005). For instance, in some jurisdictions, compulsory mediation or referral to mediation by the court has been criticised as being done in the absence of the consent of the disputants. Disputants may feel coerced to settle out of fear of later sanctions from the court and could lead to dissatisfaction with the outcome (Drummond 2005). Further, if mediation is forced on unwilling parties, it may only result in additional costs and delay in the court's determination of the dispute which demeans its perceived effectiveness [Dyson LJ in *Halsey v Milton Keynes General NHS Trust* (2004) EWCA (civ) 579].

Compulsory mediation might also affect the parties' right to commence an action in court (Boulle & Nesic 2001). This could happen if parties are ordered to mediate prior to the lodgement of their cases in court. For instance, in jurisdictions where there is no power to suspend the running of a limitation period while mediation is being attempted or still on going, this might affect the parties' rights and remedies through their failure to initiate judicial proceedings before they are barred. Strategically, it may be good for the defendant who is an unwilling party to the mediation to participate in it as ordered only to delay the initiation of court proceedings by the plaintiff in the hope that the limitation period expires before mediation does (Alexander 2009).

Right of representation

The impact of the lawyers' presence in mediation has been a controversial issue (Rueben 2000). Some believe that representation by a lawyer is not needed in mediation due to its informality and in allowing parties to resolve their own disputes. Others consider that such representation is needed to overcome imbalances of power such as knowledge of legal rights which is essential to the exercise of the parties' self-determination in making a fully informed decision (Agusti-Panareda 2004). Those who oppose the presence of lawyers in mediation claim that they are not helpful in resolving disputes for many reasons. One is that the presence of lawyers in the process may restrict or limit the parties' opportunities to express their views as lawyers are likely to play a dominant role (Rosenberg 1991). Another is that lawyers' legal background and training will result in an approach which is more contentious than problem-solving which may reduce the likelihood of settlement (McEwen et al. 1995). However, the disadvantages of having parties represented in mediation have to be weighed against the right to be represented in the light of concerns for fairness, particularly for parties who are in an inferior bargaining position. Without representation, parties may be coerced or misled into accepting a settlement which they may otherwise appear to be satisfied. Related to this issue is the problem of inequality of power considered next.

Inequality of power

Inequality or power imbalance may impact on justice in mediation. It exists especially where disputants have different capacities or abilities to negotiate (Spencer & Brogan 2006). The power dynamics can be attributed to, or as a result of, the difference between the parties: financial resources; degree of knowledge and negotiation skills; level of relationship with the mediator; and, personal respect and status (Carpenter & Kennedy 1988). For instance, a large corporation or institution may be able to commit more financial resources to the process in assembling evidence than an individual. Similarly, an individual with a low level of knowledge and poor negotiation skills may find it difficult to exercise self-determination than a more articulate and knowledgeable individual.

This power imbalance can distort the perceived fairness of the outcome as the powerful party has the ability to coerce or even deceive the weaker parties into agreeing with a settlement (Sternlight 2008). The impact of power dynamics or parties inequality in the playing field can also influence a weaker party into accepting a settlement out of need, ignorance or low expectations (Frey 2001). This may cause injustice as only the dominant party's needs and interests may be met. The mediators' role is also limited in addressing power imbalances as their impartiality might be compromised. The parties' power over the process and outcome is also affected if mediators actively intervene into the process (Lobel 1998). Zakaria (2010) suggests two approaches by which mediators may intervene. One is the sign them up approach and the other is the strong interventionist approach. In the former, the mediator simply informs the parties to seek independent legal advice or otherwise leave the settlement as it is. In the latter the mediator advises parties on matters which they might have overlooked in coming to their decision.

Repeat Users of Mediation

Imbalance of power between disputants in mediation can also arise from the phenomenon known as the repeat user of mediation (Thornton 1990). The repeat users of mediation who are familiar with the process may manipulate or strategically used mediation to their advantage (Brooker 2010). Thornton (1990) argued that in equal employment opportunity cases, repeat users are mostly the representatives of large corporations who gain an advantage through the knowledge and skills learned in mediation over their opponents who are generally unrepresented woman workers. The repeat users' increase familiarity and skill with mediation may contribute to their negotiating favourable resolutions than non repeat or 'one shot' players.

Lack of procedural safeguards

Whilst the flexibility of mediation in allowing parties to come to their own agreement is a key advantage, it also represents a key criticism. Its critics have argued that the relaxation of procedural safeguards and due process protections which are otherwise available to the disputants in the formal justice system could present the greatest danger of abuse (Drummond 2005). For instance, Brunet (1987) argued that mediation

lacks effective discovery procedures to require parties, who may be unwilling, to give the substantive disclosure needed to reach a just result. The discovery of information helps to equalise power imbalances as it gives the weaker party the chance to obtain more facts about the disputes that might otherwise remain in the exclusive possession of the powerful party (Delgado et al. 1985).

On the other hand, having full disclosure will not reduce the possibility of bias and prejudice. This is because unfettered disclosure may be used inappropriately by an unscrupulous opponent. This is the reason why some lawyers look at mediation process as a discovery tool rather than a settlement device (Rueben 2000). The risk of prejudice is even greater when it involves sensitive and delicate issues which require strict confidentiality. This potential of bias can be minimised by having rules of procedures and evidence that clearly address the scope of the process, exclude irrelevant, intrusive and damaging information (Delgado et al. 1985).

Another criticism of mediation is the lack of due process although not in the way the due process applies in judicial proceedings. Caucus mediation, where one party meets the mediator individually in the absence of another, is said to be inconsistent with due process and rules of natural justice (Twyford 2005). Further, the conduct of mediators in giving their views on the merits and outcomes of a case, a technique commonly used in evaluative mediation, could create an appearance of bias towards or against one party or another (Gunning 2004).

Some of the procedural safeguards in the formal court system which are not available in mediation include: a guaranteed place in the trial in which to present his or her case; the ability to present and test evidence to rebut the other disputant's case; a guarantee of procedural justice (see Section 3.7.1); a systematic review of the third party (judge); and, an official record of the reasons for the decision (Van Gramberg 2006).

Confidentiality

Where parties are of equal standing, the creativity of their solutions, for instance a confidential settlement which benefits the disputant who raised the issue but not others

who may have the same interests may also violate community or other public standards of behaviour. In other words, the confidentiality of the process can hide a particular outcome which may have caused greater public scrutiny of behaviour if it is an open and public record. For instance, companies could misuse the confidentiality feature of a mediated settlement to conceal their own bad practices and activities from the public eye under the pretext of safeguarding trade secrets or business operations (Kotz 1996). Further, in the absence of public scrutiny in private disputes, an analysis and research into the plight of disadvantaged groups becomes difficult. An example is violence against women. One issue is domestic violence and central to it is power imbalances in family disputes which are generally considered to be private matters which makes it impossible to scrutinise any wrongdoings (Imbrogno 1999). Imbrogno (1999) argued that the lack of public scrutiny and discussion of the domestic violence issues may hinder the development and vindication of battered women's legal rights.

Prevention of precedent

Although the private resolution or settlement in mediation may allow for various remedial outcomes specially tailored to the parties' needs, it creates no precedent (see Chapter 1). Thus, future disputants maybe greatly disadvantaged in the absence of a precedent which might otherwise beneficial in similarly recurring disputes (Applebey 1991). Private settlements may also affect and stifle the development of further case law (Low 2011). As mediation results in a private settlement, it implies that the only interested parties to the dispute are those participating in the process (Van Gramberg 2006). It is unlikely that the public would learn from the good or bad experiences of the disputants in previous cases. This reinforces doubts over whether justice is achieved in such confidential environment.

Enforceability of mediated settlement agreements

Settlement agreements arising out of mediation have the effect of a binding contract to the consenting parties (s 14(1) of the *Mediation Act 2012*). The issue of the enforceability of mediated agreement arises if one party reneges on its terms and the other seeks remedies for its breach. It is not so much an issue if the mediated agreement is the result of court-connected mediation as it is enforceable as a consent judgement

recorded by the court as prescribed by the PD. Problems may arise when the mediated settlement agreement was as a result of the mediation process which was conducted outside the general court system. Here, an action has to be instituted for breach of normal contract (Boulle & Nesic 2001). One potential harm which may frustrate the parties of the enforceability of mediated settlement as a contract is when its validity is disputed. This requires the parties to the mediated settlement to give some accounts of what occurred in the mediation to prove their mutual understandings (Lee & Giesler 1998). This becomes a hindrance to the process due to the strict rules of confidentiality. It may not be a problem to all across jurisdictions particularly in Australia, where the settlement privilege no longer exists when a settlement is reached [see s. 131 of the *Evidence Act 1995 (Cth)*]. In some jurisdictions, the issue of enforceability of mediated settlement as a contract is still vexed: whether it requires statutory mechanism for enforcement; whether it requires rectification and review; and on the choice of court and the application of relevant law (Alexander 2009). The *Mediation Act 2012* has no statutory mechanism to enforce a mediated settlement agreement.

Without a third party decision maker who can decide on what is a fair outcome, the agreed outcome in mediation may depart substantially from community norms (NADRAC 1997). This is what Zakaria (2010) termed as ‘out of range settlements’. Most seriously, some of the essential requirements of civil justice such as openness, transparency and accountability are simply lacking in mediation which is why it is generally considered as second class justice (Hardy 2008).

This section examined the literature on the perceived benefits and drawbacks of mediation as it is applied in a court setting. Despite these drawbacks, mediation is a popular addition to the formal legal system and is widely used across jurisdictions. The next section moves to consider the sorts of models of mediation in use by courts, private and public agencies and by judges and other third parties.

3.3 Different types (models) of mediation

How the actual process of mediation is governed depends on which of a range of approaches is taken by the mediator (Spiller 2002). The various models of mediation

provide a framework for the mediators to consider the appropriateness of their use to suit different situations or disputes (Brooker & Wilkinson 2010). Generally, the most commonly recognised mediation models drawn from the review of the literature are facilitative, evaluative and transformative. In Australia particularly, two other mediation models are recognised namely narrative and settlement mediation (Aibinu et al. 2010). All of the models make assumptions about the purpose of mediation and their use by individual mediators may not always recognise that they are represent various theories of mediation.

Facilitative mediation

Facilitative mediation is described as the ‘purest form’ of the technique because the mediator facilitates communication and encourages dispute resolution through a joint problem-solving approach which satisfies the needs and interests of both parties (Menkel-Meadow 1993). The definition of facilitation provided by NADRAC (2003) and discussed in Section 3.2 above, suggests that the mediator adopts a generally passive role which is similar to that of chairing a meeting. As the parties create their own solution, they generally have the overall control in the process (Boulle & Nestic 2001). This model is said to be adopted in most jurisdiction within Australia as it is often recommended and provided in the mediators’ guidelines (Sourdin 2008).

Evaluative mediation

In evaluative mediation, the role of the mediator is to evaluate and advise the parties of their legal rights and duties aimed at persuading them to negotiate to reach a settlement on the basis of the mediator’s evaluation (Astor & Chinkin 2002). Although the mediation settlement is generally within the range as determined by the mediator based on the assessment of the parties’ rights and duties if the matter were to go to court, the terms of settlement must be agreed by the parties (Aibinu et al. 2010). An evaluative mediator assesses the strengths and weaknesses of the parties’ cases and he or she can even urge or push them to settle or to accept a settlement proposal (Riskin 2003). Boulle et al. (1998) claimed that the mediators use their own expertise in evaluative mediation to provide additional information to persuade the parties to settle.

Currie (2004) suggests the use of professional expertise by the mediator may lead to certain amount of bias.

Debates over Facilitative and Evaluative techniques

The appropriateness and the effectiveness of these two techniques of mediation (facilitative and evaluative) have generated debates. The facilitative mediators argue that evaluative mediation is an oxymoron because mediation should inherently be facilitative while the evaluative mediators argued that facilitative mediation is too passive, inefficient and unrealistic (Currie 2004). According to Kallipetis & Ruttle (2006), judges and lawyer mediators are strongly inclined to apply evaluative mediation as this is the way they are traditionally trained to resolve disputes. The authors explained that these mediators consider their role as advisors to the disputants on the likely outcome if the case were to be decided by the court.

Depending on which technique is used, the mediators assume different responsibilities and expectations from the parties. Evaluative mediators take the position that the parties need their guidance to reach a settlement through their assessment of the case according to the established rules of law, the practice in the industry, or other professional standards. In contrast, facilitative mediators assume that either party could freely obtain their own substantive information during the negotiation process. Further, they see their role as limited to improving communication between the parties to enable them to make their own decisions (Currie 2004; Riskin 1996).

The mediator's assessment on the likely outcome of the parties' case which invariably favours one side over the other may breach the concept of neutrality. This is because what the mediator thought would be the likely outcome of a trial from his or her evaluation of the case is the mediator's self imposed view (Kovach & Love 1996). Kovach and Love (1996) claim that evaluative mediation endangers the impartiality of the mediator and perpetuates an adversarial culture. It will only discourage understanding and cause a rapid disintegration between the parties as they try to persuade the mediator of their positions through confrontational and argumentative approaches. According to Gumbiner (1995), evaluative opinions especially when

expressed after private sessions can have the effect of polarising the parties and making settlement less likely.

Some commentators, however, view this issue differently in that there is no blanket principle that a mediator should not perform an evaluative role as evaluation is sometimes necessary in any mediation. For some the issue is when should the mediator communicate to the parties about the evaluations and whether it should be either in a separate or joint sessions (Kallipetis & Ruttle 2006). McDermott and Obar (2004) further argued, evaluative approaches such as reality testing or assessing strengths and weaknesses are often used in the shadow of facilitative mediation which make the categorisation of mediator techniques even more complicated. In the context of cross cultural disputes, for instance, the roles of mediators are located along a continuum wherein they can be very passive at the beginning before becoming increasingly active and interventionist (Gulliver 1979).

In order to reconcile the inconsistencies which arise from the dual evaluative and facilitative dimensions of a mediator's approach, Riskin (2003) used the terms 'directive-elicitive' instead in his 'grid approach' which reflects a wider range of behaviour which includes directing the process or the participants, towards a particular procedure, or perspective or outcome, or alternatively eliciting the parties' perspective and preferences in problem-solving.

Transformative mediation

Under this model, the mediator's role is to create an environment where parties can engage in a transformative dialogue through which they can feel that they are empowered to articulate their own feeling, needs and interests (Noce 2008). The mediator in transformative mediation is interested to see whether the parties have gained some sense of empowerment to resolve their own disputes and recognised each other's standpoint (Noll 2001). While the 'empowerment effect' supports the parties in coming up with their own analysis of the dispute and decision making, the 'recognition effect' enhances their willingness and ability to see things from a different perspective (Bush 1996). Some commentators suggest that this approach to mediation

neglects the most important element of the process, as its success is measured by whether or not the relationships of the parties are enhanced or restored and not by whether the disputes are resolved (Kallipetis & Ruttle 2006).

Narrative mediation

Narrative mediation encourages the parties to look at their dispute as a 'story'. In a narrative process the mediator's role is to help the parties to reconstruct their stories into 'more workable shared narratives' (Jarret 2009). This approach is said to be effective in disputes which involve threats to social and cultural values, shared beliefs, and social identity (Winslade & Monk 2000). According to Waldman (1998) both narrative and transformative mediation can function as therapeutic especially in disputes stemming from the break-up of or misunderstandings in relationships, perhaps most relevant in family and business partnership disputes (Oberman 2005).

The literature on the categories of mediation also points towards the existence of different models and diverse terminologies. For instance, the mediation model described by Alexander (2008) as 'contemporary meta-models' which includes, expert advisory mediation, settlement mediation, wise counsel mediation, tradition-based mediation, facilitative mediation and transformative mediation. Her description of meta-model of mediation does not include evaluative mediation.

From the above discussion, clearly, the complexity suggests that mediators need to have some understanding of the issues and the parties' expectations in order to be able to choose the appropriate model or to advise the parties on which model suits their purposes best. The next section considers the kinds of mediation that exist and which are practiced alongside formal court systems.

3.4 Mediation and the courts

The relationship between mediation and the courts has been considered by Buth (2009) who noted that practices and terminology vary. The author suggests the term 'court-connected' mediation as a collective term for the many variants of mediation linked to courts. In the US, court-annexed mediation was developed through the establishment

of Neighborhood Justice Centers in early 1978 which served as models for the referral of cases for mediation by the courts (McGillis 1979). As mentioned earlier (see Section 2.4 of Chapter 2), the *Civil Justice Reform Act of 1990* and the *Dispute Resolution Act of 1998* establish ADR as part of the US civil justice system. Through these Acts, the concept of the multi-door courthouse was introduced offering an array of options including mediation along with other methods of dispute resolution (Kessler & Finkelstein 1987-1988). In the UK, a pilot program on court-annexed mediation was launched at the Central London County Court (CLCC) in 1996 and later became a permanent feature of the court process. At first, the CLCC program was purely voluntarily before it changed the policy to ‘automatic referral’ to mediation (Genn 1999). Research on the success of court-annexed mediation schemes in Birmingham and Exeter had indicated differing results: the voluntary mediation scheme in Birmingham County Court which was offered between 1999 – 2004 had a 60% settlement rate whereas in the Exeter County Court the settlement rate was only 30% when mediation was directed or ordered by the court (Genn et al. 2007). Based on this evaluation, Genn (2007) claimed that when more pressure was put on parties to mediate settlement is less likely.

Zalar (2004a) pointed to some of the benefits of installing mediation through court-annexed mediation: it provides access to justice on the same level as the formal court system; and it ensures equal protection of standards of fairness of outcomes and processes. Additionally, according to Drummond (2005) the relationship between the civil courts and mediation could achieve better and more genuine access to justice if minimal safeguards are provided and the fundamental values of the mediation is preserved. Significantly, court-connected mediation programs aim to achieve certain objectives which include: to produce fair and just outcomes, to meet a party’s satisfaction, and to preserve a party’s respect for and confidence in the justice system (Astor 2001).

As noted in Chapter 1, under the Practice Direction No. 5 of 2010 (PD) in Malaysia, there are two types of mediation offered namely Judge-led mediation and mediation by a parties-agreed non-judge mediator. In mediation by a parties-agreed non-judge

mediator, parties may opt for a private mediator of their choice or certified mediators from the MMC. As a measure to prevent further delays, one month is given from the date the case is referred for the parties to report to the court on the progress of the mediation or on the outcome if the mediation process has been finalised (s 6.3 (a) of the PD). It is the duty of the judge to ensure that the mediation process is completed within three months of the date of referral. No further extension is given except with the leave of the court (s 6.3 (c) of the PD). This type of referral to private mediators by the court can be included under the definition of court-annexed mediation which is described in the next section.

3.4.1 Court-annexed mediation

Court-annexed mediation is defined as one where judges make orders that the parties attend mediation before a trained court registrar or before third parties, such as private mediation practitioners, agreed upon by the disputing parties and formally appointed by the District Registrar (Wood 2004). This is what Buth (2009) classified as court-referred mediation. Court-annexed mediation in justice system models may be court sponsored where mediation is conducted within the court system (for instance by a court registrar) or one conducted independently by private mediators on the court's order. In either case, it has strong referral ties to the court (Roehl & Cook 1989; Sourdin 2008; Zalar 2004a).

Court referred mediation

As mentioned above, there are two kinds of referral which the court can make for cases to go to mediation. One way of referral is to the registrars or mediators employed within the court (internal mediators). Second, the referral to external mediators who can be legal practitioners or lists of mediators registered with the mediation centres. For instance, Order 29.2 of the *Rules of the Supreme Court 1971* (Western Australia) clearly defines courts referral of mediation to registrars or external mediators appointed by the court. While there is no fee charged for the in-court mediation (court-sponsored mediation), mediation by external mediators is subject to their prescribed fees (for example the MMC has their own prescribed fees for mediators in addition to administrative and rental charges).

- ***Mediation by Registrars***

Mediation by the courts' registrar or mediators employed by the court generally conducted within the court system. The Supreme Court of New South Wales has had court-annexed mediation conducted by registrars since 1996 but in some circumstances, where appropriate, a judge mediates (Spigelman 2000). Mediation in the Kuala Lumpur Court Mediation Centre (KLCMC) utilises the judges as mediators (MLTIC 2011a).

- ***Mediation by external mediators***

Mediation by the external mediators is conducted independently from the court system although referral is made upon the court's direction. In Malaysia, this is the type of referral by the court provided and issued by the PD in 2010. However, this practice is not new as some jurisdictions in Malaysia were referring cases for mediation to the legal practitioners registered with MMC (see Chapter 1) even before the PD was issued. Through the PD, referral of cases to external mediators is now given formal recognition although for some reasons, it receives minimal attention (see Section 2.7.1 of Chapter 2). In some courts in Australia, judges are empowered to refer matters to mediators with or without the consent of the parties (North 2005) [see Section 2.6 of Chapter 2]. It is interesting to note the reminder given by Callinan (2006) that judges or courts must not be seen as outsourcing agencies like case administrators through sending the parties away to have their disputes resolved.

The other mode of mediation is judge-led mediation.

3.4.2 Judge-led mediation

Judge-led mediation, as the name suggests, refers to a judge taking on the role of mediator. It is sometimes referred to as 'judicial mediation' but this term has also been used to generally describe court-ordered mediations (as opposed to voluntary, consensual mediations) as well as where retired judges are retained as mediators (NADRAC 2009a). In Malaysia, the terms 'judicial settlement' (Koshy 2010b) and 'court-assisted mediation' (the Star Online February 25, 2011) were sometimes used to refer to judge-led mediation.

It is, however, unclear what the 'mediation' actually comprises in the judge-led mediation concept since there are no universal standards for the technique. Thus the style of mediation used could be facilitative, evaluative, or may be more interventionist or directive approaches; the process could also be either formal or informal. What appears to be certain is that it is a 'non-adjudicative' technique devoid of traditional trial procedures used by judges within the formal judicial system (Landerkin & Pirie 2003). Winkler (2007) claimed that the judge usually provide evaluative mediation of case which the disputants could use in arriving at a settlement. The use of a facilitative approach causes some discomfort as judges see their role as decision makers. Judges with a lack of skills and experiences in mediation have found that they are still struggling to find a proper balance so as not to usurp the role of judicial mediator (Winkler 2007).

Mediation in the Kuala Lumpur Court Mediation Centre (KLCMC) is only done at its centre (see Section 2.7.1 of Chapter 2). This has recently replaced the old practice of judges conducting mediation in chambers. It is predicted that this change in the place of mediation from a judge's chambers to the centre (KLCMC) will also change the disputants' perception of mediation (MLTIC 2011a). Zalar (2004a) reported that when mediation takes place in the court, parties are more willing to participate. He further claimed that when judges mediate in court, parties have greater satisfaction with their own decisions and with the courts generally.

Judge-led mediation gives the disputants the feeling that they have received their day in court and achieved a fair and reasonable result under the circumstances (Galanter 1985). French (2009) claimed that disputants may take mediation process more seriously when there is judicial involvement. This is because of the authority and respect that the judges command. He added, this statement however, reflects a misunderstanding on the concept of mediation where the formal authority of a judge plays no function in it. A research on judge-mediator conducted in US and Canada had indicated that a high percentage of lawyers believe judicial involvement improves the chances of settlement of disputes (Spencer 2006).

Judges-mediators are becoming more apparent in many jurisdictions especially in the US. It first surfaced formally in the form of ‘settlement conferences’ where judges participated in disputes settlement in the 1920s (Galanter 1985). In 1983, Rule 16 of the *Federal Rules of Civil Procedure* was amended to provide a specific authority for judges to discuss settlement with disputants as some had been reluctant because of uncertainty of their authority. This rule validates what many judges had already been doing in facilitating disputes settlement (Baer 2001). The increase of judicial participation in negotiation settlements has transformed the traditional role of common law judges into a managerial role supervising the development of the case through informal discussion (Resnik 1982). Resnik (2000) argued that the ‘blurring role’ played by judges in reorienting and redefining their traditional judicial roles by adding mediation is purely motivated by, and in response to, increasing caseloads. More judicial interventions may result in quick settlements and lawyers seem to approve the practice as judges do have negotiation skills (Galanter & Cahill 1994).

In order to see whether mediation practice in court has impacted on the backlogs or pending cases in court or tribunal settings, it is imperative to analyse the rate of settlements both in Malaysia and in other jurisdictions.

3.5 Settlement Rates in Mediation

There are significant benefits when mediation is used in courts and tribunals as a means of disputes resolution. In some studies on mediation, the settlement rate is the common indicator measuring the success of mediation (Mack 2003). In the early court-annexed mediation schemes in Victoria (the Spring Offensive), the settlement rates was over 50 per cent for cases selected for mediation in 1992 (Bartlett 1993). The Dispute Settlement Centre of Victoria (DSCV) reported a settlement rate of 84% for mediation conducted in 2005-2006 (Department of Justice 2006). More recently, the Federal Court of Australia in its 2006/2007 Annual Report noted that the settlement rates of cases referred to mediation since the commencement of the program in 1987 has averaged a 55% success rate (Federal Court 2007). An evaluation of the Settlement Scheme in the New South Wales, an initiative of the Law Society, NSW recorded a 69% success rate of mediation cases (Sourdin & Matruglio 2002).

Research on small claims mediation in Exeter County Court's free scheme between December 2003 and February 2004, showed the settlement of more than half of small claims cases referred to mediation and 90% of the users found that they had a good experience in using mediation and were prepared to use it again (Fleming 2004b). Another study in England and Wales conducted by the Centre for Effective Dispute Resolution (CEDR) found that mediators in commercial mediations claimed approximately 73% of their cases settled on the day, with another 20% settling shortly afterward, with an aggregate settlement rate of 93% (Mackie 2006).

In Malaysia, there has been no formal study to measure the success of mediation except for the records of statistics kept and maintained by the courts on the number of cases disposed by way of mediation. However, a recent conference paper on the matter reveals that the courts in Sabah and Sarawak have settled 456 cases by way of judge-led mediation since the practice commenced in 2007. The statistics on the number of mediated settlement for the courts in Sabah and Sarawak from 2007 until 2010 is shown in Table 3.1. For the West Malaysia courts, mediation by judge mediators was initially practiced in motor vehicles accident cases especially in Sessions Courts from 2009 (Zakaria 2010). The success rate as at 14 February 2010 was 45% for both Shah Alam and Kuala Lumpur Sessions Courts and 80% for Kota Baru's Sessions Court (Koshy 2010b). As mediation has become part of the Malaysian judicial system, it is now practiced at all levels of courts including the Federal Court and Court of Appeal. For the year 2011, the Federal Court had mediated two cases while the Court of Appeal had settled 13 cases by way of mediation. For the High Courts and the subordinate courts, there were 2,276 cases and 4,347 respectively mediated during the same year with a success rate of 50% (Zakaria 2012).

Table 3.1: Cases settled by Judge-led mediation in Sabah and Sarawak’s courts from 2007 until 2010

YEARS	COURTS		
	SABAH	SARAWAK	TOTAL
2007	59	5	64
2008	30	13	43
2009	37	137	174
2010	97	78	175
TOTAL	223	233	456

Source: Adapted from a conference paper, ‘Court-Annexed Mediation’ by Justice David Wong Dak Wah (Dak Wah 2011)

While mediation within the courts has been promoted for its ability to reduce caseload, it is also subject to criticisms. The next section discusses some of the criticisms levelled specifically at court-connected mediation.

3.6 Criticisms against court-connected mediation

The discussion under this topic will cover the criticisms of both court-annexed and judge-led mediation.

3.6.1 Dilemmas of court-annexed mediation

Court-annexed mediation has its own downside. Rundle (2007) argued that the aim of court-annexed mediation from the legal perspective is more towards institutional efficiency particularly in reducing case backlogs rather than parties’ satisfaction and just outcomes through creative problem-solving. In other words, court-annexed mediation has a tendency to be settlement oriented. For instance, there is evidence of a preoccupation with settlement rates in the Supreme Court of Tasmania, as the success of court-annexed mediation was measured by the number of mediations held and the number of cases resulted in mediated settlement (Cox 2004). An overzealous move to see the success of mediation through high rates of settlement may diminish mediation attributes that emphasise on the needs and interests of the disputants (Rundle 2007).

Shaw (1989) argued that mediation within court sponsored or annexed programs has become more like case evaluation or advisory settlement which seeks to investigate

facts or determine relative liability instead of identifying and exploring the underlying interests, needs and constraints of both parties. Referral to court-annexed mediation can turn out to be less like alternative process intended by its proponent (Senft & Savage 2003). Astor (2001) identified a potential danger that mediation will be distorted by its close proximity to the court. The court may have influence over the process in court referred cases and the parties may feel constrained by the framework of the law and procedural rules which limit the boundaries of their negotiations. In a study to highlight the importance of preserving the values of mediation in court-annexed mediation in Florida, it was found that the institutionalisation leads to the assimilation of authority and formality of the court to the mediation program (Drummond 2005).

As discussed in Section 3.4.1 above, two kinds of referral are generally practiced in court-annexed mediation: referral to registrar or internal mediators employed by the court and referral to external mediators who are generally private legal practitioners or pool of mediators (who are lawyers themselves) listed or registered under the mediation centres. As mediation by the registrars or in-court employed mediators is basically from within the court itself and judge-led mediation also falls under the same category, the effect of the discussion on the criticism of judge-led mediation will also apply to the courts registrar.

The question whether or not judges should act as mediators has led to a debate amongst scholars. Lawyers too are susceptible to the same criticisms due to their different role as advisors and counsellors acting in their clients' best interest as opposed to the role of the neutral third party in mediation. Some of the criticisms made against lawyer-mediators are discussed next.

- ***The criticism of lawyers as mediators***

As explained above, the courts referral to external mediators, in the Malaysian context means courts' referral for mediation to legal practitioners or lawyers. One main criticism of non-judge mediators (lawyers) concerns their impartiality (Frey 2001). According to Frey (2001), there are two explanations of how lawyers can be said to be

less than impartial. Firstly, as parties in mediation are free to select their own mediators, there may be an issue of favouritism in situation where one party knows the mediator better than the other, particularly when parties have established a relationship with the mediator from previous mediation. Secondly, the perception of bias can be easily targeted at lawyers who act as mediators because of their general contact with the other lawyers in the same profession. These other lawyers might have represented their clients in the mediation session.

The lawyer-mediator's role poses a challenge to lawyers in their transition as advocates for a single party to a neutral and independent mediator who helps both parties to achieve settlement that serve their needs and interests equally (Cukier 2010). The author argues that as mediation is being commercialised, the tendency for lawyer-mediators to commit breaches of ethical guidelines is increasingly likely. There is also a possible risk of abuse where the lawyer-mediator's prior knowledge of the privilege communication (lawyer-client relationship), might be used in a manner adverse to the party giving that information to a lawyer turned mediator (Riskin & Westbrook 1997).

Judges acting in the capacity of mediators have been criticised due to the role of a judge as an adjudicator and not a facilitator. The next section looks into some of the arguments against judge-led mediation.

3.6.2 Dilemmas of judge-led mediation

The main concern in the literature of judge-led mediation is that judges might be too forceful in their dealings with parties and might rely too much on their judicial authority to bring the parties to an agreement. Judges may find it difficult to 'change hats' to become more like facilitators in resolving disputes than being the decision makers (Zalar 2004b). On the other hand, the disputants may experience coercion as they may lose control of their dispute through the judges asserting the position of decision-makers. This is in conflict with the core principle of mediation (Roberts 1988).

Some writers are very outspoken in their criticisms of the undesirable aspects of judge-led mediation. These include Mohamed Abdullah (2008) who claimed that judges might be motivated to produce settlements to overcome caseload pressure by employing 'arm twisting' tactics under the cloak of mediation. He further stressed that because of their traditional adjudication skills and directives style, judges would make the mediation process no different to litigation. This has led to arguments over how far judges can go in expressing their views without creating an appearance of bias or possible accusations of favoritism (NADRAC 2009b). Due to the concern over the competency of judges as mediators, Alfini (1999) suggested that they should undergo training to become real mediators.

Schuck (1986) argued that the active role played by the judge to affect settlement can pose risks to justice in three circumstances: judicial overreaching, judicial overcommitment and procedural unfairness. By judicial overreaching, he means that although the judge in general cannot punish lawyers who are disinclined to promote a settlement, the danger remains that lawyers interpret judicial pronouncements and actions as 'thinly-veiled coercion'. His argument is based on the absence of a consensus as to what constitutes judicial impropriety; the discussions in the mediation process are often highly emotional and perceptions are based on interpretations; and, the unavailability of transcripts or records of the proceedings. A second risk to justice may be a tendency for judges to be over-committed to an outcome with finality which may compromise the needs of the parties over a rush settlement. Thirdly, there is risk to justice in the informality and the confidentiality of mediation which may threaten procedural fairness. This includes among others the parties' participation in the process, the treatment afforded to them and the openness of the process. For instance when the judge meets privately with one of the parties, in a caucus session, due process is wanting as the other party is unable to rebut any allegations made in his or her absence (Schuck 1986).

More recently the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), in a critical review of judge-led mediation recommended that judges should not mediate except under exceptional circumstances and that their

mediation role should be circumscribed by a number of conditions, including having completed accredited training and not hearing the matter subsequently (NADRAC 2009b). In response, the Chief Justice of Victoria, Marilyn Warren stated that if judges were to mediate then care must be taken to manage their involvement including having a court officer present in the mediation session; having proceedings recorded; having lawyers present in private meetings with the judge mediator; and otherwise ensuring that parties had sufficient alternatives. She suggested that sufficient alternatives to judge-led mediation could be ‘judicial case or settlement conferences, judicial early neutral evaluation and summary trials’ (Warren 2010). These may provide a way for judges to play an ADR role without actually mediating.

In this context, central to the concepts of justice in the adversarial system is the principle, ‘justice must not only be done, it must be seen to be done’, which is an issue for judge-mediators. This leads to discussion of justice and its theories particularly how they might apply to mediation.

3.7 Theories and concepts of justice

Whilst the expansion of mediation into the mainstream of dispute resolution may help parties to resolve their disputes in an inexpensive and speedy way, it raises a question whether it can provide processes and outcomes that could be said to be just. It is important that mediation is procedurally just but this must be balanced with speed, cost effectiveness, informality and flexibility, the assumptions and values that underpin it. Galanter (1984) expressed a mixed view about justice in dispute resolution by saying that ‘justice does not reside entirely in the realm of formal legal processes nor is it entirely absent from the world of bargaining’ (Galanter 1984, p. 275). This section commences with a discussion of general concepts of justice. It is important to understand the ideas and meanings of justice in the formal court system and how they are imported into, and embedded in, mediation practice. The presence, or absence, of justice in mediation is by reviewing relevant literature.

3.7.1 The meaning of justice

Justice is a concept with strong emotional appeal but with no precise meaning (Fox 2000). It is constructed and perceived in many different ways making it difficult to give it a definite or exact definition (Sourdin 2008; Sternlight 2008). For example, some link justice to retribution and restoration (Barsky 2007; Ife 2001) while others link it to fairness (Folberg & Taylor 1984; Gunning 2004). Boule (1996) suggests that justice is measured in the speed of the dispute resolution process, the informality of settings, the level of responsiveness of the process to the parties' needs, and the degree of accessibility afforded to them. In the formal court system the concept of justice appears in two phrases which describe two key aspects of the trial process; the first is natural justice which relates to the procedures and the second is substantive justice or the outcome of the adjudicative processes (Twyford 2005).

Justice in the formal court system generally provides a standard for the rights and duties of the disputants based on the rule of law. These ideas of justice may not fit with mediation as parties may agree on settlements according to their own needs, values and wishes ((NADRAC 1997; Sternlight 2008). In mediation the disputants rely on their own ideas of justice to seek emotionally and practically fair outcomes. This is what is termed by Nolan-Haley (1996) as 'individualised justice'. So, when justice is based on the parties' consensual agreement, its meaning is even more elusive. This is because the notions of justice vary between individuals and are shaped by many factors, including both their shared and individual values and beliefs. De Jersey (1991) argued that it would be difficult to argue that those consensual agreements reached by mediation could not be perceived as just. Such an argument, according to Van Gramberg (2006), confuses the success of mediation settlements with the disputants' perception of justice.

Justice can be considered from two different perspectives as indicated above in respect of procedural and substantive justice. A study by Thibaut and Walker (1975), describes process control as the amount of control that disputants have over the procedure (relating to procedural justice) and decision control refers to their influence over the final outcome (relating to substantive justice). Later, Tyler (1988) argued that there are

four key issues which dominate the disputants' assessments of whether the process was fair: firstly, the ability to participate in the process; secondly, the neutrality of the third party; thirdly, the level of interpersonal respect afforded to the disputants by the third party; and finally, the quality of the outcome of the dispute, which must be fair. In Tyler's assessment of fair process above, the aspect of interactional justice is included. It concerns the level of respect and dignity afforded to the disputants (Bies & Moag 1986). The relationship of procedural and interactional justice in creating the perception of justice is so close that they can function as substitute for each other (Skarlicki & Folger 1997).

What constitutes a just decision results from the interaction between elements of procedural, distributive and interactional justice (Deutsch 1985). These aspects of justice are basic human interests and a means to measure fairness and the disputants' sense of satisfaction with the outcome of dispute (Van Gramberg 2006). These elements of justice will now be discussed.

- ***Procedural Justice***

Procedural justice is the use of a fair procedure to enhance the fairness in dispute management processes and satisfaction with outcomes (Howieson 2002). It refers to the perception that the procedure through which appropriate rules are applied are fair (Tyler & Lind 2000). It has been described as having subjective and objective measures (Thibaut & Walker 1975). Subjective procedural justice refers to the disputants' personal evaluations and perceptions (Lind et al. 1990; Thibaut & Walker 1975; Tyler 1994). In contrast, objective procedural justice is based on the application of safeguards which conform to some normative standards of justice (Lind & Tyler 1988). These include, firstly, the right to be informed in sufficient details of the nature of the claim (McDermott & Berkeley 1996). The second is the right to present a defence. This may be in writing or in person (Barrett 1999). Third, due process requires that the hearing be conducted before an impartial person or panel (Posthuma 2003). Fourth, is the right to be provided with reasons for the decision (Bayles 1990; Jameson 1999). Fifth, is the right to appeal against the decision

made (Posthuma 2003). The final requirement is that the dispute resolution process should be conducted in a timely manner (Jameson 1999).

The disputants' perceptions of procedural justice also impact on their willingness to accept the outcome of the dispute (Thibaut & Walker 1975). In formal trials, Thibaut and Walker (1975) found that, disputants are more willing to accept the decisions, irrespective of whether they lose or win, if they perceived that the trial procedure was fair. Lind & Tyler (1988) reported that disputants are more concerned with the process on how the decisions are made and the nuances of their treatment by the third party. This leads to greater compliance with the outcome (Welsh 2001).

Research into procedural justice also emphasises the opportunity for the disputants' voice (Thibaut & Walker 1975); the opportunity for disputants' participation and self-determination (Folberg & Taylor 1984; Thibaut & Walker 1978); a respectful and dignified approach to, and management of, the disputants' issues (Smith et al. 2006; Welsh 2007); and, transparency (Maiese 2004).

The opportunity for voice is related to the disputants' feeling that they have had a fair chance to present their case and that their views have been heard and considered (Campbell & Chong 2008). Welsh (2007) claimed that disputants valued the opportunity for voice as it could increase their level of self-identity and self-respect (Brazil 2002). When mediators fail to ensure voice, disputants can feel unsure whether they have received justice and doubt the legitimacy of the process (Welsh 2001). The opportunity for voice can therefore be said to be a predictor of disputants' satisfaction with the process (Gunning 2004).

Whilst issues of procedural justice matter in litigation, some argue that they are not so significant in mediation as the disputants maintain control over the terms of settlement which they may reject if they feel that they are unfair (Welsh 2002). On the other hand, earlier research by Lind et al. (1978) found that procedural justice issues apply as much to mediation as to litigation. The authors explained the relevance

of procedural justice to mediation on the basis of two theories: social exchange theory and group value theory. Whilst the social exchange theory emphasised the opportunity for voice discussed above, the group value theory considers voice as something more than a means to achieve outcomes and includes the feeling of inclusion as well as treatment with dignity and respect.

Research by Welsh (2001) evaluating mediators' behaviour has supported social exchange theory and its requirements that the disputants hear and understand each other's voice to reach a mutually acceptable outcome. The mediator too is required to hear and understand their voices, so that the information can be used to encourage them to engage in responsive and creative bargaining (Welsh 2001). Welsh (2001) related the group value theory with the disputants feeling of inclusion particularly when judge acts as mediator because they value their interaction and the judge's behaviour in the process symbolises the courts' attitudes towards them and their disputes (Welsh 2001).

Some practices in mediation, particularly caucus mediation, may be inconsistent with the disputants' perception of procedural justice. The exclusion of one of the disputants may raise suspicions. It is in contradiction with the disputants' desire for procedures in which they are given the opportunity to hear and consider each other's voice and be treated as equally valued members of society. Exclusion does not indicate social inclusion. The rules of procedural justice also require that communications between the mediator and the disputants take place in the presence of, or be disclosed to, each other (Twyford 2005).

- ***Distributive Justice***

Distributive justice focuses on perceptions of, and criteria to determine, the substantive fairness of the outcomes (Deutch 2000; Rawls 1971). It suggests that disputants' satisfaction is increased when they believe that the outcome is fair (Nabatchi et al. 2007). The three key principles in distributive fairness are: equity, equality and need (Deutch et al. 2006). The equity principle posits the idea that everyone should receive benefits proportional to their contribution.

Adams (1965) and later, Walster, Walster & Berscheid (1978) state that people judge an outcome as fair when the ratio between their own inputs and outputs compares well with the ratio of inputs and outputs of the others. Whilst the equality principle means that everyone gets the benefits of the outcome, the needs principle recognises the fact that individuals vary in their ability to attain the basic resources necessary for their well-being (Lewin-Epstein et al. 2003). The needs principle denotes that a just outcome requires a distribution to those in greatest need.

These three principles may appear to be in conflict in any particular allocation. In a scenario where the benefits were distributed to all equally, irrespective of their contributions and needs, the equity principle would be breached (Deutch et al. 2006; Van Gramberg 2006). Nevertheless, a decision to reward one based on equality and need principles may be considered as fair based on justice motivation theory (Lerner 1977). It depends on the objectives of the allocator and the factors that the allocator took into consideration in coming to the decision (Deutch 1985). Another important conception of distributive justice is formulated in relative deprivation theory which focuses on the recipients' perceived fairness of outcome (Deutch et al. 2006). The sense of deprivation or injustice occurs when people perceived that there is a short fall between what they actually received and what they expected to receive.

- ***Interactional Justice***

Closely related to procedural justice is interactional justice (Bies & Moag 1986) which is defined as the interpersonal treatment afforded by the mediator (Tyler 1991). There are two sub-categories of interactional justice: informational justice (explanation about the decision making procedures) and interpersonal justice (the degree to which disputants are treated with politeness, dignity, and respect) (Tyler & Bies 1990). These two subcategories may in turn overlap with each other but it is interpersonal justice that is more relevant to mediation. The interpersonal treatment afforded by the mediator, could make disputants feel satisfied with the process regardless of the outcome (Greenberg 1993).

Tyler (1991) argued that disputants place great importance on being treated with respect and dignity. He argued that how disputants felt about the way they were treated had an impact on their perceptions of fairness in the process.

3.7.2 Justice and mediation

Two significant theories of mediation are based on conflicting views of justice. The first is self-determination theory which proposes that justice derives primarily from the parties' right to self-determination (Waldman 2005). This right allows parties to participate in decision-making and determine the outcome. It is rooted in personal autonomy and self-governance. In other words, the parties' self-determination gives ownership of the conflict to them (Nolan-Haley 2007). It offers procedural justice protections, providing parties with fairness and dignity. The second is social norm theory. Social norm theorists believe that the inclusion of justice norms from the formal court system will bring justice into the process. These serve to prevent exploitation and provide a level playing field. In other words, applying legal norms in mediation is likely to result in a fair outcome.

Research into the relationship between mediation and justice has focussed on two concept of justice, namely procedural (whether the process is fair) and distributive (whether the resulting outcome is fair). These have been used frequently by researchers to gauge and explain the disputants' perception of fairness and satisfaction in court-annexed mediation (Kressel & Pruitt 1989). A number of authors believe that these two concepts are co-existent and intertwined. For example, Menkel-Meadow (2004) argued that both are necessary in mediation. Maiese (2004) argued that procedural justice results in greater compliance with the outcome and a fairer distribution of goods and resources between the disputants. Gunning (2004) argued that both are so closely aligned that mediators should emphasise both in their mediations. Fisher and Brandon (2002) claimed that mediators can deliver a fair process and a just resolution.

There is also a debate whether justice exists in what mediators do and how disputants perceive these different approaches (Sourdin 2008). For instance, the mediator's level of intervention and control may be higher in a complex dispute

resulting in less participation and control by disputants over content and process (Thibaut & Walker 1978). In their field study on procedural justice, Shapiro and Brett (1993) found that the disputants' perceptions of procedural justice is influenced by the interpersonal context through the mediator's behaviour which strongly indicates that mediators can enhance perceptions of procedural justice in what they do.

On the other hand, Howieson (2002) claimed that procedures are independent of outcomes. In other words, procedural justice issues are relatively unaffected by issues of distributive justice. She reported that disputants' satisfaction is related to perceptions of the fairness of the procedure regardless of the outcome. Some researchers suggest that outcomes are more important with disputants than procedures (Van Den Bos et al. 1997). Lind's (1992) fairness heuristic theory proposed that disputants form their fairness judgments on the basis of the procedure and later incorporate outcome information into their fairness judgment. The reasoning underlying this is that the information about the process is available before the outcomes become apparent.

From the above discussion of the theories of justice (Section 3.7), it is demonstrated that mediation may afford procedural justice, distributive and interactional justice to the disputants. The former Chief Justice of Victoria, John Phillips noted that justice offered by mediation is not an inferior type of justice (Alexander 2006). It satisfies the requirement of procedural justice as disputants are given the opportunity to present their case and determine their own outcome in the presence of third party neutral mediators. As highlighted by the justice theories above (see Section 3.7.2) that the more the disputants' perceived that they have received procedural justice, the greater their perception of distributive justice. The trust and the interpersonal treatment afforded by the impartial mediator symbolises interactional justice.

This section discussed the theories of justice particularly how justice can be achieved and afforded to disputants in mediation. The third theoretical foundation is change theory. As mediation is becoming central to the court system, the institutionalisation

of mediation will change the role of the court, the function and training of judges and require changes in attitudes from lawyers and their clients. Through an exploration of change theory we can better understand the forces driving and resisting court-connected mediation and consider ways to implement the necessary changes. The next section moves to consider the change theory and how it informs change management.

3.8 Theory of Change

Change management theory has been mainly applied to organisational reform and generally involves a reciprocal relationship between the change orchestrated by managers and their employees. The process of change impacts employees and other stakeholders by directing them to function in a different manner than the usual practice. Employees have an impact on the effectiveness of the change because their active or passive acceptance or, alternatively, active or passive resistance, will have a direct effect on the outcome of the change in the management (Mack et al. 1998).

While courts are not businesses increasingly ideas of change management from business are being applied to public sector institutions. Further, it is argued here that given that the changes in implementing court-connected mediation will have a direct effect on all stakeholders it is important to consider this theory in predicting and informing the success of the installation of mediation in the judicial system in Malaysia.

The meaning of change is discussed in the next section.

3.8.1 Definitions of Change

Change is an alteration to the status quo. It is defined as ‘a process of transformation, a flow from one state to another, either initiated by internal factors or external factors, involving individuals, groups or institutions, leading to a realignment of existing values, practices and outcomes’(Morrison 1998). Lewin (1947, 1951) described organisational change as a dynamic balance (‘equilibrium’) between two forces working in opposite directions: the driving forces pressuring for a change and the restraining forces pressuring against a change.

Contrary to Lewin's definition of change which is viewed as placing organisations in the centre between two opposing forces, there are at least three key definitions of change which see change as a planned process that gears an organisation towards achieving its goals and objectives. Schalk, Campbell and Freese (1998) define change as 'the deliberate introduction of novel ways of thinking, acting and operating within an organisation as a way of surviving or accomplishing certain organisational goals'. In a similar tone, Lines (2005) describes the process as 'a deliberately planned change in an organisation's formal structure, systems, processes or product-market domain intended to improve the attainment of one more organisational objectives'. Further, whilst maintaining organisational planning as the main focus in his extended definition of change, Hendry (1996) suggests that there are three main issues influencing the process of change particularly in a workplace, namely strategic business development (workplace changes arises due to changes in the development and operation of the organisation), significant process innovations (workplace change arises as a result of product or process innovations) and continuous improvement (an evolutionary process of workplace change due to changes within the workplace).

Lewin's change theory is said to be suitable for considering change in many organisations through his use of two sets of field forces: the driving forces and the restraining forces (Graetz et al. 2010). This section moves to consider Lewin's theory of change.

- ***Lewin's Force Field or Change Theory***

Kurt Lewin's(1951) force-field theory posits that change occurs in three stages: unfreezing, moving and refreezing. Unfreezing involves motivating individuals by preparing them to accept change, moving involves encouraging them to adopt a new ways by having them realise that the current situation can be improved, and refreezing involves reinforcing new patterns of behaviour embedded into operations of the organisation. According to Lewin's theory, change is more likely to occur when resistance is lessened rather than when the drivers of change are increased (Coghlan & Brannick 2003). Increasing the driving forces will only produce a balancing increase in resisting forces (Bartol et al. 2008).

Lewin's force-field theory has led to mushrooming interest in the subject of change and to competing terms for what he described. For example, Hughes (1991) refers to the force-field process as 'exit' (departing from the existing state), 'transit' (crossing unknown territory), and 'entry' (attaining a new equilibrium). Tannenbaum & Hanna (1985) describe the change process as a situation where movement is from 'homeostasis and holding on', through 'dying and letting go' to 'rebirth and moving on'. Judson's (1991) change process comprises five stages: analysing and planning the change; communicating the change; gaining acceptance of the new behaviours; changing from the status quo to a desired state; and, consolidating and institutionalising the new states. Like Lewin, Judson's model of implementing change adopts a linear staged model.

To effect a change in any organisation is not an easy task as it requires participants to adapt and learn new skills when they are already in possession of skills and knowledge which they have previously gained. It also involves shifting from familiar to unfamiliar settings and people. This brings resistance to change. The next section considers some of the sources of resistance.

3.8.2 Resistance to Change

Resistance towards change is not only experienced by the individual employee or stakeholder but also the organisation instigating the change. In overcoming resistance to change, the sources of resistance both from individuals and organisational aspects need to be identified (Kotter & Schlesinger 1979; Robbins et al. 1994). Individual sources of resistance include: habits; low tolerance for changes; fear of a negative economic impact; fear of the unknown; desire not to lose something of value; selective information processing; and, belief that change does not make sense for the organisation. The organisational sources of resistance include: structural resistance or inertia; threats to resources; threats to expertise; threats to power; and, group inertia (Robbins et al. 1994).

A range of strategies to manage and counter resistance have been developed over time (Kotter & Schlesinger 1979) which include:

- Education and communication (to give enough information so that employees are aware of the logic of the planned change);
- Participation and involvement (to meaningfully engage employees in the decision making process of change);
- Facilitation and support (to help employees to deal with fear and anxiety during a transition period);
- Negotiation and agreement (to engage in some form of exchanging views in order to reduce resistance to the change program);
- Manipulation and co-optation (to covertly influence resistance to the change as well as directly winning over those demonstrating resistance to change); and,
- Coercion (to threaten those directly resisting the change with adverse outcomes unless they support the change).

The last two methods of overcoming resistance can be seen as unethical. For instance, manipulation and co-optation may result in some adverse effects to the management once the employees realised the detrimental effects of change and resistance may be further escalated if change is effected by coercion (Kirkpatrick 1986; Rue & Byars 2003). These practices may also result in employees' dislike for, and negative feelings over, management's changes and may drive their attitudes to resist future changes (Nutt 1986).

The sources of resistance identified above generally explain the reasons for not making a change in an organisational context. The next section considers changes in the context of courts particularly in a move to use mediation as an alternative to trials.

3.8.3 Change Management in the court

Changing court management requires the adoption of business strategies aimed towards accessibility, speed and quality of judicial services (Zalar 2004a). The parties' demands for early resolution of their cases with minimum costs requires a change in the way the courts operate (Kandakasi 2006). What this means is that the court will have to look for an alternative to overcome these complaints such as

long delays and high fees arising from litigation. This is where mediation can be a solution to some problems faced by a court. As noted earlier in this thesis, it may enable justice to be done expeditiously and more cheaply (Roehl & Cook 1989).

To what extent mediation can be accepted and adopted as a means to resolve disputes in Malaysian courts depends on a change in the stakeholders: the judges and lawyers who must turn it into reality; the disputants who are the main players in any negotiations; and, ministers, members of parliament and civil servants as well as professional bodies in promoting it. There is no doubt that the PD and the *Mediation Act 2012* and *Rules of Court 2012* have been introduced to boost to further development of mediation, but without the stakeholders' support and readiness to embrace mediation, the use of mediation is likely to fail. Therefore, there is a need for the change in the stakeholders' mindsets: from adjudication to facilitation for judges; from adversarial skills of advocacy to advisory and collaborative problem-solvers for lawyers; and from winner takes all to win-win for the disputants.

Investigating and identifying forces driving and resisting change in the Malaysian court system will be a first step in enabling change management towards a more cohesive approach to court-annexed or judge-led mediation. The driving factors for change in the Malaysia court system were identified in chapter 1. First, the increase of court backlogs has been the main driving factors pressuring for the use of mediation in court. This had led to the development of a draft of the PD and mediation bill by the judiciary and the government. Second, as court backlogs are a common problem, the success of court-connected mediation in other jurisdictions in reducing their backlogs is also a driving factor influencing its uptake in the Malaysian court. The increased understanding of the benefits of mediation as an effective alternative to litigation amongst the stakeholders, particular judges has also been the driving factors for a change in managing their cases through the informal discussion rather than litigation.

The restraining factors against the change in the court management to use mediation were also identified in Chapters 1 and 2 and this chapter. First, lack of provision expressly providing for the practices of mediation in the court is an inhibiting factor to

this practice. Second, the resisting factors for change were also due to the prevailing culture of legal practice in the way how both judges and lawyers perceive their respective roles (ALRC 1997). Whilst judges' mindsets are for adjudication, lawyers' mindsets are for litigation. Judges fear of losing authority in having the final decision and their unfamiliarity with mediation due to lack of skills and experience are the inhibiting factors. Lawyers' roles are to protect clients' interests through contentious approach rather than by problem-solving. The fear of losing income is also one of the keys factors for lawyers' resistance.

The public's lack of knowledge of mediation and its benefit is also the inhibiting factor. The disputants are depending on their lawyers to keep them informed of the other alternative means of dispute resolution such as mediation. If the lawyers were resisting as discussed above, the clients were then not able to counter the lawyers' preference for litigation (ALRC 1997).

3.9 Chapter Summary

The present chapter provides an overview of the literature on the theoretical and conceptual framework of the thesis. The theories of mediation and some of its major concerns are examined. It highlights the debate on the different types or models of mediation before discussing the operation of mediation in courts and its increasing institutionalisation. The use of mediation in courts has gained recognition as a tool to reduce backlogs but there is some criticism against court-annexed and judge-led mediation including the issue of the judicial attitudes and the many subtle pressures which can be placed on disputants and lawyers to settle in judge-led mediation.

The concepts and theories of justice and its relation to mediation were examined. The research found that mediation affords disputants with procedural justice (the chance to present their views and these views have been considered) and distributive justice (the chance to determine their own outcome). The disputants' perception of fairness in the process is further enhanced if they were treated with respect and dignity by the mediator. This symbolises interactional justice.

Finally, the chapter canvassed the literature on change management which has been applied to many organisational contexts and arguably can be used to assist in identifying and dealing with the forces of resistance to change in a court setting. The next chapter turns to the methodology used for this thesis.

CHAPTER 4

RESEARCH METHODOLOGY

4.0 Introduction

As explained in Chapter 1, this thesis aims to trace and explore the growth and development of court-annexed and judge-led mediation in Malaysia and consider the issues relating to change management for its institutionalisation by examining key stakeholders' attitudes and perceptions, particularly lawyers and judges, to court-annexed and judge-led mediation. In doing so, the following research questions will be answered:

- i. What are the key factors that have led to the growth and development of court-annexed and judge-led mediation in Malaysia?
- ii. What are the key factors that have made court-annexed and judge-led mediation successful in other jurisdictions?
- iii. What are the key factors that have caused barriers to court-annexed and judge-led mediation in Malaysia?

This chapter deals with the operationalisation of these research questions and in doing so, lays out the methodology chosen for this thesis. The chapter also canvasses some of the methodologies utilised by others to study court-annexed and judge-led mediation in the literature. They are diverse and include both qualitative and quantitative techniques. As described in Chapter 1, Malaysian research on court-connected mediation and particularly court-annexed and judge-led mediation is limited so this thesis is informed by the methodological approaches utilised in those studies of other jurisdictions.

The chapter commences with a critical appraisal of methodologies commonly utilised in past research on court-connected mediation before moving to discuss the methodology chosen for this work. The imperative to take this course of action results from numerous discussions and debates concerning the quandary associated with investigating mediation through qualitative and quantitative methods due to the

inherent differences and potential incompatibilities between the methods. Furthermore, there are difficulties in studying mediation associated with court systems. They arise principally because of its private and confidential nature, lack of documentation and difficulty in accessing parties in the process (Bales 1951; Fassnacht 1982; Van Gramberg 2006).

4.1 Past research in court-connected mediation and its implications for the research methodology of this thesis

There has been very little research on mediation connected with the courts in Malaysia despite the extensive research elsewhere. Much of the literature on the modern practice of mediation emanates from the US, UK and Australia illustrating the dominance of Anglo culture civil law jurisdictions. Generally, empirical research investigating mediation has drawn on data from interviews with disputants, surveys of practitioners, analysis of court documentation, case studies and direct observation of disputants during ADR sessions. As there has been some debate regarding the relative merits of these techniques of data collection, it is pertinent here to review the methodologies associated with those techniques before discussing the research techniques used in the present study. This section commences with an overview of qualitative methods before moving to consider quantitative methods of inquiry. It should be noted that many of the methodological questions addressed below are common to many fields of inquiry and not just mediation.

4.1.1 Qualitative Methodology

Qualitative research often seeks to understand the meaning of participants' perceptions and experiences, and the way they make sense of their lives in specific and natural settings (Fraenkel & Wallen 1990; Locke et al. 1987; Merriam 1988). Thus, the results of this kind of qualitative inquiry are generally subjective as they are based on how data is presented by participants (for instance interviewees) and then interpreted by the researcher (Wolcott 1994). Qualitative research produces richer textual accounts of individual and group experience where consideration is given to the context and setting of the research. The attempt is to understand not one but multiple realities (Lincoln & Guba 1985).

Whilst qualitative methods provide a window to observe individuals in particular settings, two key weaknesses should be noted:

- Qualitative research is useful to describe personal experiences of a phenomenon, however, its findings cannot be generalised for other groups of people or other settings because of the usually, small sample sizes and how they were selected. The findings of qualitative methods may be unique to the relatively few people included in the research study.
- Qualitative methods can provide deficient interpretations because these methods allow more easily for the personal interpretations of the researcher and this can lead to the insertion of researchers' biases into the reported findings (Creswell & Plano Clark 2007). The results can also be value-laden, social constructions of reality and contextual considerations (Denzin & Lincoln 1994).

This section considers three types of qualitative research used in the study of court-connected mediation: interviews with disputants; caseload information; and observation of participants and processes.

Interviews with disputants

An in-depth interview is one of the most common sources of data in qualitative studies. Other commonly used sources are from focus group interviews and participation observations (Easterby-Smith et al. 2002). Whilst interviews with disputants provide a range of direct evidence related to their individual perspectives, they are also affected by the values of both the disputants and the researchers. One problem with interviewing disputants undergoing mediation which demonstrate the difficulties of analysing data from interviews is that their points of view can be quite different depending on whether they are plaintiffs or defendants. For instance, in research examining the potential benefits of mediation particularly in an early resolution of disputes, Vidmar (1984) noted that plaintiffs are more satisfied with mediation because they receive settlements within shorter periods than through litigation but defendants

be less satisfied as litigation defers their obligation to settle. The nature of responses from disputants can also broaden inquiries into other areas which may pose some problems in subsequent analysis. For instance, some may feel that mediation can save money in cases where settlement is expedited but in the cases that do not settle, mediation is seen to add to the overall costs of the dispute and even can delay disputants' access to the right to trial (Keare 1995).

Interviewing disputants, however, is a commonly used approach for data collection especially by US researchers (McEwen & Maiman 1981; Pearson & Thoennes 1984; Roehl 1986; Roehl et al. 1992; Sarat 1976; Vidmar 1984; Wissler 2006). Early research investigating the advantages of facilitative ADR techniques over litigation, used interviews with disputants to gauge their satisfaction with mediation as a key indicator (McEwen & Maiman 1981; Pearson & Thoennes 1984). More recently, Sourdin (2009) conducted interviews with disputants in a research project on mediation in the Supreme and County Courts of Victoria in Australia. The data for the study were used to assess the use and effectiveness of mediation of disputes filed in these courts and whether mediation offered a resolution, provided better access to justice for disputants, whether it was perceived as fair, and achieved effective and acceptable outcomes.

The type of questions asked of disputants in interviews can be critical to avoiding methodological bias (Van Gramberg 2006). For instance in (Genn et al. 2007) research on disputants' motivation to undergo mediation in the automatic referral to mediation (ARM) program in the Central London County Court, the interview questions highlighted the critical role of legal practitioners as gatekeepers to mediation and revealed that parties generally, accepted their solicitors' advice to mediate. Thus lawyers' views of mediation are also likely to affect not only the disputants' decisions to use mediation but also their attitudes and expectations about mediation, their experience during the process, and their satisfaction with the process and its outcomes (Pearson et al. 1982; Wissler et al. 1992).

Despite this, interview questions are rarely included with the quantitative, aggregated data in the final research papers, and disputants are rarely defined as 'plaintiff' or 'defendant' but as a homogenous group of 'disputants' (Van Gramberg 2006). Nevertheless, interviews are widely acknowledged as sources of first hand information on the mediation experience but the results need to be analysed carefully in light of the problems associated with interviews as discussed above.

Caseload Information

Caseload information is available from court administrative systems for various ADR programs. This information, however, is generally geared to reporting annual changes in total number of cases, especially the kind of aggregate information needed to identify resource needs and are not typically designed to yield evaluative data on what happened in the mediation process (Stipanowich 2004). In other words it sheds no light on how particular agreements were reached. Therefore, caseload information suffers from being second-hand and dependent very much on the interpretation of the researcher (Van Gramberg 2006). One of the limitations identified that can restrict a researcher's ability to analyse the efficacy and utility of court-connected mediation is related to how mediation is reported as well as interpreted. This is impacted upon by blurred reporting terms, irregularities in quantifying settlement rates, and the absence of specific registry and case-specific data to monitor mediation related cases (Buth 2009).

Further, caseload information may not assist in finding the result expected for the study. For example, in a study focussing on the volume and character of private caseloads in Los Angeles, Rolph et al. (1996) reported that the information was gathered through case records from legal firms providing ADR services and superior court case records. The exact comparisons on workload could not be made as the private caseload grew continuously each year, while the caseloads of the court system were more or less stable. Moreover, the private ADR caseload reflected a somewhat different mix of case types to those in the court system particularly in the areas of personal injury and business-to-business disputes which were much more frequently handled by private ADR. The findings of this research were unsupportive of the claim

or hypothesis that private ADR lightened the burden of civil caseload of courts in Los Angeles.

There are significant methodological and conceptual difficulties in comparing mediation with litigation and also in terms of evaluating and defining their processes. For example, the costs of both processes are difficult to compare because many civil cases are settled out of court; secondly, some of the possible benefits of mediation are said to be difficult to measure since an increased use of mediation may lead to a decrease in litigation, foster better relationships between parties and subsequently higher levels of compliance with the outcome; and, thirdly, significant definitional variations among different states, courts and tribunals in relation to the range of mediation processes makes evaluation difficult, resulting research findings that are not comparable across jurisdictions or regions (Sourdin 2000; Wissler 2004)

For the purposes of the present study, and given the relatively recent introduction of court-connected mediation in Malaysia, it was decided not to include an analysis of mediation through court documentation. Nevertheless, there are some statistical data used to show the trend of mediation took place in the courts and the MMC and these are presented in Chapters 2 and 3.

Observation of participants and processes

The advantage of directly observing disputants in a mediation session is that it allows the researcher to be present during the mediation process and the information can be obtained directly from it (Ingleby 1991). However, an important challenge in using this methodology is to gain access to the mediation sessions which are either conducted privately or in court-annexed mediation. As mediation usually begins with both contractual, and in some cases statutory, protection of confidentiality between both disputants and the mediator, the consent of disputants is necessary as is the consent of the mediator (Menkel-Meadow 2009).

Observation can be a flawed methodologically as it is also subject to value based interpretation. It is also time consuming. This method may be readily available to

those studying informal tribunal processes, where a steady stream of cases are scheduled each day (Van Gramberg 2006), but it is not a reliable means of examining the uptake of mediation unless the system is generally accepted and the researchers' attendance during the mediation process will not undermine the rule of confidentiality or change the dynamics of the disputants in the session.

One recent observation study was conducted by Relis (2009) whose exploratory study on practitioners' perceptions in litigation and mediation utilised observation of the mediation process; however, the researcher avoided any interference with disputant dynamics by observing the video documentary files in 64 medical injury disputes cases which were settled by mediation.

Whilst observation is a technique which can shed light on the actual process of mediation, it does not assist in the present study which examines the uptake and growth of court-connected mediation rather than the process used in mediation sessions.

4.1.2 Quantitative Methodology

Apart from qualitative research methods, the other main type of inquiry is quantitative research which relies on numerical statistical methods to measure and analyse specific aspects of a phenomenon and particularly the causal relationships between variables in order to produce a generalisable result (Johnson & Onwuegbuzie 2004). It is useful for studying large sample sizes to ensure data can be generalised from a representative sample (Carey 1993). It usually employs techniques of data collection in the form of surveys and questionnaires. Surveys are particularly useful for providing quantitative or numerical descriptions of trends, attitudes or opinions of population by studying a sample population (Creswell 2003). The strength of quantitative methods lies in its ability to generalise research findings if the data is based on random samples of sufficient size. Consequently, reliability is strong due to the testing and validating of an already constructed hypothesis even before the data were actually collected (Johnson & Onwuegbuzie 2004). The key method used in quantitative approaches for social science research is surveys. In mediation research, surveys are commonly employed to examine the attitudes of mediators and disputants. In terms of the

development of court-connected mediation, the following section addresses surveys of mediation practitioners.

As with qualitative methods, quantitative methods also have several disadvantages:

- Although quantitative research findings can be generalised and replicated when data is based on random samples of sufficient size, the knowledge produced may be too abstract and general for direct application on specific local situations, contexts and individuals (Guba & Lincoln 1994).
- The ability to hear and understand the individual voice is limited. In this type of research the researchers are usually in the background and they cannot interact with their subjects. According to Creswell and Piano Clark (2007) researchers are thus assumed to be silent on their biases in interpreting the research results.

Surveys

A survey of mediation practitioners (such as judges, court registrars and court appointed mediators) is not only considered suitable for collecting the volume of responses desired but also the best way of collecting descriptive data that can show stakeholders' perceptions of court-connected mediation. In a study conducted by the Centre for Analysis of Alternative Dispute Resolution System (CAADRS) reported by Yates et al. (2007), a survey approach was utilised and conducted with practitioners enquiring about their attitudes towards, and experiences with, mediation services as an effective way to access justice for poor and low-income disputants in Illinois. Surveys also have the advantage of offering quick responses. For instance, in Wissler's (2002) study of the pilot court-connected mediation program in nine courts in Ohio, surveys were distributed and completed by mediation practitioners as soon as the mediation session ended.

One key disadvantage with surveys is that they generally require large numbers of responses to be statistically relevant. Mail and email survey responses tend to be low

relative to the sample administered and research suggests that many groups of people are over-surveyed and fatigued by constant demands from researchers (Baruch & Brook 2009). The manner in which surveys are distributed is also critical to determine response rates. For example, in the New South Wales Settlement Scheme study (Sourdin & Matruglio 2002), surveys were distributed in person which yielded more responses than the later study by Sourdin (2009) which used different modes of survey distribution such as ordinary mailing.

Despite the limitations seen in survey administration as a method of research on mediation, it remains a relevant technique for this study.

This discussion of mediation research informs the present study in the following ways:

- i. Interviews with disputants may provide a rich source of data, but in order to develop a clear picture of an issue, extra care must be taken to interview a variety of informants in order to gain an overview of stakeholders' perceptions towards the development of court-connected mediation.
- ii. Direct observation of disputants undergoing mediation would be desirable in terms of collecting information about the process and the experience of disputants. This was rejected as a possible method for this study because the research does not focus on the mediation process itself.
- iii. Surveys of practitioners are useful for understanding the perceptions of large groups of people from which generalisations can be made. It was decided to utilise this approach to examine stakeholders' perceptions toward the growth of court-connected mediation in Malaysia.

4.1.3 Bringing together qualitative and quantitative research to investigate court-connected mediation

Given the limited research in Malaysia on court-connected mediation, the task at hand for this research project was to create datasets on court-annexed and judge-led

mediation and map the terrain of this emerging field in the country through two sets of empirical evidence. In order to carry out this task the researcher decided to take an exploratory approach using mainly qualitative techniques to gather the perceptions of court-connected mediation from key stakeholders in the form of interviews with the aim of understanding the many complex human phenomena in this area. Quantitative techniques were also undertaken in the form of surveys and were analysed using descriptive statistics.

It is common for both quantitative and qualitative techniques to be utilised in an exploratory study although in most cases, the qualitative inquiry dominates. It is normally complemented wherever possible with descriptive analysis such as frequency distributions in reporting the findings (Stebbins 2001). This is discussed in the next section before moving to the methods used for this thesis.

4.2 The justification of incorporating qualitative and quantitative into this exploratory study

Despite the apparent weaknesses in each both qualitative and quantitative methodologies, when both are used together, they complement each other and work towards filling the gaps in the other method (Johnson & Onwuegbuzie 2004). Their use can provide a greater understanding and a broader view of the research topic than either of the methods on their own would (Creswell & Plano Clark 2007; Teddlie & Tashakkori 2003). Used together they allow for stronger inferences and enhanced interpretation because generalisable results can be substantiated with an understanding of the research context as well as ‘hearing’ the individual subject’s voice (Mark & Shotland 1987). Different methods of investigating the research questions were needed to throw light on their different facets especially as the questions are multifaceted (Evans & Gruba 2002). As a consequence, the results and findings of the research using these two methodologies generate some diversity and multiplicity due to different research strategies and triangulation provided by the data from quantitative and qualitative (Foss & Ellefsen 2002).

Specifically, for the present research, the study aims to uncover and understand a phenomena about which little is known. Whilst it is exploratory, its contribution is in creating new datasets and mapping the issues related to the emergence of court-annexed and judge-led mediation utilising qualitative research as the main methodology and to provide a set of multifaceted dimensions of findings through triangulation with quantitative techniques in the forms of a survey.

The research approach was designed having regard to the need to gather the views and perceptions of relevant stakeholders (judges and lawyers), the nature of the issues being examined, the limited resources available to examine that topic, the values of the individuals and organisations involved and the availability of comparable or existing research. In doing so the thesis provides two sets of original empirical data that map the extent of mediation in the courts and provides stakeholders' attitudes towards this growth comprising a series of in-depth interviews with key members of the Malaysian judiciary, the Industrial Court's chairman, a member of the Arbitration and ADR committee of the Malaysian Bar Council, Malaysian court officials, the officials from the Attorney-General's Chambers, academics as well as a survey of practising lawyers in Sabah and Sarawak, East Malaysia. The methodology was used in answering the research questions. The following section sets out how each of the research questions was answered.

4.3 Operationalising the research questions

Having given an overview of the justification for the qualitative and quantitative methods chosen for this study, it is pertinent now to explain how the three research questions used to drive this thesis were operationalised:

1. What are the keys factors that have led to the growth and development of court-annexed and judge-led mediation in Malaysia?

This research question is discussed in Chapter 1 (background to the research), Chapter 2 (literature review), Chapter 5 (findings from the survey) and Chapter 6 (findings from the interviews) utilising the techniques discussed below:

- i. The broader environment which includes political, economic and social impacts on the performance, achievement and future planning on court-connected mediation were examined through documentary evidence including government reports, newspapers, material held by MMC and the AG's Chambers including the proposed mediation legislation is presented in Chapters 1 and 2;
 - ii. A search of academic journals and publications of professional associations offering court-connected mediation was conducted to assess the growth of information about its processes is presented in Chapter 2;
 - iii. A survey was conducted of practicing lawyers to examine their attitudes and perceptions to court-connected mediation and to gauge their support or otherwise towards the growth and development of mediation practice (Chapter 5).
 - iv. A series of interviews with key members of the Malaysian Judiciary (judges), the Industrial Court's chairman, a member of the Arbitration and ADR committee of the Malaysian Bar Council, the officer of the AG's Chambers, court officials and academics were conducted to evaluate the growth and development of mediation in Malaysia (Chapter 6).
2. What are the key factors that have made court-annexed and judge-led mediation successful in other jurisdictions?

This research question is answered in Chapters 2 and 3 (literature review), Chapter 5 (findings from the survey) and Chapter 6 (findings from the interviews) by utilising the following investigative techniques:

- i. A review of available literatures including library base literature, journal articles, conference proceedings and a wide variety of online information on

the development of mediation in other jurisdictions and their success stories (Chapters 2 and 3).

- ii. A survey of practicing lawyers particularly their views of the claim that mediation could ease court backlogs in the light of its success in other jurisdictions in reducing court backlogs (Chapter 5).
 - iii. Semi-structured interviews with key members of the Malaysian judiciary (judges), the Industrial Court's chairman, a member of the Arbitration and ADR committee of the Malaysian Bar Council, officers in the Attorney General's Chambers, court officials and academics were conducted to detail the nature, forms and models of mediation practiced in other jurisdictions that are known to them and which have led to its success (Chapter 6).
3. What are the barriers and the enablers to court-annexed and judge-led mediation in Malaysia?

This research question is answered through Chapter 5 (findings from the survey) and Chapter 6 (findings from the interviews) by utilising the following investigative techniques:

- i. A survey of lawyers practicing in Sabah and Sarawak, East Malaysia to examine the uptake and resistance to mediation. Arguably, more often than not, matters are determined by lawyers whether it should go to mediation or proceed to trial, so this is an important group to survey on this point (Chapter 5).
- ii. Semi-structured interviews with key members of the Malaysian judiciary (judges), the Industrial Court's chairman, a member of the Arbitration and ADR committee of the Malaysian Bar Council, officers in the AG's Chambers, court officials and academics (Chapter 6).

4.4 Data collection method

As outlined in the above section, the empirical data for this study were collected through surveys and interviews (using a semi-structured instrument). The surveys were designed to reach large numbers of lawyers in different geographical regions to explore their views and opinions concerning what they know about court-connected mediation. To measure the degree and strength of the participants' responses to the structured questions, Likert scales were used. Likert scales are the most widely used ordinal scale among survey researchers (Cooper & Emory 1995; Orlich 1978). They not only produce responses that exhibit sound reliability and validity (Spector 1992) but are also easy to administer and simple to complete for the convenience of both researcher and the participants (Foddy 1993; Neuman 1997; Zikmund 1997). With this method of data collection, the researcher can ask all participants identical questions in the same order so the response categories from which participants may choose are 'closed-ended' and fixed. The advantage of this inflexibility is that it allows for meaningful comparison of responses across participants and study sites.

The surveys also utilised open-ended questions to seek an explanation to the answers given to the structured questions, that is, the close-ended questions. Whilst structured questions were principally used as they are quicker and easier for the participants to answer (De Vaus 2002), open-ended questions were incorporated into the surveys to help generate further insights into participants' closed question responses. They were also used as a means of generating fresh ideas from participants, and to break-up the monotony of the survey. The open-ended questions will allow a follow-up issue related to the answers to be further highlighted and clarified. A copy of the survey sent to Lawyers is provided in 'Appendix A'.

A semi-structured interview was also used as it could facilitate an immediate response to a question. It was decided to use semi-structured interviews with key informants and these are described in detail below. These also allow for some latitude to both the interviewer and interviewee to explore the answer given and to resolve any ambiguities that may arise (Gorman & Clayton 2005). The interviewer used probing questions to drive the content of the interviewee's answer and when it dried up, the interviewer

posed a further question. This is consistent with the approach taken by Cavana et al. (2001). This interview method was chosen as it is appropriate to discover what the interviewees feel, and explain how their world is working. It also allows the researcher to gain insights and understanding of how they make sense out of their own experiences (Rubin & Rubin 2005). Qualitative data gathered from semi-structured interviews was based on small samples but they were sufficient and adequate to gather 'thick description' and 'thick interpretation' of the phenomena which interested the researcher (Patton 2002). This was particularly because of the quality of expert interviewees (judges) and the length of time taken to explore each issue. Each copy of the semi-structured questionnaire to the interviewees is provided in 'Appendix B (judge interviewees) and Appendix C (non-judge interviewees)'.

4.5 The population and sampling

Qualitative research sampling procedures are not clearly defined in this study as the aim of the researcher is not to seek a representative sample as in quantitative research rather explicitly to select a range of people that will allow the researcher to explore different and comparative experiences relevant to the research question and develop the theoretical ideas which may challenge the earlier assumptions made through literature review (Davies 2007).

Sampling is a procedure used to 'identify, choose and gain accesses' to relevant units which is used to generate data by any method. For the survey participants, quota sampling was used which is sometimes considered a type of purposive sampling (Mack et al. 2005). Purposive sampling allows the researcher to gain access to information-rich cases (Patton 2002) and to choose sample of informants who are able to demonstrate several features or processes in the area of research (Silverman 2004). Under this method, the participants were chosen based on the characteristics and criteria fit to answer the research question which focus on participants who would be most likely to experience, know about, or have insights into the area of research (Mack et al. 2005). Details of the surveyed lawyers are found in Chapter 5 and described briefly in 4.5.1.

The non-probability sampling method or purposive sampling was also employed in the selection of 13 interviewees believed to be the informants who could provide and generate pertinent data based on their involvement with mediation in general and court-connected mediation in particular. A snowballing technique was used to maximise the number of judges interviewed where the first interview with a judge led to a number of recommendations of other interviewees based on their known expertise (Fraenkel & Wallen 1990). Yin (1994) stated it is important that those included in the sample are distinguished from the outside. Details of the samples are found in Chapter 6 and described briefly below in 4.5.2.

4.5.1 Surveys of Practising lawyers in Sabah and Sarawak

Using the above approaches to sampling, the participants for the survey were chosen because, as lawyers, they play a key role in getting their clients agree to settle through mediation or otherwise through litigation. After receiving ethics approval from Victoria University, both the President of Sabah Law Association and the Advocates Association of Sarawak were notified by the researcher through email to ask for their cooperation and assistance to get members of the bar from Sabah and Sarawak to participate in the survey. They were provided with a formal letter detailing the purpose and reason for the study which was attached to the email ('Appendix D). Through email, the President of the Advocates Association of Sarawak responded positively to the researcher's request to distribute the questionnaires to the Sarawak Bar. The Vice-President of the Sabah Law Association provided an updated list of lawyers practising in Sabah to the researcher.

The questionnaires were mailed out and addressed to the lawyers' firm identified from the list of lawyers' firm of both associations (the Sabah Law Association's directory as at 11 November, 2009 and the Advocate Association of Sarawak's in-house directory for the year 2008) provided to the researcher. In the state of Sabah, lawyers' firm are spread over across Kota Kinabalu, Sandakan and Tawau, while for the state of Sarawak, lawyers' firm are located around Kuching, Sri Aman, Sibul and Miri. There were 245 questionnaires mailed out to the lawyers' firm. The firms distributed the survey to their lawyers and 100 responded.

Each participant in the survey was supplied with the information regarding the confidentiality of their responses and an assurance that only the summarised data, with no identifying features, would be reported in the thesis. The information sheet to the participants is provided in ‘Appendix E’. A consent form was also furnished to them to obtain their consent to participate in the survey and this is exhibited in ‘Appendix F’.

4.5.2 The Semi-structured Interviews

As mentioned in section 4.4 of this chapter, the qualitative data were collected from a series of semi-structured interviews. The list of judges was sourced from the Chief Registrar’s Office, the Federal Court of Malaysia’s official website. From this list, seven judges were selected and, as indicated earlier, their selection was based on their knowledge and experience in mediation. Of these seven judges, three were serving in Sabah and Sarawak and four in Kuala Lumpur. After the judges were identified, their emails as well as their registrars’ emails were obtained from the Information Technology Division of the Chief Registrar’s office, Federal Court, Malaysia. Judges were invited for an interview by email and when they accepted the invitation, an appointment was made. For the other non-judges interviewees they were either invited through emails or telephone calls. The semi-structured interviews in the present study were conducted between one to two hours at the interviewees’ office. They were supplied with an information sheet explaining the confidentiality of information gathered from them and their anonymity by any reference which might identify them individually. The interviews were voluntary and they could choose to leave from the interview at any time. A copy of the information sheet to the judges and other participants involved in the interviews is exhibited in ‘Appendix G’. A consent form was also furnished to them to obtain their consent to be interviewed to comply with the Victoria University’s ethical requirement. A copy of consent form is exhibited in ‘Appendix H’.

Transcribing the interviews

The transcription of all the 13 digitally recorded interviews were done entirely by the researcher using Sony Digital Voice Editor Version 3 which is user-friendly software equipped with digital pitch controller and transcription keys. These include easy search

forward and backward. The process took nine months to complete beginning in June 2010 until March 2011. All the transcriptions were done verbatim to ensure the richness of information was kept at the maximum level. The words used by the interviewees and the way they responded to the questions reflected their enthusiasm and concern for the matters. These were captured during the transcription process. The transcriptions were labeled and numbered chronologically without naming the interviewees to maintain their anonymity during the data analysis phase.

4.6 Data Analysis

In this research, the analysis and management of data collected from surveys and interviews was assisted by SPSS and ATLAS.ti computer-assisted data analysis softwares respectively. Kent (2001) suggests that the use of computer-assisted softwares to analyse data is not just the case of cut and paste activities but it allows the researcher to operate beyond by looking at connections between codes and text and relationships between codes themselves.

Specifically, the analysis of the qualitative data from the interviews was facilitated by ATLAS.ti version 5.0. ATLAS stands for ‘Archiv fuer Technik, Lebenswelt und Alltagssprache’ which means ‘Archive for Technology, the Life World and Everyday Language’, and its extension ‘ti’ stands for ‘text interpretation’. The analysis using this software was done in sequence. Firstly, a microanalysis of the interview transcripts (primary documents) was carried out to identify concepts (contexts) and themes from which an open coding was created. Secondly, the codes which represent the concepts and themes were subsequently grouped and formed into categories through the axial coding procedure. At this axial coding stage, these group and categories were further developed according to their properties and dimensions. Thirdly, the properties and dimensions which were identified are linked together using the words ‘*contributes to*’, ‘*is cause of*’, or ‘*resistance to*’ as created and determined by the software (see Chapter 6). This coding procedure is guided by the coding paradigm established by Strauss and Corbin (1998). It helps to arrange the concepts in an orderly way by grouping or categorising them according to logical classification themes.

The data obtained from the surveys was analysed using SPSS Version 20. The variable names are defined and given value labels where appropriate before data was entered into the software. Descriptive statistics are used to describe the characteristics of the sample and they are explained through frequency and percentage. As mentioned in 4.4, there were some qualitative data gathered from the surveys in the form of answers to the open-ended questions. These data were analysed and grouped into categories according to their concepts and themes.

4.7 Reliability and validity

Reliability and validity are commonly used criteria to establish the quality of research designs (Yin 2003). In order to ensure these principles are adhered to, in the presence research, some steps were undertaken as discussed in the following section.

4.7.1 Triangulation (Data triangulation and Methodological triangulation)

As described in 4.2, this study uses a triangulation process as it involves more than one source of data to answer the research questions (Cavana et al. 2001). The different sources of data collection causes triangulation to occur which help to enhance the reliability and validity of this research. Triangulation provides a means by which qualitative researchers could test the strength of their interpretations. It helps researchers to substantiate their findings. It is only logical that the validity of one's findings is strong if it is supported by more evidence.

In the presence research, the methods used to collect data through the review of literature, surveys and interviews and at each level of processes the data is tested, sieved and triangulated with the next level of process. For instance, the use of questionnaires in the surveys and the semi-structured interviews provide a different form of perspectives of participants whilst the collection and analysing of literature review could lead to a discussion on the existing information of theoretical constructs which can be tested from the results of primary data of surveys and interviews (NADRAC 2004).

4.7.2 Content validity

Content validity refers to how well the items in the instruments are developed to measure the behaviour for which it is intended. Simply put, it refers to the credibility, and the soundness, of the assessment instrument used in the research designs for measuring the construct of interest (Sireci 1995). To achieve the content validity of the instrument, the researcher has undertaken an exploratory research through review of literature to understand the concepts related to the study (the broad theories of mediation, justice and change). Specifically, the research instruments (surveys and semi-structured interviews) used for this research were constructed utilising the information collected at the initial stage of the study and presented in Chapter 2 and 3. The instruments were piloted and revised taking into account the conceptual framework and research objectives mainly to investigate the perceptions and attitudes of the stakeholders (lawyers and judges) and how these can impact on the development of court-connected mediation.

In addressing credibility, firstly, the researcher self administered surveys were distributed to informants who are most likely to experience, know about, or have insights into the area of research. Secondly, the researcher conducted semi-structured interviews with experts in the field of research. The use of evidence from different sources of data collection assists in affirming content validity by merging the lines of inquiry towards the same conclusion.

4.7.3 Reliability

Reliability is essentially a synonym for consistency and replicability (Cohen et al. 2000). It refers to the ability of the other researchers to reproduce and replicate the results upon choosing to investigate a similar subject matter as well as in using the same procedures (Yin 2009). This means that the procedures used to conduct the research must be transparent and well documented. It has to contain traceable evidence to link the conclusions to the findings. Specifically, for this thesis, the researcher retained the data bases of questionnaire responses and its analysis in SPSS version 20. The codifications of interview transcripts and its results have also been retained by the

researcher in Atlas.ti version 5.0. These sources of documented processes constitute traceable evidences for the study and available for inspection and scrutiny.

4.8 Ethical Considerations

This research project has the approval of the Victoria University Human Research Ethics Committee (VUHREC) exhibited in ‘Appendix I’. Further, a range of permissions have been obtained to conduct this research. Specifically, permission to obtain the data and interviews has been granted through the Commissioner of Law Revision and Law Reform of AG’s Chambers, Malaysia, exhibited in ‘Appendix J’, and the permission to obtain the data from the interviews with judges was obtained through the Chief Registrar of the Federal Court, Malaysia, exhibited in ‘Appendix K’. The permission to collect data through the distribution of surveys has also been obtained through the president of the Sarawak Advocates Associations and the Sabah Law Association through an email as previously illustrated in sections 4.5.1 and 4.5.2 of this chapter.

4.9 Chapter Summary

This chapter provided a comprehensive description of the methodologies undertaken to answer the three research questions of this study. The interviews and surveys were critical in informing the research objectives mainly exploring and tracing the growth and development of court-connected mediation in Malaysia. To achieve this research objective, the exploratory research method was adopted with qualitative research methodology used to investigate and examine stakeholders’ perceptions on court-connected mediation.

The next chapter presents the process involved during the execution of data collection from the administration of the questionnaires and the results that its bring from the perspectives of practising lawyers in Sabah and Sarawak on court-connected mediation.

CHAPTER 5

THE SURVEY FINDINGS

5.0 Introduction

The preceding chapter described the methodology used to gather the data required to answer the research questions for this thesis. The methodology entailed a survey of lawyers registered to practice in Sabah and Sarawak and a set of 13 interviews including seven judges from these states and West Malaysia. This chapter presents the findings of the survey assessing the lawyers' understandings of mediation and how mediation is conceptualised in practice. It commences with a discussion of the demographics of the lawyers who responded to the survey before moving to analyse their opinions and experiences on various issues of mediation; the concepts of justice in mediation; criticisms of mediation particularly how it relates to justice; the types or models of mediation utilised by mediators; the idea of pre-court mediation and mandating it; change management in Malaysian courts; and finally their recommendations on how to improve and develop both types of court-connected mediation (court-annexed mediation and judge-led mediation).

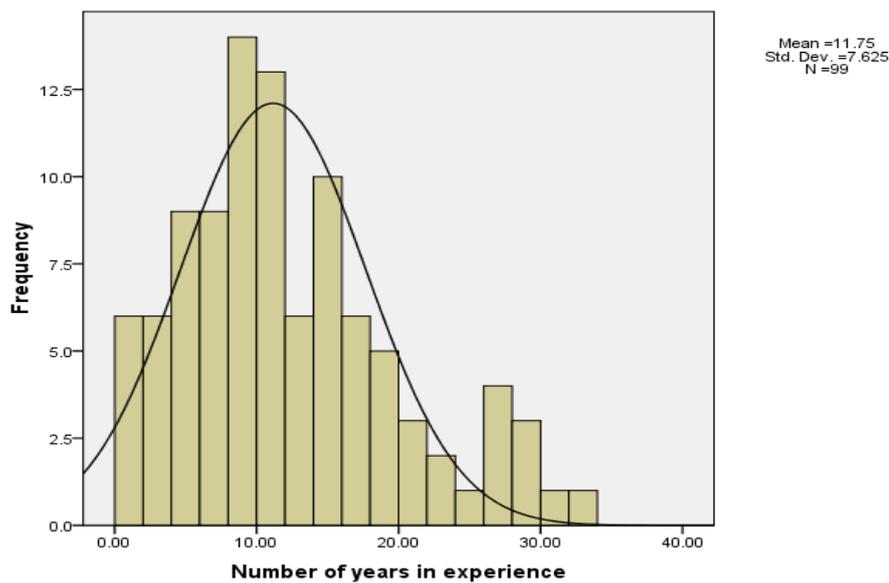
5.1 Demographics and Characteristics of Survey Respondents

As described in the methodology section of this thesis (Section 4.5.1), surveys were mailed to registered lawyers in Sabah and Sarawak chosen randomly from the lists of law firms supplied to the researcher. Of the 245 questionnaires mailed out, 100 responses were received back through an enclosed postage paid envelope. The final response rate was 40.82%. This section describes the sample of respondents' years of work experience; their ages; gender; locality; and, qualifications. Due to the small size of sampling of the surveyed lawyers, the demographic characteristics of their responses across different questions are not cross tabulated.

The survey divided years of work experience as a lawyer into three categories: junior lawyers (up to 5 years experience), senior lawyers (6 to 14 years of experience) and very senior lawyers (15 years and above). The SPSS analysis of the 99 respondents who provided answers to this question revealed that 21 respondents (21.2 %) were

junior lawyers, 49 respondents (49.5%) were senior lawyers and 29 respondents (29.3%) were very senior lawyers. The span of lawyers' experience was from 4 months to 32 years. Whilst this is quite a large range, the bulk of the respondents were senior and very senior lawyers (78.8%) indicating that this sample was highly likely to be experienced enough to comment on the operation of the court system and developments such as mediation. Figure 5.1 presents the distributions of lawyers' experience as a histogram

Figure 5.1: Distribution of respondents by years of experience



In terms of age, 77 respondents indicated they were between 25 years to 67 years and most who answered this question were clustered into the age group of 25 to 41 years (63.6%) and the remaining 36.4% of lawyers were between the ages of 42 to 67. A large group of 23 respondents did not provide their age.

Sarawak-based lawyers made up the greatest proportion of respondents (55 respondents) consisting of 34 males and 21 females. Sabah respondents accounted for 44 people (25 males and 19 females). One lawyer based in Kuala Lumpur participated in the survey but recorded her presence in Sabah. The vast majority of respondents

(N=91) (91%) of the 100 participating in the survey hold basic law degrees and the remaining 9 respondents (9%) hold Masters degrees.

As noted in Chapter 2, mediation is relatively new in Malaysia as an adjunct to the court system. Given that lawyers play such an important role in advising their clients either to attend or not to attend mediation, the survey was critical in exploring lawyers' attitudes as well as their experience and knowledge of mediation and its attributes.

5.2 Respondents' knowledge of mediation and its attributes

One of the key issues explored in this thesis is the extent to which legal practitioners support or do not support mediation of disputes because this influences whether their clients will use mediation. The literature review canvassed in Chapters 1 and 2 suggested that lawyers may discourage their clients from seeking mediation because it is likely to negatively affect their fees and reduce their control of the case. In order to understand lawyers' attitudes towards mediation it was first necessary to find out what knowledge they had of mediation. The respondents' knowledge of mediation was self-rated through a four point descriptive Likert scale ('Not much', 'Moderate', 'Very much' and 'Excellent'). All 100 respondents answered this question and 24% of respondents described themselves as having 'not much' knowledge, 60% considered themselves as having a 'moderate' knowledge, 11% considered themselves as having 'very much' knowledge and only 4% believed that they had 'excellent' knowledge. One respondent in the last category described him or herself as 'a qualified mediator'. Another respondent who claimed to have 'very much' knowledge of mediation also indicated that he is a trained mediator.

For ease of explanation, the four categories of self ratings were collapsed to two depicting either a lower or higher amount of knowledge by merging the 'not much' and 'moderate' answers into a 'Lower knowledge' category and the 'very much' and 'excellent' into a 'Higher knowledge' category. In doing this it is clear that a large number of respondents (84%) rated themselves as having lower knowledge about mediation compared with only 16% who considered themselves as having higher knowledge about mediation. The findings likely reflect the relative newness of

mediation in the country and, perhaps, imply an area for further legal education amongst qualified practitioners. The result could also reflect an under-estimation of the knowledge held by these practitioners. These factors are taken up later in the Discussion Chapter.

5.2.1 Respondents' perceptions of the benefits of mediation

Respondents were asked their views on the benefits of mediation. A list of the commonly reported benefits of mediation sourced from the literature was provided in the survey and these were canvassed in Chapters 1 and 2. The most frequently described benefits comprised:

- mediation as saving time and allowing for quicker resolution (Drummond 2005);
- being relative low cost and economic (Rifleman 2005);
- offering realistic possibilities of settlement and better resolutions (Jahn Kassim 2008);
- assisting to resolve relationship problems (Abraham 2006; Lim & Xavier 2002; Scherer 1997);
- having an informal process (McEwen 1982);
- providing disputants' empowerment or control over outcomes (McEwen 1982; Stamato 1992); and,
- providing settlements that are better tailored to the parties' needs (Folberg & Taylor 1984; Moore 2003).

Respondents were provided with a five point Likert scale from 'strongly agree' to 'strongly disagree' for each of the theoretical benefits of mediation. In addition to these lists, the survey provided space so respondents could indicate other possible benefits if they so wished. None of the respondents added to the list of benefits.

Again in order to drive a more targeted analysis, the five categories of self rating were regrouped into three depicting either agree or disagree to the given statements on the benefits of mediation while the other category remains as neutral. These are depicted in Table 5.1.

Table 5.1: Respondents' self rated either agree, disagree or neutral on the benefits of mediation

Benefits of mediation	Agree	Disagree	Neutral	Total
Saving time/quicker resolution	78 (78.8%)	5 (5%)	16 (16.2%)	99
Relative low cost & economic	68 (68.7%)	5 (5%)	26 (26.3%)	99
Realistic possibility of settlement	58 (58.6%)	8 (8.1%)	33 (33.3%)	99
Resolve relationship problems	56 (56.6%)	10 (10.1%)	33 (33.3%)	99
Informality of the process	76 (76.8%)	8 (8%)	15 (15.2%)	99
Empowerment or control of outcomes	46 (46.9%)	14 (14.3%)	38 (38.8%)	98
Settlements tailored to the parties' needs	50 (51.1%)	8 (8.1%)	40 (40.8%)	98

From Table 5.1, it can be seen that respondents reacted positively to the list of benefits of mediation with the strongest agreement that mediation: saves time and produces quick resolution (78 respondents); is informal (76 respondents); and is relatively low cost and economic (68 respondents).

Very few respondents disagreed with these perceived benefits. The strongest disagreement was in two areas where 14 respondents (14.3%) disagreed that mediation empowers disputants and 10 respondents (10.1%) disagreed that it resolved relationship problems.

There were a considerable number of respondents who took a neutral stance on the listed benefits of mediation. For, instance, 40.8% were neutral on the issue of whether settlement was tailored to the parties' needs and 38.8% were neutral on whether mediation was empowering to disputants. Another 33 respondents of the 99 who

answered this part of the question (33.3%) were neutral on whether mediation offers a realistic possibilities of settlements and similarly 33 respondents (33.3%) were neutral on whether mediation could resolve parties' relationship problems.

The findings demonstrate an interesting mix in which the majority of respondents support the textbook definitions of the benefits of mediation but with a large minority opting for a neutral stance. Despite the vast majority of respondents (84%) providing a low self rating on knowledge of mediation (Section 5.2), many of them nevertheless, agreed with its listed benefits which indicates that they may likely under-estimate their knowledge of the rhetoric of mediation and its benefits. A large group of respondents who remain neutral on the benefits of mediation could well indicate less exposure to, and awareness of, mediation. The next section of the questionnaire probed further into the respondents' perceptions of the benefits of mediation.

5.2.2 Whether mediation could bring about quicker and fairer settlements

The survey asked respondents their views on whether mediation can bring quicker and fairer settlements as the parties themselves design their terms of settlement to tailor to their needs. This question included a five point Likert scale from 'strongly agree' to 'strongly disagree'. For the purpose of analysis, respondents' answers were categorised into 'agree' or 'disagree' by combining 'strongly agree' and 'agree' and 'disagree' with 'strongly disagree'. The remaining category represents the respondents who answered 'neutral'. A total of 64 (64%) of the 100 respondents who answered this question agreed with the statement and only 5 (5%) dissented. A relatively large group of 31 respondents (31%) were neutral. The survey asked respondents to provide reasons for their answers to this question and these are discussed below.

5.2.2.i Agree

Of the 64 respondents who agreed (either strongly agree or agree) with the statement that mediation can bring quicker and fairer settlements as the parties themselves design their terms of settlement based on their needs, 50 provided their reasons. Twenty of these 50 responses could not be categorised and therefore are not reported (they are

provided in full in Appendix L1). The remaining 30 responses were themed and are reported below. Of these, two respondents were unequivocal:

'I strongly agree to the above statement and it should work that way'
(SR78).

'That is the main idea behind mediation!' (SR63).

Despite agreeing that mediation can be quick if parties designed their own settlement, another two respondents thought that it may not be fair:

'The stress in mediation is for a win-win situation for both parties. As for 'fairer' settlements this word is subjective' (SR59).

'On some occasions, my client didn't get what he or she wanted'
(SR74).

The next remaining 26 responses were arranged and grouped into five sub categories as described in Table 5.2:

Table 5.2: The summary of 26 responses who agreed mediation can bring quicker and fairer settlement

The categories of responses	The number of comments
Mediation settlement is tailored according to the disputants' needs and interests	9
Mediation is quicker and fairer because of the role played by the mediators	5
Parties are aware of their needs and interests	5
Mediation settlement is quicker and fairer if parties are in consensus	4
Mediators may be involved in proposing the terms of settlement	3
Total	26

i. Mediation settlement is tailored according to the disputants' needs and interests

Nine of the 26 respondents analysed in this section believed mediation enables disputants to work out their own terms of settlement based on mutual understandings and needs (their views are provided in full in Appendix L2). Typical of the nine comments were: *'Through mediation, both parties may have a sort of 'common-agreement' as to the terms of settlement' (SR51)*; *'Mediation is based on mutual understandings. Whatever solution achieved is based on a two-sided settlement' (SR54)*; and, *'It brings about a solution that both parties agreed ... through discussion during the mediation. Parties are facing the reality of their respective cases' (SR21)*.

ii. Mediation is quicker and fairer because of the role played by the mediators

The second sub category of comments from the 26 respondents was that mediation is quicker and fairer because of the role played by mediators. Here, five respondents referred to the ability and the role of a mediator in assisting parties to reach quick settlements (their views are provided in full in Appendix L3). Typical of these five comments were: *'Mediators can guide parties and bring them back to reality as regards time, costs and continuing uncertainty' (SR32)*; and, *'Open up channels of communication between parties with the assistance of a neutral and impartial mediator' (SR28)*.

iii. Parties are aware of their needs and interests

The third sub category of comments from five of the 26 respondents was that mediation is quicker and fairer as parties know their own needs and interests to design their own terms of settlement (their views are provided in full in Appendix L4). Typical of these five comments were: *'Disputants know what they want on the remedy/quantum of damages' (SR68)*; and, *'Both parties are well aware of the terms of agreement reached by them ...' (SR61)*.

iv. Mediation settlement is quicker and fairer if parties are in consensus

Four respondents in the fourth sub category of 26 respondents claimed that mediation helps to bring about quicker and fairer settlements if parties are sincere in their

commitments (their views are provided in full in Appendix L5). Typical comments from this category of responses included: *‘I am more to agree than neutral because if both parties are genuine then that is definitely the direction ...’* (SR37); and, *‘Only on the assumption that both parties are willing to compromise’* (SR60).

v. Mediators may be involved in proposing the terms of settlement

The final sub category of those 26 respondents who agreed that mediation can produce quicker and fairer settlements, as the parties themselves design their terms of settlement based on their needs was a group of three respondents who commented that mediators may be involved in proposing the terms of settlement:

‘In appropriate cases, this is true. Unless as in cases handled by JLM [judge-led mediation] the judge imposed a settlement proposal to the parties by merely scaling down their respective claims to reach the middle ground’ (SR9).

‘Although the terms of settlement are based on the parties’ needs, they will be within what can be expected based on the facts/law involved as may be expressed by the mediator’ (SR95).

‘I agree but sometimes the mediator may suggest or propose the possible terms of settlement’ (SR56).

5.2.2.ii Disagree

Only 5 respondents disagreed that mediation can produce quicker and fairer settlements as the parties themselves design their terms of settlement based on their needs. Of these five, two gave the reasons that the proposed terms of settlement were the result of the lawyers’ efforts, not the disputants:

‘Parties’ terms of settlement are dictated by their legal counsels. There are instances whereby such terms of settlement do not come from the parties themselves’ (SR39).

'Terms of settlement are designed by the lawyers, not the clients'
(SR67).

Another two respondents who answered 'disagree' also commented on the role of the mediator rather implying that mediators can detract from a tailored solution to disputes:

'The mediators must be pro-active' (SR27).

'Flexibility invites dilatoriness. The mediator must be pro-active shepherding the parties along the road to consensus' (SR29).

One respondent gave as his or her reason for disagreeing that when the mediators get involved in the decision making process, their lack of understanding of the issues may result in unsatisfactory outcomes:

'Mediators who have no understanding of the issues/facts have the keenness to resolve override parties' interests. Sometimes, they bulldoze the outcome' (SR8).

5.2.2.iii Neutral

On the question whether mediation can bring quicker and fairer settlements as the parties themselves design their terms of settlement based on their needs, a large group of 31 of the 100 respondents were neutral. Of the 31 respondents, four comments were not able to be categorised and these are provided in full in Appendix L6. The other 27 comments were analysed including two respondents who gave as the reason why they answered 'neutral' that the lawyers instead of their clients design the terms of settlement:

'Most times, advocates play an important role to decide for their clients rather than the clients themselves as most clients would want, and prefer their own desires rather than considering the practical terms and the other side circumstances' (SR77).

'Solicitors for the parties play an important role. Often, the outcome of mediation depends very much on the solicitors' attitude' (SR86).

Another respondent of the above 27 commented that mediations in road accident cases cannot be settled quickly unless the insurer is made a party:

'Mediation between parties involved in road traffic accident case is meaningless as the ultimate paymaster would be the insurer of the tortfeasor ...' (SR1).

The remaining 24 neutral responses were grouped into four sub categories which are described below.

i. The settlement in mediation may be quicker but not necessarily fairer

The first sub category of responses were from a group of 10 who felt that a settlement made in accordance to the parties' own design does not guarantee a fair or just outcome but rather, reflects a quick outcome. Some typical responses from this group included:

'May be a quicker method but not necessary the fairest as parties may settle to save time and costs and not be his or her preferred settlement' (SR19).

'If their design is to bring about a compromised settlement, it need not necessarily be a fairer settlement; albeit, a quicker settlement. Such compromised settlement could have been chosen or used as a means to reduce the waiting period if the dispute is to be litigated' (SR73).

'Not necessarily fairer. It can be a bit one-sided at times. However, parties proceed to settle despite unfair result due to stress and trauma of litigation' (SR99).

'Not necessary 'quicker' and 'fairer' as on occasions, a mediator forces parties to agree on certain terms of settlement' (SR40).

ii. On whether mediation could bring quicker and fairer settlements depend on the nature of cases

The second sub category of 24 responses was from a group of seven who believed that mediation could bring quicker and fairer settlements in appropriate cases (their views are provided in full in Appendix L7). Typical comments included: *'Not always unless it is a simple commercial/construction dispute or between banker/customer (SR66);* and, *'Depends on the circumstances of each case' (SR100).*

iii. Mediation would only be settled quickly on the parties' own terms if parties have the desire to settle and compromise

Another four of the 24 neutral respondents commented that mediation would only be settled quickly on the parties' own terms if parties have the desire to settle and compromise (their views are provided in full in Appendix L8). Typical comments included: *'Only effective if all parties involved participate in mediation with the common intention/aim of settlement, willingly – otherwise it is a waste of time and resources' (SR30)* and, *'It depends very much on the parties themselves. Not every lay person involved in a dispute knows how to design their term of settlements' (SR22).*

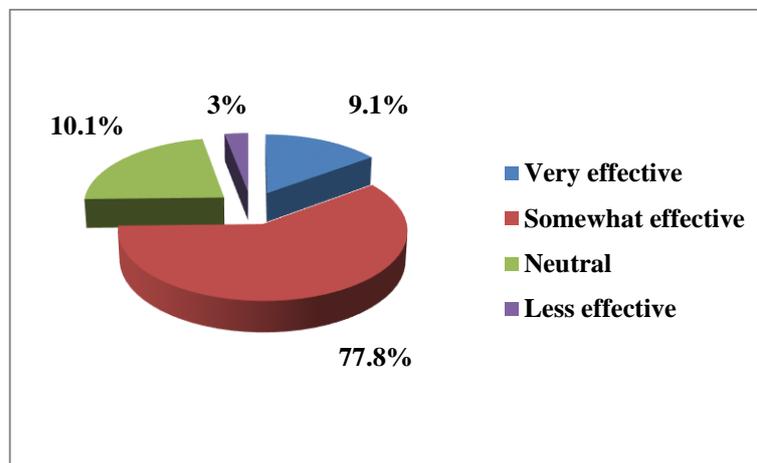
iv. The attainment of a fair outcome in mediation depends on the ability of the mediator

According to three of the 24 neutral respondents, the attainment of a fair outcome in mediation depends on the ability of the mediator and the manner in which the mediation is conducted (their views are also provided in full in Appendix L9). Typical comments included: *'Whether fair or not sometimes depend on the image of the mediation as projected by the mediator, e.g., hints of a weak case or weak issue in front of the other party' (SR4);* and, *'It depends whether the mediator could bring the parties to some kind of consensus. But I do not deny that if the mediator is competent, mediation would serve its purpose' (SR98).*

5.2.3 Respondents' opinions on the role of mediation as an alternative to litigation

One of the important aspects of the questionnaires was to obtain opinions from the respondents on the potential role of mediation as an alternative to litigation. As these professionals comprise key players in the use of mediation as their advice to clients would often determine whether a case could be resolved by mediation or by a judicial hearing. Indeed, the survey found that of the 99 respondents who answered this question on whether mediation is a good alternative to litigation, 86 respondents (86.9%) considered mediation to be either very effective or somewhat effective as an alternative to litigation. Only three respondents (3%) believed that mediation is less effective as an alternative to litigation and 10 respondents (10.1%) were neutral. None of the respondents believed mediation is not effective. This result shows that, despite the earlier finding of a clear majority of 84% of surveyed lawyers claiming to have low levels of knowledge of mediation, most believe that mediation is an effective alternative to litigation. Details are shown in the Figure 5.2 below.

Figure 5.2: Respondents' opinions on the role of mediation as an alternative to litigation (N=99)



Many of the 86 respondents also provided reasons why they believed mediation was effective as an alternative to litigation and these are described below:

5.2.3.i Very effective and somewhat effective

Of the 99 respondents to the question of whether mediation is an effective alternative to litigation, nine respondents (9.1%) described mediation as very effective and 77 respondents (77.8%) described it as somewhat effective.

Of the nine respondents, eight provided their reasons for why it is a very effective alternative. Three of the eight referred to their clients' satisfaction with the informal mediation process. In particular they noted that their clients were satisfied because they had the opportunity to participate in the mediation process. A typical response from this group was:

'Clients may feel more satisfied if they feel that they have some control in settling the matter' (SR23).

Two respondents noted that mediation may help avoid trials and reduce court backlogs:

'Low cost, saves time and do not have to undergo lengthy trial' (SR56).

'The backlog of cases in our legal system has become a nightmare but with the process of mediation, I believe, we can solve this problem' (SR54).

Two respondents related the effectiveness of mediation as an alternative to litigation from their own experience:

'A lot of cases handled by myself were settled through mediation' (SR74).

'The few litigations I handled, were successfully settled off when they were converted to mediation' (SR85).

One last respondent from this group described mediation as an alternative if the parties have the right frame of mind in their approach to it:

'Parties are usually too 'personal', 'unrealistic' in their expectations, missing the 'big picture' due to nitty-gritty matters or labouring under over-optimistic legal advice' (SR32).

Of the 77 respondents who described mediation as somewhat effective as an alternative to litigation, 71 provided reasons for their rating but 20 responses were not able to be categorised for reasons that they are not directly related to the question asked, incomprehensible or a single comment which does not fit in any specific categories. The other 51 responses were themed and arranged into five categories described below in Table 5.3 along with the number of comments for each category:

Table 5.3: The summary of 51 responses who described mediation as somewhat effective as an alternative to litigation

The categories of responses	The number of comments
The nature and characteristics of the mediation itself	22
The disputants' attitudes	10
The attributes and roles of mediators	7
The need for a proper legal framework for mediation	6
The nature and types of dispute	6
Total	51

i. The Nature and Characteristics of Mediation

The first category of 51 responses was a group of 22 respondents who attributed the effectiveness of mediation as an alternative to litigation to the nature and characteristics of mediation itself. Of these 22:nine respondents referred to the general benefits of mediation as an alternative to litigation; five respondents recognised that mediation allows disputants to explore all the possibilities to resolve their dispute; four respondents believed that the mediation process lacks paperwork and formality; and, four respondents wrote that mediation allows disputants to provide their viewpoints. Their views are described below:

- **The general benefits of mediation**

A group of nine respondents under this category referred to the general benefits of mediation as somewhat effective alternative to litigation. Typical responses from this group include: *'To resolve parties' issues at the early stages of dispute' (SR41); 'I think many people would like to try mediation as it saves time and is economical' (SR81); and, 'Reduce backlog of cases in court' (SR38).*

- **Mediation allows the disputants to explore all the possibilities in resolving their disputes**

Another group of five respondents recognised that mediation allows the disputants to explore all the possibilities to resolve their disputes with an impartial person. The parties would then be likely to have an outcome based on their interests and needs. Typical responses from this group include: *'Enable parties to bare their respective strength and weakness of their respective case. It's kind of 'reality testing'. Get compromised solution on win-win basis' (SR21) and, 'Parties are given the opportunity to face the problems/disputes face to face rather than through their respective solicitors/advocates as the medium' (SR77).*

- **Mediation lacks paperwork and formality.**

According to this group of four respondents, as mediation lacks paperwork and formality, disputants may raise their concerns free of legal procedural and evidentiary rule which makes the process effective as an alternative to litigation. Typical comments from this group of respondents include: *'By its less informal process, mediation does prospectively bring about a quicker resolution between the parties to the disputes' (SR73); and, 'Not bound by legal procedures and evidential rules, probably parties get an outcome closer to their intended solution' (SR59).*

- **Mediation allows disputants to provide their viewpoints**

The final group under this category was a group of four respondents who believed that the mediation process is effective as the disputants get the chance to express their opinions and expectations directly to the mediators who in turn, after hearing them, suggests possible solutions to settle their dispute. Typical comments received from this

group included: *'After both sides had aired their views before the mediator (preferably judge-led mediation) who later gave suggestions/options, the disputants are likely to settle their disputes'* (SR95) and, *'Because the parties will be less tense and more direct as questions are posed to them by the judge in the absence of their counsels'* (SR15).

ii. The disputants' attitudes

The second category of comments from the 51 respondents who noted that mediation was 'somewhat effective' comprised a group of 10 who shared the view that the disputants' attitudes to the process is vital to ensuring mediation as an effective alternative to litigation. This group of respondents believed that disputants' openness, sincerity and willingness to co-operate and compromise in the mediation process make it more successful. Typical comments from this group included: *'I am of the opinion that mediation will not work when parties are bitter and unwilling to listen to reason'* (SR60); *'Only successful if both parties are willing to settle the dispute. Most of the time, parties are not willing to mediate despite the fact that their case is easy to resolve, just to save face'* (SR18); *'Mediation is only effective if parties are sincere in attempting to find a resolution'* (SR28); and, *'It is only effective if parties are willing to meet each other ... and ... forgo some of their legal rights or entitlements'* (SR76).

iii. The attributes and roles of mediators

The third category of the 51 respondents' comments categorised under mediation as a 'somewhat effective' alternative to litigation indicated that it is dependent on the attributes and roles of the mediators. According to the seven respondents mediators must have a good understanding of the issues and facts, an appropriate personality, an ability to balance power between the disputants as well as experience which contributes to parties settling. Typical comments from this category of responses included: *'Mediators who have no understanding of the issues/facts have a keenness to resolve which overrides parties' interests. Sometimes, they bulldoze the outcome'* (SR8; and, *'It all depends on the temperament and the personality of the mediator'* (SR98).

iv. The need for a proper legal framework for mediation

The fourth category of comments noting that mediation was ‘somewhat effective’ comprised a group of six who felt that a legal framework for mediation is needed, including the courts’ power to direct parties to mediate their disputes by mandating it. Typical of this group were the following comments:

‘Its effectiveness will largely be determined by the establishment of a proper framework and clear guidelines being laid down and, most importantly, it must be armed with teeth to command adherence’ (SR29).

‘It will be effective if it is forced upon the parties in dispute ... ’ (SR13).

v. The nature and types of disputes

The final category of comments from the 51 respondents was that the effectiveness of mediation as an alternative to litigation is dependent on the nature and type of disputes. According to the six respondents in this category, mediation is best suited to simple cases as opposed to the complicated cases that involve questions of law. One respondent wrote mediation becomes ineffective in personal injuries cases (particularly accident cases) as the plaintiff’s lawyer sometimes requested an unjustifiable quantum of damages in the mediation settlement. Another respondent believed that mediation is effective for cases which involve dollars and cents. Other typical responses included: *‘Mediation is not for all types of cases. Simple cases, which involve misunderstanding breach of contract, tort, divorce case, are good to be referred to mediation for a fast, a more economical way to resolve disputes’ (SR72);* and, *‘It’s effective in cases involving relationships and personal issues. It’s less effective where legal issues are involved as the parties become totally dependant on their lawyers for opinions on the success of their claim’ (SR69).*

5.2.3.ii Less effective

When asked whether mediation was an effective alternative to litigation, three respondents responded that it is less effective. Two wrote that the outcomes may not satisfy the disputants:

'Disputants may disagree to the decision made where a monetary claim is in issue. The amount claimed may not be realised or materialised as it may be reduced when case is settled' (SR2).

'Settlement may not be tailored to the parties' needs' (SR42).

The third respondent believed that judges may not be equipped to be mediators:

'The way mediation process is conducted is less effective. Some judges did not even evaluate the case' (SR27).

5.2.3.iii Neutral

Ten of the 99 respondents (10.1%) who participated in this section of the survey were neutral on the effectiveness of mediation as an alternative to litigation. One respondent did not provide a reason. Four of the remaining nine respondents based their reasons on the lack of awareness about, and exposure to, mediation which led to the parties being unable to perceive the advantages of mediation:

Parties are not really exposed to mediation system and/or process (SR100).

The effectiveness of the mediation process would largely depend on whether or not clients would be able to perceive it as a cost effective method of dispute resolution (SR89).

Mediation would only work if, (1) it is cheaper (2) there is willingness on the part of litigants to adopt the process. As it is, there is insufficient publicity and also evidence of success ... Litigants would

opt for this process if they are able to see the real benefits of mediation (SR16).

It's a good idea but whether it will be accepted or not in this country is yet to be proven (SR55).

One of the above respondents (SR16) added that the mediation fees by private mediators (legal practitioners) are expensive as they mirror the professional legal fees charged in litigation. This results in parties' preference for the court:

As mediators are also legal practitioners, the fee structure appears to model closely to their professional charges which are high and thus litigants may opt for courts which are more efficient now (SR16).

One respondent indicated that the promotion of mediation was less due to its effectiveness but more because of the shortcomings of litigation:

Not all the parties are happy with mediation. It's just that may be they want to get rid of the litigation process, to avoid high costs and to shorten the time to settle the matter (SR31).

The other concern for the neutral respondents is the quality of mediators. Two respondents raised this issue:

Dependent on other factors e.g. parties involved and the quality of mediator (SR40).

Process is not effective as there are always problems between parties when it comes to the appointment of a mediator. A lot of times mediators are not legally qualified leading to problems (SR43).

One respondent indicated that judges may not provide the right style for mediation:

Mediation by the court is done more like an arbitration style and this may or may not be good for the satisfactory outcome (SR84).

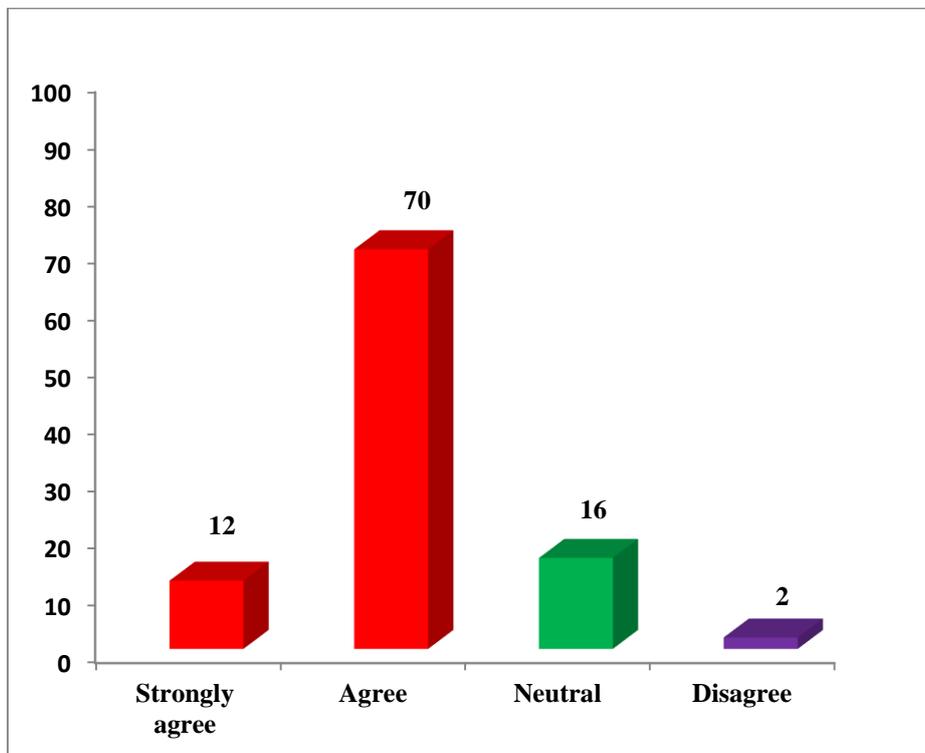
Finally, one respondent reported his or her own negative outcomes with mediation:

I have attempted mediation several times but so far all have failed (SR63).

5.2.4 Whether mediation can ease the problem of case backlogs

The survey provided respondents with the statement: ‘One of the factors which has made mediation successful in other countries is the reduction of court backlogs. Can mediation ease the problem of case backlogs?’ For ease of analysis the responses were grouped into agree, neutral and disagree. Of the 100 respondents who answered this question, the majority (N=82) agreed that mediation can ease the problem of case backlogs, 16 respondents (16%) remained neutral and only two respondents (2%) disagreed. There were no responses to ‘strongly disagree’ in this section. The details of the result are shown in Figure 5.3.

Figure 5.3: Can mediation ease the problem of case backlogs?



The respondents were asked to provide reasons for their responses and these are discussed below:

5.2.4.i Agree

Of the 82 respondents who believed that mediation can ease the problem of case backlogs, 68 provided reasons for their selection. Nineteen of these 68 responses were unable to be categorised and are not reported. The remaining 49 responses include the two respondents who provided comments noting that mediation not only reduced cases at the court of first instance but also at the appeal stage:

'A successful mediation will close one case which is pending for trial. As mediation usually satisfies both parties, there will be no appeal, which will usually be filed upon decision being made after a trial' (SR95).

'Time taken to resolve disputes in mediation is much less than having a trial and there will be no appeal as parties accept outcome' (SR62).

Another two comments of the 49 respondents noted that a mandated system of mediation was required to reduce the court backlog:

If mediation is just court directed, most of the time, parties will not make it a success (SR18).

Mediation can ease backlogs provided that the parties are required to mediate. And the costs are not prohibitive. A scale of fees must be imposed. In short mediation is not a human characteristic by virtue. It must be enforced and made attractive (SR37).

Next are the 45 of the 49 respondents who provided reasons which were themed and formed into two groups comprising those who saw mediation as easing court backlogs

(38 comments) and those who agreed but added that it requires party support (seven comments).

i. Mediation eases court backlogs

Recognition that mediation is intended to reduce backlogs was clear to most of the 82 respondents but 38 specifically commented on this. For example: *‘This is one of the reasons why mediation was introduced in Malaysia’ (SR50); ‘Yes, a successful mediation does help in the reduction of court backlogs. Some cases do not need to go for trial’ (SR98); and, ‘Yes, mediation in its pure sense can ease the problem of case backlogs’ (SR73).*

ii. Mediation can reduce case loads if everyone is supporting it

A second category of responses to this section were seven respondents who believe that mediation could reduce court case loads provided everyone is supporting it. Typical comments of this group were: *‘If more people are going for mediation there would be lesser cases in court’ (SR81); ‘To a certain extent, yes –but mediation is never the answer to every case – not if one party stands firm in litigating the matter and refuses to compromise’ (SR30); and, ‘This is because more cases will be resolved by way of mediation provided [it] mediation is well promoted and supported’ (SR47).*

5.2.4.ii Disagree

Of the 100 respondents who participated in this question, only two disagreed that mediation eases backlogs. The only respondent who provides a reason, referred to the parties’ perception of the right based process of litigation:

‘As a general rule parties prefer litigation as it reinforced respective parties’ zero-sum mentality, through which they drive a feeling of vindication if they are successful’ (SR35).

5.2.4.iii Neutral

Sixteen of the 100 respondents who answered this question were neutral on whether mediation can ease backlogs. One respondent did not provide a reason. Of the 15

respondents who provided the written responses: four respondents attributed the success of mediation to disputants' attitudes; two respondents related it to the role played by mediators; two respondent indicated disputants' attitudes towards the mediator; and, another two respondents thought judge-mediators bring some formality to the process. One respondent identified the opinions of the lawyers as the key to the success of mediation. Details of these 11 comments can be found in Appendix L10. Another four responses of the 15 neutral respondents could not be categorised.

5.3 How court-connected mediation can be implemented under the supervision of the court system.

Court-connected mediation schemes are directly related to courts and often the success of these schemes rely on the court supervising the referral of disputes to mediation. As lawyers are an important link in this process the survey canvassed their ideas about how such supervision by the courts might take place. A total of 71 respondents responded to this question. Although the respondents were encouraged to consider both court-annexed mediation and judge-led mediation in their answers, most of them grouped these together and provided general comments and opinions on mediation in the courts. For the purpose of analysis, their answers were divided into three categories: those responses pertaining to general views and comments on mediation (13 comments); responses that concern the process on how each type of mediation can be implemented under the court's supervision (15 comments); and, responses referring to the advantages and the effectiveness of, and preference for each type of mediation (24 comments). A further 21 comments were not categorised.

The respondents' answers to each of these categories are discussed in the following section.

5.3.1 General views and comments on mediation

Of the 71 respondents who responded to this question 13 provided written comments in this category. This includes one respondent who believed that mediation should be promoted by the government:

'There must be a political will which dictates finances and resources. Otherwise it will be piecemeal and short-lived depending on the judiciary's own limited resources and goodwill of judicial staff and lawyers' (SR37).

Two of the 13 respondents noted the importance of creating awareness of the availability of mediation:

'Mediation should be introduced gradually and as 'a way of business' and not just a knee jerk reaction in order to satisfy or fulfil some key performance index (KPI) or churn out statistics. The mindset of all should be tuned to it and it should not be treated as a quick cure to clear backlogs' (SR1).

'Apart from obviously considering the introduction of mediation procedures and methods, it is important that the public should be educated on the benefits of mediation first' (SR60).

The final group of 10 under this general category wrote that a mandated system of mediation was required in Malaysia. Typical of these comments were: *'If the Rules are amended and mediation is mandatory for certain cases, it will force the parties to mediate cases such as running down and disputes as to properties which can be resolved through mediation' (SR3); 'The rules of courts have to be amended to include mediation as part and parcel of the judicial process' (SR7); and, 'Well ... just put a new provision in the Rules. For example, in Malaysia, put new provision in the Rules of High Court or Rules of Subordinate Court pertaining to the implementation of the mediation process' (SR51).*

5.3.2 How each type of court-connected mediation can be implemented under the court's supervision

The second category of comments of 15 from the 71 respondents concerns how each type of mediation can be implemented within the court's supervision. Of the 15

respondents: seven commented on court-connected mediation making practical suggestions including training and accreditation of mediators and rules around mandating mediation prior to lodgement of the case in court. Seven other responses provided suggestions on how court-annexed mediation can be implemented under the court's supervision; and, one respondent offered suggestions on how judge-led mediation can be implemented within the supervision of the court. Typical of these comments were:

How each type of court-connected mediation can be implemented under the court's supervision:

'Rules should be in place that prior to filing a claim, parties must seek mediation by registered mediators. If mediation fails, then a certificate should be issued by the mediator and litigants can then file the claim. Courts can train the registrars at discovery stage to evaluate the matters suitable for mediation and then refer to a judge to mediate' (SR16).

'Appointment of the mediator in CAM [Court-annexed mediation] should be made by the judge/court with the consent of the parties. If it is a JLM [judge-led mediation] it should not be mediated by the judge who presides in the matter' (SR17).

How court-annexed mediation can be implemented under the court's supervision:

'Court-annexed mediation can be run by an accredited body where a panel of trained mediators are available' (SR11).

'Court-annexed mediation can be implemented with a close supervision of the court firstly by identifying the suitable cases and following thru with properly qualified mediators' (SR9).

How judge-led mediation can be implemented under the court's supervision:

'Judge-led mediation can be implemented by assigning mediation to other judges not sitting to hear the case' (SR95).

5.3.3 The respondents' comments on the advantages and the effectiveness of each type of court-connected mediation and which one is their preference

The third category of the 71 respondents who provided written responses, were a group of 24 comments which contained statements about: (i) the advantages of each type of mediations (five comments); (ii) the effectiveness of judge-led mediation (eight comments); and (iii) their preference for one particular type of mediation over the other and their reasons (10 comments). These sub categories are discussed in the following sections.

i. The advantages of each type of court-connected mediation

Three of the above 24 respondents acknowledged the advantages of court-annexed mediation while two commented on the advantages of judge-led mediation. Typical of these comments from each type of mediation were:

The advantages of court-annexed mediation:

'Court-annexed will open up a dispute to a bigger pool of mediators whereas JLM [judge-led mediation] requires at least 2 courts with one judge each in a particular locality as the mediating judge has to disqualify himself if there is no resolution. In smaller districts this therefore is impossible' (S13)

The advantages of judge-led mediation:

'JLM [judge-led mediation] gives the impression that it is more realistic as the judge had decided previous cases and hence his opinion carries more weight' (S20).

ii. The effectiveness of judge-led mediation

This second sub category was group of eight respondents of the 24 respondents who commented about judge-led mediation being effective. There was no statement on the effectiveness of court-annexed mediation. Typical of these comments were: *‘In Malaysia due to the mindset of the people, judge-led mediation would be more effective. Parties may be less inclined to settle when the mediator lacks judicial authority’ (SR89); ‘Judge-led mediation is more effective as parties know that the judge would decide the case one way or another (SR99); and, ‘Court-annexed mediation is not as effective as pressure element on lawyers is non existent. Mediators referred might also not be legally qualified’ (SR43).*

iii. Preference for one particular type of court-connected mediation over the other and their reasons for such preference.

This third sub category comprised of 10 of the 24 respondents who preferred one type of mediation. Of these 10 comments, seven preferred judge-led mediation whereas three preferred court-annexed mediation. Typical comments as reasons for their preference for one type of mediation included the following:

Judge-led mediation is preferred

The respondents’ who preferred judge-led mediation believed the disputants have more respect for it because of the authority of a judge. Typical comments from this group of respondents include: *‘Judge-led mediation is much better as parties will respect and trust a judge more than a privately appointed mediator who is often a legal practitioner’ (SR62); ‘JLM [judge-led mediation] is definitely much better because the parties always have faith in the fairness of the judge’ (SR15); and, ‘My opinion is, it is better to have the judge-led mediation since the judge himself is involved in settling the matter’ (SR61).*

Court-annexed mediation is preferred

Three respondents preferred court-annexed mediation as the private mediators are properly trained to deal with mediation process. Typical comments include: *‘Prefer court-annexed mediation as judges may be biased in forcing a forced resolution rather*

than mutual resolution in order to clear backlogs’ (SR24), and, ‘Court-annexed mediation would be preferred as guidelines can be laid out especially on the conduct of the mediators’ (SR68).

As the practice of judge-led mediation is becoming more dominant than court-annexed mediation (see Chapters 3 and 4), the next section canvasses the respondents’ views specifically about judges sitting as mediators in a court setting.

5.4 Judges sitting as mediator in a court setting

The respondents were asked their opinions on judges sitting as mediators in a court setting. As this is an open ended question, the lawyers’ answers can be categorised into three comprising of: ‘Agree’, ‘Disagree’ and ‘Neutral’ based on their reasons given to support their answers. Of the 92 respondents who responded to this question, 42 agreed with the notion of judges as mediators, 27 disagreed and 23 were neutral. Their reasons are discussed in the following sections.

5.4.1 Agree

The first category was a group of 42 respondents who agreed with judges being mediators. There were 37 comments which were grouped into four sub categories: (i) the expression of support for judges as mediators (16 comments); (ii) judges’ experiences and knowledge in law (eight comments); (iii) the various benefits of judges sitting as mediators (seven comments); (iv) judges’ neutrality, impartiality and authority (four comments); and, (v) the legitimacy and seriousness of the process (two comments). These sub categories are discussed in the following sections. Five comments of the 42 respondents could not be categorised. For instance: one respondent raised an issue about the insufficient number of judges to handle mediation and another suggested that judges required an additional allowance to undertake mediation.

i. The expression of support for judges as mediators

The first sub category was a group of 16 respondents who indicated their support for judge mediators. Typical comments from this group include: *‘That should be the*

practice' (SR32); *'Good and should be this way'* (SR33); *'Good. Should be encouraged'* (SR99); *'I strongly support'* (SR1); and, *'It is a positive way'* (SR91).

ii. Judges' experiences and knowledge in law

The second sub category of the above 37 respondents was a group of eight who thought that judges have the experiences and knowledge to become good mediators. Typical responses from this group include: *'Judges are mostly experience and knowledgeable on various areas of law due to their exposure in different cases. They would be very helpful in getting matter solved and give useful or effective suggestions'* (SR81); *'Judge is a well respected person with highly experienced and can give a fair and good judgment. He has the temperament to hear both parties'* (SR2); *'It should be encouraged as the judge is likely to have good grasp of the facts/law involved and be in the position to give a practical solution to the problem to the satisfaction of both parties'* (SR95); and, *'Good. They understand and appreciate the facts better'* (SR45).

iii. Judges-mediators benefit the parties

The third sub category of the above 37 respondents was a group of seven respondents who noted the benefits of judge mediators to the parties. Typical responses from this group include: *'I think the judges can give some options and ideas to the parties in settling the matter'* (SR61); *'It would encourage parties to speak out and to take the advice of the judge as they feel that they are given an opportunity to be heard on their side of story'* (SR75); and, *'It would definitely enhance the better and faster resolution of matter and achieve a better outcome or result'* (SR77).

iv. Judges' neutrality, impartiality and authority

This fourth sub category was a group of 4 respondents who commented on the salient characteristics associated with judges which make them suitable as mediators. Typical of these comments were: *'... to a layman judge is a symbol of justice and fairness. So, judge can easily persuade the litigants to settle provided they understand the real situation of their case'* (SR18) and, *'I think it facilitates settlement as a judge is seen as a figure of authority'* (SR23).

v. The legitimacy and seriousness of the process

The final sub category was a group of two of the above 37 respondents who believed that the process of judges sitting as mediators in the court setting will give a feeling of legitimacy and seriousness:

'In the Asian context, it confers a mantle or aura of legitimacy to the whole proceedings' (SR35).

'Give the sense of seriousness to the proceedings' (SR36).

5.4.2 Disagree

There were 27 respondents who felt that it was inappropriate for judges to conduct mediation. They provided their comments which were themed and arranged into five sub categories including: (i) the fear that the judges may not be able to conduct mediation properly due to their lack of training and experience (nine comments); (ii) the impact of judge mediators on the parties (nine comments); (iii) the preference for non-judge mediators (four comments); (iv) the fear that a judge-mediator may hear the case again if mediation fails (three comments); and, (v) the environment of the court setting is not suitable for mediation (two comments). These comments are discussed in the following sections.

i. The fear that judges may not be able to conduct mediation properly due to their lack of training and experience

The first sub category of nine respondents represented the view that judges are unable to function as mediators due to their unfamiliarity with the process and lack of training. Typical comments from this group were: *'Unfortunately some forgot to leave their robe and wig, hence behave as if they are conducting trial' (SR3); 'Not really effective as their mindset is different and not trained to resolve matter in a compromise manner' (SR44); and, 'Shouldn't be because during the mediation the judge could possibly have make up their mind already' (SR5).*

ii. The impact of judge mediators on the parties

Another nine respondents in the second sub category of 27 respondents who disagreed, thought that judge mediators may have an impact on the quality of justice as desired by the parties in the process. Typical of responses from this group were: *'It is my view that judges sitting as mediators in a court setting would create undue pressure on disputants to settle their dispute'* (SR7); *'This could harm a real mediation as parties may not want to show their real strengths and weaknesses'* (SR84); and, *'Not advisable as it is too formal. Parties may feel uncomfortable and discussion may be treated like court proceeding. Lack of frank and candid disclosure of information'* (SR21).

iii. The preference for non-judge mediators

The third sub category of the 27 respondents who disagreed with judge mediators in court settings was a group of four. Their comments indicated a preference for mediation conducted by non-judge mediators. Typical comments of this group were: *'Prefer court-annexed mediation as judges may be biased in forcing a forced resolution rather than mutual in order to clear backlog'* (SR24) and *'Judges might not be experienced in certain areas as compared to private mediator for instance matters involving accounting or international law'* (SR38).

iv. The fear that a judge-mediator may hear the case again if mediation fails

The fourth sub category was a group of three respondents who expressed their concerns that the judge-mediator may hear the case again if mediation fails. A typical response from this group was:

'It may prejudice the parties if a judge hears the case in the event mediation fails' (SR42).

v. The environment in a court setting is not suitable for mediation

The final sub category from this group was two respondents who believed that the environment in which mediation was held matters:

'The court setting might impede the mediation process' (SR5).

'It would appear intimidating. The environment is very important so that parties can be at ease' (SR17).

5.4.3 Neutral

The third category of comments from the 92 respondents who provided written responses was a large group of 23 who were neutral on whether judges should sit as mediators. One respondent did not offer a reason. The 22 remaining responses were grouped into three sub categories: (i) judges' impartiality may be affected when they continue to hear a matter after mediation fails (10 comments); (ii) mediation should not be held in the court setting (open court) (five comments); and (iii) judges may conduct mediation improperly (five comments).

i. Judges' impartiality may be affected when they continue to hear matter after mediation fails

The first sub category from the 22 respondents who provided their reasons was a group of 10 respondents who were concerned that judges may not retain their impartiality when they proceed to hear the case after mediation fails. Typical comments from this group were: *'No issue, provided parties are agreeable, and if the mediation does not work out, the judge who sat as a mediator should not hear the trial' (SR48); 'I think it is alright if it is not the same judge who will be trying the case... ' (SR76); and, 'No problem, but the judge who had sat as mediator should not hear the case in the event the mediation is unsuccessful' (SR89).*

ii. Mediation should not be held in the court setting (open court)

The second sub category was a group of five respondents who believed that mediation is not suitable to be conducted in the court setting as it reflects formality of the process. Typical responses from this group were: *'The setting should be informal (in chambers) as open court may exert the same pressure as a full blown trial' (SR89) and 'Will have no problem if the judge speaks and acts less formal and the room is not set up like court room' (SR50).*

iii. Judges may conduct mediation improperly

According to the third sub category of comments coming from a group of five of the 22 respondents who gave reasons judges must not act like judges in the formal trial, but real mediators instead. Typical comments from this group were: *'With the current intent on clearing backlogs, judges have to act properly and not give views on the prospect of a party's case during mediation as it gives the impression of partiality and or put counsel in an uncomfortable scenario' (SR4)*; and, *'Judges when sitting as mediators would have to ensure that they do not 'order' the litigants or influenced them. They could give them options at both private sessions and several sessions and approach the litigants in a different tone and manner' (SR16)*.

The last two of the 22 neutral respondents gave different comments: one thought that whether or not judges can sit as mediators will depend on their background and character and the other believed that judges can act as mediators provided they are given sufficient training.

As discussed in Chapter 3, the review of literature shows that mediation affords justice to the disputants. The next section seeks the respondents' views about justice in mediation.

5.5 Justice in mediation

A series of statements about justice were put to respondents. Mediation does afford justice to disputants the same way as they would have expected justice from the formal litigation. A five point Likert scale was used to measure lawyers' responses from 'strongly agree' to 'strongly disagree'. For ease of analysis the responses were grouped into agree, neutral and disagree. Their responses to the justice statements are provided below and depicted in Table 5.4:

Table 5.4: Statements of justice in mediation

Statements of Justice	Agree	Neutral	Disagree	N
Mediation does afford justice to disputants the same way as they would have expected justice from the formal litigation.	49	34	17	100
Disputants perceive the outcome as fair in mediation when the outcomes are responsive to their needs.	69	26	4	99
Disputants perceive the procedure in mediation as fair when they believe that they had a fair chance to present their story and their views been considered.	78	18	4	100
When the disputants are treated with respect and dignity, their perceptions of fairness in mediation is further enhanced.	86	11	3	100
Disputants are only concerned with the fairness of the outcome of the dispute.	56	23	20	99

Table 5.4 shows that slightly under half of the 100 respondents who answered this question (N=49) believe that mediation does afford justice to disputants. But a large group of 34 respondents were neutral and 17 respondents disagreed. For the second statement of justice, the majority of the 99 respondents answering this question (N=69) considered that disputants perceive the outcome as fair in mediation when the outcomes are responsive to their needs. Again, a large neutral group was observed comprising 26 respondents but only four respondents disagreed with the statement.

The responses for the third statement of justice showed that the majority of the 100 respondents (N=78) agreed that mediation would be fair if disputants could present their stories and have their views considered. A sizable neutral group of 18 respondents was observed and only four respondents disagreed. In regard to the statement that disputants' perceptions of fairness would be further enhanced if they are treated with respect and dignity the vast majority of the 100 respondents agreed (N=86), 11

respondents were neutral and three respondents disagreed. When provided with a statement that disputants are only concerned with the fairness of the outcome of their dispute, just over half of the 99 respondents answering this question (N=56) agreed. Another 23 respondents were neutral and 20 respondents disagreed. The detail of the findings is described in Table 5.4.

These findings show that lawyers' perception of fairness in the mediation process is highly influenced by the extent to which they believe disputants are provided interactional justice (86%) and procedural justice (78%) rather than distributive justice (56%). These findings concur with the general theory and research on justice (see Chapter 3) and are discussed further in Chapter 7.

The following sections seek to determine whether the legal practitioners have different views of justice in court-annexed and judge-led mediation. The explanation of the terms court-annexed and judge-led mediation were given in the respondents' survey (See Chapters 3 and a copy of the survey is provided in 'Appendix A').

5.5.1 Procedural Justice

The general findings on the statements of justice in mediation (Table 5.4) revealed that 78 of 100 respondents agreed that mediation is fair if disputants have a chance to present their stories and have their views considered. Table 5.4 also demonstrates that 86 of 100 respondents participated in the survey agreed that the disputants' perceptions of fairness is enhanced if they are treated with respect and dignity. As the literature on procedural and interactional justice demonstrates they are inter-related concepts (see Chapter 3) the findings on these two concepts are combined in this analysis.

As earlier noted in Chapter 3, there are six rules of procedural justice: the right to be presented with, or informed of, sufficient details of the nature of the claim against a person (McDermott & Berkeley 1996); the right to present a defence (Barrett 1999); the right to a hearing conducted by impartial person (Posthuma 2003); the right to be provided with the reasons or grounds for the decision (Bayles 1990; Jameson 1999); the right to appeal against the decision made (Posthuma 2003); and, the right to have

the hearing conducted in a timely manner (Jameson 1999). In this respect, the respondents were asked whether they have different views about these aspects of procedural justice in court-annexed and judge-led mediation particularly on whether these processes are perceived as fair, whether these processes allow parties to express their views and their views are heard and considered and whether these processes treat parties with respect and dignity. The results of these findings can be seen in Table 5.5.

Table 5.5: Findings on procedural justice in both types of court-connected mediation

Aspects of Procedural Justice	Types of mediation	Agree	Neutral	Disagree	N
Process that is perceived as fair by the parties	Court-annexed	61 (61.6%)	34 (34.3%)	4 (4.0%)	99
	Judge-led	66 (66.7%)	27 (27.3%)	6 (6.1%)	99
An opportunity for parties to express their views	Court-annexed	81 (82.7%)	17 (17.3%)		98
	Judge-led	74 (74.7%)	23 (23.2%)	2 (2.0%)	99
An opportunity for parties' views to be heard and considered	Court-annexed	80 (81.6%)	16 (16.3%)	2 (2.0%)	98
	Judge-led	76 (76.8%)	21 (21.2%)	2 (2.1%)	99
Treatment that perceives by parties as dignified and respectful	Court-annexed	65 (66.3%)	33 (33.7%)		98
	Judge-led	75 (75.8%)	23 (23.2%)	1 (1.0%)	99

Court-annexed mediation

As shown in Table 5.5, the survey results show that 61 of 99 respondents (61.6%) who answered this part of the question believe that court-annexed mediation is perceived as fair by the parties, 34 respondents (34.3%) were neutral while four respondents disagreed (4.0%). A large majority (N=81) (82.7%) of the 98 respondents who answered this question believe that this process provides an opportunity for parties to

express their views while 17 respondents were neutral (17.3%) and none of the respondents disagreed. Also the vast majority of respondents (N=80) (81.6%) of 98 respondents believe that this process allows an opportunity for parties' views to be heard and considered while 16 respondents (16.3%) were neutral and only two respondents (2.0%) disagreed. Most (N=65)(66.5%) answering this question also believe that parties' perceive the treatment in this process as dignified and respectful and 33 respondents (33.7%) were neutral while none of the respondents disagreed.

Judge-led mediation

The respondents were also asked the same questions on these aspects of procedural justice in judge-led mediation. A total of 99 respondents answered all four questions. The majority of 66 respondents (66.7%) believe that the process is perceived as fair by the parties, 27 respondents (27.3%) were neutral while six respondents disagreed (6.1%). On whether this process provides an opportunity for parties to express their views, 74 respondents (74.7%) agreed, 23 respondents (23.2%) were neutral and only two respondents disagreed (2.0%). On whether it allows an opportunity for parties' views to be heard and considered 76 respondents (76.8%) agreed, 21 respondents were neutral (21.2%) and only a minority of two respondents disagreed (2.1%). Most of the respondents (N75) (75.8%) also believe that parties' perceive the treatment in this process as dignified and respectful, 23 respondents (23.2%) were neutral and only one respondent (1.0%) disagreed.

Although the majority of the respondents in the survey agreed that there are elements of procedural justice in both types of court-connected mediation, the high proportion of respondents who decided to withhold their opinion (the neutral respondents in Table 5.5) could be due to their limited experience of the practical aspects of the mediation itself in these two models.

5.5.2 Distributive justice

The elements of distributive justice are important as they affect the parties' perceptions of fairness in mediation. This section will seek to determine whether the legal practitioners have different views of the fairness of outcomes in both types of court-

connected mediation (distributive justice). Six aspects of outcomes were assessed and these are depicted in Table 5.6 below and again the figures for judge-led and court-annexed mediation are provided separately.

Table 5.6: Findings on whether the outcomes in mediation deliver distributive justice

Outcome in mediation	Types of mediation	Agree	Neutral	Disagree	N
Consistent with rule of law	Court-annexed	48 (48.5%)	39 (39.4%)	12 (12.1%)	99
	Judge-led	72 (72.7%)	23 (23.2%)	4 (4.0%)	99
Responsive to parties' needs	Court-annexed	65 (66.3%)	27 (27.6%)	6 (6.1%)	98
	Judge-led	66 (67.3%)	26 (26.5%)	6 (6.1%)	98
Consistent with parties' determination	Court-annexed	54 (55.1%)	36 (36.7%)	8 (8.2%)	98
	Judge-led	61 (62.2%)	30 (30.6%)	7 (7.1%)	98
Durable	Court-annexed	46 (47.9%)	47 (49.0%)	3 (3.1%)	96
	Judge-led	60 (61.9%)	36 (37.1%)	1 (1.0%)	97
Maintains or improves relationships	Court-annexed	48 (49.0%)	40 (40.8%)	10 (10.2%)	98
	Judge-led	52 (53.1%)	37 (37.8%)	9 (9.2%)	98
Parties' perceived as fair	Court-annexed	53 (54.1%)	40 (40.8%)	5 (5.1%)	98
	Judge-led	60 (61.2%)	29 (29.6%)	9 (9.2%)	98

Court-annexed mediation

The survey results show that 48 of the 99 respondents to this part of the question (48.5%) believe that the outcome of court-annexed mediation would be consistent with the rule of law, 39 respondents (39.4%) were neutral while 12 respondents (12.1%) disagreed. While this part of the survey did not call for respondents to explain their choices, it is likely that the relatively low rate of agreement with the statement could be influenced by the non-court setting, informality and the flexibility of the mediation process where its procedures may depart from the strict adherence to the steps required for, by the rule of law. It should also be noted that in Malaysia there is little use made of the MMC as the main source of court-annexed mediation.

The majority of 65 respondents (66.3%) believe that the outcome of mediation would be responsive to litigants' needs, while 27 respondents (27.6%) were neutral and six respondents (6.1%) disagreed. Just over half of the 98 respondents answering this question (N=54) (55.1%) believe that the outcome of mediation would be consistent with the parties' determination; while 36 respondents (36.7%) were neutral and eight respondents (8.2%) disagreed.

However, 46 of 96 respondents (47.9%) believe the outcome of mediation would be durable, slightly lower than the number of neutral respondents (N=47) (49%), while only three respondents (3.1%) disagreed. On whether the outcome of mediation maintains and improves relationships, a slim majority of respondents (N=48) (49%) of 98 respondents agreed, 40 respondents (40.8%) were neutral and 10 respondents (10.2%) disagreed. Finally on whether the parties perceive the outcome of mediation as fair, 53 of 98 respondents (54.1%) who answered this question agreed, 40 respondents (40.8%) were neutral and five respondents (5.1%) disagreed.

Overall the result display a reticence to support court-annexed mediation and a large group of neutral lawyer respondents suggests a lack of experience in this type of dispute resolution. These issues are discussed further in Chapter 7.

Judge-led mediation

The respondents were also asked the same questions on distributive justice pertaining to judge-led mediation. The vast majority of respondents (N=72) (72.7%) of 99 respondents who answered this question believe that the outcome of mediation is consistent with the rule of law, 23 respondents (23.2%) were neutral while four respondents (4%) disagreed. Of the 98 respondents who answered this part of question, 66 respondents (67.3%) believe that the outcome of mediation would be responsive to litigants' needs, 26 respondents (26.5%) were neutral and six respondents (6.1%) disagreed. On whether the outcome of mediation is consistent with the parties' determination, 61 of the 98 respondents who answered this question (62.2%) agreed while 30 respondents (30.6%) were neutral and seven respondents (7.1%) disagreed. On whether the outcome in judge-led mediation is durable, 60 of the 97 respondents who answered this question (61.9%) agreed, 36 respondents (37.1%) were neutral and only one respondent (1%) disagreed. Slightly over half of 98 respondents to this part of the question, (N=52) (53.1%) believe that the outcome of mediation maintains and improves relationships while 37 respondents (37.8%) were neutral and nine respondents (9.2%) disagreed. And finally 60 respondents (61.2%) of the 98 respondents who answered this question believe that the parties' perceived the outcome of mediation as fair, 29 respondents (29.6%) were neutral and nine respondents (9.2%) disagreed. So, in general the lawyer respondents appear to display a more favourable approach to judge-led mediation although again, the level of neutral respondents indicates either an uncertainty or lack of experience in being able to make an assessment and this discussed further in Chapter 7.

Some of the key issues in mediation canvassed in the earlier chapters are related to justice. The next section deals with these issues.

5.6 Some issues of concern in mediation

The surveys included questions related to some key issues in mediation which have been raised in the literature as being problematic to its uptake (see Chapter 3). The issues canvassed were: whether lawyers give advice to their clients to take up mediation which leads to a question whether disputants need to be represented in

mediation to overcome any imbalances in power (Hofrichter 1982; Singer 1979); whether the procedural safeguards on the admissibility of evidence has any application in mediation (Boulle & Nestic 2001); whether the confidentiality and the private nature of mediation prevent a binding precedent from being set (Fiss 1984; Imbrogno 1999); and, whether the enforceability of mediation agreements have to be regulated to ensure that disputants get the fruits of their settlements. These issues were discussed in Chapter 3 of the thesis.

5.6.1 The lawyers' role in deciding to take matter to mediation

In this section of the questionnaire, the respondents were asked their opinions on whether as lawyers they play a more prominent role in deciding to take a matter to mediation than their clients. As this was also an open ended question, respondents were asked to give their opinions. Based on their answers to this question, they can be grouped into two categories: agree and disagree. Of the 85 respondents who answered this question, 62 agreed and 21 disagreed. Two of the 85 respondents who answered wrote 'unsure' and 'depends' respectively. The two main categories of responses are now discussed.

5.6.1.i Lawyers play a prominent role in taking matters to mediation.

The first category was a large group of 62 respondents who agreed that it was the role of lawyers to recommend mediation to their clients. Four from the 62 respondents did not provide their reasons and the other four responses could not be categorised. Typical comments received from the remaining 54 lawyers included:

'Yes, because solicitors know the strength of their case and whether it is suitable for mediation ...' (SR3).

'Yes, solicitors play a more prominent role as they possess the knowledge and know the most suitable course of action to take and thus advise their clients accordingly' (SR5).

'Yes. Solicitors understand the legal aspects of the client's case and know when is the best time for the client to consider mediation' (SR18).

'Of course solicitors play an important role as it is they who can see if the matter can be resolved but a correct and honest approach has got to be adopted' (SR34).

'Yes. Most time solicitors are the key person to decide for their clients as they know their cases inside out' (SR77).

'Yes. Client relies strongly on their solicitor's legal advice and expertise' (SR90).

'Yes, because lawyers' roles are to advise their clients and bargain the best for their clients' (SR97).

5.6.1.ii Lawyers do not play a prominent role in taking matters to mediation.

The second category from 85 respondents who answered this part of the question was a group of 21 respondents who disagreed that lawyers had a say in deciding to take the matter to mediation. This group indicated that the decision is left entirely in the clients' hands. They gave reasons for their answers and these were grouped and themed into two categories which are described below:

i. The clients can make their decision after they are advised by their lawyers

Seven of the 21 respondents who disagreed, believed that the role of the lawyers is to give advice on the prospect of mediation but the clients are to decide. Typical comments from this group included: *'Clients should have the right to choose and make their decisions after being briefed and advised by their solicitors' (SR70); 'No. Client should make decision. Lawyers can help clients to have better understanding of the process and their case. But it is the clients who should want to mediate' (SR11); and, 'Should not. Clients should be advised and they should make the decision' (SR63).*

ii. The clients know how they want their disputes be resolved better than their lawyers

Another six of the 21 respondents who disagreed, believed that mediation is all about the parties who will decide their own outcome according to what they want. Typical comments from this group included: '*Clients should decide whether to go for mediation or not because at the end of the day they are the parties that benefited from the mediation*' (SR52); '*No, because the purpose of mediation is to encourage settlement in accordance with the parties' needs*' (SR25); and, '*No. Clients know what they want and their interests in a matter to be decided*' (SR54).

The remaining eight of the 21 respondents who disagreed that lawyers play prominent roles in deciding to take the matter to mediation could not be categorised.

According to these findings, overall lawyers certainly believe they have a prominent role to play in advising their clients to go to mediation in terms of having the requisite knowledge of the case and influence over their clients. Nevertheless, there is a sizeable minority who feel they do not make this decision or advise their clients on the issue. The thesis now moves to explore whether the lawyers believe that disputants need to be represented in mediation to level the playing field.

5.6.2 Representation

The respondents were asked this question, 'Do you think that parties need to be represented in mediation to overcome imbalance of power due to unequal bargaining?' They were provided with 'Yes' and 'No' answers indicating whether they agree or disagree and also spaces to give a reason for their choice. Although 'Neutral' was not an option, the respondents' neutrality can be assessed and identified through their answers. Of the 96 respondents who answered this question, 85 respondents (88.5%) agreed that the disputants need to be represented in mediation, eight respondents (8.3%) disagreed while three respondents (3.1%) were identified through their comments as being neutral.

5.6.2.i Agree

The first category from the 96 respondents who answered this question was a group of large 85 respondents supporting representation in mediation. Of this 85 respondents, 76 gave reasons for their opinions which are grouped and presented into three sub categories according to their common themes:

- (i) the perceived advantages of representation in mediation (43 comments);
- (ii) the disputants' lack of qualification in presenting their case (26 comments);
and,
- (iii) the lawyers role in mediation is limited (five comments).

Another two of the 76 respondents could not be categorised as they gave their reasons for the perceived advantages of representation in a trial situation rather than in mediation.

i. The perceived advantages of representation in mediation

According to the first sub category of 43 respondents from the 76 responses, the perceived advantages in being represented was described. Typical comments from this group were:

'Though the presence of counsel may lessen the chances of success of mediation, it levels the playing field' (SR76).

'Yes, especially if the other party is represented. However, the representative should have positive attitude towards the mediation process for if not, he becomes a stumbling block' (SR11).

'Better presentation of the parties' position with clarity and more focus on issues in dispute. Legal counsels can assist the mediation i.e. role of legal counsels be adjusted to assist the process of mediation and not an adversarial system. Legal counsels can explain to party on the pros and cons of settlement during mediation. Parties in such mediation with counsels are more involved and participating in the process' (SR41).

ii. Disputants lack qualifications to present their case

The second sub category of the 76 respondents who provided reasons was a group of 26 respondents who believed that disputants need to be represented in mediation as they lack the qualifications to present their own case (the 26 views are provided in full in Appendix S48). Typical responses from this group include:

‘In our society, the less educated may be victimised as they may not be able to express their views with sufficient clarity and effect’ (SR60).

‘Unrepresented parties to mediation feel vulnerable not knowing their respective rights in a new procedure’ (SR9).

‘To me bargaining power includes the ability to present your case before the mediator. If a person is less eloquent, he may be at a disadvantage in terms of presenting his case before a mediator. Hence, parties should be allowed the liberty to be represented in mediation’ (SR17).

iii. The lawyers’ limited role in mediation

The third sub category was a group of five respondents who believed that parties need to be represented in mediation to overcome imbalances of power due to unequal bargaining because lawyers have limited roles in mediation. Typical comments from this group were: *‘But only in respect of presenting relevant facts and issues for the mediator to consider. At times the representatives who are lawyers themselves may hinder progress of the mediation’ (SR83);* and, *‘Only to a certain extent as presentation and consideration of the legal aspects in their said cases and justifications as to the parties’ terms of settlement’ (SR39).*

5.6.2.ii Disagree

The second category from the 96 respondents who answered this question was a group of eight respondents who disagreed that parties need to be represented in mediation. Their reasons were grouped into three categories described below:

(i) It is for the parties themselves to decide and compromise (four comments) including: *‘Mediation is a process which encourages the parties themselves to participate in the outcome decision. Representation would not achieve this and may turn into a legal contest, which is not the aim of mediation’* (SR16); and, *‘No, to enable the parties to express their reasons freely’* (SR93).

(ii) Lawyers should not be representatives because they may influence the disputants’ decision (two comments) including: *‘Mediator should assist to ensure ‘balance’. Representatives are not parties themselves. They are not ‘hurt’ if mediation fails. Lawyers as representatives accompanying parties should be discouraged because some parties feel obliged to listen to their lawyers. Some do not want to look weak in front of their lawyers’* (SR4); and, *‘Too many cooks spoil the soup. The lawyers have opinions which are different from their clients. Lawyers will stir up further issues’* (SR99).

(iii) Rather than having a representative, the parties could be advised prior to the mediation process (two comments) including: *‘In order to differentiate mediation from litigation, parties in mediation need not be represented to save time in bringing about a quicker resolution. After all, prior to the mediation, the parties could have been advised by their representatives accordingly’* (SR73).

5.6.2.iii Neutral

The last category from the 96 respondents who answered this question was a group of three who were categorised as neutral as they gave similar responses to whether the parties need to be represented in mediation. One of the three neutral respondents argued that the parties’ representation depends on the qualification of the mediators:

‘Yes, if there is no specialised qualified mediator with strong qualifications in the judicial process including real time experience in appreciation of evidence and people. No, if the mediator is qualified in

law, real time judicial experience in appreciation of the evidence and people. It is wise and fair at heart' (SR37).

Another respondent believed that mediators should be able to play their role and the last respondent thought that representation in mediation is dependent on the status of the parties:

Either way unrepresented or represented, mediator must be able to convey message in a manner understood by layman (SR48).

Dependent on the status of the parties for e.g. individual vs. corporation (SR67).

This section has considered whether respondents believe that disputants need to be represented in mediation to balance power and the majority of respondents endorsed this. They act as gatekeepers in the various justice processes, protecting their clients' needs and interests. The thesis now moves to consider whether the respondents believe that a lack of procedural safeguards in mediation may be a factor in their decision to refer their clients to mediation.

5.6.3 Lack of procedural safeguards in mediation

As discussed in Chapter 3, the procedural safeguards in the formal trial generally comply with the standard norms of justice which include all the procedural rights which disputants are entitled to under the rule of law. As mediation is an informal process there is a free flow in the disclosure of evidences which do not necessarily follow the rules for the admissibility of evidence. The respondents were asked their opinions on this question, 'Do you think procedural safeguards on admissibility of evidence have no application in mediation?' The respondents were required to give written response to their answers ('why' or 'why not'). The respondents' written responses can be grouped into three categories: the respondents who agreed that the procedural safeguards on the admissibility of evidence should have no application in mediation; the respondents who disagreed; and, the respondents who were neutral. Of

the 89 respondents who provided their comments, 53 respondents agreed, 31 respondents disagreed, and five respondents were neutral. These three main categories are discussed.

5.6.3.i Agree

The first category from the 89 respondents who provided written responses was a group of 53 respondents who agreed that procedural safeguards on the admissibility of evidence should have no application in mediation. Six comments were not categorised. The remaining 47 written responses on why procedural safeguards have no application in mediation were grouped into four sub categories:

- (i) mediation procedure is informal, flexible and less technical (27 comments);
- (ii) mediation process is to be distinguished from a trial (10 comments); and,
- (iii) procedural safeguards should have no application or at the very least only have minimal application (eight comments)
- (iv) parties as well as the mediators may be unaware of procedural rules on admissibility of evidence (two comments).

These sub categories of responses are discussed below:

i. The mediation procedure is informal, flexible and less technical

The first sub category of the 47 respondents who provided written comments was a group of 27 respondents who thought the informality of, and the less technicality in, mediation make the application of procedural rules on admissibility of evidence redundant as their use may only delay the settlement process. As mediation is flexible, parties could mutually settle their disputes in any manner they like. Typical comments from this group included:

‘Yes. Mediation shall be informal and based on both parties’ needs. Bringing up procedures on admissibility of evidence would complicate matters’ (SR81).

'Yes, otherwise it is akin to another court proceeding and will become very technical with legalities' (SR5).

'No application since mediation process should involve less technicality and thus evidential rules may hamper the process' (SR6).

'All negotiations should be on 'without prejudice' to give everyone including the non-attending counsel, peace of mind if mediation fails' (SR4).

ii. Mediation process is to be distinguished from a trial

The second sub category from the 47 respondents who provided written comments was a group of 10 who thought that procedural rules on the admissibility of evidence have no place in mediation as it is part of the trial process. Typical comments from this group included:

'They should have no application in mediation because to do so the process of mediation will have no difference from a trial' (SR33).

'Should not. If there are such safeguards, then what difference will mediation be from trials?' (SR17).

'Supposed to be more user-friendly. If safeguards on admissibility of evidence apply, why mediate? Go to court immediately' (SR48).

'That's true, because settlement through mediation is achieved based on mutual agreement not evidence or strength of case. Often humane elements play a role' (SR99).

iii. procedural safeguards should have no application or at the very least only have minimal application

The third sub category from the 47 respondents who provided written comments was a group of eight who thought that the procedural rules on the admissibility of evidence have a very limited application in mediation. Typical comments from this group included:

‘For the sake of keeping mediation as an informal process, the procedural safeguards ought not to be applied in a strict sense. Nevertheless, it could be utilised as a ‘tool’ to bring a resolution to the disputes’ (SR73).

‘Evidence should only be looked at for the purpose of evaluating the parties’ side of the story’ (SR19).

‘Procedural safeguards on admissibility of evidence have different application in mediation’ (SR97).

iv. The parties as well as the mediators may be unaware of the procedural rules on the admissibility of evidence

The final sub category comprised of two respondents who held the view that it is proper to disregard the procedural rules on the admissibility of evidence in mediation as the unrepresented parties may not be conversant with them as lawyers are. Similarly, mediators with no legal background may find it difficult too:

During the mediation, it is not for the lawyers to conduct the matter but the parties themselves. So, it’s no guarantee that the parties know better than lawyer in terms of admissibility of evidence (SR22).

Mediators come in many shape and sizes. What if mediator is not legally qualified what does he know of the rules of evidence? (SR3).

Whilst agreeing that rules for the admissibility of evidence should not be applied in mediation, one respondent in the uncategorised group, however, thought, it is entirely up to the mediators if they wish to bring in the rules on admissibility of evidence to evaluate any parties' case.

Admissibility of evidence should not be an issue in mediation as this is technical. However the mediator may comment on the strength of case based on admissibility of evidence (SR20).

5.6.3.ii Disagree

The second category from the 89 respondents who provided written responses was a group of 31 respondents who disagreed with the statement that procedural safeguards on the admissibility of evidence have no application in mediation. In other words these respondents felt that procedural safeguards on the admissibility of evidence should have some application in mediation. The remaining 24 comments were grouped and arranged into three categories:

- (i) to prevent abuse and to provide some measures of control to the mediation process (13 comments);
- (ii) to ensure the effectiveness of the process (six comments); and
- (iii) to advise parties of their stance and chance of success if matter is to be litigated (five comments).

i. To prevent abuse and to provide some measures of control to the mediation process

The first sub category of the 24 respondents who provided reasons was a group of 13 who thought that procedural safeguards on the admissibility of evidence can prevent abuse and provide some measure of control over the introduction of evidence in the process. Typical comments from this group included:

'It has application in mediation-reason?- simple: to prevent injustice - if mediation does not apply the rule of evidence, then parties will bring any documents as they wish' (SR51).

'Yes because it would prevent irrelevant evidence being introduced' (SR43).

'Safeguard on admissibility of evidence/protection must be put in place, in case mediation fails/to prevent parties using mediation as a 'fishing expedition' (SR70).

'No there should be procedural safeguard to a certain extent that disputants do not deviate from the issues at hand' (SR24).

ii. To ensure the effectiveness of the mediation process

The second sub category from the 24 respondents who provided reasons for their answers comprised of six respondents who believed that procedural safeguards should be in place to ensure the success of the mediation process. Typical comments from this group included:

'No, because admissibility of evidence still needs to be adhere so as to have an effective result in mediation' (SR91).

'It has an application as most documents would be already known to the parties directly or indirectly' (SR69).

'Admissibility of evidence must be agreed by both parties. If disputed then it must go for trial' (SR46).

iii. To advise parties of the strength of their case and chance of success if matter is to be litigated

The last sub category of 24 respondents who provided reasons for their answers was a group of five respondents who thought that the disputants would be more open to reaching a settlement if they know their position in a possible trial. Typical comments from this group included:

'I think it has application. My reason is that if admissibility of evidence is a problem, the strength of the disputants' case is compromised and he/she should be advised accordingly' (SR7).

'I think that the evidence of a case may be evaluated in order to assess the strength of a case and a party may be more willing to settle if his evidence does not support his claim' (SR76).

'It is applicable. It is the key for the parties to try to compromise with each other' (SR18).

5.6.3.iii Neutral

The final category of the 89 who responded to this question was a group of five respondents who were neutral on whether the procedural safeguards on the admissibility of evidence can be applied in mediation. Four of the five respondents answered 'not sure' without further explanation and one last respondent gave a general comment on whether the procedural safeguards on the admissibility of evidence should have applied in mediation:

'A careful balance should be maintained' (SR62).

5.6.4 Confidentiality

Another aspect of mediation explored in the thesis is whether the lawyers felt that confidentiality and in particular the lack of ability for decisions to be used to develop legal policies or precedents was a contributing factor to a decision to proceed to mediation or not. The respondents were asked for comments on this statement: 'The confidentiality and private nature of mediation prevents a binding precedent from being established'. The respondents' written comments can be grouped into three categories: the respondents who agreed that no binding precedents are created in mediation settlements; the respondents who disagreed; and, the respondents who were neutral. Of the 80 respondents who provided a written response, 62 respondents

agreed, 16 respondents disagreed, and two respondents were unsure without further explanation. The two main categories of responses are now discussed.

5.6.4.i Agree

The first category from the 80 respondents who provided their comments was a large group of 62 respondents who believed that the mediation settlement does not establish a binding precedent for future cases. Of the 62 comments, 13 could not be categorised.

Five reasons emerged from the 49 comments included:

- (i) the nature and the characteristic of mediation itself (14 comments);
- (ii) each case is unique and distinct from any other (12 comments);
- (iii) settlements are based on the needs of the disputants (nine comments);
- (iv) mediation does not favour the development of principles replicating binding precedents (nine comments); and,
- (v) that confidentiality in mediation is required for an open and frank discussion (five comments).

i. The nature and the characteristic of mediation

A group of 14 respondents was the first sub category of the above 49 who thought that by its very nature and characteristics, mediation cannot and should not create a binding precedent. Typical comments from this group included:

‘The confidentiality aspect is important and should be maintained. Arguments may be focussed on the claims and the case law cited only for reference to determine liability but it is not advisable to create precedents for mediation as the role of the mediator is not as a judge but a facilitator’ (SR16).

‘Since it is mediation, it has to be confidential, matters of privacy, and of course, trust’ (SR3).

'If the mediation is successful, then the binding contract is only for that matter and hence it is for the parties to reveal the matter to a third party' (SR10).

ii. Each case is unique and distinct from the other

The second sub category of the 49 respondents who agreed that mediation does not create a binding precedent for other cases was a group of 12 who thought that each case is unique and distinct from the other based on the parties' own consideration and willingness to compromise which made this principle of binding precedent less applicable in mediation. Typical comments of this group included:

'Agree, disputes are normally due to a particular set of facts and should not bind other disputes' (SR13).

'Yes, outcome of mediation is strictly on a case to case basis based on the parties' preferences and mutual negotiated terms' (SR75).

'Each case is special and ought to be mediated based on the parties' willingness to compromise and not a fixed pattern' (SR89).

iii. Settlements are based on the needs of the disputants to a particular dispute

The third sub category of the 49 respondents who agreed that mediation does not create precedent was a group of nine who believed that the settlement in mediation should be based on the disputants' needs in the particular dispute. As the need of the disputants varies in each particular case, the outcome of one mediated case does not bind the other. Typical comments from this group included:

'No binding precedent will be set during mediation because the aim is to reach settlement based on parties needs' (SR25).

'Should not be a binding precedent for future/similar disputes as the settlement is based on their own and different needs' (SR93).

'Mediation is voluntary, tailored to parties' needs – by setting precedents, the flexibility of mediation would be lost' (SR36).

iv. Mediation does not favour the development of principles replicating binding precedents

The fourth sub category from the 49 respondents was a group of nine who believed that the principle of binding precedent would give no benefits to the parties in the case being mediated. Typical of these comments included:

'Totally agree so as to avoid further animosity between disputants' (SR24).

'To avoid embarrassment to parties' (SR71).

'Agree. The issues of binding precedent would not be relevant at all as the outcome are based on consent without determining the merits of the case' (SR98).

v. That confidentiality in mediation is required for open and frank discussion

The final sub category from the above 49 respondents is comprised of five who believed that the principle of binding precedent is inconsistent with the element of confidentiality in mediation which allows for an open and frank discussion. Typical comments from this group included: *'Confidentiality of the procedure is necessary so as to facilitate disclosure by the parties' (SR5); '... Confidentiality protects the identities of parties to the disputes' (SR64); and 'It would especially if parties treasure their privacy' (SR6).*

5.6.4.ii Disagree

The second category of responses from the 80 respondents who provided their comments was a group of 16 respondents who disagreed with the statement that mediation settlement could not establish binding precedents. Of the 16 respondents, four did not explain their comments further except for just stating: 'Not at all';

‘Disagree’; ‘Not really’; and, ‘Not quite agree with the statements’. The remaining 12 comments can be themed into two categories described below:

First, mediation can set a binding precedent in cases that have been successfully mediated in particular where settlement agreements result in consent orders subject to the parties’ consent (eight comments) including: *‘A mediator may use his experience/knowledge of a previous case to suggest possible alternative solution to another case he is mediating’ (SR11)*; *‘Do not agree because the decision after mediation especially one that is JLM [judge-led mediation] can be binding because it is by way of a consent order’ (SR15)*; and, *‘No issue with it being precedent, subject to agreement between parties’ (SR48)*. Second, the application of the doctrine of precedent in mediation ensures consistency and fairness (two comments) including: *‘Not at all. The corpus of cases evolved through the doctrine of precedents lends certainty consistency and fairness which will aid in mediation’ (SR29)*; and, *‘There must be consistency in resolutions as parties are likely to find out a particular outcome even when confidentiality is in place’ (SR60)*.

One respondent provided a suggestion on how the outcome in mediated cases can be relied on in future cases:

‘Put the outcome/’decision’ of the mediation in the law reports without mentioning ... the name of the parties’ (SR51)

Another last respondent from this group commented that the binding precedent in mediation has no legal effect:

‘Even if the precedent had been set, it would be only persuasive as not legally binding with full legal implication’ (SR77).

5.6.5 Enforceability of mediated settlement agreements

The enforcement of mediated settlement agreements is one of the issues of concern in the literature. The regulation for agreement enforcement is thought to be fairly

unnecessary as these agreements are achieved by consent of the parties to mediation. The respondents were asked, ‘Do you think that the enforceability of mediated settlement agreements needs to be regulated to ensure parties get the fruits of their settlements?’ They were required to give written response to their answers (‘why’ or ‘why not’) as provided in this question.

The respondents’ written comments can be grouped into two categories: respondents who agreed that the enforcement of mediated settlement agreement should be regulated (80 respondents); and, respondents who disagreed (16 respondents).

5.6.5.i Agree

The first category from the 96 respondents who provided their comments was a majority of 80 respondents who agreed that the enforcement of mediated settlement agreement sought to be regulated. Ten of the above 80 respondents were not reported as they only wrote ‘yes’ in their comments. Thirteen other comments of the 80 respondents were not able to be categorised. From the remaining 57 comments, five sub categories emerged of why the enforcement of a mediated settlement agreement should be regulated which include:

- (i) to serve the aims and objectives of mediation (15 comments);
- (ii) to ensure the enforceability of the outcome of mediation (14 comments);
- (iii) to ensure the disputants’ compliance with the mediation agreement (12 comments);
- (iv) to encourage disputants to take up mediation (eight comments); and,
- (v) to increase disputant’s level of confidence in this process (eight comments).

These sub categories are described and discussed in the following sections.

i. To serve the aims and objectives of mediation

The first sub category was a group of 15 of the 57 respondents who believed that the enforcement of mediation agreement should be regulated to ensure that the disputants

get the benefits of their specific agreement. Typical comments from this group included:

'Yes should be regulated. If not it will negate the objectives of embarking on mediation in the first place' (SR8).

'Yes, it's not worth the effort if at the end of the day what you get is a worthless piece of paper which you cannot enforce against the other party' (SR82).

'Yes, if not, mediation will just be another route to take by a party/parties to see 'who will last the longest' (SR48).

ii. To ensure the enforceability of the outcome of the mediation

The second sub category was a group of 14 of the 57 respondents who believed that enforcement of the mediation agreement should be regulated to ensure that the disputants will get the fruits of any settlement. Typical comments from this group included: *'Yes the mediation agreements being usually by way of consent order duly signed by the parties' respective counsels need to be sealed [the court's seal] and signed and thus its enforceability is assured' (SR15); 'Yes, if there is no enforceability then mediation is just paper. Some form of order or judgment (consent) must be registered' (SR46); and, 'Yes, because mediation is another way of resolving disputes, though an informal one, through mutual negotiations of parties and therefore it should be regulated to ensure parties get the fruits of settlement and not be subjected to abuse' (SR75).*

iii. To ensure the disputants' compliance with the agreement

The third sub category was a group of 12 of the 57 respondents who believed that regulations enforcing mediation agreements will ensure the disputants' compliance with it. Typical comments from this group included: *Yes, strongly agree. This is to ensure that both parties would stick to their own written agreement and have no further*

dispute in relation to the settlement’ (SR22); *‘Yes to prevent parties going back on their promises’* (SR12); and, *‘Yes to ensure the agreements are followed through’* (SR23).

iv. To encourage disputants’ to take up mediation

The fourth sub category was a group of eight of the 57 respondents who believed that regulations enforcing mediation agreements will make mediation more attractive. If there is a problem in the enforcement of mediation, the disputants may prefer to go to trial and may not want to even attempt mediation. Typical comments from this group included: *‘Yes, otherwise parties would still prefer to go back to court for trial to get what they want’* (SR55); *‘Yes without avenue to enforce the mediation agreement, it would be futile to even commence mediation proceeding’* (SR98); and, *‘Yes. Otherwise what is the use of the solution achieved through mediation?’* (SR68).

v. To increase the disputants’ level of confidence in the mediation process

The final sub category of the 57 respondents was a group of eight who argued that the regulation of the enforcement of any mediation agreement would increase the level of confidence of the disputants in the mediation process. Typical comments from this group included: *‘Without regulatory measures confidence will plummet’* (SR1); *‘If parties are deprived of the fruits of settlement, then mediation would have failed as well. In order to boost the confidence in mediation, mediation agreements could be in the form of a court order’* (SR73); and, *‘Of course it needs to be regulated because by regulating the mediation agreement, it will legalise the agreement itself’* (SR51).

5.6.5.ii Disagree

The second category of the 96 respondents who provided their comments was a group of 16 who did not see the need to regulate the enforceability of mediated settlement agreements. Two respondents did not give a reason. The 14 comments reflect five sub categories. These are:

- (i) A consent judgment in lieu of further regulation (six comments) including: *‘No regulations are needed because when the mediation is successful, a consent judgment can be recorded’* (SR85); and,

'No need for settlement agreement, just enter consent order without admission of liability and therefore the enforceability will not be an issue' (SR33).

- (ii) Mediation is based on mutual agreement (two comments) including: *'There is no necessity to regulate the agreement achieved during mediation as the same is reached by consensus/mutual consent and is likely to be followed through' (SR95).*
- (iii) Mediation agreements are to be treated as contractual obligations (two comments) including: *'No need regulation. Can sue for breach. It should be an easy case to win since the agreement was properly drafted and witnessed' (SR62).*
- (iv) The case should be tried if any of the disputants fails to comply with the terms of the settlement (two comments) including: *'It is not necessary as mediation is meant to be an informal dispute resolution process. If one party does not get the fruit of settlement there is still active, litigation via the court available to him' (SR39).*
- (v) To make mediation as flexible as possible due to its voluntary nature (two comments) including: *'No. Mediation agreement is an agreement to resolve the dispute. If it becomes an enforceable agreement between parties to force an outcome of mediation, no party would go for mediation' (SR21).*

The various models of mediation utilised by mediators were discussed in Chapter 3 and were described as being facilitative or evaluative, reflective of the extent of activity and intervention of the mediator. In the survey, the respondents were asked to select the most appropriate role for mediators in civil cases in Malaysia. In mediation there is no determinative role for mediators. This is because the process relies on the

disputants making their own resolutions rather than being directed towards a particular outcome. Nevertheless, the survey included this category in an effort to gauge the level of support or otherwise for such a role for mediators, particularly as some mediators would be judges and thus familiar with a determinative role. The next section seeks to determine the respondents' view on the most appropriate role for mediators.

5.7 The Mediators' roles

The respondents could select more than one role of the three given roles of mediators and they were asked to give reasons for their choices. Definitions of these three terms were given in the surveys: in facilitative mediation, the mediator's role is slightly passive in chairing the session and helping to develop options to reach settlement; in evaluative mediation, the mediator is more active in making suggestions to resolve the dispute; and, in determinative mediation, the mediator plays the role of decision maker, issuing directions or giving orders to resolve disputes.

The result of the surveys shows that of the 96 respondents who answered this question, 58 respondents (60.4%) thought the most appropriate role for a mediator is evaluative; 13 respondents (13.5%) believed in the facilitative role; 10 respondents (10.4%) nominated the role as determinative; seven respondents (7.3%) saw all three as appropriate; four respondents (4.2%) selected a combination of facilitative and evaluative; three respondents (3.1%) chose a combination of evaluative and determinative; and, one respondent (1.0%) thought the most appropriate role is between a facilitative and determinative one. This finding is consistent with the review of literature that lawyers prefer evaluative mediators due to their training and legal background. The results of these findings are shown in Table 5.7.

Table 5.7: The most appropriate roles of mediator (N=96)

The roles of mediators	N
Evaluative	58
Facilitative	13
Determinative	10
Facilitative, evaluative and determinative	7
Facilitative and evaluative	4
Evaluative and determinative	3
Facilitative and determinative	1
Total	96

The respondents gave reasons for their choice which are discussed next.

5.7.1 Evaluative mediators

As can be seen from Table 5.21, 58 respondents believed mediators should play an evaluative role. Of the 58 respondents, 15 did not provide their reasons and nine comments could not be categorised. From the remaining 34 comments, four categories emerged which include:

- (i) the intrinsic roles and functions of an evaluative mediator (12 comments);
- (ii) greater advantages to the disputants (11 comments);
- (iii) the evaluative mediator proposes and suggests ways to settle disputes (seven comments);and,
- (iv) the evaluative mediator assists the parties to identify the strengths and weaknesses in their cases (four comments).

The category of responses from this group is discussed below.

i. The intrinsic roles and the functions of an evaluative mediator

The first category of the 34 respondents who provided reasons was a group of 12 who believed that the flexibility in the roles and functions of an evaluative mediator are

essential in assisting parties to resolve the disputes (their comments are provided in full in Appendix S74). Typical comments from this group included:

'The mediator must 'move' the parties to talk and eventually find some common grounds. This is because, especially in the Asian countries, the disputants are scared of 'losing face' to start the negotiation or scared to let the other side know of their 'bottom line' (SR4).

'The role of an evaluative mediator is to highlight pertinent issues and to put forward viable settlement avenue where both party benefit more or less' (SR35).

'The mediator should actively participate when the parties reach a deadlock in their negotiation where both parties want a win win situation for them. The mediator should also be able to find the points/key(s) to open the deadlock where the parties are unable to find it' (SR78).

ii. Greater advantages to the disputants

The second category of the 34 respondents who provided reasons was a group of 11 who believed evaluative mediators provide more advantages than disadvantages for the disputants because of their specific input into solutions. Typical comments from this group included:

'An active mediator who gives suggestions will help the parties to have better understanding about their settlement' (SR22).

'Parties need guidance to see the clearer picture of their case and expect some suggestions from the mediator without having the feeling that they have been coerced into agreeing with the settlement agreement' (SR36).

'This would enable the mediator to take control of the mediation and to express his suggestions which would usually be more easily accepted by the parties concerned' (SR75).

iii. The evaluative mediator proposes and suggests ways to settle disputes

The third category of the 34 respondents who provided their reasons was a group of seven who thought that an evaluative mediator who takes part in proposing and suggesting the terms of settlement will enhance the possibility of resolving disputes. Typical comments from this group included: *'The parties may be more open to settle the matter with an independent mediator who takes part in assisting to resolve the matter by proposing ways of settling' (SR19); 'Mediator should pick up the issue and suggest proposal to the parties with a view of resolving their disputes' (SR2);* and, *'Evaluative – because by making the suggestions/options open for the parties to consider based on the facts of the case, the disputes is more likely to be resolved instead of letting the parties to just demand' (SR95).*

iv. The evaluative mediator assists the disputants to identify the strengths and the weaknesses of their case.

The final category of the 34 respondents who provided reasons was a group of four who believed that an evaluative mediator assists the disputants to evaluate the strengths and weaknesses of their case as a way of 'reality testing' should the matter go to trial. This evaluation enables the disputants to assess the strength of their cases which makes them more positive about considering settlement. Typical of these comments included: *'The mediator should assist parties to identify the strengths and the weaknesses in the parties' case to enable the parties to fully appreciate the true position of their case and of the other party' (SR26);* and, *'This way the mediator could help the parties to fully realise what they have in hand when they go for trial in court and it would be easier to persuade them to settle' (SR18).*

5.7.2 Facilitative mediators

The second group of the 96 respondents who answered this question was a group of 13 respondents who thought that mediators' roles should be facilitative. Of the 13

respondents, 11 provided a reason for their choice. Three comments of the 11 respondents cannot be grouped. The remaining eight comments fall into three categories which are described below:

- (i) The facilitative role of mediator aligns with the objectives of mediation (three comments) including: *'To perpetrate the fact that he is neutral party, only keen to resolve the matter'* (SR82); and, *'This will ensure the driving force behind the mediation is genuine resolution of dispute; not driven by the statistics of the backlog of cases or disposal rate'* (SR9).
- (ii) The facilitative mediator ensures the flexibility and freedom for the parties to decide for themselves (three comments) including: *'Parties would feel they are not hustled into a resolution'* (SR8); and, *'This is to create an informal environment where parties can voice out their concerns openly'* (SR38).
- (iii) The basic role of a mediator is to develop options (two comments) including: *'Most litigants are not aware of options for settlement. If a mediator suggests or orders options, parties would feel that it is not an outcome which they themselves are responsible for. If a mediator develops option, then the parties can decide for themselves and outcome would be more satisfying'* (SR16).

5.7.3 Determinative mediators

The third group of the 96 respondents who answered this question was a group 10 who chose a determinative role as appropriate for mediators despite the fact that mediation precludes the possibility of having a mediator dictate the outcome of the dispute. This also indicates the limited knowledge of mediation of these lawyers. Of the 10 respondents, eight provided reasons for their answers which include six who believe that a determinative mediator will give finality to the negotiation processes leading to settlement. Typical comments included: *'Otherwise there will just be too much 'hot air' and it would be a waste of time'* (SR1); *'Otherwise the dispute would never be*

resolved! (SR6); and, *'Parties to a dispute naturally gravitate to a position of greed and maximum leveraging (which is so often explains why cases cannot be settled in the first place) and the firmness of the mediator will be of the essence in such cases'* (SR29).

Another two comments from this group were not able to be categorised.

5.7.4 Facilitative, Evaluative and Determinative mediators

The fourth group of the 96 respondents who answered this question was a group of seven respondents who thought all the three roles (facilitative, evaluative, and determinative) are appropriate. One respondent did not give a reason. According to six respondents each role is relevant, dependent on the circumstances of the case and the parties involved. Typical comments from this group included: *'All 3 roles have their respective functions during a mediation process. Depends on how the mediation process develops – each case can turn out differently and the mediator should be in position to adapt his approach'* (SR11); *'All the above are relevant and must be applied by a wise mediator at the right time'* (SR37); and, *'The mediator ought to appreciate the surrounding/prevaling circumstances and employ the appropriate roles...'* (SR73).

5.7.5 Facilitative and Evaluative mediators

The fifth group of the 96 respondents who answered this question was a small group of four respondents but only three provided a reason why they believed the most appropriate roles of a mediator should be facilitative and evaluative. According to these three respondents, both facilitative and evaluative roles are equally important in mediation and the mediator must be able to switch between these two roles as the situation requires:

'He [sic] must commence first as a passive mediator, along the way he must take an evaluative role. If he takes a determinative role, parties might as well go for arbitration. He is there to mediate as the name suggests' (SR3).

'Combination of (i) and (ii) - active mediator makes suggestions to resolve disputes and develop options. A mediator should act as a middle-man offering a solution in between the two parties and be prepared with other options, in case a certain suggestion is not acceptable to one party. He [sic] should never be directive' (SR17).

'A mediator should be evaluative and facilitative because such roles are vital for parties who are not legally represented and/or advised so that these parties are given options/suggestions to resolve their dispute' (SR39).

5.7.6 Evaluative and Determinative mediators

The sixth group of the 96 respondents who answered this question was another small group of three respondents who believed that mediators should play an evaluative and determinative role. According to one of these three respondents, the mediator should evaluate the case first before determining the issues based on the needs of the disputants:

'The mediator should be pro-active in that he [sic] should meet the parties separately and inform them of the weakness and strength of their respective case. After that he [sic] should explore a "win-win" situation for them' (SR10).

Another respondent from this group thought the disputants expect a third party mediator to have a look at their issues and advise them on the relative strengths of their case:

'Parties go to court because they have unresolved issues. Therefore a passive mediator will not resolve any issues ... The parties will expect that some other person to see the issues and tell them what their relative strengths are' (SR20).

One last respondent from this group thought these roles are relevant to the current practice:

'In between the (ii) [evaluative] and (iii) [determinative] role. The local mentality as yet requires such an approval to include facilitative. In future, with maturity, it may change to include (i) [facilitative] but not yet' (SR32).

5.7.7 Facilitative and Determinative mediators

Only one respondent from the 96 respondents who answered this question thought the role should be facilitative and determinative. He or she wrote:

'It's between facilitative and determinative as mediators would want to usher parties to dispute dissolution within the alternative 'best answer' to both conflicting parties' (SR70).

The next section seeks to determine the respondents' view on the type of cases which are appropriate to be resolved through mediation.

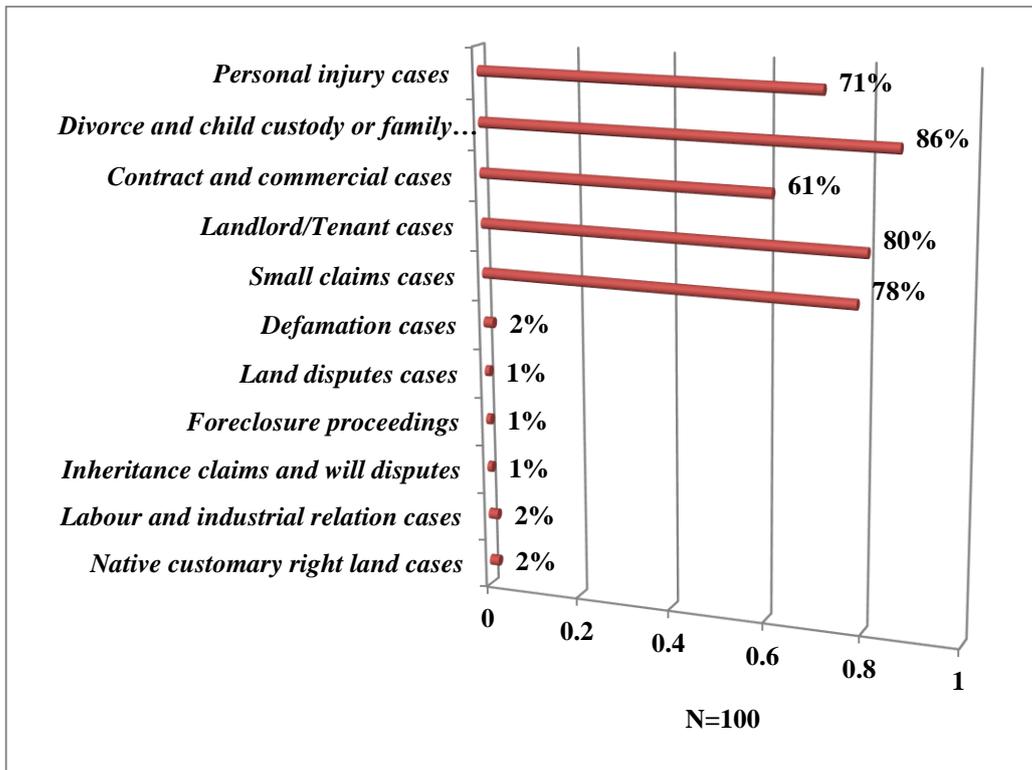
5.8 Type of cases suitable for resolution by mediation

The respondents were asked to select the types of cases which were suitable for resolution through mediation from the lists of cases provided in the surveys. They were able to select more than one case from the lists and add in any other types of cases, in the space provided which they believed would be suitably resolved by mediation. The respondents were not asked to give their reasons for their choice. The lists of cases provided were: personal injury cases (motor accidents claims and negligence); divorce and child custody or family related matters; contract and commercial matters; landlord/tenant; and, small claims.

All the 100 respondents participated in this part of the survey. The results demonstrate that 86% of the respondents selected divorce and child custody or family related cases as suitable to be mediated; 80% nominated landlord and tenants cases; 78% for small claims cases; 71% nominated personal injury cases; and, 61% indicated contract and

commercial cases. The respondents also added other types of cases into the space provided: 2% each for defamation cases; labour and industrial relation cases and native customary land cases; and, 1% each for land dispute cases; foreclosure proceedings; and, inheritance claims and will disputes cases. What is common to all these types of cases is the opportunity for negotiation between the disputants to settle the matters. These results are depicted in Figure 5.4. These type of cases, as selected, may be less effective for mediation if they involve a serious and difficult question of law and complex issues as pointed out by some of the surveyed lawyers in Chapter 5 (pp 137-138).

Figure 5.4: The respondents' selection from the lists of cases provided in the survey and the added lists of other types of cases suitable for mediation

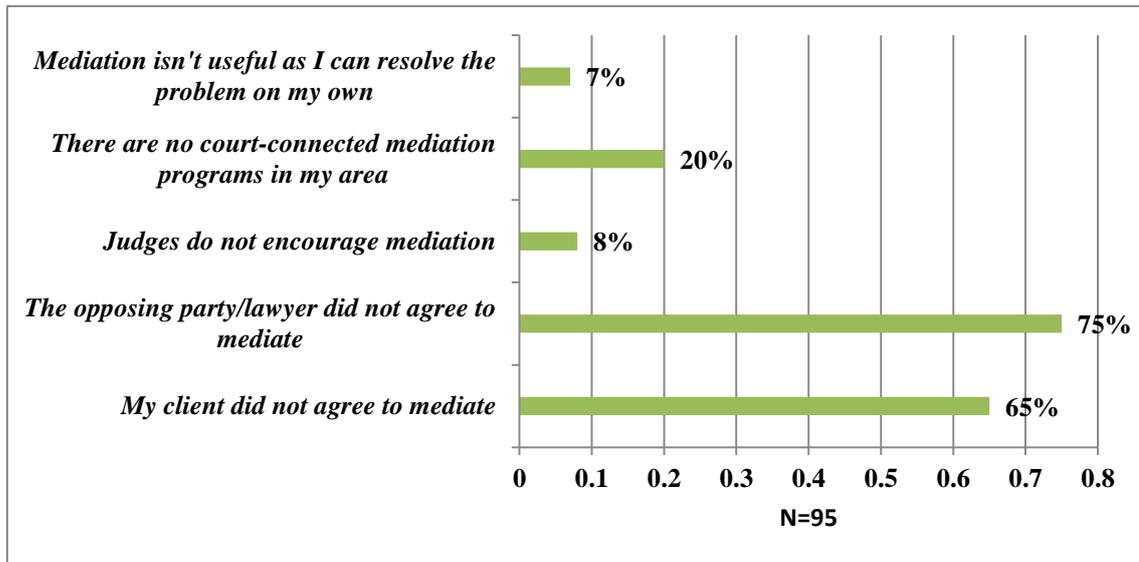


In the space provided, three respondents also wrote that all types of disputes can be resolved through mediation and another respondent wrote it is not possible to pre-determine the suitability of case for resolution by mediation.

5.9 Factors which may prevent the respondents from using mediation

The respondents were asked to indicate whether from a list of five factors provided in the survey the sort of factors which could prevent them from using mediation. They were invited to select more than one factor by ticking the appropriate box. The results of these findings are shown in Figure 5.5.

Figure 5.5: Factors which may prevent the respondents from using mediation



Besides the above provided listed factors, the respondents also listed other factors which they thought might prevent them from using mediation. Of the 95 respondents who answered, 12 listed additional factors in the space provided. Their comments can be grouped into five categories: mediation needs sanction from the court (two comments); the escalating costs of mediation fees may be a stumbling block (two comments); the lack of qualified mediators (three comments); the low level of awareness of mediation (two comments); and, the attitudes of the parties who refuse mediation (two comments). One last respondent wrote the omission of the insurance companies as parties to tort claims as a factor preventing the use of mediation.

One of the ways to get parties to use mediation is to require them to attempt it before they can file an action in court. In order to know the lawyers' attitudes towards this procedure, the next question sought their views on pre-court mediation.

5.10 Pre-Court Mediation

The respondents were asked, ‘Do you think that disputants should be required procedurally to use mediation first before filing their action in court?’ For this question, five categories of descriptive Likert scale (from ‘strongly agree’ to ‘strongly disagree’) were used. These five categories were then regrouped into three (agree, disagree and neutral). Of the 99 respondents who answered this question, 36 respondents (36.4%) agreed with pre-court mediation, 41 respondents (41.4%) disagreed and 22 respondents (22.2%) were neutral. The respondents were asked to give a reason for their answers. Their reasons for each category of responses were themed and are discussed in the following sections.

5.10.1 Agree

The first category of answer from the 99 respondents who participated in this question was a group of 36 respondents who agreed with pre-court mediation. Of the 36 respondents, 34 respondents provided their reasons. For these respondents, the prospective litigants should resolve their dispute through mediation first before filing their action in court. Their reasons can be grouped into four sub categories:

- (i) to save court’s time and litigants’ costs (12 comments);
- (ii) to give the opportunity for the parties to resolve their disputes at an early stage (10 comments);
- (iii) to ensure only cases that really need to be tried are filed (six comments);
and,
- (iv) to effectively reduce the backlogs (three comments).

i. To save court’s time and litigants’ costs

The first sub category of 34 respondents who provided their reasons was a group of 12 who believed that pre-court mediation saves the court time and litigation costs. Of these 12 respondents, six gave full reasons while the rests merely wrote to the effect of saving cost and time. Typical comments from this group included:

'Parties should be encouraged to resolve their disputes at the earliest stage possible. Once the case is filed into court, legal cost will be incurred and this will defeat the chances of settlement' (SR25).

'Parties should try out mediation before going directly to litigation proceedings so as no time is wasted' (SR81).

'Time saving as a lot of cases are litigated over very minor issues which could be resolved in mediation process' (SR53).

ii. To give the opportunity for parties to resolve their disputes at an early stage

The second sub category of the 34 respondents was a group of 10 who believed that disputes can be settled at mediation and before the filing of an action if parties are given the opportunity to discuss it through at the early stage. Typical comments from this group included:

'Matters which may be resolved can be resolved on the onset without resorting to court' (SR5).

'Mediation can come in anytime. If it starts at an early stage it may not be necessary to proceed with litigation. This is especially true in family matters' (SR11).

'Both parties are more likely able to settle the matter amicably as once a case has been filed into court, parties are required to draft their case in a manner will ensure they will win the case' (SR83).

iii. To ensure only cases that really need to be tried are filed

The third sub category of the 34 respondents who provided their reasons was a group of six who shared the view that pre-court mediation can sieve the cases that genuinely need the court's determination. Typical comments from this group included:

'Mediation will weed out the obviously weak cases filed just for annoyance or

irritation (SR20); *'So that the legal representatives of the respective parties in a legal action know that all alternative dispute resolution has been fully exhausted and that the parties obviously cannot meet each other's expectation in the matter'* (SR39); and, *'It will give a realistic check on the claim to be filed'* (SR69).

iv. Reduce the backlogs

The final sub category of the 34 respondents who provided their reasons was a group of three who wrote that court backlogs can be substantively reduced as a direct consequent of pre-court mediation.

Three other respondents of this group of 34 respondents who provided their reasons mainly wrote about the benefits of mediation rather than the reasons to support pre-court mediation.

5.10.2 Disagree

The second category of answer from the 99 respondents who participated in this question was a large group of 41 respondents who disagreed with pre-court mediation. These respondents felt that the action must be filed in the court first before any attempt to mediate is undertaken. One respondent did not provide a reason. Another five comments could not be categorised. The remaining 35 respondents' comments are framed into eight sub categories:

- (i) civil action is barred if a limitation period accrues (eight comments);
- (ii) the issue in dispute is well defined (seven comments);
- (iii) the filing of an action by one party may lead to the other party being open to settlement (five comments);
- (iv) some cases are not appropriate for mediation (four comments);
- (v) parties are not interested in mediation in the first place (four comments);
- (vi) the result of not filing an action may delay the settlement process (three comments);
- (vii) the increase in legal costs (two comments); and,
- (viii) parties can rely on litigation if mediation fails (two comments).

These responses are discussed in the following sections.

i. Civil action is barred if a limitation period accrues

The first sub category of 35 who provided reasons for their answers was a group of eight who believed that a civil action ought to be filed first due to limitation issues. Any delay in instituting an action may lead to it being barred because of the amount of time which has passed. It may cause prejudice to the parties if the limitation period is reached while mediation is underway and no action has been filed. Typical comments from this group included: *'To file the claim before it's time barred' (SR58); 'Parties are bound by limitation period, if [they] go for mediation and [it] fails; it would prejudice them due to time barred' (SR91); and, 'Parties are more receptive to resolve [their disputes] if a case has been filed in court. Further it ensures that the matter is not caught by the limitation period' (SR19).*

ii. The issue in dispute is well defined

The second sub category of 35 respondents was a group of seven who believed that the facts and issues in dispute can be more clearly presented and defined if the action is filed. It gives the parties a better idea of the strength of their respective cases before considering mediation. Typical comments from this group included: *'A possible benefit of filing the action is that the scope of the disputes can then be defined or narrowed. For mediation to be more successful there ought to be some directions leading to settlement of the disputes' (SR73); '... When an action is filed in court, the parties will know ... the exact claim or subject matter of the action' (SR61); and, 'Mediation's usefulness or applicability can only be gauged after pleadings are closed' (SR62).*

iii. The filing of an action by one party may lead to the other party being open to settlement

The third sub category of 35 who provided reasons comprised of a group of five who expressed the view that parties are more receptive to resolve their dispute if a case has been filed in court which shows a determination to pursue the claim. Typical of their comments included: *'Without an action being filed to court first parties will not be*

serious in settling the disputes' (SR12); 'A suit needs to be instituted to show to the opponent that they are serious in instigation' (SR24); and, 'The parties would be more inclined to settle if they have a case heading for trial ...' (SR76).

iv. Cases which are not appropriate for mediation

Four of the 35 respondents who provided reasons for their answers was the fourth sub category who shared the view that mediation will not be useful in some cases and therefore they have to be filed for judicial determination. Typical comments of this group included: *'Some matters just do not lend themselves to mediation' (SR8); and, 'No, there may be some cases of utmost urgency which require court's urgent intervention for e.g. injunction' (SR98).*

v. Parties are not interested in mediation in the first place

The fifth sub category of the 35 respondents was a group of four who shared the view that lodgement of the case is important if parties do not believe in mediation. Typical comments from this group included: *'It might be a waste of time, particularly where litigants are not interested in mediating' (SR17); and, 'The society here is not prepared to use mediation yet' (SR50).*

vi. The non filing of action may delay the settlement process

The sixth sub category was a group of three who felt that the parties could use mediation to delay the action. Typical comments from this group included: *'[Mediation] will delay the settlement and no incentive to settle without an action in court' (SR21); and, 'Mediation should only come after the filing of court processes/actions in order to avoid the other party of making use of the mediation to avoid liabilities' (SR77).*

vii. The increase in legal costs

The seventh sub category was a small group of two respondents who believed that if parties are required to mediate before they can file an action, it will necessarily increase the legal costs:

'Disagree because not all cases are suited for mediation and if all is required to use mediation first this may be costly' (SR23).

'Litigants bear costs for both sets; mediation and litigation' (SR59).

viii. Parties can rely on litigation if mediation fails

The final sub category of the of the 35 respondents who provided reasons was another two respondents who argued that mediation may be pursued if the matter is currently in the court lists, so if mediation fails, litigation remains as a fallback. In other words, parties will not end up with nothing if an action is filed before mediation as the litigation process is then able to continue:

'... An action must be filed first in court before mediation, which if it is fail, there is always a litigation process' (SR31).

'Mediation must be viewed as an option when the case has already been filed and is a pending action if mediation fails' (SR32).

5.10.3 Neutral

The third category of answer from the 99 respondents who participated in this question was a group of 22 respondents who were neutral regarding pre-court mediation. Of the above 22 respondents, 20 provided their reasons whether or not mediation is required before the filing of action depending on three factors: (i) the facts and nature of each case (11 comments); (ii) the parties' willingness to mediate (seven comments); and, (iii) the lawyers' advice (two comments).

i. Depending on the nature of case

The firsts group of 11 of the 20 respondents who provided their reasons believed that the facts and nature of each case will determine whether mediation should be considered before the filing of an action. Typical comments from this group included: *'Yes for personal injury or insurance matters but if it is for banking matters, the banks*

will probably not agree (SR88); and, *'Depends on the circumstances of each case, its suitability and appropriateness'* (SR71).

ii. Depending on the parties' willingness to mediate

The second group of seven of the 20 respondents who provided their reasons shared a view that, it is entirely left to the parties to consider mediation to resolve their disputes. Typical comments from this group included: *'Litigants should be given the 'option' to consider if they want to sit to discuss settlement'* (SR34); *'As an alternative means to resolve disputes, parties should always be given the option whether or not to explore settlement by mediation'* (SR60); and, *'It's an option for all parties to go through mediation'* (SR55).

iii. Depending on the lawyer's advice

The last group of two of the above 20 respondents who provided their reasons felt that it is the lawyers who will advise on the potential of their clients' case including whether mediation should or should not be initiated:

'Prior to filing into court, the litigant would have been advised as to the costs, time and chances of success if proceeding to trial' (SR9).

'Lawyer is the right person to advise the disputant whether to go for mediation based on the type of dispute' (SR22).

The issue of mandating mediation is a vexed one. For instance, on one view by requiring parties to attempt mediation first before filing their action in court, it is akin to imposing an obligation on parties to mediate without their consent. On another view it is clear that mandated mediation can assist in reducing court backlogs.

Although mediation has been practiced in civil cases in Malaysian courts pursuant to the Practice Direction No. 5 of 2010, the frequency and the quality of this process in court-connected mediation could be further improved. The next section analyses the

results obtain from surveying lawyers' opinions on how Malaysian courts can manage the change in the system represented by promoting mediation.

5.11 Change Management in the courts

The respondents were asked: 'Do you agree that parties' demand for early resolution of their cases with minimum costs requires a change in the way the courts conduct their business by considering mediation either referral to mediation or judge-led mediation?' They were given options ('yes', 'no' and 'unsure') and asked to give their reasons for their answers. Of the 96 respondents who answered this question, 63 (65.6%) agreed, 9 (9.4%) disagreed and 24 (25%) were unsure. The three main categories of responses are discussed next.

5.11.1 Agree

The first category of the 96 respondents who answered this question was a large group of 63 respondents who agreed that reforms of the court system will have to occur. Of the 63 respondents, 48 provided their reasons which were grouped into three sub categories: (i) court-connected mediation is a way forward due to its benefits (17 comments); (ii) the courts' roles in spearheading the promotion of court-connected mediation (16 comments); and, (iii) court-connected mediation expedites case disposal (eight comments). The following sections discuss these sub categories.

i. Court-connected mediation is a way forward due to its benefits

The first sub category was a group of 17 who viewed that reform of court-connected mediation is a way forward for the future of the civil justice system. This is driven by the benefits of mediation in meeting expectations of the public especially for a future court system which can offer quick resolution and lower costs. Typical comments from this group included: '*A court directed mediation can go a long way to achieve public expectation of early resolution with minimised costs*' (SR63); '*Mediation seems to be the best cost effective and fast manner of resolving disputes*' (SR76); '*Mediation is new transformation in legal system*' (SR54); and, '*Parties would not have to wait and be delayed further*' (SR6).

ii. The courts' roles in spearheading the promotion of court-connected mediation

The second sub category of the 48 respondents who provided reasons was a group of 16 who believed that the change required of the courts would be to promote mediation in the nation civil justice system. Typical of comments from this group included: *'Initiative from court can promote more mediation and settlement'* (SR99); *'Court should play an active and positive role in directing parties to mediate'* (SR21); and, *'Court is to provide options and to ensure that options are considered when suit commences. It is a way of introducing mediation to the public'* (SR38).

iii. Court-connected mediation expedites case disposal

The next issue raised by lawyers regarding the changes needed to the court system to bring about mediation are related to the perennial problems of backlogs and how to bring about a change to this. This view was shared by a group of eight. Typical comments from this group included: *'This would allow the court to minimise cases for trial through mediation and only registering cases that could not be mediated for trial'* (SR75); *'To weed out non-contentious cases from going to trial ...'* (SR53); and, *'Parties could settle without going for lengthy trial'* (SR98).

Another two of the 48 respondents who provided reasons raised concern about changes required to the legal framework and legislation for court-connected mediation:

'Because at the moment, there is no regulatory procedure to ensure that mediation is part and parcel of the judicial process' (SR7).

'Rules of the Court have to be changed and legislation needs to be enacted. Re-training of the judicial officers needs to be carried out' (SR10).

The last five respondents of the 48 respondents who provided their reasons could not be categorised including two who wrote about the current court system.

5.11.2 Disagree

The second category of the 96 respondents who answered this question was a group of nine who disagreed with the need for change in the court management system. One respondent did not provide a reason. From the eight comments, two believed that the goals of the courts are not mainly to achieve quick settlements but to give justice to the litigants and another three respondents from this group felt that both the government and lawyers should support the court's efforts to have mediation in place as judges have their own limitations to promote it in terms of time and the extent of coverage. Another respondent in this group expressed his or her concern with the rising of costs if mediation is outsourced from the private mediators. The other two remaining comments could not be categorised.

5.11.3 Unsure

The third category of the 96 respondents who answered this question was a group of 24 who were unsure about changes in the court management system. Of the 24 respondents, 12 provided their comments which could not be categorised.

This section dealt with whether lawyers perceive there is a need for changes in the court system to accommodate mediation and most agreed that it does require quite significant change entailing changes in attitudes, processes and the legal framework. As this will require strategies for proper implementation, the next section explores the lawyers' views on strategies to implement these changes.

Change strategies in court management

The respondents were asked about the sort of strategies that may be used to manage change in the court to accommodate mediation from a list of suggested strategies. They were asked to select from the five point descriptive Likert scale (from 'strongly agree' to 'strongly disagree') to rate each of the strategies. These 5 scales were then simplified into 3 categories: agree, disagree and neutral. The list of strategies provided in the survey is shown in Table 5.8 below.

Table 5.8: The change strategies to manage change in the court

Change strategies	Agree	Disagree	Neutral
Education and communication	86	2	10
Participation and involvement	86	1	11
Facilitation and support	83	3	12
Negotiation and agreement	87	1	10

5.12 Recommendations

The survey concluded by asking respondents for recommendations on how to make court-connected mediation more efficient in the civil court system. This question is also related to an earlier question asking them how court-connected mediation can be implemented within the supervision of the court (Section 5.3). Of the 100 respondents who participated in the survey, 77 gave recommendations in respect of court-annexed mediation while 73 gave recommendations in respect of judge-led mediation. These recommendations are described in the following sections.

5.12.1 Court-annexed mediation

Of the 77 recommendations received to enhance the efficiency of court-annexed mediation, 24 comments were not able to be categorised. The remaining 53 recommendations were classified into five categories:

- (i) the role of the court in reinforcing the practice of court-annexed mediation (23 comments);
- (ii) information and publicity on mediation (14 comments);
- (iii) legislation and mediation rules (seven comments);
- (iv) the conduct and attitudes expected of the mediators (six comments); and,
- (v) mediation training (three comments).

i. The role of the court in reinforcing court-annexed mediation

The first category of recommendations from 53 respondents was a group of 23 who recommended that the court must first have a system in place for referral to court-

annexed mediation. Typical comments from this group included: ‘... a properly devised system ought to be in place together with the panel of mediators’ (SR73); ‘... appoint trained and qualified mediators for the selection of the disputants ...’ (SR7); ‘Enlist competent mediators where cases can be referred to, go through files to find appropriate cases with counsel’s consent’ (SR9); ‘Having an administrative process where mediation could be monitored’ (SR11); and, ‘Special registry to register mediation cases in the court’ (SR50).

ii. Information and publicity on mediation

The second category of recommendation was a group of 14 who emphasised the importance of providing information especially to the public and lawyers on the effectiveness of mediation. Typical comments from this group included: ‘Have seminars and courses for the lawyers and the public to know and understand what mediation is all about’ (SR45); ‘Substantive action is required to educate the public and disseminate information on mediation and other forms of ADR’ (SR60); and, ‘Provide information to the public and lawyers on the effectiveness of mediation and what can they expect from it’ (SR83).

iii. Legislation and mediation rules

The third category of recommendations was from a group of seven who felt that legislation and rules should be formulated or amended to provide for procedures to regulate the conduct of mediation. Typical comments from this group included: ‘The Rules must first be amended to make mediation compulsory or mandatory’ (SR3); ‘Make mediation as a pre-condition to litigation. Amend the Rules of Court if necessary’ (SR68); and, ‘Procedures and guidelines must be set up’ (SR31).

iv. The conduct and attitudes expected of the mediators

The fourth category of recommendations was shared by a group of six who concentrated on the conduct and attitudes of the mediators. Typical comments included: ‘The parties shall have their own turn to face the mediator. Friendly and cordially manner. Less reference to cases or procedural rules, etc’ (SR2); ‘Allow flexibility so that parties would not feel pressured. Mediator must maintain

impartiality at all times' (SR21); and, 'Make it less formal, more relax and less procedure' (SR55).

v. Mediation training

The final category of recommendation was from a group of three who suggested mediators undergo training to ensure they can handle mediation properly.

5.12.2 Judge-led mediation

Similarly, recommendations were also received from 73 respondents on how to enhance the efficiency of judge-led mediation. Of the 73 recommendations, 12 were not able to be categorised. The remaining 61 recommendations were grouped into five categories:

- (i) the do's and the don'ts for judges in judge-led mediation (37 comments);
- (ii) training of judges as mediators (eight comments);
- (iii) the appointment of more judges to handle mediation cases (eight comments);
- (iv) awareness of judge-led mediation (five comments);and,
- (v) legislation and mediation rules (three comments).

(i) The do's and the don'ts for judges in judge-led mediation

The first category of recommendations from the 61 respondents was a large group of 37who suggested how judges should conduct themselves in mediation. Typical comments from this group included:

'Most importantly is that judges must have the correct attitude while conducting mediation, they should not pressure the parties to resolve the disputes because of his personal interest, e.g. to achieve his personal target of reducing backlogs in his court to fulfil targets set by the higher authority etc' (SR25).

'Judges have to speak up their mind and point out clearly the issues and strengths or weaknesses' (SR1).

'As the mediation process is different, judges ought to play a facilitative, evaluative as well as determinative role, depending on the nature of the case. The hats the judges wear are not the same' (SR7).

'Not giving views on the prospects of a party's case' (SR4).

'Judges are to refrain from 'forcing' a resolution in order that the case does not feed [fall] back into court system' (SR32).

'Be a bit humane and don't treat the process as if it's a trial' (SR3).

(ii) Training of judges as mediators

The second category of recommendations to increase the efficiency of judge-led mediation was from a group of eight who suggested the training of judges as they are less familiar with the practice than mediators. Typical comments from this group included: *'It may also be proper to consider providing some form of training to the judge in mediation techniques. Otherwise, the judge may apply litigation style to the mediation to resolve dispute' (SR73); 'Judge should also take mediation training, not just doing mediation to avoid having to conduct the trial by them' (SR18); and, 'Only with the knowledge of all aspects of mediation including the psychology of individuals will mediation cases be handled better' (SR60).*

(iii) The appointment of more judges to handle mediation cases

The third category of recommendations was from a group of eight who suggested more judges should be appointed to deal specifically with mediations. One respondent in this group suggested the appointment of specialist judges in specific areas of mediation and another respondent suggested retired judges be appointed as mediators. Typical comments from this group included: *'Appoint more judges and allocate a judge-led mediation system in judiciary' (SR85); 'Appointment of specialist judges dedicated to*

sitting in mediation cases. These judges ought to be highly conversant with the cases which they seek to mediate (SR29); and, *'Retired judges should be reappointed as mediators'* (SR24).

(iv) Awareness of judge-led mediation

The fourth category of recommendations to increase the efficiency of judge-led mediation was from a group of five who suggested more awareness programmes be organised for the public and lawyers on the benefits of judges as mediators. Typical comments from this group included: *'Provide information to the public and lawyers on the effectiveness of mediation and what can they expect from it'* (SR83); and, *'There should be more public information about mediation'* (SR10).

(v) Legislation and mediation rules

The final category of recommendations came from a group of three who suggested some form of practice and procedures to be formulated to provide for mediation practice. Typical comments included: *'Introduce Rules of Court to regulate the mediation practice and procedure'* (SR34); and, *'Guidelines for mediation should be in place so that all parties would be clear what to expect from it'* (SR23).

These recommendations are discussed further in Chapters 7 and 8.

5.13 Chapter Summary

This chapter provides the overall views and perceptions of the lawyers in Sabah and Sarawak on various issues on mediation and its practice. Firstly, the lawyers' knowledge of mediation was assessed to understand their attitudes towards mediation. It found that, despite the majority of lawyers rating themselves as having limited knowledge about mediation, they have little doubt about the various benefits of mediation canvassed in Chapter 2. It also found that most surveyed lawyers considered mediation as an effective alternative to litigation. The effectiveness of mediation in reducing delays in the proceedings and court backlogs was endorsed by most lawyers. The lawyers also believed that the disputants may get justice in mediation through the way they are treated with respect and a fair opportunity to present their views. The low levels of knowledge of mediation as claimed by these lawyers, despite of their strong

understanding on its benefits as discussed above, may indicate an under-estimation of their knowledge about mediation. That said, the survey revealed a large group of lawyers who remained neutral on many questions and this could indicate that a sizeable proportion of the sample either did not have the experience or knowledge to answer.

Secondly, the chapter found that lawyers preferred judges as mediators due to the respect and authority associated with them. Those lawyers who didn't agree with judge mediators did so mainly from a concern that judges may create undue pressures on the parties to reach settlements. Most lawyers preferred evaluative mediators who assess the parties' case and make suggestions to resolve disputes. Some preferred mediators to be determinative. This may appear to be inconsistent with the general definition of mediation as purely facilitative but, for practical reasons, lawyers are more interested to know the likely result of their case should it proceed to trial. It may also help them to evaluate the strength and weakness of their case and that of their opponent before considering mediation.

Thirdly, it was also found that whilst lawyers play an important role in their clients' decision to use mediation there are mixed reactions to the extent to which they would refer their clients to mediation. Although the disputants are the main actors in mediation in determining their own outcomes, the majority of lawyers believed that they still have to be represented in the process to ensure that their needs and interests are protected. The survey showed that lawyers generally agreed on other issues: procedural safeguards on the admissibility of evidence should have no application in mediation due to its informality; mediation creates no binding precedent as confidentiality in mediation is essential to reach a mutual settlement; and, the enforcement of mediated settlement agreements should be regulated to ensure the parties get their due from the settlement.

Finally, the lawyers generally did not endorse requiring mediation to be incorporated as procedural step and pre-requisite to filing an action. This finding may indicate their disapproval of forced mediation and agreement that it should be voluntary and require the parties' consent. There were also some recommendations by the lawyers on how

to manage the process of incorporating the practice of court-connected mediation into the civil justice system in Malaysia which particularly emphasised the need for greater awareness of it amongst lawyers and their clients and or ensuring that judges and other mediators had the appropriate training to undertake mediation.

The next chapter moves to the findings of the interviews.

CHAPTER 6

THE INTERVIEW FINDINGS

6.0 Introduction

The second set of empirical work conducted for this thesis involved interviews with members of the Malaysian judiciary, a member of the Arbitration and ADR committee of the Malaysian Bar Council, a Chairman of the Industrial Court, officers from the Federal Court and the AG's Chambers and legal academics. The interviewees were chosen because of their knowledge and experience in mediation, and particularly court-connected mediation as outlined in the Methodology Chapter for the thesis. This chapter commences with an overview of the interviewees, their locations, institutions and gender. Next, the evolution of court-connected mediation is considered from the viewpoints of the interviewees before moving to consider their opinions on judge-led mediation and its drawbacks. The chapter then describes interviewees' comments regarding the growth of court-connected mediation and what they see are the leadership and support factors needed in Malaysia to successfully implement court-connected mediation. Finally, the use of mediation in Malaysia and its success in jurisdictions outside Malaysia is described through the eyes of the interviewees. In doing so, the chapter turns to consider the interviewees' opinions on the barriers to court-connected mediation in Malaysia.

6.1 The Interviewees

Chapter 4 provides an in-depth description of the interviewees selected for this study. Briefly, interviews were conducted from 5 February to 8 March 2010 in the three locations of Kuala Lumpur, Kuching and Kota Kinabalu. A semi-structured interview instrument was used for each of the interviews which ensured consistency in the interview process.

6.1.1 Interviewees' distribution according to localities and Institutions

A total of 13 interviewees were involved in the study comprising seven males and six females. The distribution of judges interviewed comprised: four from Kuala Lumpur, two from Sarawak and one from Sabah. The six other interviewees comprised:

- one Chairman of the Industrial Court from Sabah;
- one ADR committee member of the Malaysian Bar Council from Kuala Lumpur;
- one senior officer from the Attorney General’s Chambers at Putrajaya;
- one senior officer from the Chief Registrar’s Office, Federal Court of Malaysia at Putrajaya;
- two senior law lecturers in the field of ADR from a public university in the KL region.

Details of interview lists and localities are described in table 6.1.

Table 6.1: Interviewees’ distribution according to localities and Institutions

Locality	Judges	Industrial Court Chairman	ADR committee member of Bar Council	Senior officers from the court and AG’s chambers	Senior ADR Law Lecturers	Total (N=13)
Kuala Lumpur	4		1			
Sarawak	2					
Sabah	1	1				
Putrajaya				2		
Selangor					2	
Total	7	1	1	2	2	13

6.2 The research context

This study took place against a dynamic backdrop of legal and attitudinal changes towards mediation in the courts. It is relevant to place the interviews in the context of these changes. As described elsewhere in this thesis, over the past decade, there have been a variety of efforts to move mediation into the mainstream of the court system in Malaysia. The pilot project on court-annexed mediation in the early 2000s in Penang, West Malaysia was the first of its kind to embed acknowledgement of the potential benefits of mediation in reducing courts workloads. This was made possible with the

establishment of Malaysian Mediation Centre (MMC) in 1999. Cases were referred to MMC by the court for mediation (see Chapter 1).

As noted earlier, the interviews for this research were undertaken between the 5 February 2010 and 8 March 2010. A draft of the *Mediation Act* was already in existence. It was finally introduced by the Malaysian Parliament in May, 2012 (see Chapter 1). A draft Practice Direction (PD), to provide for the mediation in courts, was also being considered by the Malaysian judiciary. It was finally issued and took effect on 16 August 2010. As previously noted (see Chapters 1 and 3), under this PD, two models of mediation were provided for: mediation by a judge (judge-led mediation) and mediation by a non-judge mediator by consent of the parties (court-annexed mediation). The PD sets out the guidelines for conducting mediation giving parties the option of free court-assisted mediation (by a judge) or private mediation (by MMC) at a set cost. It also formalised the ad hoc practice which had been in place since February 2010 where only certain judges in West Malaysia asked parties whether they would like to use mediation (Koshy 2010a). An important event also took place immediately before the interview period. A seminar on judge-led mediation for Malaysian judges held from the 1st to 3rd February 2010 conducted by Judge Clifford J Wallace former Chief Judge of the United States Court of Appeals for the Ninth Circuit of which he is currently a senior judge. This gave greater encouragement to the practice of mediation in West Malaysia. In Sabah and Sarawak (East Malaysia) the support and enthusiasm for judge-led mediation was more long standing as it had been practiced since 2007 (Talip 2010).

This chronology gives some idea as to the state of mediation in Malaysia when the interviews were conducted. The interviews commenced with a preview of the two forms of court-connected mediation used in Malaysia (court-annexed mediation in Penang and judge-led mediation particularly in Sabah and Sarawak) and respondents were asked to comment on the evolution of mediation practice in Malaysia.

6.2.1 Development of court-connected mediation in West Malaysia

Because court-connected mediation developed differently in West and East Malaysia, this section considers its development in West Malaysia and the following section

picks up its development in East Malaysia. There were six interviewees who offered their comments on the development of mediation practices in West Malaysia. One who was interviewed on 8 February 2010, acknowledged that there was a court-annexed mediation pilot project in the Penang court at one point, but felt it was not a formal part of the legal system. This interviewee believed that judge-led mediation was also not considered as part of the court system until the Malaysian judges were given a seminar on mediation by Judge Clifford J. Wallace in the first week of February 2010. This is reflected in the interviewee's comments:

'... that was a pilot project up to a particular point in time and in Penang. It was not something that was encouraged consciously or unconsciously as part of the system or part of the system what the court wanted to offer ...but as of last week, I can tell you it is very much part of the system' (IR2).

The five other interviewees also referred to the practices of mediation in West Malaysia. Three offered comments on the rather patchy practice of court-annexed mediation and the other two interviewees noted that the practice of judge-led mediation was initially done in running down cases (personal injury as a result of a traffic accident). This is consistent with the literature review on the early history of judge-led mediation in West Malaysia (Chapter 3). All the five comments are provided in full in Appendix IR1.

6.2.2 Development of court-connected mediation in Sabah and Sarawak (East Malaysia)

In Sabah and Sarawak, judge-led mediation has been the dominant form of mediation practiced since 2007 (see Section 6.3 and Chapter 3). Court-annexed mediation is not popular, and indeed almost non-existent according to the three interviewees. Two of the three indicated that they had never sent cases to private mediators. Their comments include:

'Now, when you speak about court-annexed mediation, you mean is referring to a private mediator, I think so far in Malaysia, especially in

Sabah and Sarawak, is nil, is none existent, unless the parties themselves ask From my experience, I only do mediation [judge-led mediation]. I've yet to call on any party, "Can we go and see so and so for mediation", no, that's not happened as far as I know' (IR1).

'... as far as I am concerned ... I think most are judge-led' (IR5).

The third interviewee said that even though he sent a few cases to private mediation they were rarely settled as the cases came back to the court:

This is my experience for the last three years. I've tried to refer mediation to private practitioners, though they went, in two or three cases we have done it, they never succeeded (IR12).

In a related development in judge-led mediation in Sabah and Sarawak, a 'mediation corner' was set up, particularly in Sarawak courts, in 2010 where the public, including litigants, can obtain leaflets to inform them that this type of mediation is offered by the court with no costs. Three interviewees from Sabah and Sarawak spoke about this development:

'We already distribute a leaflet to litigants. The minute they file the claims in court, they would take the cause paper back, attached to it is the leaflet of a statement whether they would like to go for mediation, to whom and in what manner, they will tick that and at least making them aware there is mediation in the court' (IR1).

'The court in Sarawak now, we have set up this mediation corner ... we have a consent slip so we make it known to the public, the litigants themselves ... even without the lawyers, if they agree, they can put in the slip so we can fix a date for mediation' (IR11).

'What we are doing is we have the mediation corner and all that to me that's one way of getting everybody started' (IR12).

From the above, it can be summarised that judge-led mediation was dominant even though the interviewees recognised that court-annexed mediation had been introduced much earlier. The next section seeks to determine the reasons why judge-led mediation became more dominant.

6.3 The dominance of judge-led mediation over court-annexed mediation

Of the 13 interviewees, eight offered reasons on why judge-led mediation became dominant. These reasons were themed into three categories: the qualities and the characteristics associated with judges (five comments); litigants’ preferences (four comments); and, the effectiveness of judge-led mediation (three comments). These categories are described in Table 6.2.

Table 6.2: Themes related to the reasons why judge-led mediation is more dominant than court-annexed mediation

Comments by the interviewees according to themes	ID
The qualities and the characteristics associated with judges	IR1, IR2, IR5, IR11 & IR13
Litigant preferences for judge mediators	IR1, IR2, IR11 & IR12
The effectiveness of judge-led mediation	IR6, IR11 & IR12

Firstly, the qualities and characteristics associated with judges make them suitable mediators from the parties’ perspective according to the interviewees: their confidence and respect for judicial authority; and, their perception that the judge is able to provide a level playing field or judicial neutrality. Typical of the five comments in this theme are the following:

‘Of course there is some shortcoming ... whether they will have that kind of authority as that of judges ... The authority I mean is, from the perceptions of the litigants ... that, “If we go before somebody in a judicial capacity who can gives us the confidence level ... and the

influence he may have to help us in resolving dispute”, that I think is an experience we encounter even here’ (IR13).

‘They see the judge as a person who is independent and ... neutral ... but ... mediation by a private mediator could ... lean to one side or the other ...’ (IR5).

‘They find that the judge is someone that they respect and someone they know who is neutral It is that element of respect and impartiality they have for a judge’ (IR11).

The second category of four interviewees noted that litigants’ preferences are for judge-led mediation rather than court-annexed mediation. Their comments include:

‘There are quite a number of trained mediators but if I were to refer a case, or parties before me to them, “Can you refer this case to a lawyer Mr. X or so” ... they will say, “No” (IR1).

‘I can see from my experience ... when I did mediation ... the respect that the parties themselves give to the judge-led mediation as opposed to non judge-led mediation’ (IR12).

‘In fact judge-led mediation is in a way ... better for the parties ... the feedback that I have heard from the lawyers and the parties appearing before me in the mediation is that it is preferred ...’ (IR11).

The third theme emerging from the interview analysis suggests that judge-led mediation is more effective than court-annexed mediation. There were three interviewees who offered their reasons based on this theme:

‘I find that judge-led mediation is better, which is judicial settlement actually Judge himself does it ... it is more effective ... the judge

can see the parties, talk to the parties in the presence of the lawyers or not' (IR6).

'I think maybe they have their own reason They may have cases with the lawyers before and something like that because these private mediators they are also practising lawyers isn't it?' (IR11).

'They agree to do that but when they went there (Court-referred mediation), it took a couple of sessions but it did not succeed. The case came back to the court ... ' (IR12).

One interviewee from the above eight interviewees provided a reason why judge-led mediation is relevant to parties who wanted their 'day in court' as sending the case elsewhere may be considered a dereliction of the courts' functions:

'I think when you get to the court and you get the court telling you to go somewhere, putting it in most elementary, "go somewhere to sort out your problem", seems to the layman the dereliction of the courts' functions That's why it is so important that it should be judge-led' (IR2).

The finding from the interviews that judge-led mediation has become more dominant and more preferred than court-annexed mediation is supported by the review of Malaysian literature. Mediation conducted by judges has been found to be more successful as the parties have more confidence in them (the Star online February 25, 2011). It has been found to be more preferred as it is also more economical and time saving (Azmi 2010).

Despite the level of agreement on the benefits of judge-led mediation, the interviewees nevertheless identified a number of problems with the model which are canvassed in the next section.

6.4 The drawbacks of judge-led mediation

The interviewees were asked whether there are drawbacks in using judge-mediators. All four interviewees who commented on this question noted that judges may carry their adjudicative styles into mediation.

Firstly, three interviewees stated that judges may not be able to conduct mediation properly as they are so used to adjudication. As mediation is a non-directive process this is a considerable problem for the model if judges exercise their influence over the outcome of the dispute. For instance, one interviewee claimed that judges might force the parties to agree with their proposals to settle. The comments are summarised below.

'Judge-led mediation ... most of the judges don't have the mediation skills and trainings. Theirs would be similar like judicial settlement They will more or less force parties to come to settlement The element of arm twisting is always there when judge-led mediation' (IR10).

'The only pitfall is that the judge may lose his temper because he suddenly realised that he is putting back on his adjudicatory head especially when the other side is very stubborn ... sometimes, you've got to give some leeway and not cut off the point but do it very politely' (IR13).

'I think judges do have ... a sort of a mental make up which is too much aligned with the adversarial system. So, if another person is chosen for this purpose I think that's better They may be senior lawyers ... retired judges or private persons' (IR7).

The second set of comments around the danger of judges taking an adjudicative stance in mediation focused on circumstances such as where the judge may have heard the case in trial (at any stage of the proceedings) prior to mediating and then may have

made a decision on how it should be resolved. Nevertheless, two interviewees noted this as a drawback:

'It's not a very good idea for a judge to mediate because he carries baggage. Once mediation fails and legal proceedings have started, now he's carrying a baggage, a baggage of memories, baggages of, you know, yes, good and bad feelings towards one party or the other and that gets reflected into his judgement You can see how mediation is conducted in Syariah Court here They do have formal rules They never allow a Qadi [judge] to mediate.' (IR7).

'... what worries me is that those matters which the parties say if it goes for trial they won't be allowed to be disclosed by virtue of the Evidence Act about ... inadmissible evidence but they can bring it during the mediation and that kind of evidence, I think, if you hear it ... will keep on disturbing you, even though you shut your mind and say, "No, I must confine myself to that admissible evidence". In that sense, I think, the judge who mediates and hears the cases maybe a bit influencedThat's why I prefer if you mediate, you don't hear the case' (IR5).

One interviewee indicated that the parties' autonomy in determining their own outcome was taken away because they could be intimidated by the mediating judge:

'In a caucus session you are supposed to disclose a lot of personal things which the other party shouldn't know. And if all these are disclosed to the judge, the judge will then, look at it and say, "You better decide, better accept, this and that", he'll be directing parties to ... accept certain forms of settlement because he will use his influence as a judge and say, "hey, this one [if] you go [for] hearing, you'll lose the case". To me, there is no party autonomy as suchThe parties must be in a position to decide for themselves whether that is good for them. That you can have it in the private mediation process not in a judge-led

mediation because the private mediator will not force you and will not say, "I'm a judge you know, I would have decided this way" (IR10)

The parties' perception on the 'authority' of the judge was interpreted differently by this interviewee to support his above argument:

'... the mediation process is the process where parties decide but when they appear before a judge, parties will more or less allow the judge to decide for them because the judge is seen as an authority; they worry if they don't agree with the judge's proposal, tomorrow [the next time] when the case is heard, this judge would have told the other judge, so they are worried about that element.' (IR10).

This section provided an overview of the state of mediation practice in the courts at the time the research was conducted. Following a patchy uptake of mediation in West Malaysia the interviewees believed that mediation was definitely on the agenda for courts processes and that, whilst some difficulties were associated with judge-led mediation, it was the predominant model being used by the courts in both West and East Malaysia. The next section turns now to the first research question: to determine the key factors behind the growth and development of court-connected mediation.

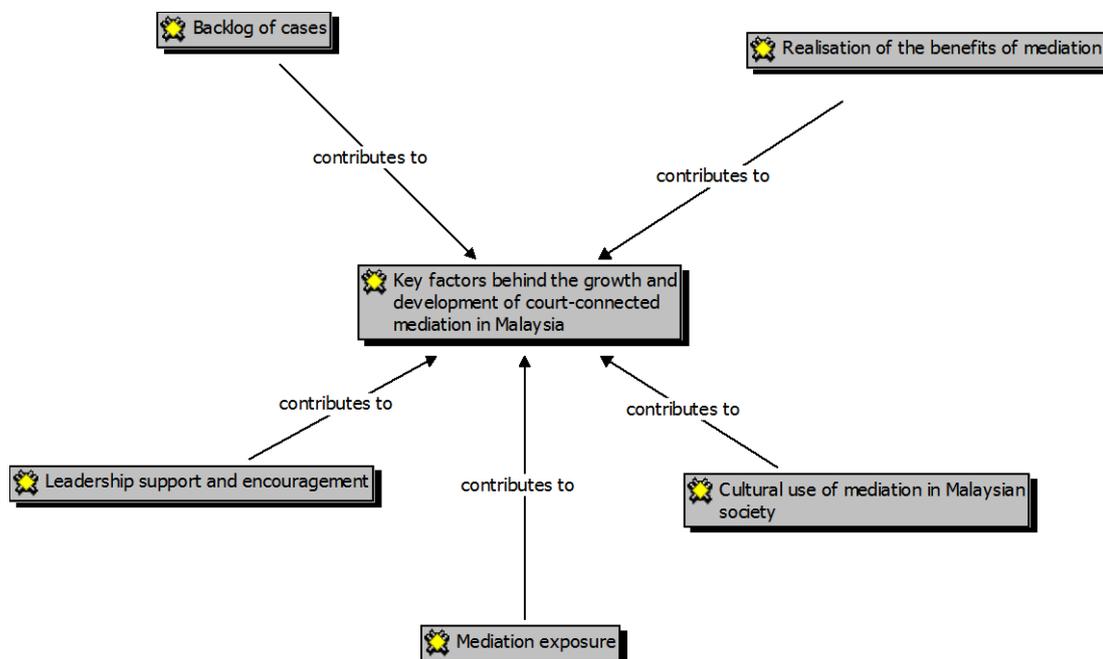
6.5 The key factors behind the growth and development of court-connected mediation in Malaysia

The first research question asks 'what are the key factors that have led to the growth and development of court-annexed and judge-led mediation in Malaysia?' It was found in the international literature review presented in Chapter 2 that mediation has grown in popularity as a dispute resolution mechanism in courts and tribunals of many jurisdictions across a range of countries. Several reasons were uncovered in the research canvassed. Most prominently, mediation is considered to be a viable tool for alleviating the backlog of cases in the civil court system. Hence the growth and development of mediation found internationally has been generally spurred on by, and associated with, the problem of court backlogs. In Malaysia, the contributing factors

to the backlogs were identified in Chapter 1. They comprise: the increasing number of cases brought to court due to economic growth and greater awareness of rights among citizens; the delay caused by lengthy trials and convoluted court procedures; and, the lack of timely preparation of cases and frequent requests for postponement by lawyers or by the court for various reasons.

Apart from alleviating court backlogs, the growth and development of court-connected mediation is ascertained from the sparse literature in Malaysia as being related to number of factors which include: the increasing realisation of the benefits of mediation; the conscientious support and encouragement given by leaders of the judiciary; the exposure of stakeholders to mediation in other jurisdictions; and, the cultural use of mediation in Malaysian context. These factors are illustrated in figure 6.1. The next section will detail these factors from the findings gathered from the interviewee respondents (IR).

Figure 6.1: Key factors behind the growth and development of court-connected mediation in Malaysia



6.5.1 Prevailing backlogs

That the growth and development of court-connected mediation in Malaysia is directly related to the growing backlogs of civil cases was confirmed by all 13 interviewees. One typical response was:

'This thing [drafts of the Mediation Bill) cropped up during the meeting on backlog cases chaired by the law minister. So from there we intensified our effort, set up a committee to study and compare the two drafts bills produced by the court and the bar and to come up with legislation (IR3).

This finding is consistent with the extensive literature reviewed (Chapter 2) which describes backlogs and delay as the reasons to pursue mediation as an alternative to litigation in a number of other jurisdictions. The findings from the survey also pointed to the same reason (see Section 5.2.8.i). Hence, these issues were further investigated through interviews.

All the 13 interviewees stated that mediation eases court backlogs and this has been the key reason behind its growth and development in Malaysia. Seven specifically gave reasons and three main themes emerged. These were: litigation cannot solve the increasing volume of cases filed in court but mediation can (five comments); mediation can clear up appeal cases (two comments); and, mediation saves the court's time in resolving cases (one comment). The themes are described in Table 6.3.

Table 6.3: Themes related to the growth and development of court-connected mediation is due to the ability of mediation in reducing court backlogs

Comments by the interviewees according to themes	ID
Litigation cannot resolve the increasing volume of cases filed in court but mediation can	IR4, IR9, IR10, IR12, IR13 & IR 11
Mediation can clear up appeal cases	IR11 & IR13
Mediation saves the court's time in resolving cases	IR1

Firstly, many interviewees noted that mediation is something that must necessarily be pursued to deal with the increasing cases filed in court. Here, six interviewees shared this belief. The general consensus was that litigation could not cope with the growing number of cases regardless of the court's efficiency. Typical comments included:

'I think let's face it, if one were to go to litigation, the system of litigation is such that it will take time invariably even if it was conducted very professionally [and] with speed ...' (IR13)

'I think to me personally this is the very reason ... why we are doing mediation, judge-led mediation, because to ease the backlogs otherwise you know I mean we can never finish, we can never be on time with our cases and then it will not be good for our country if we have a backlog, long decisions in the court' (IR4).

Secondly, consistent with the survey findings (Section 5.2.4.i), two interviewees commented that mediation not only reduces the cases pending in the court of first instance but it also prevents parties from appealing. Suffice to quote one of the two interviewees:

'I think it is with that realisation that we can help to reduce backlog of cases The fact that once you settled a case by mediation, it helps because there will not be any appeal arising from the decision that is made by the mediator, the order is recorded by the mediator so ... you clear your part of the case, you also help to prevent cases from being filed in an appellate court. So it is actually a two pronged attack, not just reducing the backlog cases in the existing court but preventing further cases from being filed in the higher court' (IR 11).

The third related theme emerging from the analysis of the interviews suggest that mediation saves the court's time in resolving cases as the key factor that led to the development of mediation:

'Mediation eases backlogs If I can settle a case through mediation, I can save one week for trial' (IR1).

The view by the judge that he could save time when a case is settled by mediation has to be considered with the review of the literature which recognised the fact that some of the benefits of mediation are hard to measure as most cases are settled. This difficulty in measuring the success of mediation was acknowledged in the Research Methodology Chapter at p 103.

Chapter 3 generally described the practice of court-annexed mediation in two ways: mediation by the courts' registrars or mediation by the private mediators who are commonly lawyers. In West Malaysia, the courts have been referred cases to the MMC. One of the 13 interviewees raised the point here that court-annexed mediation can also lessen the court workloads:

'One good step which can be done because it takes the case out of court premises and gives it to a third party who may not have any particular interest in that case and neither is he anyway related with that case. So, it is completely divorced from the court matters' (IR13).

The Mediation Act (2012)

As discussed in the earlier part of Section 6.5.1 above and also in Chapter 1, the *Mediation Act (2012)* was intended to promote the practice of mediation with the main objective of reducing backlogs. At the time of interview the Act had been drafted but was only gazetted in June 2012. There were some divergent opinions amongst the interviewees supporting and opposing it. In this context, the interviewees were asked: 'Do you think that the drafting of the *Mediation Act* leads to a significant development of the practice of mediation in Malaysia?' Six of the 13 interviewees offered their views that the Act had some significant impact on the development of mediation. The other seven interviewees believed that mediation could be pursued in the courts even without legislation and their views are considered in a later section.

Three main themes emerge from their comments relating to whether the *Mediation Act* would boost the practice of mediation in courts: it crystallises the power given to the judge to mediate and to refer cases to mediation (two comments); it provides a legal framework to formalise the practice of mediation (three comments); and, it brings confidence to mediation practice (two comments). These comments are described in Table 6.4.

Table 6.4: Themes related to the establishment of Mediation Act leads to further development of mediation practice

The summary of comments by the interviewees according to themes	ID
It crystallises the power given to the judge to mediate and to refer cases to mediation	IR6, IR12
It provides a legal framework to formalise the practice of mediation	IR2, IR7, IR5
It brings confidence to mediation practice	IR5, IR12

Having the specific legislation (*Mediation Act*) in draft was seen to be a factor which would crystallise judges' power to conduct mediation and to send cases to mediation. For example, Rule 16 of the *Federal Rules of Civil Procedure* in the US was amended to provide specific authority for judges who had been reluctant prior to the amendment to discuss settlement with parties because of uncertainty about their authority (Chapter 2). The *Mediation Act*, as set out in the draft recognised and validated the practice of mediation. This was the view shared by two interviewees:

'My personal point of view, legislation is a must. And judges ought to be given the power to order mediation' (IR12).

'So I think we still need the law and I think the law is coming up. Once with the emergence of the law ... people will accept it Of course the judge will feel more confidence because he will view it as part of the system, as part of justice institution ...' (IR6).

The second category of comments was from three interviewees who believed that the *Mediation Act* would boost the further development of mediation as it would provide a proper legal framework for its practice. Additionally, this legal framework could address some of the grey areas in which the law is uncertain, for examples the issues of confidentiality, privilege communication and the enforcement of a mediated settlement agreement. The three interviewees' comments were:

'I think some initiatives need to be taken for example by passing the Mediation Act for Malaysia. There must be something, somewhere that you establish a bench mark' (IR7).

'If you want to move abreast with the international communities we should take mediation quite seriously ... that means we shouldn't be delaying with the Mediation Act. We should try to make it a reality as soon as possible' (IR5).

'I think the bill puts things in very clear perspective. It lends certainty' (IR2).

The third category of comments suggests that the passing of the *Mediation Act* by the parliament would take the lead in providing the framework for mediation practice. It would in effect serve as the government's and the legislature's support and approval of the process. This view is shared by two interviewees (IR5 and IR12) who also provided their reasons included in the other two different themes (Table 6.4):

'The government has to get on board, right, i.e. by passing legislation. By the fact of passing legislation that means government behind it' (IR12).

'If they put the Act in place, I'd say it will be a boost to mediation' (IR5).

One interviewee gave as her reason for supporting the *Mediation Act* the strengthening of the practice of mediation by making it uniform over different provisions used by the different agencies:

'At the moment mediation practice is not uniform Financial [Mediation] Bureau, CIDB ... KLRCA ... have their own mediation rules Therefore with this Mediation Bill, it will strengthen the standard of practice and apply to every agency (IR3).

Whilst the interviewees above shared their views on why the forthcoming *Mediation Act* was needed to support the growth and development of mediation, seven were of the view that mediation can be done even without legislation. Typical of their comments were the following:

'Even if you have a beautiful statute of mediation, if people do not follow it or people are not interested in it, and it will not work. There is no magic to every legislation' (IR1)

'I think as long as it is made voluntary I don't see any problem at all [and] as long as if it is with the consent of the parties ...' (IR11)

'But if you don't have the practice how ... so what is the purpose of having an Act? What is important is to practise it first' (IR8)

This section reported on the divergent views regarding the introduction of the *Mediation Act 2012*. It should be noted however that the Act does not apply to the practice of mediation by courts pursuant to the Practice Direction.

6.5.2 The realisation of the benefits of mediation

Another key factor contributing to the growth and development of mediation in Malaysia is the increased realisation by key stakeholders such as judges, of the benefits of mediation over trials. The literature review presented in Chapter 3 identified the

benefits of mediation widely acknowledged by researchers internationally and these comprise: mutual settlement is achieved with the assistance of a neutral third party; parties' empowerment and self-determination; confidentiality; flexibility and informality; and, the parties' relationship is maintained. When asked about the benefits associated with mediation, four interviewees noted that: it maintains parties' relationships; its outcome is tailored to the parties' needs and is acceptable to both; even if mediation fails, it may reduce or limit the issues for trial; its outcome is a 'win-win' as opposed to 'winner takes all'; it may reduce the courts and legal fees; and, the strict adherence to principle of law does not guarantee a solution in community disputes. The list of benefits raised by these interviewees is described in Table 6.5.

Table 6.5: The interviewees' comments on the benefits of mediation which may contribute to the development of mediation

The list of benefits of mediation raised by the interviewees	ID
It maintains parties' relationship	IR1,IR2
Its outcome is tailored to the parties' needs and is acceptable to both	IR2, IR11
Even if mediation fails, it may reduce or limit the issues for trial	IR1, IR2,IR11,IR13
Its outcome is a 'win-win' as opposed 'winner takes all'	IR1
It may reduce the court and legal fees	IR1
The strict adherence to principle of law does not guarantee a solution in community disputes	IR1

The first benefit of mediation raised by two interviewees was the ability of mediation to maintain the parties' relationship. This is consistent with the rhetoric of the benefits of mediation in the literature, that it is generally preferred by the parties as their disputes are resolved without compromising their relationship (Chapter 3). The two interviewees' comments on the first benefit:

'To me, mediation is not the question of winning and losing in terms of law, it's the question of getting the two parties settle their disputes and both are happy. And they may even continue with their relationship subsequently, right? But where if you go to trial, either that you win or

lose, that is it, the relationship is gone forever, so I believe in that' (IR 1).

I think, mediation does something which litigation might fail especially if litigation is hot and very emotionally fought; mediation removes the ends which parties can really do without, mediation removes that horrible component which is why you have disputes in the first place (IR 2).

The second benefit of mediation as identified by the interviewees was that its outcome is tailored to the parties' needs. The lawyers' survey, however, shows mixed views on this issue. The majority of lawyers agree that mediation resolves relationship problems but large minority were neutral. This finding may be due to lawyers' inexperience in, and less exposure to, mediation or their lack of awareness. These issues are taken up in the Discussion Chapter. Here, two interviewees shared their belief on the second benefit:

'Mediation is always about the parties, mediation is not about what I think about the case, not about what I think how they should settle the case, there is nothing to do with who is right or wrong, legally or otherwise it has nothing to do with that, it's everything to do with what the parties want' (IR2).

'Once they find that their legal disputes are settled ... to a solution which is acceptable to both of them, that level of satisfaction, I think, is translated and it will embrace the courts and the lawyers as well. I think with that feeling ... justice has been done. Yes, this is what they want' (IR11).

Even though mediation is used to attempt to resolve a case quickly, it does not always end with a settlement. It, however, helps the parties to narrow their dispute for trial. Hence, parties can appreciate each other's cases better, which eventually leads to

settlement. This explains the third benefit of mediation raised by four interviewees, that mediation clarifies the issues for trial (Table 6.5):

'So even though, through mediation I may have failed, right? Because of the ENE [early neutral evaluation], and little bit of the case management there, narrow down the issues, went to another judge, they settled' (IR1).

'So, one step to overcome this is the mediation process I think. You can call it anything, can be mediation, it can be evaluation, evaluation sometime you can even get it settle at case management stage, narrow down the issue there's only one issue so something is interesting to resolve ...' (IR13).

'Mediation also doesn't mean resolution of the whole problem, it can always mean a narrowing of issues that have been finally going to trial and it's any kind of combination' (IR2).

'But one thing I find that even if the matter is not settled by mediation sometimes the mediation session helps to narrow down the issue for trial, so it helps a lot. Say for example, in divorce cases sometimes there are few prayers for dissolution of marriages at first they may not agree but in the end they agree then you just leave the matter of custody or maintenance for trial. Sometimes they agree on custody, the only thing they don't agree is maintenance, so ... the judge only has to decide on maintenance. I think that helps the judge a lot and it saves time also' (IR11).

The fourth benefit of mediation identified is that its outcome is a 'win-win' for both parties as it is an interest-based process. An indication of this benefit is given by one comment from an interviewee:

'The reason why I'm pushing mediation is I believe that's the way to go because it is a win-win situation and lack of technicality' (IR1).

Further, the same interviewee offered two examples where mediation can be very beneficial particularly to poorer groups and in community base disputes. These are the fifth and sixth benefits identified from the interviews (Table 6.5). First, mediation can reduce the cost of litigation and legal fees:

'In fact, to be honest with you, I think, we should really encourage mediation especially among the lower income group, why should they spend money to pay lawyers, pay the court fees? I wish they could have saved by going to mediation. Sometimes they don't have money to start with, then, I understand some lawyers say, "I took up your case, but 30%, for example running down cases, 30% or 40% of your rewards must go to me", sympathy like contingency; and then they will say, "Even the cost given to you, I'll collect". So, he gets 50%. Now, is that healthy? No, it is not healthy. The man is awarded by the court RM100,000.00 he only ends up with 50 [RM50,000]. The reason why the court gives him a hundred thousand is to assist him in his injuries, now his injuries is shared by a lawyer or by a devil, isn't it? So, when the court said you may need the above money to get to your surgery, then suddenly, half of it is already gone. What happened to the poor man?' (IR1).

The second example is where mediation can resolve the disputes in the community. According to this interviewee, in some cases involving disputes in the native communities, a strict reference to a point of law will not guarantee a solution otherwise than by mediation by a person knowledgeable of the cultural nuances of specific communities. He related his experiences in mediating a conflict over land containing indigenous graves between an indigenous community and an ethnic Chinese who is the registered owner of the land:

'So, the law can't solve that kind of problem. Court is impossible, if you still want legal principle, no way! So I thought about it, if I follow strictly, it would be a simple judgment but not helpful, how? If I see it like a lawyer, he is the land owner, why wasting your time here? But I don't think it is helpful to the society. I don't even being helpful to the owner of the land' (IR1).

6.5.3 Leadership support and encouragement

Leadership support and encouragement are recognised as key factors in the development and uptake of mediation. The growth and development of mediation internationally particularly court institutionalised mediation has the strong support of their Chief Justices. In Chapter 2, it was found that the role of the Chief Justices in promoting the uptake of mediation plays a significant part in the development of mediation in other jurisdictions. For example, Chief Justice Warren Burger of the US Supreme Court and the Chief Justice of the Supreme Court of NSW, Sir Laurence Street, were key figures in providing enthusiasm and support for the development of mediation.

The role of a Chief Justice in promoting the use of mediation is no less important in Malaysia. Of the seven interviewees who provided answers to this issue, two recognised the importance of leadership support to make mediation a success and one believed that the senior leadership in the judiciary has to be exposed first to mediation to get all involve: *'... The Chief Justice should be the first one to be exposed then he will get the people around him to be exposed otherwise it's going to be a difficult task because you are pushing a system when ... people are not aware'* (IR13). The remaining four interviewees related the development of judge-led mediation in Malaysia to the encouragement and support by the senior members of the Malaysian judiciary. Two interviewees from West Malaysia referred to the efforts undertaken by the former Chief Justice of Malaysia and the former Chief Judge of Malaya respectively.

'First of all, it is driven by the Chief Justice, himself. He, I believe, is committed to the idea of resolving disputes and resolving disputes in the fastest of time, given conditions ... and he said, "Look! don't wait for legislation and there's nothing to stop, it's part of our judicial functions to encourage settlement, resolution" (IR2).

'It was more of a push right from the top to try doing mediation. Probably this mediation was not there ... when CJM [Chief Judge of Malaya] said, "Why not, we should implement it here", so it was done in the lower courts for running down cases through a certain form of mediation' (IR9).

The other two interviewees named the Chief Judge of Sabah and Sarawak as someone who spearheads the effort to promote mediation in East Malaysia:

'Well, one thing I'd say is the initiation by ... the chief judge as far as Sabah and Sarawak are concerned ... more prominent after CJSS [Chief Judge Sabah and Sarawak] took over, he in fact encourages and promotes mediation widely' (IR5).

'I think ... the fact that this mediation, judge-led mediation ... seriously consider ... as an option to settle legal dispute is because of the encouragement given by the Chief Judge of Sabah and Sarawak [CJSS]' (IR11).

6.5.4 A consistent exposure to mediation

The growth and development of court-connected mediation in Malaysia is also related to the increasing length of exposure and training given to the stakeholders. This sentiment was shared by all interviewees. Two interviewees indicated that they have been sent overseas to see for themselves how mediation is being implemented. One said he, and others before him who have been overseas, had written reports of their

experiences. They have passed on their knowledge and experiences in reforming court processes to facilitate this method of dispute resolution.

'I have been sent to the United States for one month together with other judges to look into this thing and I put up my papers on my return. Not only me, before me there were a few other group, all of them gone to United States and each and every group have also done their papers when they came back' (IR6).

The other interviewee said, on his visit to a Californian court, he was exposed to the multi-option program under which cases are assigned at filing to the court or by direct referral from the judge to arbitration, ENE, mediation and settlement conferences. The one that attracted his attention the most was mediation.

'I have a look at the US system in several states in two occasions, in one I went with few judges and members of the ADR committee to look at the system in California especially in San Jose, Los Angeles and San Diego. We came back and then we put up a report to chief justice, recommending that we adopted the system in San Jose but only limited to mediation' (IR10).

In addition to overseas visits, two other interviewees indicated that they have been also given local training on mediation by speakers and judges from the United States and Australia:

'I have just come back from mediation seminar ... last week and the speaker was Justice Wallace from the US, a retired judge, whom I understand held a pilot mediation programmes in the country' (IR2).

'We did have one training last time ... by Justice Ian Harrison of Supreme Court New South Wales for judges, judicial officers and lawyers on mediation' (IR11).

6.5.5 The cultural use of mediation in Malaysian society

As the review of the literature shows, the early history of mediation in Malaysia is rooted in the cultural practices of its diverse ethnic communities (see Chapter 2). This is reflected in the practice of bringing the disputes to elders and respected members of the community. At least two interviewees suggested that the cultural use of mediation in early Malaysian society is a key factor that influences the growth and development of court-connected mediation:

'The Malaysian society at its most fundamental is not a litigious society, we have converted the last twenty years to a litigation society so we need to go back to our roots, that's why we got "Penghulu" [headman] court, Natives court, so we have to go back to our roots of conciliation, having a cup of coffee and more problems get settled over cups of coffee than courts' (IR2).

'But in Malaysia we are just starting, it takes time to sell the idea. But I dare to say ... mediation is actually a native to this country ... We have a system especially to the natives of Sabah and Sarawak, we have ketua kampung, the village head, and he is a mediator, through and through. If there is a dispute in his kampong [village], under him, they come before him and he will settle he will work it out and find a solution. He is the mediator. So is the Chinese community, they have a "Kapitan Cina" [headman] they called it, he is a mediator most of the time. Even among the Muslim Malay community, they also have the imam [headman in prayers], the Qadi [judge], they are the mediators. So, that's why I dare to say mediation is a native to this country, provided the head is a respected person' (IR1).

In supporting the above argument, this interviewee went further by referring to the characteristics of the Asian cultures generally including Malaysian society:

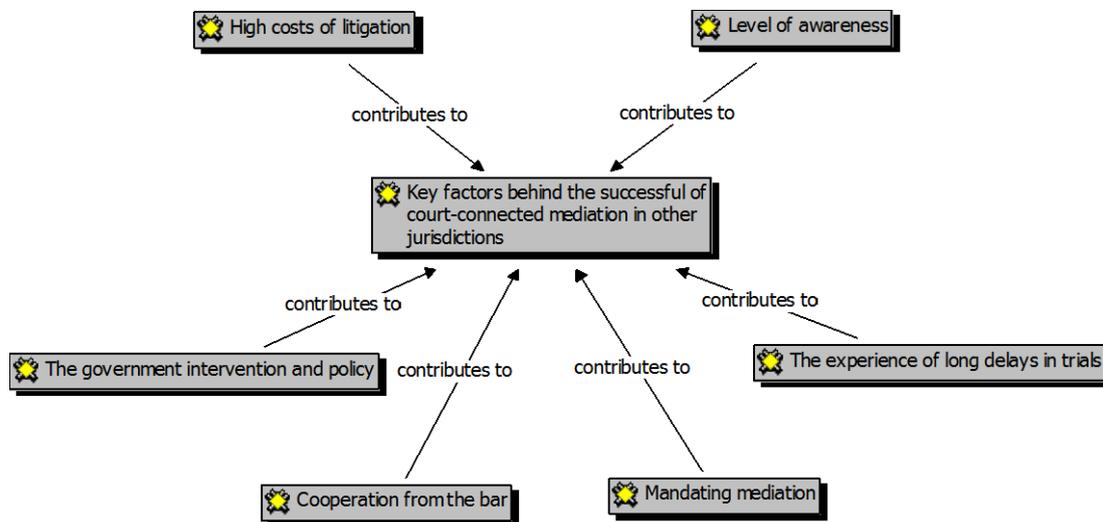
'I think we Asians are very paternalistic in the sense that we respect the elder. We respect the authority. This is the Asian cultural background. For example, like us in a village, a village head is the respected leader, you can say tribal in that sense, tribal leader. I believe that we have a lot of respect for the leader and authority' (IR1)

Having considered and determined the key factors behind the uptake of court-connected mediation, the next section will deal with the second research question to determine the key factors behind the success of court-connected mediation in other jurisdictions.

6.6 The key factors behind the success of court-connected mediation in other jurisdictions

The second research question asks 'what are the key factors that have made court-annexed and judge-led mediation successful in other jurisdictions?' Mediation in other jurisdictions for example in the US, UK and Australia has existed for over a decade and has become part of their justice systems. The success of mediation in these jurisdictions is documented in the literature review (Chapter 2). The key factors that have led to the success of mediation in these countries varies but the analysis of interviews uncovered the fact that interviewees were cognisant of many factors contributing to this success including the high costs of court and lawyers' fees, the increase level of awareness among the public, government intervention and policy, the experience of long delays in trials, close cooperation from the bar and the practice of mandatory mediation in some of these countries. Those factors are illustrated in figure 6.2. The thesis now moves to discuss the details of these factors from the interview findings.

Figure 6.2: Key factors behind the success of court-connected mediation in other jurisdictions



6.6.1 High costs of court and lawyers' fees

The high costs of litigation were identified as the main reason for the widespread use of mediation in other jurisdictions (see Chapter 2). The increasing cost of litigation relates to court fees as well as to lawyers' fees. Even in Malaysia, an increase in legal fees is expected as the result of the increase in the costs of operating a legal practice. The interviewees were asked the question 'why do you think that court-connected mediation has been successful in other jurisdictions?' Two claimed that the exorbitant court and lawyers' fees were the reason why court-connected mediation is resorted to in other jurisdictions whereas in Malaysia, the litigation costs are too cheap.

'... In the West [Western Countries]... the reason why it is very popular ... because people don't want to spend more money going to court, they are very expensive affair, right. Even in Singapore, I understand it is quite expensive to go to court ... So in order to save cost it is good they go to mediator ... in other countries ... private mediators may have done well, not because they want to go there with due respect but because of costs factor going to court. Whereas, over here ... it is cheap to do litigation, why should I worry about going to mediation, isn't it?' (IR1).

'The cost of continuing the suit, in the Singapore court, was so prohibitive it was much better to deal with it away from the court. It's ... so expensive to do it ... Our filing fees are far too cheap!' (IR2).

One interviewee questioned whether the costs of conducting mediation are cheaper than litigation because parties also require the services of a lawyer in mediation so perhaps a more formal study of mediation costs is required:

'On question of costs, I think it is debatable ... whether you get a counsel in mediation or you get a counsel in litigation, which costs more? Because there is actually no comparison study being done to say ... mediation is cheaper' (IR5).

6.6.2 The increased level of awareness

The second factor identified by interviewees for the success of court-connected mediation in other jurisdictions was the increased level of awareness of mediation by the public. In the US, for example the literature review revealed that there was a public demand for a cheaper and quicker method to resolve their disputes (see Chapter 2). There were four comments provided by three interviewees grouped into two themes: the long existence of mediation practice and public attitudes to mediation. These two themes are described in Table 6.6.

Table 6.6: Themes related to the level of awareness on mediation in other jurisdictions

The summary of comments according to their themes	ID
The long existence of mediation practice	IR1 & IR5
The public attitudes to mediation	IR12 & IR5

Firstly, as mediation has taken place for a decade or more in some jurisdictions like the US, UK and even Australia, they have managed to sell the idea to the public to make them aware of mediation as another means to resolve disputes other than in a trial. Two interviewees shared this view:

'As I said just now, in the [United] States, I look at it; the reason why I think it is successful is they have been working on it for years. I was there in 2000, they were telling me, they had started it twenty years ago, and that was 2000. I think 1990s, 1980s they had already on it. It takes time to sell the idea. Of course over here it is very new. Only now we are talking about mediation. It takes time to settle and it takes time for people to believe or to have confidence in this process' (IR1).

'In fact, other countries like US, they are years ahead of us' (IR5).

The other reason contributing to the high level of awareness of mediation in these jurisdictions which led to the successful of court-connected mediation was related to the public attitudes to mediation. Here, two comments were provided under this theme:

'... the change of the mindset of the people. I'm sure that twenty years ago the people of the countries that have successful mediation now, twenty years ago where we are now' (IR12).

'I'd say of awareness, public awareness because over there, they make mediation well known to people as an alternative' (IR5).

6.6.3 Government intervention and policy.

The third key factor responsible for the success of court-connected mediation in other jurisdictions according to the interviewees was the role of the government in taking the lead to provide the framework for its implementation. Three interviewees with this view referred to the Singapore government as an example:

'I think Singapore is the best example ... the government spearheads a lot of things ... everything is tied in to its investment, economy and the government sets the pace; "We want to do this, to do that, we want to offer the best selection to the investors, who may or may not leave their shops and we want to keep the money here, the investment here". So,

Singapore sets up mediation centre, it doesn't wait for somebody else to do it. It doesn't leave it to the court and to the lawyers to do it Funded by the government and it was government driven' (IR2).

'Don't go very far, just look at Singapore. How Singapore has done it? On just pure initiative, nothing more, I mean, once they tasted the flavour of success then things you know electrified it and well expanded in a very fast manner and they are still expanding' (IR7).

'I don't know about US but in Singapore I think, what made it successful is ... the court refers [cases] straight away ... to centre ... of course they have all the people who are actually properly trained to do it and have the requisite knowledge ... there is a concerted effort to do it from the beginning when the claim is filed to channel it for mediation ... they are very serious about mediation' (IR11).

Three other interviewees noting the importance of the government's role suggested that when the government is involved, it can show the public its seriousness in wanting to have mediation in the justice system. In other words the government can legitimise the process of mediation. The public in turn will have some confidence in practising it as it is recognised as a method to resolve disputes. It will also ensure that their efforts to reach settlement by mediation are not wasted as there is finality to the settlement agreement.

'That's why in my view, my personal view is that the government plays an important role, we must have legislation. By having legislation that means the government is telling the public that it's a form of getting a solution to a dispute' (IR12).

'I will say partly because of the official approach to the whole thing is not firm. I'm sure you are aware they are trying to pass through the Mediation Act, but until now they have not done it. That to me is an

indication that, they are not really firm in having this mediation. I mean look at the government, if the government really wants the alternative to do litigation, government should've pushed the Act' (IR5).

'... Mediation can only take off if ... government wants it ... the magic is with them' (IR8).

6.6.4 Cooperation from the bar

As discussed in Chapter 2, the success of court-connected mediation in other jurisdictions, particularly in the US and Australia, was due largely to the support and close cooperation from the lawyers' associations as well as by individual lawyers themselves. For instance, the American Bar Association helped to set up court-connected mediation in some states in the US. In Australia, the Law Council of Australia, a body representing lawyers in Australia, has been very active in promoting mediation. They have prepared a comprehensive guideline to assist lawyers in representing their clients in mediation (Limbury 2011). The findings from the survey (Chapter 5) also confirmed that lawyers play a prominent role in advising clients to go to mediation and these can be influenced by a supportive lawyers' association. The lawyers' attitudes to mediation have some effects on the disputants' decisions to use mediation but a large minority of lawyers surveyed for this thesis did not think they played a role in advising clients to use mediation. The interviews allowed a further probe into this issue. One interviewee considered that the success of court-connected mediation in other jurisdictions was due to the role and cooperation from lawyers and their associations:

'Like in the US, they had established the system ... you have to go through ADR first ... The lawyers ... seem to be that's their way' (IR6).

The lawyers' cooperation to make mediation a success was also shared by the four other interviewees in the Malaysian context. Two themes were identified arising from the interviewees' comments. The first theme was that a mediation agreement can be achieved with the cooperation of the lawyers (two comments):

'It would be mostly with the cooperation of the counsel ... from both parties. If they don't cooperate ... obviously we can't go through it'
(IR4)

'To me in the mediation process basically if the lawyers come prepared with what the clients' want, what is the requirement of the clients and not what is the clients' right in law, then you are home for mediation'
(IR10)

The other theme in the interviewees' answers was that lawyers can promote mediation in their capacity as the litigants' advisors (three comments).

'Yes, the lawyers play a role to persuade their clients, they've got to advise the parties on the weakness and strength of the case ... on the issue of speed ... on the issue of cost. If you are truly being a court officer ... you should not be thinking, "If I go and advise him on cost, I lose my cost"' (IR5).

'Oh, yes! because the lawyers are to advise, obviously they are paying the lawyers to get advice ... if the lawyers want to be flexible in that matter and leave it to the clients to have it a go ... then from there, you know, start the ball rolling' (IR4).

'... if the lawyers themselves are not the believers in mediation or they got other reasons why the matter should not go to mediation, then forget about mediation. But if they themselves believe in mediation, they believe in the speedy resolution of cases, they may go to mediation with all due respect, if they are not greedy, then it will be okay' (IR1).

There were two other comments stating that the lawyers need to be trained to assist in mediation. Their role in mediation is very different from the role they play in court:

'... lawyers can play their role in mediation and their role in mediation must be conciliatory ... in the sense that, look at the ways and means to achieve what their clients want rather than ... the loopholes in each party's case ... that's the reason why lawyers also need to be trained for mediation' (IR10).

'At the moment, the lawyers who attend mediation are actually still wearing the head as the counsel, right? ... we need to train lawyers to be as lawyers assisting the mediation rather than mediator ... If you have a lawyer who is trained to assist in the mediation, he will say, "look we are not sure if we are going to win this point or not and then may be the best solution is to give and take" (IR12).

Representation in Mediation

The issue of representation in mediation was canvassed in the lawyers' survey as it may be a factor which might encourage lawyers to use mediation for their clients. The findings from the survey revealed that most lawyers believed that disputants need to be represented in mediation. The interviewees were also asked about lawyers' roles in mediation. Five judges who gave an opinion on this question preferred mediation to be conducted without the presence of the lawyers and only one preferred the presence of lawyers. Three judges who preferred mediation without lawyers present provided reasons. A typical comment from a group of two interviewees who preferred mediation in the absence of lawyers was:

'When I see the parties with their lawyers, I always tell the lawyers, I just want to talk to the clients, but we are very careful with this ... we will never speak to the clients until the lawyers say, "yes". Because again, you know they may not like it ...' (IR1).

The other three interviewees who provided reasons why mediation is preferred in the lawyers' absence fell into two themes. Firstly, the presence of lawyers in the mediation session could protract settlement (two comments) which included: *'... Lawyer looks*

at it [the case] more legalistic, so we only bring in lawyers for the first session when both parties are present so that the lawyers are aware what we tell the parties. After that, when the parties come to us for second session where they can be frank with us, we leave out the lawyers' (IR5); and, 'The lawyers are the first who converted the ordinary problem where two parties are not talking to each other into a legal problem' (IR2). Secondly, the parties themselves should convey their wishes directly to the judge as lawyers have a tendency to look at their clients' interest only (one comment) and includes: 'All I always want is for them to tell me ... what are their demand and to convey the demand to the other side ... if it comes through the lawyers sometimes ... they'd want to look at the situation one sided ...' (IR11).

Only one interviewee who preferred the presence of lawyers in mediation offered a reason:

'I call the parties together with the lawyers. I want the lawyers to be present because I find them ... more of an asset than a liability. People get scared I mean, they get worried because the lawyers is going to usurp the function [of their clients] ... they would be doing all the talking' (IR13).

6.6.5 Mandating mediation

Another key factor which contributes to the success of mediation in other jurisdictions was due to its compulsion. In the US and Australia, mediation has a statutory mandate under their specific legislation regardless of the parties' consent. One interviewee noted the compulsory mediation implemented in the US and compared it with the practice of mediation in the UK:

'... you can look at the US system ... that you have to see the mediator first ... only then ... you go to court. In the UK ... it's kind of very gentle in introducing mediation. They don't want to make it compulsory ... that's why the practice of mediation is really slow (IR8).

Whilst the survey of lawyers found little support for mandated mediation, the judges were more positive about it. Five interviewees offered their reasons on the rationale of such move to mandate mediation like in other jurisdictions. Their reasons fell into two categories: to implement mediation more effectively (three comments); and, to save the parties legal costs (two comments). The comments of all the five interviewees are described in Table 6.7.

Table 6.7: Themes related to the reasons why parties have to be compelled to go to mediation

The interviewees' comments related to the effective implementation of mediation as a reason to mandate it	ID
<i>Some party are not willing to have the matter resolved early ... someone must direct parties ... go for mediation otherwise mediation will not work as successfully as what the others' experience.</i>	IR10
<i>I personally feel that if you really want mediation to work, you should compel people to go to mediation at the start, make them go. Our society needs that methodology. Mediate before you can file, part of our protocol court action.</i>	IR2
<i>If it is voluntary mediation, I would say it will not have the desired effect as much as you want; even in US, I think it's not voluntary, but mandatory mediation.</i>	IR5
The interviewees' comments related to saving the parties legal costs as a reason to mandate mediation	ID
<i>We are still giving them an opportunity ... if they are not successful, the opportunities are always available; we are not ... cutting them off completely ... we are in fact ... helping them to save their cost.</i>	IR13
<i>... if actually you attack it before the case goes to court ... I think it is actually helping the parties ... in terms of costs because if they filed in court, they have to engage lawyers ... filing fees and all that; so if you take mandatory for certain cases to go for mediation first before they file their action in court ... save them that costs.</i>	IR11

Denial of access to justice

As discussed in Chapter 3, mandating mediation may be viewed as downgrading access to the court and the civil justice system by creating an extra step in the process. In the absence of consent to mediation, the parties may feel they are further denied justice by being forced to mediate. The interviewees noted the positive aspects of mandating mediation and two considered the argument about denial of access to justice as an incorrect perception of court-connected mediation:

'If you look at it in isolation, it could be some validity in the argument but if you look at it as part of the court system ... before you come to the court, you try to resolve your case through mediation first ... it's not so much of denial of your right because in the end if you are not successful there, you can come back to us, that's not the denial of access to court' (IR5).

'... we are just asking for mediation if you failed, you can still come back. It's not denied of access to justice. Deny of access to justice means you cannot go to the court (IR12).

6.6.6 The experience of long delays in trials

The experience of long delays in disposing of cases is associated with the backlogs of cases. Reducing these backlogs has been singled out as one of the contributing factors to the success of ADR particularly, mediation in other jurisdictions. One of the interviewees gave one example over the long delays in California in the US:

'The reason why they started implementing this was in California that time if you file a matter in court, it'll only be heard about twelve years later. That's how bad the delay was. To more or less to resolve this long delay both the bar and the judiciary sat together and they came out with this idea. And the court agreed to implement it. So, after implementing this ADR system 97 or 98% of cases are settled by this method only 2% of cases failed, go to trial. So much so, they managed to reduce the

waiting time from twelve years to less than 24 months. That's how successful it has been. So if you ask me of a success story to me San Jose's story probably is the most you know selling point. Everybody who I need to talk about ADR, to me San Jose's experience speaks volume' (IR10).

Another interviewee observed that public complaints over the inefficiency of the litigation system in the US, including the long waiting time for a case to be tried, had shifted attention to better alternative dispute resolution methods including mediation:

'The society wants it. They've got enough [problems] ... with all the weaknesses of litigation, high expenses, long delays, inefficient and what not ... I think in US, it was ... from the grass roots ... the society itself They want mediation' (IR8).

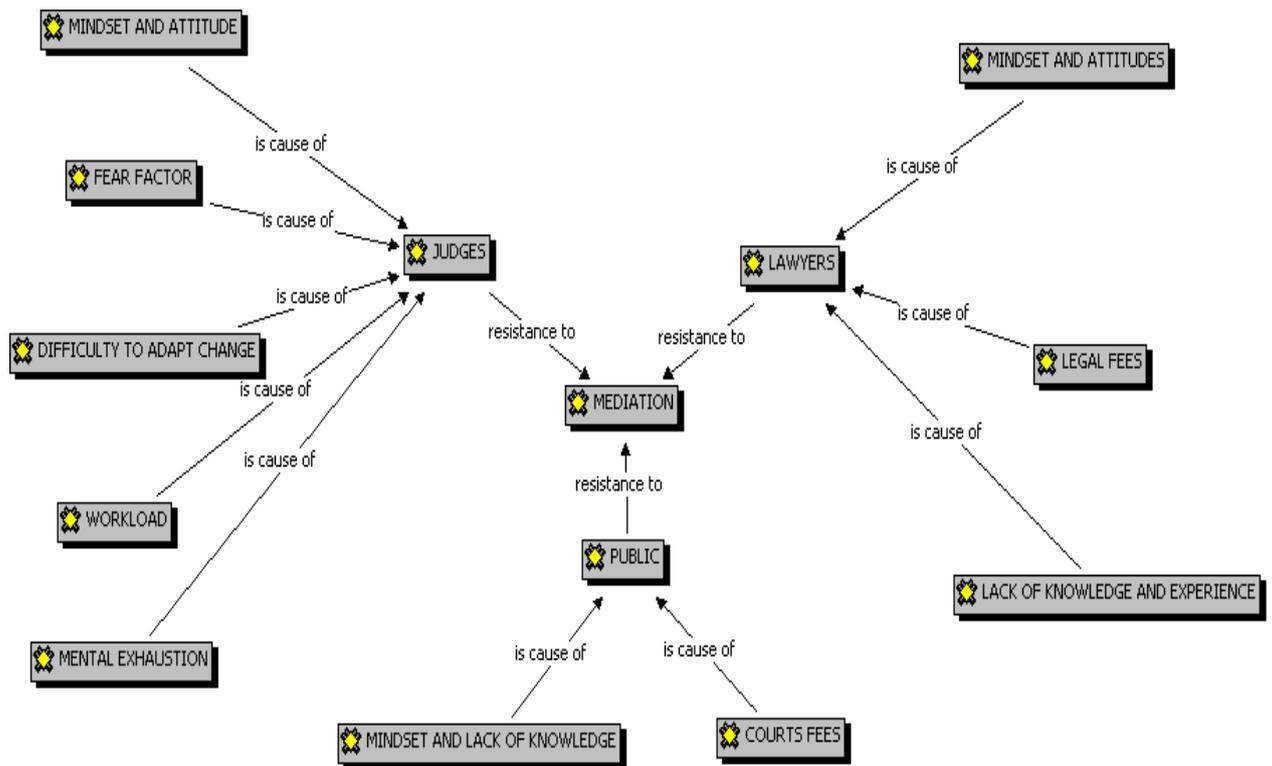
Having identified the key factors behind the success of court-connected mediation in other jurisdictions, the next section moves to the third research question which is to determine the barriers or rather the stumbling blocks to the development of court-connected mediation in Malaysia.

6.7 The key factors that have caused barriers to court-connected mediation in Malaysia

The third research question for this thesis asks 'what are the key factors that have caused barriers to court-connected mediation?' Mediation is a new practice in Malaysia and, not surprisingly has been subject to various opinions from the public and professionals. When resistance to mediation comes from the stakeholders themselves, this poses a challenge to its successful implementation. The interviews sought to gain some insight into the types of barriers to the implementation of mediation in Malaysia. Interviewees were asked the question 'what do you think are the key reasons for the low response among judges, lawyers and the public including the disputants towards court-connected mediation?' The interviewees' reason for

resistance to court-connected mediation by judges, lawyers and the public is depicted in Figure 6.3. These various reasons are discussed in the following sections.

Figure 6.3: The key factors that have caused barriers to court-connected mediation in Malaysia



Lack of awareness

As discussed in Section 6.6.2, the increased level of awareness amongst the people in jurisdictions outside Malaysia is said to be the reason for the success of court-connected mediation. In Malaysia, the lack of awareness was identified as a considerable barrier to court-connected mediation. This belief was shared by these interviewees.

‘Yes, awareness that’s the first stumbling block’ (IR12).

'Right now, I think, the one that we are facing, the biggest, is ignorance because ... nobody knows about it ...' (IR11).

'Everybody,[lack of awareness] from the judiciary, from the lawyers, and from the public ...nobody has talked about mediation before. What is mediation, right?' (IR12).

6.7.1 Judges' resistance

As can be seen from Figure 6.3, five key factors were identified in the interviews as reasons for judges' resistance to court-connected mediation comprising: judges' mindset and attitudes (three comments); fear factor (two comments), difficulty in adapting to changes (two comments); the increase in the judges' workload (three comments); and, mental exhaustion (two comments). These key reasons are discussed in the next section.

6.7.1.i Judges' mindsets and attitudes

Firstly, judges' mindsets, ways of thinking or attitudes were identified as key reasons for resisting court-connected mediation. The essence of this reason is that judges are trained in litigation not mediation, a finding repeated elsewhere in this study. Three interviewees believed that the resistance by judges is due to their professional attitudes; knowing that their function is to adjudicate the dispute and deliver judgment in the adversarial court system:

'Even among the judges, they don't believe in mediation because they think that, the court is there to hear disputes and settle disputes, not for any third party. Conservatism, this is the main reasons' (IR1).

'Yes, yes. That goes without saying, I would say, the majority of the judges feel that way and I don't blame them. "I'm a judge. I'm here to adjudicate a dispute; I'm not here to find a solution for you people. I'm not here to facilitate. I want to hear cases and dispense justice as I see it" (IR12).

'The judges are used to the style ... now you want to turn them into facilitators It's difficult because that has been practised for so long' (IR8).

6.7.1.ii Fear factor

Secondly, it is claimed that due to the judges' lack of experience of, and exposure to, mediation, they have a fear of mediating. There is also a fear that mediation may not go down very well with lawyers and parties who may want their 'day in court'. Two interviewees expressed this feeling:

'I think most of my brother and sister judges, again it is part of our training, and we want to do it correctly. I think they don't know what it is yet, but they are willing to give it a try ... At the end of the day it is the fear of the unknown' (IR2).

'It's just that, they are very careful, in the sense that, they don't want to antagonise the parties because they are there for what they are doing as judges, are just to hear the cases. It's a new thing, when you ask me to mediate and the first thing our [my] thought will be whether the parties will, you know, accept it' (IR4).

6.7.1.iii Difficulty to adapt to changes

Thirdly, and related to the fear factor above, some judges may find it difficult to switch to mediation as they are long used to litigation. Two interviewees related these difficulties:

'... very much depends on how the judge conducts the case ... would they be able to put on a different hat, in personality-wise, the atmosphere-wise, the way they chit-chat to the parties Some just can't do it ... they are not used to it and they find it difficult. That would be a stumbling block' (IR13).

'Some people are just a bit reluctant to be actually exposed! Because when you do mediation, you are actually exposing yourself to them because we are actually one to one with the parties, you know, and most people, the mentality is that, "I am a judge, so I must be away from you, there must be that barrier that distant between us", and so, we might not feel very comfortable to sit down together with the parties, one to one like that, you know' (IR11).

6.7.1.iv The increase in the judges' workloads

Fourthly, mediation may increase the judges' workload. It may not be attractive for some judges especially if the process takes away their time allocated to try cases, their main role as a judge. Three judges raised these concerns:

'... The judge is quite reluctant to do mediation because of the workload ... when you do mediation for example like we practise in Sabah and Sarawak, we give it to another judge. When we give to another judge, his trials will be put on hold' (IR5).

'We have enough workload without mediation. No, no, no, no what I'm saying is, because ah ... without mediation our workload is more than enough. With mediation we try to fit it in, we try to fit it in, of course some officers, some judges do not want to do mediation because they want to finish off their cases alright' (IR12).

'I think, and the other challenge we face, is of course finding the time to do mediation. Because as you know, mediation sometime, the session takes very long, so it takes away our judicial time trying cases ... so we have to be very committed to set aside time to do it even because we cannot deny it, once we do mediation, like I said, it will take away time from our cases' (IR11).

In addition to this problem of heavy workloads, the shortage of available judges can become the source of judges' resistance. This may be a factor influencing the interviewees' comments:

'... Because of manpower shortage, we cannot be passing file from one judge to another ...' (IR13).

'To me in order for the judges to play the role as mediators, we must have enough judges in this country' (IR10).

6.7.1.v Mental exhaustion

Finally, in addition to being time consuming, judges felt that mediation is tiring as they would be fully engrossed into it, going back and forth, as in caucus mediation. Two judges expressed this:

'... For me personally ... mediator's job is a very tiring job. Every time after mediation, I am drained, I feel so tired. It is mentally exhausting. It is a very exhausting job. You are really there; your mind is 100% focused on it. You are in it, so engrossed in it trying to find a solution. You use every angle of your brain to think alternatives (IR1).

'... the judge has to go through the document himself, he must be well appraised of the facts, on the pleading ... in fact is more tiring than hearing a case I get exhausted after one case ... it's not a workload but you have to already start putting yourself in trying to understand the facts well in order to probe the questions ... whether what he is orally mentioning to you, synchronises with what you have actually read' (IR13).

Another comment made by one of the above interviewees was that some judges may feel after failed mediation that it is not worth the effort trying. They become less motivated to do it another time:

'It's just that, sometime ... when it didn't work ... some judges ... might feel discouraged, you know, they didn't want to try again' (IR11).

6.7.2 Lawyers' resistance

The second group which resists court-connected mediation are the lawyers. The review of the literature suggests that lawyers' resistance may be due to their ignorance and lack of experience or fear for loss of income (see Chapter 2). This issue was further probed in the interviews with question about the reasons for lawyers' resistance. These reasons included (see Figure 6.3): lawyers' mindsets and attitudes (seven comments); fearing a loss in legal fees (eight comments); and, lack of knowledge and experience of court-connected mediation (two comments). These key reasons are discussed in the next section.

6.7.2.i Lawyers' mindsets and attitudes

As with the findings for judges, lawyers' mindsets, outlooks or attitudes were also identified as a key reason for resisting court-connected mediation. Being trained in litigation, lawyers were seen to primarily want to advance their advocacy skills in court which was linked to their ability to impress their clients who in turn pay their legal fees. The interviewees believed that the adversarial process builds their legal reputations. For these reasons lawyers were seen to not be interested in advising their clients to go to mediation. Four interviewees shared these views:

'The lawyers ... like to fight in court and there are a lot of these lawyers always think of, "If I don't fight in court, my client might think I'm a weakly, I am the type who doesn't dare to fight in court" (IR1).

'If you ask me why, I can't give you a reason. To me, I think they have a set mind, matters can only be resolved in court, and mediation is going to be a waste of time' (IR10).

'... because it is against their whole nature, by the time the client comes to them ... they think their clients want to go to court ... the lawyers are not thinking, "My client wants settlement of his dispute" (IR2).

'Mediation is also offered to lawyers but some, more often than not ... don't take it out' (IR9).

Some lawyers were described as preferring to sit on their files for as long as they can believing that the longer the matter drags on in court, the more fees they will get. This causes a barrier to mediation according to two judges:

'First of all, you have to change the mindset of the lawyers, resistance you know ... because they know when it goes for mediation, it is faster, will be cheaper ... it's better for the lawyers to maintain and to keep the file for as long as they can and to go on and on with the court and they can collect ... you know ... keep on delaying. That's so common' (IR6).

'I'm sure, I'm sure, I'm sure, that's the problem. I'm sure that's the problem. As you know the more time is spent in court the more money they get' (IR12).

One interviewee claimed that to make unenthusiastic lawyers interested in mediation is an uphill task:

'... every time we go around and organise a talk ... the number of lawyers who attend ... was about fifteen, twenty; so it's difficult to force people [lawyers] to come and listen, so this is the problem we are facing' (IR10).

6.7.2.ii Fearing a loss of legal fees

The second reason for lawyers' resistance to court-connected mediation is related to their 'bread and butter' workload. The interviewees believed that lawyers fear that

their business will be adversely affected by court-connected mediation as they would lose the fees normally generated from litigation. Typical comments included the following:

'To my mind, the main apathy is in the lawyers who are practising in the courts. They see, in mediation, something which may go against their own interests and may affect the volume of their legal practice and it has now become a question of life, a bread and butter issue for them ... in case mediation does come and nearly 80% of the cases get settled through mediation, then only 20% cases will come to the court and their share in this basket will go down. That to my mind, this is the main reason, why ... resistance comes' (IR7).

'One of the reasons is monetary, cost factor ... Some firms cost by the hours they spend in the court, ... Let's say, RM500, if I conduct the case, if the case get postpones you will still pay me RM500. Some of them have ... the idea that, if I go for mediation, if the case gets settled, what fees am I going to collect?' (IR13).

'How many of them are really willing to give that kind of advice because somehow their business will be affected ... their legal fees. If the parties can settle the matter by themselves, so that's it. So where is the business for them, somehow it will be affected, I think' (IR8)

Interestingly, four other interviewees maintained that mediation should not affect lawyers' legal fees. They explained that: lawyers would always get their legal fees when billing their clients depending on the extent of their legal work; they may even get paid more quickly as mediation could lead to faster resolutions; they may get more cases with higher claims and greater value for money rather than staying with older cases of lesser value in light of the declining value of currency; and, there no serious comparison has been undertaken to show that the legal fees of a lawyer engaged in mediation are necessary less than those in a trial. Nevertheless, notwithstanding these

opinions, it appears that there is widespread belief amongst the judiciary and the sparse research literature that lawyers' resistance to recommending their clients to mediation may stem from a fear of losing income.

6.7.2.iii Lack of knowledge and experience of mediation

The third reason given by the interviewees to explain the resistance of lawyers to court-connected mediation was their lack of knowledge and experience of mediation. The interviewees believed that this lack of knowledge and inexperience may be partly due to the newness of this technique in Malaysia. Without practical experience in mediation, it is difficult for lawyers to measure the benefits of mediation. For example two interviewees offered their views on this issue:

'The main problem ... many lawyers don't know what the benefits are. If they themselves do not know, how are they to convince their clients?'
(IR6).

'I don't blame them because mediation is something new to them; they never had any formal training. When they went through law school there was no mediation as a subject' (IR12).

6.7.3 Public's resistance

The last group seen to contribute to resisting court-connected mediation was the public; including the disputants themselves. The public are more likely to be unaware of mediation than judges and lawyers. It was also found in the survey that disputants tend to rely on their lawyers' advice on whether to take up mediation. Resistance from lawyers thus contributes to the disputants' lack of knowledge of mediation. To probe further into this issue, the interviewees were asked the reasons for public resistance to court-connected mediation. Their answers formed two themes: public mindset and lack of knowledge; and, courts' fees are affordable. These themes are discussed in the following sections.

6.7.3.i Public's mindset and lack of knowledge

The perception of the interviewees is that the public know even less of the benefits of mediation than the lawyers. Additionally, interviewees felt that public attitudes have been moulded by the existing trial system. A judge, not the parties themselves, must decide the dispute and consequently there is an expectation that there must also be a winner and loser. The public's views of mediation were explained by three interviewees:

'Because our society wants someone to decide for them! They are not willing to decide. They are not ready to decide because it is a cultural change And ... one more thing... they want to see in this case, I am the winner. I win the case and you lose the case, that kind of attitude ... just like the doctor always wants to win ... the patient wants to prove that this is the negligence on the part of doctor ... how to prove it, go to the court to know who's right and who's wrong' (IR8).

'Anything means go to court. This shouldn't be so. The court should always be the last resort not the first' (IR2).

'I mean it's typical of ... everybody that they are not easily persuaded to make changes. Ah, new things ... you will get a negative response before you get a positive one' (IR4).

The interviewees felt that the public are even more unaware of mediation than the judges and lawyers and suggested that an awareness campaign be aggressively undertaken focussing on the public awareness:

'... the awareness among the society is very low to the extent that ... they confused mediation with meditation ...' (IR8).

'The public is more on question of awareness ...' (IR5).

'At present, the target group is only the lawyers and judges. They are the one who's been taught about mediation but the principle actors themselves which is the litigants are not being targeted to go for mediation' (IR5).

'We have to create awareness in the society that is more important to me ... they are the consumers. We have to wake them up ... on the advantages of mediation. They need to be advised' (IR8).

'I think posters around the court or on our notice board as a reminder of the process [mediation] ...' (IR2).

6.7.3.ii Court fees are affordable in Malaysia

As discussed in Section 6.6.1, litigation costs including court fees are relatively affordable in Malaysia. So unlike the situation in other jurisdictions such as the US, costly litigation is not a factor promoting mediation in Malaysia. This explains why the public is not more interested in court-connected mediation. For example, three interviewees shared this view:

'Legal fees are quite cheap, litigation costs are quite cheap ... so why should I go and pay an extra fee, when the court is there to settle my problem?' (IR1).

'I think in Malaysia ... our society is not ready for mediation. The court costs are manageable' (IR8).

'For thirty years we haven't revised our bills, our filing fees are far too cheap!' (IR2).

Despite the affordability of litigation, mediation is cheaper in Malaysia. One interviewee raised this point suggesting that there are possibly other reasons why the public refuse mediation:

'If you look at the benefit of settling this through mediation, compared to litigation, for a RM100,000.00 claim, if you lose there [in the court], you have to pay cost at least about RM4,000, RM5,000, RM6,000. ... Here, it's only RM500; so to me it's not a burden, it's not a burden to both parties For a RM1,000,000.00 claim, you may end up paying costs of RM900,000.00, here you only pay RM500 for each party, so to me, if you're talking about cost, this cost is not an issue' (IR10).

One last interviewee suspected that even big organisations like banks also resist mediation as in some cases it might be less profitable for them:

'There is some resistance, for example, I tried ... one banking case. I can't remember which bank, so I asked the counsel, "Do you want to try mediation?" They said, "Okay, I'll take instructions from my client". ... When she came back, she said, "Sorry my client did not agree to mediation". I suspect ... I do not know maybe I'm wrong, I suspect, here it is, the bank makes big money on their interest, ... mostly on the interest If the bank is willing to negotiate on the reduction of interest, probably mediation can succeed but the bank may not want to' (IR5).

This section has provided an overview of interviewees' responses to the barriers to court-connected mediation finding that all stakeholders: judges, lawyers and disputants contribute to the barriers. These include mindsets geared to litigation, lack of knowledge, lack of court resources (particularly in the form of sufficient numbers of judges) and lawyers' fear of loss of income and experience with mediation. In light of these barriers, the interviewees were asked to consider the sorts of recommendations they could make which might overcome the barriers to allow for a smoother implementation of court-connected mediation.

6.8 Recommendations

The analysis of the interviews was concluded by asking interviewees for suggestions on how to increase the uptake of court-connected mediation. Seven main strategies were proposed which are summarised in Table 6.8.

Table 6.8: The interviewees' suggestions on strategies to develop and enhance the efficiency of court-connected mediation

The list of benefits of mediation raised by the interviewees	ID
Changing of stakeholders' mindsets and attitudes	IR1, IR6, IR10, IR11, & IR12
Providing information and publicity	IR5 & IR8
Introducing a legal framework for court-connected mediation	IR2, IR12, IR13, IR6, IR3 & IR5
Training and appointment of more judge mediators	IR10 & IR7
Mandating mediation	IR10 & IR2
Setting up an independent mediation centre	IR7
Learning from the practice of <i>sulh</i> in Syariah Court	IR7 & IR8

These recommendations are now discussed in light of interviewees' comments.

i. Changing of stakeholders' mindsets and attitudes (judges, lawyers and the disputants)

The first strategy proposed by the interviewees was in relation to the stakeholders' mindsets and attitudes which need to be changed. Judges must be willing to change their adjudicative styles into more informal and friendly manner in dealing with the disputants. The interviewees who nominated this suggestion believe that the parties would then feel more comfortable and responsive:

'Then I shuttle from one room to the other room. Now, what I found with my approach, when the litigants see the judge doing that, they would say hey, this guy is really genuine in trying to settle this matter, right? And I can see that in their face, their reaction and when I come back to them as I walk they feel embarrassed to say sorry that we need you to do that. I said don't worry, this is my job I do that and by breaking the barrier you know they become more responsive' (IR12).

'I think the approach that we take when we do mediation is also important. We have to discard the persona of a judge to actually more like a friend of the parties or go down to their level to listen to them' (IR11).

The interviewees also believed that it is important for the judges to play their roles in encouraging mediation to the parties through their lawyers. By asking parties to mediate, it indicates the seriousness of the court in trying to resolve their dispute in a speedy way. It also reminds the parties about the benefits of mediation:

'Again it is the question of options and how to educate them, and how to make that second option [popular], which we are trying to push We have to make mediation attractive ... little by little' (IR1).

'... I think the initiative by the court ... because sometime when we do cases we ourselves are aware whether the case is actually good for mediation or not and that is where we play a role and actually asking the parties whether they are interested so we should not just keep quiet' (IR11).

'... we have done our preliminary stage of educating and telling the people this is another way of attaining justice' (IR12).

Two other interviewees noted both the lawyers and the disputants have to discard their traditional belief that disputes can only be resolved by the court.

"... the reason is a lot of our lawyers, they're not referring cases to us (MMC). If you ask me why, I can't give you a reason. To me, I think they have a set mind, matters can only be resolved in court, mediation is going to be a waste of time' (IR10).

'... all these sound foreign to them [the public] ... it's a new thing because as they know and as we know our justice system is court and it will be heard by a judge or a magistrate' (IR6).

ii. Providing information and publicity

In order to change this mindset and attitudes especially that of the public, the interviewees proposed continued education by providing information and publicity on court-connected mediation.

'Our society is used to someone gives them the decision. I mean they go to the court they look for decision... . That you have to create awareness among them' (IR8).

'We must also try to disseminate as much information on the benefits of mediation' (IR5).

iii. Introducing a legal framework for court-connected mediation

The interviewees also suggested that there should be a proper legal framework for the practice of court-connected mediation. This includes legislation and rules expressly providing for these practices:

'I would like a proper legal framework to be put [in place] And I would like to see it is a duty ... of legal counsels to always offer that [mediation] as the first option to their clients ...' (IR2).

'Change the ... rules of high court. [To] provide the high court judge can become a mediator, ... enabling provision' (IR12)

According to the interviewees, with these frameworks in place, a better and proper system of court-connected mediation can be implemented. For instance, two interviewees suggested for a system for judge-led mediation:

'I don't think the court has really come out with the formal step toward how to interact with the parties to encourage them to go for mediation, the system has not been set up yet that is the problem. The parties come before the judge, the judge says, would you like, interested in mediation. It won't work If the system is not there, you are going merely on verbal, ad hoc approach of doing thing, it will never succeed' (IR13).

'That's why I said we have to develop the system. We have to put the system in place otherwise ... sometime people do it like this, the judge does it like that, the lawyer advises like this ... ' (IR6).

Another two interviewees suggested for a system for referral to list of qualified mediators in court-annexed mediation. Besides the MMC, there should be more of such centres where the list of qualified and accredited mediators are kept and can be accessed by the public:

'If the courts want to refer [cases], to whom should they refer to? Who keeps the list of private mediators? Who are those qualified mediators' (IR3).

'... I'm not very sure whether we have a body, national or a state body that have a panel [of] all the mediators ... and then if you have dispute, you can come and choose one of the mediators ... that I think is another step you can do' (IR5).

iv. Training and appointment of more judge mediators

In order for judge-led mediation to be effective and efficient, the interviewees suggested for the training of judges as mediators. Due to the shortage of judges, it was also recommended for more judges be appointed to deal mainly with mediation:

'If you can train all of the judges to be a real mediator, it does make a difference. If they can play the role as real mediator in mediation process, fine' (IR10).

'Okay in the initial stages of this promotion of mediation ... the judges may ... attend a short course say five days course in mediation, five days is the standard of 40 hours. Eight hours per day, five days that is the today's norm of training. It's so even in Australia, this is how it is so 40 hours. So if this 40 hours of training is given to a judge that I think makes him good enough to act as a mediator and that may solve the problem' (IR7).

v. Mandating mediation

As discussed in Section 6.6.5, six interviewees provided their views on the rationale for mandating mediation. It was their recommendations that mediation should be mandated to achieve its effective result and to save the parties' legal costs. Two of such comments included:

'Some parties are not willing to have the matter resolved early ... someone must direct parties ... to go for mediation otherwise mediation will not work as successfully as what the others' experience' (IR10).

'I personally feel that if you really want mediation to work, you should compel people to go to mediation at the start, make them go. Our society needs that methodology. Mediate before you can file, part of our protocol court action' (IR2).

vi. Setting up an independent mediation centre

The sixth strategy put forward by the interviewees is the setting up of an independent mediation centre. As discussed in Section 6.3, the interviewees suggested that the parties preferred judge mediators rather than court-annexed mediation which is

basically run by the MMC. This is because of the parties' perceptions of lawyer mediators:

'You will be surprised that the Mediation Centre was established long back, around 1999, and since then only a few cases have been dealt with by them because of the popular perception of the centre in the mind of the average person is that the same people who happen to be doing the litigation practice in the courts are doing the mediation there. Yes and they will not have any change... in their perception' (IR7).

The setting of an independent mediation centre according to this interviewee should be established:

'An independent mediation centre should be established ... an accreditation body also for the country to ensure training and accreditation is standard' (IR7).

Whilst the above suggested for an independent mediation centre, one interviewee proposed a mediation centre within the courts' premises:

'Either they as you said judge-led mediation or court-annexed mediation or may be like Syariah Court you [may] have ... mediation centre ... under the courts roof' (IR8).

vii. To learn from the practice of *sulh* in Syariah Court

As there was a concern that judges may be unable to do mediation properly due to their lack of training (see Section 6.4), it was suggested that mediation should be undertaken by a qualified mediator who is employed as the court staff. Two interviewees made this recommendation:

'They never allow a Qadi [judge] to mediate. So... once he [Qadi] decides, that it is a fit case for mediation, he refers it to mediation

officer or to the other one ... a sulh person. He is specialised in that. Now he conducts the sulh and in a very systematic manner. If he succeeds then the settlement agreement is referred to the Qadi [who] ... issues the judgement in terms of [the] settlement agreement' (IR7).

'What they practice in Syariah Court is in sulh you file a case then the registrars will see the nature of the case ... if this can be settled through sulh so they pass it to sulh. Then sulh will start the session. That is the sulh officer appointed by a proper appointment' (IR8).

6.9 Chapter Summary

This chapter presented the findings on the three research questions from the 13 interviews.

The first research question explored the key factors behind the growth and development of court-connected mediation in Malaysia. The analysis of the interviews in the chapter indicates that there were five key factors which contributed to this phenomenon. First was the increasing backlog of court cases in Malaysia which, at the time of the interviews, had led to the development of the Mediation Bill and a range of ad hoc practices including judge-led mediation and referral to the MMC. The other four key factors were: the increased realisation of the benefits of mediation; the support and encouragement given by the senior members of the judiciary, the exposure and mediation training; and, the use of traditional mediation by Malaysian society.

The second research question explored the six key factors behind the success of court-connected mediation in other jurisdictions. The first factor was the high costs of litigation, making it a cheaper alternative. The second reason explored here was the increase in the level of awareness of benefits of mediation among the public in these other jurisdictions. Other reasons included: government intervention and policy; cooperation from the bar; and the fact that mediation is often mandated. Finally, the success of court-connected mediation in other jurisdictions was linked to the

experience of long delays in commencing trials which are associated with court backlogs.

Finally, answers to the third research question were explored through the interviews identifying barriers to court-connected mediation. In particular, the kinds of barriers posed by stakeholders themselves were canvassed: judges; lawyers; and, public. Judges were considered to contribute to the barriers to implementing mediation because of: a fear of mediation; difficulty in adapting to change; the increase in workload; and, mental exhaustion. Lawyers' resistance was described as based on: worrying about a loss of legal fees; as well as a lack of knowledge and experience. The public are also perceived to be a barrier to the implementation of court-connected mediation because of their lack of knowledge about mediation and the affordability of litigation.

Finally, some recommendations were proposed by the interviewees to enhance the efficiency of court-connected mediation in the civil justice system in Malaysia which included providing the public with information, creating awareness amongst judges and lawyers, the need for legal framework and to mandate mediation as well as training of judge mediators.

The next chapter discusses the broader issues raised by the empirical evidence presented in this thesis. The chapter briefly overviews the results presented in Chapters 5 to 6 and places them in the context of the literature examined on mediation and change management.

CHAPTER 7 DISCUSSION

7.0 Introduction

This is exploratory research, which aims to map out the terrain of court-connected mediation in Malaysia and also create new datasets relating to it. It sets out to explore its development and uptake, to identify the factors contributing to its success in other jurisdictions and to determine barriers to it succeeding in Malaysia. These aims are represented in the three research questions which were based on the review of the literature which are framed as follows:

Research Question 1: What are the key factors that have led to the growth and development of court-annexed and judge-led mediation in Malaysia?

Research Question 2: What are the key factors that have made court-annexed and judge-led mediation successful in other jurisdictions?

Research Question 3: What are the key factors that have caused barriers to court-annexed and judge-led mediation in Malaysia?

The previous chapters, 5 and 6, presented the findings from the survey and interviews. The present chapter provides the linkages between the findings and the established literature reviewed in Chapters 2 and 3 and brings these together in the context of answering the three research questions. As explained in Chapter 4, an exploratory approach was chosen for this study given the dearth of extant research in the area and the limited resources available. Developments in this area have been poorly documented and are found piecemeal in a variety of publications, mostly grey literature and newspaper reports.

The chapter begins with a discussion of the state of court-connected mediation in Malaysia drawing on the data collected from the empirical work and the review of the literature. This will be followed with the discussion of the findings relevant to answering the three research questions.

7.1 The development of court-connected mediation in Malaysia

Mediation in the Malaysian court civil justice system, as a means of resolving disputes, was patchy until the issuance of a PD in 2010 and later legislation and rules relating to mediation practice in 2012. The PD, the *Mediation Act 2012* and *Rules of Court 2012* were introduced after the survey and interviews, covered in Chapters 5 and 6 had been completed. As discussed in Chapters 1 and 6, court-annexed mediation commenced in the High Court at Penang, West Malaysia when cases were sent to the MMC for mediation. However, there was little awareness of this program amongst the public or lawyers as it was not widely promoted, had little media coverage and Malaysian lawyers had little interest in mediation at the time. Furthermore, there was also no specific provision in the previous Rules of Court (the *Rules of the High Court 1980* and the *Rules Subordinate Court 1980*) to empower judges to conduct mediation or to send cases away from the court to private mediators or the MMC. To get around this lacuna, the Penang Court practiced court-annexed mediation as a part of case management [*Order 34 rule 4(1) of RHC 1980*] under which the court could give further directions to ensure the just, expeditious and economic disposal of a case. It was assumed that when the case was directed to be mediated, it had been disposed of in such a manner (Geok Yiam 2006). The lack of mediation provisions in the *RHC 1980*, was said to be the reason why most judges in Malaysia resisted mediation in the early 2000s (Geok Yiam 2006).

Despite the lack of mediation provisions, judges in Sabah and Sarawak from 2007, and later in West Malaysia began to steadily practice judge-led mediation with the consent of the parties. The Sabah and Sarawak courts in particular went a step further by setting up a ‘mediation corners’ in the court premises in 2010. They function as one stop information centres to inculcate awareness about judge-led mediation. In West Malaysia, judge-led mediation was practiced initially in road traffic accident cases before it spread to other areas including commercial and family matters.

As described in Chapter 1, the idea of a *Mediation Act* was first considered by the Malaysian judiciary when it proposed such Act in its 2005/2006 Annual Report. It was stated that it would enable the superior and subordinate courts to implement court-

annexed mediation. This took place under the former Chief Justice of Malaysia, the Rt Hon Tun Ahmad Fairuz after seeing the success of the pilot program in the High Court, at Penang. The discussion of the need for a *Mediation Act* to provide an alternative to litigation reached ministerial level in 2008. The then federal law minister, Datuk Zaid Ibrahim took the need to address the backlog of civil cases seriously. Backlogs of both civil and criminal cases had increased at an alarming rate by December, 2007, as described previously in Table 1.1 and contrasted dramatically with the success of court-connected mediation in other jurisdictions (Mohamad 2008).

Despite the evidence of the existence of court-annexed mediation in some parts of the country; the more ad-hoc incidence of judge-led mediation and the developments in drafting the *Mediation Act*, the findings from the interviews noted that mediation was not recognised as part of the Malaysian court civil justice system. This may be explained by the absence of a clear policy at the national level which also explains why court-annexed mediation was mainly concentrated in Penang court and judge-led mediation in the Sabah and Sarawak courts.

The thesis found that the developments of court-connected mediation, particularly judge-led mediation has risen to a higher level after a seminar on mediation which was held and conducted by Judge Wallace, a US Court of Appeals judge, for some Malaysian judges in February 2010. Since then, Malaysian judges, particularly in West Malaysia have been encouraged to take up mediation, and they in turn persuaded the lawyers and parties to try it (Zakaria 2010). As previously noted, in Sabah and Sarawak, judge-led mediation has operated since 2007 having been spearheaded by the Chief Judge of Sabah and Sarawak. Court-connected mediation grew steadily and was strengthened when the court introduced the PD in August 2010 which formalised the ad hoc practice of judge-led mediation and the referral of cases to the MMC or external mediators chosen by the parties. Whilst the growth of court-connected mediation in Malaysia has been modest, the greatest part of this growth has been in judge-led mediation which is discussed below.

7.2 Judge-led mediation is more dominant in Malaysia

Judge-led mediation has become the dominant form of mediation despite the earlier practice of court-annexed mediation. The cases sent by the courts to the MMC gradually reduced and the bulk of them were only from the Penang Court (see Table 1.2 and Table 2.1). It was reported that referring cases to the MMC was unpopular among the disputants which led the courts to reconsider its practice (Zakaria 2010). There was also no research undertaken of court-annexed mediation in Penang except for the statistics showing the rate of settlements. Without the feedback from the stakeholders, particularly lawyers and the disputants, it is difficult to measure the impact of court-annexed mediation in terms of the parties' satisfaction with the court's referral of their cases to MMC and the effectiveness of the referral in terms of monitoring and supervising the cases referred to MMC and returned to the court after a failed mediation.

The findings from the lawyers' survey and the interviews confirmed that judge-led mediation is more dominant and considered more effective than court-annexed mediation. The research found that lawyer respondents have a more favourable approach to judge-led mediation for various reasons including: the disputants have more respect for judges because of their judicial authority; the characteristics associated with judges of neutrality and impartiality; and, the involvement of judges in the process enhances the settlement of the disputes (Chapter 5). According to the research conducted on judge mediators in US and Canada, most lawyers believe that judicial involvement in mediation further improves the chances of settlement (Spencer 2006).

Some of the surveyed lawyers in this study indicated that judge-led mediation is more effective because of the public's mindset that a case should be finally decided by a judge in one way or another due to the judges' authority. Disputants may also take the mediation process more seriously because of the authority of and respect that judges command (French 2009). These lawyers' views, however, may reflect some misconceptions of the role of judges as mediators and lack of understanding of the concept of mediation itself. This is suggested by the misunderstanding of the role of

judge mediators with some lawyers suggesting that judges should play a determinative role to give finality to the negotiation processes leading to settlements. The role of judge mediators, like non-judge mediators, is to facilitate a settlement and not to be decision makers. As such, the formal authority of a judge has no function in mediation but this was not commonly understood by the respondent lawyers.

Judge interviewees also indicated from their own experience when conducting mediation that the disputants' preferences are for judge mediators. According to them, the disputants perceive the role of judges to be the resolvers of disputes and the role of lawyers to be the conveyer of the problems to the court. They report that disputants feel more confident with judge mediators as they see them as capable of providing a level playing field in the mediation process. The literature in Chapter 3 indicates that other studies have also found disputants to be more willing to participate when judges mediate (Zalar 2004a). Further, they feel that they have received their 'day in court' and have achieved fair and reasonable settlements (Galanter 1985).

The favouring of judge mediators stands in stark contrast to attitudes about lawyer mediators. In Malaysia, interviews conducted for this thesis found that disputants could have had previous dealings with the lawyers, who also act as mediators at the MMC, which raises concerns of favouritism and their neutrality in the process. It was suggested that the perception of bias might also arise from the lawyer mediators' association with the other lawyers who represent their clients in the mediation session (Frey 2001). The role of lawyers who act in the interest of their clients alone appears to be in conflict with the role of mediators who are expected to be neutral and independent (Cukier 2010).

Both the findings in the surveys and interviews have identified some drawbacks to the practice of judge-led mediation in Malaysia. One of these is judges' lack of skills in and experiences of mediation. This would impact on the effectiveness of judge mediators. For instance, due to their judicial training, judges might use their adjudicative skills and directive styles to get parties to agree to a settlement. Other literature in other jurisdictions also suggests that they find it difficult to step out of

their traditional judicial roles and become more like facilitators (Winkler 2007). Together with the finding that some lawyers suggest that a determinative form of mediation is preferable, it means that the introduction of judge-led mediation in Malaysia will require a shift in thinking if it is to accommodate a facilitative form of mediation.

The other problem relates to justice. The lawyers' survey indicated that judge mediators may have an impact on the quality of justice desired by the parties (Section 5.4.2.ii). For instance, the process may become too formal when a judge mediates a case in a court setting. This would create undue pressure on the parties to submit to the authority of a judge mediator. A few interviewees also raised some concerns over the status of the judicial authority of judge mediators. One claimed that the parties' autonomy in determining their own outcomes can be taken away if judges were to exercise their judicial authority in mediating their case. In the worst case scenario, judges might employ 'arm twisting' tactics for personal gain of achieving their targets in clearing backlogs. One criticism levelled at judge-led mediation refers to situations where a judge meets privately with one of the parties in a caucus session. This is said to be inconsistent with the due process and rules of natural justice which require an equal opportunity given to the disputants to express their views in the presence of each other before a mediator (Twyford 2005).

In the context of these drawbacks to judge-led mediation, the interviewees identified a number of issues which may have produced barriers in implementing a wider spread of judge-led mediation. Part of these issues arise from the judges' lack of skills and training as mediators, which includes personal fear factors, difficulty in adapting to changes and their mindset and general outlook about their judicial roles. Some of the issues include the shortage of judges, their lack of enthusiasm for mediation and heavy workloads. These factors which contribute to judges' resistance to mediation are discussed in the later section on the barriers to court-connected mediation.

7.3 Mediation is a voluntary practice in Malaysia

As discussed in the previous section, due to the past lack of clear policy at the national level, two models of court-connected mediation developed differently on an ad hoc basis. In both models, mediation could not be taken up without the consent of the parties. This could probably explain why court-connected mediation has not achieved a significant uptake. The research found that some lawyers and most parties to litigation are not aware of mediation and its benefits in resolving disputes. Lack of awareness and knowledge about the benefits of mediation is the main reason for the low uptake. This issue is further taken up in the discussion on the public resistance to court-connected mediation.

The parties' lack of awareness of the benefits of mediation was not a surprise as the findings also found that most legal practitioners have had little exposure to mediation. The implication of this finding is that if the lawyers themselves are inexperienced in it, it is highly probable that their clients would not be undertaking mediation. This is supported by another finding from the research which suggested that lawyers play a more pivotal role than their clients in taking matters to mediation. In other words, the decision to go to mediation lies principally in lawyers' advice to their clients. Lawyers in other jurisdictions too will often resist recommending mediation to their clients and this is considered to be greatest inhibitor to the use of mediation in litigation (Peters 2011). For instance, several studies in the US on whether lawyers suggest or recommend mediation to their clients revealed that most lawyers often failed to do so (Peters 2011). According to the study by Genn (1998) and later Brooker & Lavers (2000), lawyers' resistance to mediation in the UK was related to concerns about loss of income. It has also been reported that lawyers in Malaysia were the stumbling block to the practice of mediation as they felt that their livelihood would be somehow affected by this less costly alternative (New Straits Times June 25, 2007). This was confirmed in this thesis.

Whilst the surveyed lawyers did not favour mandated mediation, judge interviewees were supportive of it. The findings from the interviews suggested that mediation should be mandated in Malaysia to make it more effective as an alternative to

litigation. This has been the approach taken in the US and Australia which has proven to be very successful in easing court backlogs (Chapter 2). In Australia, for instance, compulsory mediation has changed the attitudes of the disputants and their lawyers in considering mediation before filing a case in court (Gottwald 2002). With the right legal framework and guidelines in place and some form of coercion its uptake is likely to significantly increase. Being unfamiliar with a new process, many may have some reservations in trying mediation unless it is mandated. This issue of mandating mediation is discussed in a later section on the factors impacting the growth of court-connected mediation in other jurisdictions.

This section gives an overview of the state of development of court-connected mediation in Malaysia at the time when the survey and interviews were conducted. Nevertheless, the views and experience reflected in the survey and interviews may change rapidly with the introduction of the PD, the *Mediation Act 2012* and the *Rules of Court 2012*. Following is the discussion of the findings relevant to research question 1.

7.4 Factors impacting on the growth and development of court-connected mediation in Malaysia

The first research question sought to determine the key factors behind the growth and development of court-connected mediation in Malaysia. It was revealed in Chapter 5 that mediation is an effective alternative to litigation due to its benefits and is an effective means to ease court backlogs. In addition to these two factors, Chapter 6 identified three other factors which appear to have contributed to its growth. These are: leadership support and encouragement; consistent exposure to and training in mediation; and, the cultural use of mediation in Malaysian society. Together these factors were found to drive the interest of stakeholders, particularly judges, to use mediation in addition to litigation to resolve disputes in civil cases. The next section provides a discussion of these findings with reference to similar findings in the literature.

7.4.1 The general benefits of mediation

The survey found that the lawyers in Sabah and Sarawak have reacted positively to the typical benefits of mediation as revealed in the research literature (Table 5.1), despite the bulk of them (84%) describing their knowledge of mediation as moderate or 'not much'. For example, they demonstrated a strong understanding of the three key benefits of mediation: it saves time and produces quick resolutions (78.8%), is cheaper and more economical (68.7%) and is informal (76.8%). This is an important finding as lawyers' support for mediation means that their clients would use mediation to settle matters because lawyers generally influence their clients in its uptake. The lawyers' low self-rated knowledge of mediation despite their understanding of its benefits may reflect its newness in the country. It could also reflect their under-estimation of their knowledge of mediation.

The findings also revealed that a large minority of lawyers were neutral in respect of some perceived benefits of mediation: it empowers disputants; it offers realistic possibilities of settlement; it assists relationship problems; and, its settlements are better tailored to the parties' needs (see Table 5.1). These findings may indicate the lack of experience in, and exposure to, mediation but requires some further explanation. For instance, although most lawyers (64%) believe that mediation is quicker as the parties themselves design their terms of settlements based on their needs (see Section 5.2.2), they further indicated that it may not be necessarily fairer. For instance, some lawyers indicated that the compromises made in mediation may not be fairer but reached to avoid the litigation process, the rising costs involved in litigation and lengthy trials. It is argued that, these findings may indirectly highlight that the reason for the uptake in mediation is not really due to its benefits but rather the shortcomings of litigation.

An interesting finding is that some lawyers indicate that the terms of settlement in mediation are not always designed by the disputants but their lawyers. This finding may indicate that the presence of lawyers in mediation impacts on the disputants' participation in shaping their own settlements as lawyers are likely to play a dominant role (Rosenberg 1991; Rundle 2010). This may be because lawyers have knowledge

of the case and they know what is in the best interests of their clients. It relates to the issue of whether or not disputants should be represented in mediation which is one of the disputed issues in mediation. Whilst the research found that most lawyer respondents endorsed the need for disputants to be represented to provide justice in the process, particularly to overcome power imbalances, the majority of judges believe that having lawyers present is not helpful. This will be discussed further in a later section on the role of lawyers in assisting the development of mediation in other jurisdictions.

The analysis of the interviews also suggests that the interviewees had strong understandings of the benefits of mediation including its promotion of better relationships as mediation generally resulted in a mutual outcome unlike a win-lose in litigation. Mediation certainly benefits the parties if it is successful, but it can also be beneficial when it fails. For instance, in some cases, the parties may have reached a settlement after a 'cooling off period' following the failed mediation. This is because the parties are in a better position to appreciate each other's cases and can see the potential outcome if they go for trial. In some cases, mediation may help reduce the issues for trial which in turn reduces the time taken to resolve the disputes.

One of the often cited benefits of mediation in the literature is that it is cheaper and economical. The interviewees supported this view but point out that in Malaysia litigation too is considered affordable. In other jurisdictions mediation is seen as helpful to those from lower income groups as they may not be able to afford court and legal fees. Nevertheless, the thesis unveiled that mediation was appreciated in community disputes due to its flexibility in mixing and matching the strategies to overcome the disputes faced by the parties compared to the rigid solutions offered by the law. For instance, one judge related his experience in mediating a conflict over land containing indigenous graves between an indigenous community and an ethnic Chinese who was the registered owner of the land. The dispute could not have been settled in a way that was helpful to both parties if it was decided on a strict reference to points of law.

Mediation is an effective alternative to litigation

The vast majority of lawyers (86.9%) considered mediation to be an effective alternative to litigation with only 3% dissenting (see Figure 5.2). The lawyers' view on this is crucial because it demonstrates the potential to provide this advice to their clients and increase the uptake of mediation in the country. The lawyers recognised the importance of clients being able to express their own opinions and to make their own decisions in a less formal atmosphere. But some pointed out that the effectiveness of mediation depends on the clients' attitudes, including their sincerity, openness and willingness to forgo some of their legal rights in submitting to mediation. Others noted that the attributes and roles taken by mediators along with a legal framework allowing courts to direct parties to mediation are elements required in order to implement successful court-connected mediation.

The presence of justice in mediation

The research investigated the lawyers' perception of whether mediation could deliver justice to the disputants in terms of the fairness of its process and outcomes. The lawyers' responses (Table 5.4) indicated that they perceive justice as achieved in mediation when the disputants had a fair chance to present their case and their views have been heard and considered (78%). The lawyers further believe that the disputants' perception of fairness is enhanced when they are treated with some respect and trust (86%). However, the lawyers did not think that the disputants' perception of fairness is related to the outcomes of their disputes (56%). These findings show that lawyers' perception of fairness in the mediation process is highly influenced by the extent to which they believe disputants are provided interactional justice and procedural justice rather than distributive justice. Similar findings have been observed in the US where Lind & Tyler (1988) found that disputants are more concerned with the process of how decisions are made and the nuances of their treatment by the third party. The interpersonal treatment afforded by the mediator could make disputants feel satisfied with the process regardless of the outcome (Greenberg 1993). A later study by Welsh (2001) evaluating mediators' behaviour in the US, found that disputants valued their interaction with the mediators particularly judge mediators as their behaviour in the process symbolises the courts' attitudes towards them and their disputes.

The view was shared by the judge interviewees but the emphasis was on distributive justice, in other words judges expressed that disputants may receive justice when the outcome in mediation is tailored to their needs through a mutually agreed settlement. The focus on distributive justice by judges is likely to lie in their greater focus on settlement of the dispute rather than the process used to settle the dispute. They agreed that settlements may not conform to the standard norms of justice if the matter were to be decided by a court, but they may be based on what is justice according to the disputants' own interpretations, guided and supervised by a neutral and independent mediator (Nolan-Haley 1996).

Despite the above findings, some legal scholars have criticised mediation over their concerns about fairness in mediation relating to: lack of procedural safeguard, the confidentiality of the process prevents the development of case law and the enforceability of the mediated settlement agreements (Chapter 3). These concerns have led some to regard mediation as second class justice (Astor & Chinkin 2002; Hardy 2008). Except for the issue of enforceability of mediated settlement, the survey findings on the two other issues relating to justice revealed that none of them have had a major impact on lawyers in their decision to proceed to mediation or not. For instance, the majority of lawyers believe that: the procedural safeguards on the admissibility of evidence should have no application in mediation due to the flexibility and the informality of the process and the confidentiality and in particular the lack of ability for decisions to be used to develop precedents does not apply in mediation as the disputants' needs varies in each particular case. A large majority of lawyers, however, feel the need for regulation to enforce a mediated settlement agreements to ensure disputants' compliance with the outcomes and increase their level of confidence on the effectiveness of the process. In the Malaysian context, while mediation remains voluntary it may be necessary to consider bolstering the regulations to enforce settlements. Certainly this might be then seen by lawyers as a reason to send their clients to mediation.

7.4.2 Reducing court backlogs

The findings from the survey and interviews suggest that the growth and development of mediation is also related to the growing backlogs of court cases in the belief that mediation eases these backlogs. Lim (1998) suggested that court backlogs provide the trigger for mediation being taken up. The problem of backlogs has become the norm in a number of formal court systems including Malaysia as various factors have led to the steady growth of cases filed which outnumber the cases disposed of. The vast majority of lawyers (82%) agreed that mediation would be successful in easing court backlogs but some pointed out in their comments that this would only happen with support from disputants and the courts. Interestingly they did not mention their own role as advisors to clients as being important in directing disputants towards mediation despite them being in a better position to convince their clients who may not have any knowledge of mediation (ALRC 1997). These findings concur with the argument found in the literature that mediation was adopted by the courts primarily to overcome its backlogs (McEwen & Wissler 2002). In fact, it was argued that the increase in the judges' participation in mediation is purely motivated by, and in response to, reducing the increased backlogs (Resnik 2000). The findings from the survey and interviews suggested that pending cases can be reduced not only at the court of first instance but also at the appeal level.

The success of mediation is measured by the increasing settlement rate of pending cases in court (Mack 2003). This is used to measure the success of mediation in the courts in Sabah and Sarawak (see Chapter 3). For instance the settlement of 456 cases by judge-led mediation in Sabah and Sarawak (see Table 3.1), has been argued to have saved 1,368 days or 3.75 years of judicial time. The figure is arrived at by multiplying 456 cases by the three days which are the estimated number of days normally taken for a trial. Previous empirical research investigating the possibilities in court-connected mediation has indicated the focus on outcomes (settlement) as the measure of success rather than other core features within the process which include, responsiveness (the disputants' preferences about the way their dispute is resolved); self-determination (the opportunity to participate); and, cooperation (Rundle 2010). These factors contribute to the parties' perception of the unfairness of the process

despite the quick resolution of their disputes. The implication is that if the purpose of court-connected mediation emphasises only quicker and more frequent settlements, it would not achieve the whole purpose and benefits of mediation.

The nature of litigation in Malaysia, which follows the common law's adversarial approach, continues conflict through the idea that the parties fight to win the case (Fiadjoe 2004). Some of the interviewees blamed this as invariably producing backlogs as parties turn disputes into legal contests to determine the winner and the loser. This situation had impacted on the change in the courts which lead the way in encouraging mediation as litigation cannot solve the increasing volume of cases and reduce the time taken in resolving cases.

7.4.3 Leadership support and the consistent exposure to mediation

The finding from the interviews also suggested that the uptake in mediation was due to the support and encouragement given by the senior members of the Malaysian judiciary. This is consistent with the literature reviewed that the use of mediation is significantly boosted when the courts and governments show an interest in developing it through policies stimulating its use. For instance, as described in Chapter 1 and Section 7.2 of this chapter, the former chief justice of Malaysia, the Rt Hon Tun Ahmad Fairuz and the then federal law minister, Datuk Zaid Ibrahim, were significantly involved in the early development of a draft *Mediation Act*.

The support by senior members of the judiciary continues. For instance, during the tenure of the former chief justices, some judges travelled overseas to learn about mediation in other jurisdictions particularly in the US. Mediation workshops and training were also organised for judges and legal officers. The Malaysian Bar has also been very supportive in conducting mediation training for its members and contributing to the development of the *Mediation Act*. This hands on experience was revealed in the interviews to be of immense influence because of the leadership and support driving the initiative.

When the former chief justice of Malaysia, the Rt Hon Tun Zaki Azmi, took over as the head of the judiciary, he introduced the PD to promote the practice of mediation.

When the PD was issued in 2010, the *Mediation Act* had still not been introduced although there had been continuous efforts in drafting what has become the *Mediation Act* by the Attorney General's Chambers and the representatives from the courts and the bar. When the *Mediation Act 2012* was finally introduced in 2012, it did not however cover the practice of court-connected mediation as the judiciary were concerned that it may stifle the present mediation practice implemented by the court through the PD (Lay Choo 2012).

Some interviewees were of the view that even without a *Mediation Act*, mediation could still be undertaken in the civil justice system while some argued there had to be specific legislation to empower judges to refer the cases for mediation. For instance, one interviewee reasoned that even though mediation may be supported by statute, the legislation will not achieve its desired result in promoting mediation if the public are not interested in practicing it. So, the public awareness of mediation and its benefits are equally important in the Malaysian context as this research found that the lack of public awareness is a considerable barrier to court-connected mediation.

7.4.4 Mediation fits with Malaysian culture

The finding from the interviews also suggested that the development of mediation is rooted in Malaysian culture. This finding is supported by the literature on the early development of mediation in Malaysia (Hickling 1987). The traditional approach to mediation is found at the level of the village. Disputes are referred to the headman of the village for settlement (Syed Hassan & Cederroth 1997). The headman is normally a senior and highly respected member of the village. He acts as a neutral third party who may advise the disputants on how to settle the disputes.

Although traditional practices of mediation may resemble the current practice of mediation, the mediator in the traditional mediation is more interventionist and authoritative in contrast with the mediators in the mediation processes which emerged in Western legal systems in the late 1900s (Rashid 2010). The role of mediators in this form of mediation is generally to facilitate and develop options for parties to make their own decision although different models including more interventionist ones are

also in use. The reason for this different role could be related to the cultural background of Asians including Malaysians who comprise a number of ethnic communities. This phenomenon is highlighted by one of the interviewees who described Asian culture as ‘paternalistic’ in that people have a lot of respect for a leader especially the elders in the community. This could also explain why the disputants chose to bring their disputes to their leader due to their status and persuasive presence which symbolise their authority (Alexander 2008). These facts suggest that the current public resistance represents a drifting away from the more traditional place mediation had in society. Clearly, as part of the educational and awareness reform measures which may have to be undertaken as part of government programs to encourage court-connected mediation it may be valuable to demonstrate to Malaysian citizens its rich history and tradition in mediation.

7.5 Factors impacting on the success of court-connected mediation in other jurisdictions

The success of court-connected mediation in other jurisdictions, particularly in the US, UK and Australia, in managing backlogs of cases has led to the call for the greater use of these practices in Malaysia. As previously noted by Mohamad (2008) the prevailing reasons for introducing court-annexed mediation in these countries has been to reduce the burdens on the judicial system. The example set by these other jurisdictions which utilised mediation as dispute settlement mechanism showed the way for Malaysia to follow.

The interviewees were asked about their knowledge of the success factors of the development of mediation in other jurisdictions. They referred to the US and Australia, and others also noted the development of mediation in UK. In the Asian region, the success of Singapore in taking the lead to encourage parties to consider mediation at the preliminary stage of filing a suit was also acknowledged by them.

The literature review identified five key factors impacting on the success of mediation in other jurisdictions which include: the high costs of court and lawyers’ fees; the increase level of awareness amongst the public; the experience of long delays in trials;

government intervention and policies; the cooperation from the bar; and, compulsory mediation. These factors are discussed in the following sections.

7.5.1 Increases in the costs of litigation

The review of the literature in Chapter 2, described the effect of high litigation costs in jurisdictions such as the US, UK and Australia which have contributed to the success of the use of mediation. Particularly, in the US, the rate of civil cases increased dramatically between the late 1970s and the early 2000s. The increasing costs of discovery and associated lawyers' fees led to substantial increases in litigation costs (Villareal 2006). The high costs of litigation and long delays caused dissatisfaction with litigation. This led to a public demand for changes in the civil justice system to achieve quicker resolutions at lower costs.

Whilst cost has been a motivator to move towards mediation in other jurisdictions the experience in Malaysia is quite different. The interviewees highlighted that court and lawyers' fees in Malaysia are relatively cheap and that mediation being less costly did not really matter to the parties. This could be a factor in explaining why parties are not so receptive and interested in mediation as they can afford the costs of litigation. The interview findings also suggest that the mediation costs may not be cheaper than litigation as the parties may have to incur lawyers' fees as well. The lawyers' survey indicated that the mediation fees charged by private mediators (legal practitioners) may mirror professional legal fees which could also explain the public's preference for litigation. The view of these respondents (see pp 139 and 238) that mediation is not cheap contradicts the general rhetoric that mediation is less costly and more economical than other forms of dispute resolution.

Despite the controversy, there has been no study in Malaysia to compare whether the costs of mediation are actually cheaper than litigation particularly on the lawyers' fees. This research did not investigate this issue as it concentrated more on the general uptake of court-connected mediation rather than on the specific issue of costs which require a different kind of research methodology. Nevertheless, if greater uptake of

court-connected mediation is required in Malaysia the investigation of relative costs of mediation and litigation is an area for future research.

7.5.2 Level of awareness

The increased level of awareness of mediation amongst the public is another factor that has fuelled its growth and success in other jurisdictions. Taking US jurisdictions as an example, mediation has existed for a number of decades and its citizens are more aware that it may be better than litigation in resolving disputes, faster and at less expense. This key factor for the success of court-connected mediation was highlighted by the interviewees. The review of the literature also pointed to its significance. The public level of awareness can be expected to increase and become stronger as the coordinated effort of various bodies including governments, courts and lawyers' association in promoting the advantages of resolving the disputes by way of mediation continues (Gray 2006; Spencer & Brogan 2006).

In Malaysia, there has been limited experience by lawyers and litigants of court-connected mediation as it is a recent development despite the long existence and practice of mediation outside the court system in society, in tribunals and other ADR institutions as discussed in Chapter 2. It will take some time to create greater public understanding and acceptance of mediation. For lawyers, mediation can become an increased source of profits as they may be able to undertake many more cases in less time. This was highlighted by one of the interviewees to rebut the notion that lawyers' fear the loss of fees if they were to do mediation (Chapter 6). Currently, many lawyers fear that it will decrease their earnings as they cease to have a role in the case once it is referred to mediation.

7.5.3 Government intervention and policy

As discussed in Chapter 2, the development of ADR in the US, UK and Australia has been with the support of governments. In the US, the federal government played a significant role in providing legislation for the implementation of mediation in court processes. For instance, the *Alternative Dispute Resolution Act 1998* empowers the court to require parties to use mediation in civil litigation.

In UK, the recommendations in Lord Woolf's *Access to Justice Report* were adopted by the government, showing its support for the development of ADR, which culminated in the establishment of the *Civil Procedures Rules*(CPR). As discussed in Chapter 2, the UK government had faced mounting pressure from interest groups and stakeholders to improve the efficiency of the civil justice system as a result of high litigation costs and the complexity of the procedural rules. For this reason, Lord Woolf was appointed by the Lord Chancellor, Lord Mackay of Clashfern, to review and suggest reforms to the civil procedure rules for England and Wales in the UK (Woolf 1996).

In Australia, the establishment of NADRAC in October 1995 was seen as an important development in the implementation of ADR. It had its origin in the 1994 report of the Access to Justice Advisory Committee chaired by Justice Ronald Sackville, *Access to Justice – an Action Plan*. It was tasked to advise the federal Attorney General on issues related to ADR.

The seriousness of these governments has given the courts, the legal profession and the public confidence that mediation is an appropriate method to resolve disputes. The interviewees also recognised that the support and the involvement of the government through its policies are important to ensure mediation has its place in the civil justice system.

7.5.4 Cooperation from the legal profession

The lawyers' attitudes towards mediation are also one of the main reasons for the success of mediation as indicated in the literature review in Chapter 2. The lawyers' support for mediation, particularly in US and Australia, is demonstrated from their involvement in the implementation of court-connected mediation. In Australia, the Law Council of Australia, the national body representing lawyers, was instrumental in publishing and adopting the comprehensive guideline for lawyers in mediation and the standard ethical guidelines for mediators (Limbury 2011). One of the interviewees acknowledged the role and the cooperation extended by lawyers and their associations, particularly in the US, by saying that ADR including mediation is seen by lawyers as

a professional way to manage their clients' interests prior to going to court (Chapter 6).

Lawyers' attitudes about mediation are likely to affect both the disputants' decision to use mediation and their perceived satisfaction with its processes and outcomes (Wissler et al. 1992). But a large minority of the lawyers surveyed for this thesis did not think that they played a role in advising their clients on using mediation. This may reflect their inexperience with it which they acknowledged, their fear of losing income and their belief that it was not their job to advise clients to go to mediation. On the other hand, the interview findings yielded a contrasting result as most interviewees believed that lawyers *should* play a role in persuading and advising their clients to use mediation (Chapter 6).

These findings also suggested that the role of lawyers in mediation is completely different from their role in litigation. Mediation has been said to require lawyers to be problem solvers, working collaboratively with the disputants, assisting them to understand the issues in the case, thereby enabling them to exercise their self-determination and ensuring that the agreement reached by them is based on informed consent (Gutman 2009). One interviewee provided an example of the role that lawyers played in mediation, that their role must be conciliatory in the sense that they look at the ways and means to achieve what their clients want rather than the weaknesses in each party's case. Nevertheless, currently Malaysian lawyers seem to think they will lose income and perhaps play no role in mediation. In this case, if court-connected mediation is to gain traction in Malaysia it will be necessary to spell out the role of lawyers in the process and provide the necessary training and awareness.

This brings the discussion to the issue of whether or not disputants should be represented in mediation as the research findings and the established literature found that lawyers played a role in promoting the use and development of mediation to their clients.

Representation in mediation

As discussed in Chapter 3, the review of the literature found that the views on whether or not parties should be represented in mediation are mixed. On one view, due to the informality of, and fewer technicalities in mediation, the presence of lawyers is seen as unnecessary. On another view, as lawyers can appreciate the significance of facts in determining legal liability better than their clients, can give advice on the terms of settlement in mediation, and can help to balance power, there are reasons why lawyers should be present (Agusti-Panareda 2004).

The survey of lawyers found strong support for disputants being represented including that it helps to level the playing field. Most judge interviewees did not think so and they preferred mediation without lawyers present. The two main reasons for their preference were: the presence of lawyers in mediation could protract the resolution of the mediation, and the lawyers' tendency to be biased. These are discussed below. It should be noted that some of the responses can be explained by self interest. Lawyers will be paid for being present. Judge mediators will have less control if lawyers are present.

The presence of lawyers in mediation could protract settlement

Lawyers are trained in an adversarial system. They tend to look at the issues too legalistically (the *rights* of the clients rather than their *interests*). The interviewees' findings highlighted the tendency of lawyers to act adversarially rather than to problem-solve which could delay any settlement. This has also been noted too in the literature (McEwen et al. 1995).

Some lawyers who agreed that parties in mediation should be represented also had some reservations about the presence of lawyers in mediation. According to them, lawyers may hinder the settlement process as they may confuse their role in assisting their clients in mediation with their role in litigation. This is also a problem expressed by the interviewees and discussed in the previous section (Section 7.5.4).

The lawyers' tendency to be biased

Lawyers are generally engaged in protecting their clients' interests and are under a duty to do so. It is no surprise that lawyers might have the tendency to look only at those interests. The finding from the interviewees suggested that it is the parties who should state their demands directly to the other parties and before the judge mediators as they know what they really want more than anyone else.

Additionally, this thesis argues that the presence of lawyers in the mediation processes may make it more just and fair to the disputants especially those who have less bargaining power or experience. As discussed in Chapter 3, the impact of power dynamics from the inequality of parties in mediation may influence a weaker party into accepting a settlement out of need, ignorance, low expectations or lack of experience (Frey 2001). These risks can be minimised if parties are represented. Given the body of literature on the role of lawyers in mediation it is clear that some balance is required which provides a role for lawyers but retains a focus on client decision making. This will be necessary should mediation become more of a mainstream court activity.

7.5.5 Mandating mediation

This thesis has found that the issue of mandating mediation is a vexed one. First, it has been demonstrated from the literature in Chapter 2 that many jurisdictions, particularly in the US and Australia, provide for mandated mediation which can be very effective in easing court backlogs. Second, the literature review also revealed other advantages if mediation is mandated. One is that neither party has to suggest it which could be interpreted as a sign of weakness by an opponent (Bergin 2007).

However, the literature indicates that ordering parties to mediation denies them their right of access to justice where it is against their wish to have their dispute resolved by a court (Stein 1998). The use of coercion to get parties to mediate might do them injustice. For example, it may lead to additional costs and delay in the court's determination of the dispute where the parties are unwilling to mediate [Dyson LJ in *Halsey v Milton Keynes General NHS Trust* (2004) EWCA (civ) 579].

Another concern for compulsory mediation is that the parties' action might risk becoming time barred due to expiration of limitation periods (Boulle & Nesic 2001). This may happen if parties are ordered to attempt mediation before they could file their cases in court (pre-court mediation). In the absence of this provision, the parties have no remedies if their action becomes time barred. It may also lead to an abuse of the process as a party may use the mediation to delay the court's action by entering into the mediation with an intention of not reaching an agreement (Alexander 2009). Although this is not an issue in Malaysia because court-connected mediation only applies to cases already registered in the court and it is on voluntary basis, it may however be considered if there is a perceived need to implement compulsory mediation. The PD, the *Rules of Court 2012* and the *Mediation Act 2012* have no provisions for the suspension of the limitation period while mediation is being attempted.

The findings from the survey and interviews on whether mediation should be mandated in Malaysia were mixed. The majority of lawyers surveyed for this thesis found little support for mandated mediation but the judge interviewees supported this idea. The lawyers' main concerns for mandating mediation before filing an action is that limitation periods will accrue but the interviewees did not raise this point. The findings from the interviews suggested that parties should be directed to mediation regardless of their consent otherwise it is not effective. The interviewees also believed that the disputants' right of access to justice or to have their 'day in court' is not taken away as that right continues if mediation fails (Chapter 6). This finding concurs with the literature review that directing parties to mediate does not interfere with their right to a court trial (Lightman 2007).

As court-connected mediation is a relatively new process in Malaysia, not everyone is aware of its benefits, particularly the public. To force parties to mediation by mandating it could give rise to more resistance. However, this is one of the strategies used in other jurisdictions to make court-connected mediation successful and to overcome resistance to it. This brings the discussion to the findings relating to the

issues raised by the final research question on factors impacting on the barriers to court-connected mediation in Malaysia.

7.6 Factors impacting on the barriers to court-connected mediation in Malaysia

The third research question seeks to identify the reasons for resistance to court-connected mediation. The previous discussion of this issue, drawing from the review of literature, found that resistance to court-connected mediation was mainly from judges and lawyers but also from the disputants themselves. This is because the parties would not go for mediation unless advised by their lawyers who have more knowledge of legal processes. The review of the literature also found that prevailing professional cultures influence the way judges and lawyers perceive their respective roles (ALRC 1997). The empirical work in this thesis indicates that Malaysian judges are still struggling to come to terms with this new facilitative role as they see their function predominantly as decision makers. The lawyers 'adversarial mindset' is one inclined to litigation which is why they often resist recommending mediation to their clients (Chapters 6). The other factor indicated in the literature that has caused lawyers' resistance is the fear of the loss of income. Disputants' knowledge of mediation can be considered a barrier to court-connected mediation because they are not in a position to make an informed decision to use it.

The reasons for the resistance for each group are discussed more fully below in light of the literature on the matter.

7.6.1 Judges' resistance

As discussed in the literature, the judges' resistance is mainly due to their attitudes and mindsets (Section 3.6.2). Their appointment confers judicial authority which gives them the power to adjudicate and determine disputes. They fear that if they were to mediate, they might impair that authority completely or partly (Zalar 2004b). The interviewees also identified judges' mindsets and attitudes as a barrier to court-connected mediation but added that the already heavy workloads of judges makes the introduction of mediation yet another layer of work. First, the interviews demonstrated

that judges find it difficult to switch to the role of mediators as it involves more personal and informal interaction with the parties. This barrier is interrelated to the issue of lack of training in mediation as without the requisite skills and experience, some judges are fearful of attempting it.

Workload issues emerged as a considerable barrier. Some mediation processes take long hours of facilitating and negotiating and more than one session to complete. Some judges do not see themselves as having time for mediation as they are also involved in litigation, their main role as a judge. Two interviewees highlighted judges' mental exhaustion in explaining why mediation is not taken up by them (Chapter 6). Judges as mediators have to actively analyse the issues from different angles to find solutions that suit the parties' needs. It fundamentally changes the role of a judge and this has been noted in other research. For instance, judges' participation in negotiation settlements has transformed their traditional role into a managerial role through informal discussions (Resnik 1982). Their reaction or resistance to this change emerges as a barrier to implementing judge-led mediation. The model of mediation too has implications for judges' workloads. Judges who undertake caucus mediation have to shuttle between rooms to get parties to compromise. Some judges just felt less motivated after undertaking efforts to settle disputes by mediation which did not succeed which is a barrier to encouraging greater uptake of mediation by them (Chapter 6).

7.6.2 Lawyers' resistance

The literature review found that the predominant reason for lawyers' resistance to mediation is a fear that they might lose substantial litigation fees if it is successful (Brooker & Lavers 2000). This thesis confirmed the finding and added a range of other barriers presented by lawyers identified in the survey and the interviews. For instance, lawyers' passion for litigation is attributed to their education and training which emphasises entitlements and legal rights of the parties rather than their underlying needs and interests. Their skills, experience and expertise in litigation are often sought by the clients to win the case and are also used to set the standard of their legal fees. The interviewees were of the opinion that lawyers' familiarity with litigation, which

takes a contentious form rather than collaborative problem-solving, is a reason why some lawyers find it difficult to assist their clients in mediation (Chapter 6). This confirms the experience in other jurisdictions (McEwen et al. 1995).

7.6.3 The public's resistance

As the public have limited legal education compared with judges and lawyers, their level of knowledge of mediation is lower. Lack of knowledge and awareness presents a form of indirect resistance by the public to mediation according to the findings from the survey and the interviews. This is compounded by the fact that disputants often depend on their lawyers for information and advice on mediation and the thesis revealed that lawyers do not see this as being their role.

The interview findings also found that the public may believe that disputes should be resolved by a court and that there must be a winner and a loser. This perception could prevent the public from considering mediation seriously and the judges interviewed stressed the importance of the 'day in court' for many disputants. The survey and interviews also showed that the public are confused over their role in determining their own outcomes in mediation and hold the traditional belief that someone (a judge) has to decide for them. Finally, the thesis found that the cost of mediation compared to litigation may be a barrier to court-connected mediation in Malaysia. The interviewees identified that the affordability of court fees contributes to the parties' preference for litigation. This is notwithstanding the fact that mediation is relatively cheaper (Chapter 6).

7.7 Change management in court environments and processes

The institutionalisation of mediation in the civil justice system will impact on the role of the court, the function and training of judges and require changes in attitudes of judges, registrars, lawyers and their clients. Each of these parties represents a set of barriers or resistance factors to the successful installation of court-connected mediation as outlined in the previous section. To overcome these resistance forces the thesis considered the utility of change management theory.

Lewin's change theory (1951) envisages that change management is generic and can be applied to any institution or individual who is undergoing change. The theory describes organisational change as a dynamic balance ('equilibrium') between two forces (driving forces and restraining forces) which work in opposite directions. In order to consider strategies to implement changes, this thesis has identified the driving factors for the uptake of court-connected mediation and the inhibiting factors that have caused the barriers for its implementation. As discussed in the earlier part of this chapter, the thesis found five key factors that contributed to the growth and development of court-connected mediation. These were also the drivers and the enablers of court-connected mediation in Malaysia. The three most important driving factors for change are the increasing backlogs which led the judiciary to consider a draft of PD to enable the practice of court-connected mediation and to the government considering a *Mediation Act*; second, as backlogs are also a problem in other jurisdictions, the successful experience of using court-connected mediation to reduce their backlogs has been a great influence on the Malaysian situation; and, third, the increasing knowledge and awareness of the benefits of mediation, especially amongst judges in Malaysia, has also been a driving factor and has created a sense of leadership and support around the issue (Chapter 6). Finally, while the surveyed lawyers could not be said to represent a driving force for change the survey found agreement with the proposition that the disputants' demand for a quick and early resolution of their case at minimum costs requires a change in court procedures. But respondents did not suggest the extent of the change needed to bring about mediation in the court system.

The factors resisting the change in court processes and management identified by this research relate to the stakeholders' attitudes and the prevailing culture of legal practice as discussed in Section 7.6 above. The other key inhibiting factor during the empirical work of this study in early 2010 was the absence of provisions expressly providing for the practices of mediation in the court. As indicated at Section 7.4.3 of this chapter, there was uncertainty whether in the absence of legislation mediation could be used in the civil justice system. The possibility of unlawfulness in court processes may have deterred some judges from adopting mediation and providing others with some legitimacy for resisting its use.

However, both the survey recipients and the interviewees recommended specific key strategies to implement court-connected mediation effectively in the Malaysian court system. This includes ways to change the stakeholders' mindsets to use mediation as an alternative to trials (Chapters 5 and 6).

7.8 Change management strategies for an effective implementation of court-connected mediation

This thesis has identified a number of strategies to overcome the barriers to, and increase the uptake of court-connected mediation. Chapters 5 and Chapter 6 reported the recommendations proposed by legal practitioners and the interviewees. There were seven key areas that need to be considered and these comprise:

1. reinforcing the practice of court-connected mediation;
2. providing information and publicity;
3. introducing a legal framework for court-connected mediation including a provision to mandate it;
4. providing guidelines on the ethical standards of mediators;
5. training of mediators including appointment of more judges as mediators;
6. setting up of an independent mediation centre run by private mediators which has no connection with the legal profession; and,
7. learning from the practice of *sulh* in the Syariah courts.

Most of these strategies have been undertaken in the US, UK and Australia as discussed in Chapter 2. Whilst mediation in the Syariah courts is conducted by its own *sulh* officers, in other jurisdictions particularly in the Federal Court, Australia, mediation is conducted by a court registrar who is specially trained. In Malaysia, in a step towards these sorts of strategies, two key changes have already been put in place. For instance, the legislation in the form of the *Mediation Act 2012* has been introduced although it does not specifically cover court-connected mediation. The *Rules of Court 2012* expressly provide for court-connected mediation but its practice is not mandated.

The first strategy proposed by the lawyers and the interviewees was that the court must have a system in place to ensure the effectiveness of court-connected mediation. This includes having a special registry in the court for mediation cases, training of the registrars to evaluate cases for mediation before they go to judges for mediation; enlisting a panel of trained and qualified mediators for the parties' selection; and, having an administrative process to monitor and supervise the cases referred to mediators and cases which return to court if mediation fails.

The second strategy was to provide information, especially to the public and lawyers, on the effectiveness of mediation in resolving disputes. They should be made aware that the court offers judge-led mediation and the benefits of having judge mediators. The third strategy was to formulate rules and legislation providing for mediation. Most of the interviewees and a large minority of lawyers went so far as to suggest rules around compelling parties to mediate or even mandating mediation prior to the lodgement of the case in court. The fourth strategy proposed in the findings was to have guidelines on ethical standards for mediators. This would ensure consistency in mediation practices by providing greater justice to the disputants in terms of preserving the mediators' neutrality and impartiality. The fifth strategy was the recommendation that mediators should undergo training to accredit them as qualified mediators.

As the structure of judge-led mediation is different from court-annexed mediation, the findings from the survey and interviews suggested special training is needed for judges in mediation. It was suggested that if judges used the appropriate techniques in mediation including being able to conduct the process more informally, the parties would feel more comfortable and responsive. In order to ensure continued education in mediation, it was proposed that judges should take the lead in encouraging the parties to mediate by advising their lawyers of this. Additionally, the findings also suggested more judges be appointed to deal mainly with mediation. Finally, the sixth and seven recommendations dealt with a setting of an independent mediation centre and the suggestion for a system as practiced by the Syariah courts to be adopted. The proposal for an independent mediation centre was proposed by the interviewees who felt that the public's perception is that lawyer mediators are not as effective as judges

would be. One of the issues raised was in relation to perception of bias that lawyers would have as mediators (see the discussion in Section 3.6.1). The *sulh* system in the Syariah courts was suggested as mediation is conducted by a qualified mediator appointed and employed as a court staff.

Interestingly, there was no recommendation from either the lawyers or the interviewees to place a duty on lawyers to advise their clients to use mediation. Given the support of the interviewees for mandated mediation, it might have been streamlined through such a positive duty on lawyers. Indeed, the CPR which governs the procedures in civil litigation in England and Wales has a provision imposing a duty on the parties and their lawyers to assist the court in managing their cases for an early settlement.

7.9 Chapter Summary

This Chapter discussed the findings of the research in light of the literature presented in Chapters 2 and 3. There are three research questions which this research has set out to answer and each has been considered in the light of the data from the findings of the lawyers' survey and the interviews as well as from the wider literature review.

The key factors which led to the growth and development of court-connected mediation in Malaysia were discussed in the context of the first research question. This research found five key factors. First, the knowledge of the benefits of mediation is the crucial starting point in increasing the use of court-connected mediation. Currently, the lack of knowledge and awareness of mediation is the main obstacle to its further development. Second, a driver for mediation is its ability to resolve congestion in the court system. As not all stakeholders support mediation, to make it more effective in resolving backlogs it was even suggested that it be mandatory for parties to be directed to mediation whether or not they consented and this may become a potential driver of court-connected mediation in the future. Third, the continued support by the senior members of the judiciary can raise the level of acceptance of mediation. Fourth, the support by the senior members of the judiciary would ensure consistent training amongst judges and the magistrates particularly on the practical aspect of mediation

practices. Finally, the traditional practice of mediation in Malaysian society has some impact on the uptake of court-connected mediation.

This Chapter also discussed the reasons for the success of court-connected mediation in other jurisdictions which is the second research question. This was answered by noting that the high cost of litigation was the key contributing factor why disputants prefer mediation. Those costs are exacerbated by the increased volume of cases in court over time and delays associated with them but it was noted that such costs may not pose such an obstacle to disputants in Malaysia. Second, the high level of awareness about the benefits of mediation is another factor why court-connected mediation is successful in other jurisdictions. Third, government involvement in promoting the use of mediation is a significant contribution to its further development. Fourth, the role played by the legal profession is no less important in creating awareness amongst its members and clients of the advantages of mediating and this role lies in stark contrast to the findings relating to Malaysian lawyers who do not believe they have a role to advise parties to use mediation. Finally, the research found judges generally believe that mediation can be very effective as an alternative to litigation in Malaysia if it is mandated following the system adopted in other jurisdictions.

This Chapter then discussed the third research question which aimed to identify the factors that may have caused barriers to court-connected mediation in Malaysia. This was answered by categorising the sources of resistance amongst the three main stakeholders: judges, lawyers and the disputants. The research found resistance from each of these as indicated by the interviewees. First, judges' resistance to mediation was mainly attributed to their attitudes, training and mindsets and also to their already heavy workloads. The lawyers' resistance was due to a fear of the loss of their fees and their reluctance to pass on any advice about mediation to their clients. Furthermore, both judges and lawyers are trained in the adversarial system, which explains their lack of skills and experience in mediation which presents itself as a barrier in this context. Finally, the public's resistance is generally associated with their lack of awareness and knowledge of the benefits of mediation or its availability in the

courts. The research found that litigation costs, particularly court fees, in Malaysia are still affordable which explains why disputants continue to seek trials in the court and refuse mediation (court-connected mediation) even though it is cheaper.

This chapter also considered organisational change management theory. It may be applied to changes in court systems, particularly in using mediation as an alternative to trials. Through change theory, the driving factors as well as the restraining factors to court-connected mediation were identified. Strategies to minimise the resistance as well as to implement necessary changes were also considered.

The research found seven possible strategies. First, the court must have a system in place to identify and facilitate the referral of cases for mediation by judge mediators. Second, in order to create an awareness of court-connected mediation, some greater efforts have to be undertaken to disseminate information on its effectiveness to the public and lawyers. Third, a legislative framework for mediation has to be formulated to ensure its effectiveness. Mandating mediation should be considered under this legislation. The fourth strategy proposed was to have guidelines on the ethical standards of mediators to ensure consistency in mediation practices. The fifth strategy is to provide training and accredit mediators to ensure their qualification in handling mediation. The sixth strategy is a suggestion for an independent mediation centre to be set up, and finally, a suggestion for a *sulh* system used in the Syariah courts to be adopted in which mediation is done by officers in the court other than judges.

This Chapter concludes the discussion of the three research questions from the thesis. The next chapter draws together the main findings from this study, summarising the key points from each of the main sources of empirical evidence presented in this thesis and suggests ways in which it may inform more efficient system of court-connected mediation.

CHAPTER 8 CONCLUSION AND RECOMMENDATIONS

8.0 Introduction

Through a conceptual framework encompassing the theories of mediation, justice and change management this thesis has reviewed the extant literature on court-connected mediation in the US, UK, Australia and Malaysia. There has been considerable growth and sophistication of mediation methods and training in these other jurisdictions which has contributed to improvement in case backlogs led by the support and leadership of government and the legal profession. The key issues arising from the literature review was that despite the similar legal backgrounds of these common law jurisdictions, the development and practice of court-connected mediation in Malaysia lags far behind both in its introduction and in its support and development. Court-connected mediation has only been formally recognised as a practice in the civil justice system after the PD was issued in August 2010. The PD formalised the ad hoc practice of judge-led mediation over the past few years and the court-annexed mediation by referral of cases to the MMC. The *Rules of Court 2012* has now paved the way for the further development of these processes in Malaysia. The *Mediation Act 2012* has enlarged the scope for mediation in other processes for the resolution of disputes in Malaysia. This thesis will contribute to the ways in which government and the legal profession might address the many forces of resistance towards a greater uptake of court-connected mediation.

The thesis established its objectives in answering the three research questions. These are to trace and assess the development of court-connected mediation in Malaysia, to investigate its successful uptake in other jurisdictions as well as the barriers to its further implementation in Malaysia. To answer the questions, and because of the dearth of extant research in the area, data from two empirical sources of evidence were utilised. These comprised surveys of 100 legal practitioners practicing in the Sabah and Sarawak High Court and interviews with 13 participants including 7 judges from both East and West Malaysia. The findings were presented in Chapter 5 and Chapter 6 and were discussed in Chapter 7.

This Chapter provides a summary of the research findings and provides an overview of the conclusions of the thesis which were described in more detail in the previous chapter. The contribution of this research particularly to court institutionalised mediation is then addressed and finally, it notes the limitations of this research and suggestion for future research.

8.1 The legal framework for the practice of court-connected mediation in Malaysia after the empirical work of this study

As with all empirical research, this thesis is set in a particular time and context. Arguably, this research was conducted at the tipping point for the development of court-connected mediation in Malaysia and it is important to briefly describe the sorts of changes which have happened since the survey and interviews were conducted in 2010 before considering how the findings of the thesis may be used to advance this initiative further.

As has occurred elsewhere, court-connected mediation was considered in Malaysia as a strategy to clear backlogs of court cases more expeditiously. Prior to August 2010, court-connected mediation (both court-annexed and judge-led) was practiced on an ad hoc basis. Court-annexed mediation existed in West Malaysia and was primarily concentrated in Penang High Court as a pilot project from the early 2000s. No legislation expressly provided for referral of cases for mediation to the MMC. It was done under the pretext of pre-trial case management which confers power on the court to give directions on the future conduct of the action to ensure its just, expeditious and economical disposal. On the other hand, judge-led mediation commenced in Sabah and Sarawak, East Malaysia in 2007 before it was extended to West Malaysia to deal with traffic accident related cases. The lack of legislation supporting court-connected mediation has limited the development of mediation in Malaysia. This barrier to court-connected mediation was identified in the empirical work for this study.

There were significant changes in court-connected mediation after the survey and interviews were conducted. A PD was introduced by the Malaysian judiciary which took effect in August 2010 and which expressly allows judges to conduct mediation

or to send cases to the MMC or to any other mediators of the parties' choice. Further, the introduction of the *Rules of Court 2012*, which took effect in August 2012, has made some significant changes in streamlining procedures for civil cases in the Subordinate Courts and in the High Court. One of these changes is the specific inclusion of mediation in pre-trial case management. Order 34 Rule 2 (2) (a) of the *Rules of Court 2012* empowers judges in the High Court and the Lower Courts to give appropriate orders or directions including mediation in accordance with the current practice direction (PD). With the insertion of mediation formally into the courts' rules, it is now part of the civil justice system. The PD reaffirms the overriding objective outlined in the procedural rules [Order 34 Rule 2 (2) (a) of the *Rules of Court 2012*], to secure the just, expeditious and economical disposal of the action.

This being exploratory research, its aim is to map court-connected mediation in Malaysia, to determine the key factors that have led to its growth and development and to identify the factors resistant to it. With limited research on this issue in Malaysia, this thesis has sought to address this gap through its review of the literature and in the lawyers' survey and interviews with judges.

To recap, the three research questions using data from the literature review and from the surveys and interviews are:

RQ1: What are the key factors that have led to the growth and development of court-annexed and judge-led mediation in Malaysia?

RQ2: What are the key factors that have made court-annexed and judge-led mediation successful in other jurisdictions?

RQ3: What are the key factors that have caused barriers to court-annexed and judge-led mediation in Malaysia?

8.2 The enablers and uptake in court-connected mediation

The key factors found to have the potential to stimulate the uptake of court-connected mediation in Malaysia are:

- an increased understanding of the benefits of mediation by all parties;
- the ability of mediation to ease court backlogs as evidenced in other jurisdictions;
- the support and encouragement from senior members of the judiciary and the legal profession along with a facilitative legislative approach by government;
- consistent exposure to and training in mediation;
- a model of mediation which provides consistency and justice; and,
- a cultural reconnection with mediation by Malaysian society in light of the history of its use in the country.

Currently, not all of these enablers are in force in Malaysia so not all of them act to promote mediation. For instance, whilst there is a good deal of knowledge of its benefits by lawyers and judges it appears that the public is not sufficiently aware of it to make a decision about the management of their cases. This finding is interesting given that traditional mediation was practiced and rooted in Malaysian culture and has had a greater impact in the development of court-connected mediation in the Syariah courts. The *sulh* system is practiced within the court premises without the necessity of sending the cases away to private mediators which helps disputants feel that they have had their ‘day in court’. Mediation also worked well in earlier Malaysian communities as they preferred to compromise in dealing with their disputes. They chose to bring their disputes to their village leaders due to their status and persuasive presence which symbolised their authority. The thesis found that the people’s respect for a leader who is seen as having an authority is a significant reason for disputants’ preference with judge-led mediation. In reconnecting the public with mediation as it was traditionally practised it will be appropriate to consider the sort of model of mediation which could be used in civil courts; one which is perceived as fair and allows for parties to make their own informed decisions. In this respect the thesis has highlighted the importance of understanding the models and legal framework used elsewhere.

8.3 The success of court-connected mediation in other jurisdictions

The success of court-connected mediation in other jurisdictions (US, UK and Australia) particularly in reducing court backlogs and waiting times for trial was seen as an important area for investigation. Their success could be used as a benchmark to evaluate the progress of court-connected mediation in Malaysia. The thesis found that five key factors contributed to this success:

- high litigation costs;
- increased levels of awareness;
- government policies;
- support and cooperation from the legal profession; and,
- the use of compulsory mediation.

The increase volume of civil cases in these jurisdictions has been matched by increases in the costs of litigation. This is related to the increases in legal fees and cost of procedures such as discovery. As mediation has been already in existence for some decades in these jurisdictions, the public level of awareness and knowledge about its advantages are considerably higher. The research found that the involvement of governments in making policies to promote the use of mediation is crucial in gaining public confidence in it. The roles played by lawyers' associations as well as individual lawyers themselves in creating awareness and advising their clients to take up mediation was also identified as reasons for this success. The research found that compulsory mediation adopted in these jurisdictions, particularly the US and Australia, has achieved the potential objectives of court-connected mediation.

The implication of these findings for the success of court-connected mediation in other jurisdictions suggests considering an increase in court fees in Malaysia in line with those other jurisdictions. Alternatively more substantial filing fees or hearing fees could be considered for those parties who refuse to participate in mediation. In the UK, for instance, parties are subject to costs and penalties if they refuse to mediate without reasonable explanation. Mandating mediation is also a possibility that has met with success internationally. The evolution of laws on court-connected mediation in

Malaysia has been slow compared to those other jurisdictions. Whilst these are stumbling blocks to the implementation of court-connected mediation in Malaysia, the research found resistance amongst stakeholders: the judges, lawyers; and, disputants.

8.4 The barriers to court-connected mediation

The thesis found that judges, lawyers and the public, including the disputants, are the three main groups with some resistance to court-connected mediation. First, judges are used to adjudicative roles in adversarial trials and have no experience of mediation techniques. Some judges felt uncomfortable with mediation due its informality. Second, lawyers' resistance is mainly related to concerns about loss of income. Another reason is that their training and experience in litigation has equipped them with the advocacy skills to argue cases in court. As a result, lawyers tend to act adversarially in mediation which may protract reaching a settlement. Finally, the public's belief that disputes should only be resolved in the court was also identified as barrier to court-connected mediation. As noted above, the research also found that the affordability of the court fees contributes to the parties' preference for litigation.

8.5 Increasing the uptake and effective implementation of court-connected mediation

The research found that there is still more which needs to be done to improve the effective implementation of court-connected mediation in Malaysia. The strategies to improve court-connected mediation which were proposed during the surveys and interviews in 2010 were described in the previous chapter. A few changes have also been adopted in Malaysia such as the introduction of the *Mediation Act 2012* and the *Rules of Court 2012*. This legislation and the rules have opened a new era in the development of mediation in Malaysia and the process is now considered as significant as litigation but its application has not yet had a major impact on court-institutionalised mediation.

As suggested by the interviewees, it appears that court-connected mediation lacks a structure or system in the form of guidelines even though judges now may conduct mediation or send cases to MMC or to any mediators of the parties' choice pursuant

to the rules and the PD. In the absence of these guidelines, one judge may conduct mediation differently from another. Guidelines, such as those on the ethical standards of judge mediators would ensure consistency in their practice and provide greater fairness to the disputants. The reason for not promulgating guidelines for judge-led mediation at the national level could be because of a potential adverse impact on the flexibility and the informality of mediation processes. There might be a fear that the guidelines would fetter the creativity of judges in exploring mutually agreed settlements. Nevertheless, the professionalisation of mediation practice will require both the development of suitable models (or codes of practice) for judge-led and court-annexed mediation as well as a code of ethics.

Related to the issue of establishing codes of practice and ethics for those who undertake court-connected mediation is the accompanying training of mediators. This strategy emerged from the interviews and survey in the following suggestions:

- to develop a special registry in the court to register mediation cases staffed by appropriately skilled personnel;
- training of the registrars to evaluate cases for mediation before they go to judges for mediation;
- training of judges in mediation;
- appointment of more judges to undertake the mediation role;
- enlisting a panel of trained and qualified mediators for the parties' selection; and,
- having an administrative process to monitor and supervise the cases referred to outside mediators chosen by the parties and back to court after the mediation fails.

A strategy to improve the education and awareness of the benefits and advantages of resolving cases by mediation, especially amongst the public and lawyers was found to be vital to the effective implementation and development of court-connected mediation. This is because the practice of court-connected mediation is relatively new to the public as well as to lawyers. They have to be encouraged to discard beliefs that

disputes can only be resolved by the judge and be convinced that mediation empowers them to more quickly and cheaply determine their own outcomes. This needs a change in their outlook.

As described above the thesis found that mediation can be very effective as an alternative to litigation if it is mandated. This is an important strategy to ease backlogs and overcome resistance from the stakeholders particularly, the lawyers and public. Such a strategy in Malaysia may be controversial because of the current affordability of litigation and the choice parties have in taking their cases there rather than to mediation. Mandating mediation may well emerge as a practical option with the continued maturation of court-connected mediation in time.

Training of judges noted above emerged as a key strategy from this thesis as mediation needs a different approach compared to litigation. Their role as adjudicators in the adversarial court system has made them familiar with the skills and outlook related to litigation. This is one of the drawbacks perceived of judge-led mediation. The current shortage of judges means that even with training their numbers are insufficient to both participate in reducing case backlog as well as continue with their adjudicative role. The interviewees were concerned that the increase in judges' workloads and the time and mental energy required to handle mediation means that more judges need to be appointed and assigned to deal with mediation.

To take the pressure off judge mediators the research found that an independent mediation centre or a reinvigorated MMC may be useful to encourage parties to take up mediation. The present practice is to source mediators from the MMC in court-annexed mediation but courts are not referring cases to it. The disputants' preference for judge mediators was identified to contributing to this phenomenon.

8.6 Limitations of the study and suggestions for future research

There are four key limitations to this study. Firstly, there have been significant developments in court-connected mediation in Malaysia since the empirical work was conducted for this study. These include the issuance of the PD by the Malaysian

judiciary, the introduction of the *Mediation Act 2012* and the *Rules of Court 2012* and the setting up of Kuala Lumpur Court Mediation Centre (KLCMC) in the Kuala Lumpur Courts' building in August 2011. The survey and the interviews could not give the participants the opportunity to comment on a number of issues raised by these developments as they were unknown until the empirical work had been completed. Future research should consider the impact of these developments on the uptake of court-connected mediation and whether they have had an effect on stakeholder perceptions. Future research could also consider whether the diversion of cases to mediation improves civil litigation overall. Secondly, a limitation relates to the participants in the empirical research. Court-connected mediation was relatively new and practiced on an ad hoc basis in the absence of the subsequent PD and statutory provisions. This explains the state of the participants' knowledge in these practices. Most lawyers surveyed admitted that they had no experience in practicing mediation. This impacted on their views and comments which are not based on their own experience. It was not possible to select the lawyers who had participated from the files of mediated settlement agreements as the researcher had no access to those files. The participants selected for the interviews were also limited in their knowledge as only certain judges had experience in conducting mediation. As the practice of mediation expands, more lawyers and judges could be expected to be involved in it. Future research should consider the views from the larger groups of participants who have real-life experience in mediation. As this research mainly concerns on the perceptions and attitudes of lawyers and judges towards court-connected mediation, future research should also consider the attitudes and perceptions of the disputants.

Thirdly, due to the newness of mediation, some issues which were raised in the literature that could have some implication for the perception of justice in mediation had not yet been experienced in the context of court-connected mediation in Malaysia. Many of these related to the perceptions of disputants but as this thesis limited itself to the viewpoints of lawyers and judges it remains for future research to investigate these disputant related factors. These included: a challenge by the disputants against the impartiality of the mediators, mediators' immunity, confidentiality and privilege, and a dispute over the enforceability of the mediated settlement agreements. In framing

this thesis, interviewing disputants had been considered but it was rejected because of the difficulty of obtaining access to mediated cases in Malaysia which tended to be ad-hoc rather than scheduled. Nevertheless, disputants were identified as presenting a considerable barrier to the development of court-connected mediation and so it will be important for future research to take up this challenge.

The fourth limitation is the lack of investigation into the costs of litigation in Malaysia compared with mediation which has led to the use of mediation in other jurisdictions. As indicated in Section 7.5.1 this is an issue which requires further investigation.

8.7 Concluding statements

This chapter concludes the main issues arising from this thesis. The thesis has mapped the growth and development of court-connected mediation in Malaysia. It has investigated the key factors behind the success of court-connected mediation in other jurisdictions and has identified the key barriers to its greater uptake in Malaysia and suggests possible solutions to overcome these. In doing so the thesis has added to the growing body of international literature on the importance of mediation in providing another process for dispute resolution and has filled an important literature gap in Malaysia.

In terms of the impact of this research on wider mediation studies, it provides comparative evidence on the practice of court-connected mediation in the US, UK and Australia and contrasted those with the emergent practice in Malaysia. The developments of court-connected mediation as reported by other mediation studies along with the strategies canvassed from the survey respondents and interviewees have the potential to enhance these practices in Malaysia. This means that from a practical perspective, the key findings of the study may provide useful information to increase mediation uptake as well as to improve the effective implementation of court-connected mediation in Malaysia.

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APPENDICES

Appendix A: Lawyer respondents' survey




**COURT ANNEXED AND JUDGE-LED MEDIATION IN CIVIL CASES: THE MALAYSIAN EXPERIENCE
QUESTIONNAIRE INSTRUCTIONS
(LAWYERS' QUESTIONNAIRE)**

The questionnaire is organised under nine key headings: Respondent's Profiles; Benefits of Mediation; Justice in mediation; Issues in mediation; Pre-Court Mediation; Change management; Mediator; Participation in mediation case; Recommendations. At the beginning of each section an explanations is provided.

Confidentiality is assured at ALL times. No individual will be identified as the source or author of any statement

Participation in this research is voluntary.

SECTION 1: RESPONDENT'S PROFILES (Please tick v)

Q1. How long have you been a solicitor?
 _____ years _____ months

Q2. Gender Male Female Q3. Age _____ years old

Q4. Legal Firm locality Sabah Sarawak Other (Please specify) _____

Q5. Please state your highest qualification?
 Bachelor Degree Master PhD

Q6. Which of the following best describes your knowledge about mediation?
 Not much Moderate Other (please specify)
 Very much excellent _____

SECTION 2: BENEFITS OF MEDIATION

The following questions are aimed at seeking your opinion in terms of what mediation could offer in the justice system and how it can be institutionalised.

Q7. How strongly do you agree or disagree on the following statements on the benefits of mediation?

1=Strongly agree 2=Agree 3=Neutral 4=Disagree
 5=Strongly disagree

Benefits of mediation	Please circle				
Savings of time/quicker resolution	1	2	3	4	5
Relative low cost and economical	1	2	3	4	5
Realistic possibilities of settlement and better resolutions	1	2	3	4	5
Assisting to resolve relationship problems	1	2	3	4	5

1

Informality of the process	1	2	3	4	5
Empowerment/ control of outcome	1	2	3	4	5
Settlements that tailor the parties' needs	1	2	3	4	5
Others (Please indicate if any)					

Q8. What is your opinion of the role of mediation as alternative to litigation in dispute resolution process?

- Very effective Somewhat effective Neutral
 Less effective Not effective

Q9. What are the reasons for your above response?

Q10. Mediation could significantly help to bring about quicker and fairer settlements as the parties themselves design their terms of settlement based on their needs.

- Strongly Agree Agree Neutral
 Disagree Strongly Disagree

Q11. What are the reasons for your above response?

Q12. One factor which has made mediation successful in other countries is the reduction of court backlogs. Mediation can ease the problem of case backlogs.

- Strongly Agree Agree Neutral
 Disagree Strongly Disagree

Q13. What are the reasons for your above response?

Q14. Please give your opinion on how court annexed mediation can be implemented under the supervision of the court system. Consider both court annexed mediation and judge-led mediation. (Court annexed mediation is when a dispute is referred by the court to a private mediation service providers while judge-led mediation is where the judge acts as a mediator to resolve the dispute).

SECTION 3: JUSTICE IN MEDIATION

The following questions are aimed at seeking your opinion about the issues of justice in mediation. Please give your response based on the following scale.

1 = Strongly Agree 2 = Agree 3 = Neutral 4 = Disagree 5 = Strongly Disagree

Q15. Mediation does afford justice to disputants the same way as they would have expected justice from the formal litigation. ¹ ² ³ ⁴ ⁵

Q16. Disputants perceive the outcome is fair in mediation when the outcomes are responsive to their needs.

Q17. Disputants perceive the procedure in mediation as fair when they believe that they had a fair chance to present their story and their views had been considered.

Q18. When the disputants are treated with respect and dignity as well as the trust that they have on the neutrality of the mediator their perceptions of fairness in mediation is further enhanced.

Q19. Disputants are only concerned with the fairness of the outcome of the dispute.

Q20. Do you think that court annexed mediation is effective in achieving its goal to deliver distributive justice including the delivery of an outcome that:

	1	2	3	4	5
is consistent with rule of law	<input type="checkbox"/>				
is responsive to litigants' needs	<input type="checkbox"/>				
is consistent with parties' determination	<input type="checkbox"/>				
is durable	<input type="checkbox"/>				
maintains or improves relationships	<input type="checkbox"/>				
parties' perceived as fair	<input type="checkbox"/>				

Q21. Do you think that court annexed mediation is effective in achieving its goal to deliver procedural justice which includes:

	1	2	3	4	5
A process that is perceived as fair by the parties	<input type="checkbox"/>				
An opportunity for parties to express their views ('voice')	<input type="checkbox"/>				
An opportunity for parties' views to be heard and considered	<input type="checkbox"/>				
Treatment that perceives by parties as dignified and respectful	<input type="checkbox"/>				

Q22. Do you think that judge-led mediation is effective in achieving its goal to deliver distributive justice including the delivery of an outcome that:

	1	2	3	4	5
is consistent with rule of law	<input type="checkbox"/>				
is responsive to litigants' needs	<input type="checkbox"/>				
is consistent with parties' determination	<input type="checkbox"/>				
is durable	<input type="checkbox"/>				
maintains or improves relationships	<input type="checkbox"/>				
parties' perceived as fair	<input type="checkbox"/>				

Q23. Do you think that judge-led mediation is effective in achieving its goal to deliver procedural justice which includes:

	1	2	3	4	5
A process that is perceived as fair by the parties	<input type="checkbox"/>				
An opportunity for parties to express their views ('voice')	<input type="checkbox"/>				
An opportunity for parties' views to be heard and considered	<input type="checkbox"/>				
Treatment that perceives by parties as dignified and respectful	<input type="checkbox"/>				

SECTION 4: ISSUES IN MEDIATION

The following questions ask your opinion on ways to overcome the pitfalls that occur in mediation as alternative source of dispute resolution.

Q24. Do you think that parties need to be represented in mediation to overcome imbalance of power due to unequal bargaining? Why?

Yes _____

No _____

Q25. Do you think procedural safeguards on admissibility of evidence have no application in mediation? Why or why not?

Q26. The confidentiality and private nature of mediation prevents a binding precedent from being established. Please Comment.

Q27. Which of the following roles are most appropriate for a mediator and why:

- (i) Facilitative (passive mediator chairs session and develops options)
- (ii) Evaluative (active mediator makes suggestions to resolve dispute)
- (iii) Determinative (directive mediator issues order to resolve dispute)

Q28. Do you think the enforceability of mediated settlement agreements needs to be regulated to ensure parties get the fruits of settlement? Why or why not?

Q29. What types of matters do you think may be amenable to resolution by mediation (Please tick where applicable):

Personal injury (motor accidents claims, negligence)	<input type="checkbox"/>
Divorce and child custody or family matters	<input type="checkbox"/>
Contract and commercial matters	<input type="checkbox"/>
Landlord/Tenant	<input type="checkbox"/>
Small claims	<input type="checkbox"/>
Others (Please specify)	<input type="checkbox"/>

Q30. Please indicate whether the following factors prevent you from using mediation (Please tick where applicable):

My client did not agree to mediate	<input type="checkbox"/>
The opposing party/lawyer did not agree to mediate	<input type="checkbox"/>
Judges do not encourage mediation	<input type="checkbox"/>
There are no court annexed mediation programs in my area	<input type="checkbox"/>
Mediation isn't useful as I can resolve the problem on my own	<input type="checkbox"/>
Others (Please specify)	<input type="checkbox"/>

SECTION 5: PRE-COURT MEDIATION

The following questions ask your opinion on the use of mediation before a case is filed in court.

Q31. Do you think that disputants should be required procedurally to use mediation first before filing their action in court?

- Strongly Agree Agree Neutral
 Disagree Strongly Disagree

Q32. What are the reasons for your above response?

Q33. Pre-court mediation should be mandatory to encourage disputants to the discussion table? Why?

Q34. What cases are most suitable for pre-court mediation?

Q35. What cases are least suitable for pre-court mediation?

SECTION 6: CHANGE MANAGEMENT

The following questions are aimed at getting your opinion on change management in the Malaysian court system towards a more cohesive approach to court annexed and judge-led mediation.

Q36. Do you agree that parties' demand for early resolution of their cases with minimum costs requires a change in the way the courts conduct their business by considering mediation either referral to mediation or judge-led mediation?

- Yes No Unsure

Q37. Please provide reasons or suggestions for the above response.

Q38. What do you think are the reasons for the use of court annexed and judge-led mediation? Please list them.

Q39. What are the stumbling blocks for the practice of court annexed and judge-led mediation? Please list them.

Q40. Change in court management from litigation to mediation can be managed through strategies which include the followings:

Please give your response based on the following scale.

1 = Strongly Agree 2 = Agree 3 = Neutral 4 = Disagree 5 = Strongly Disagree

	1	2	3	4	5
Education and communication (information bulletin, seminar)	<input type="checkbox"/>				
Participation and involvement (in planning and implementation)	<input type="checkbox"/>				
Facilitation and support (funding, providing proper equipments/material)	<input type="checkbox"/>				
Negotiation and agreement (sharing views, tolerant)	<input type="checkbox"/>				

SECTION 7: MEDIATOR

The following questions are aimed at getting your view on the qualifications and criteria for mediators.

Q41. What qualifications do you think a private mediator should have?

- Legal qualifications
- No qualifications necessary but significant experience in counselling and psychological study
- Must be a judge
- Mediation training certificate
- Other (please specify) _____

Q42. Do you think that mediators should have some substantive knowledge in the area of a case being mediated?

- Yes No

Q43. If NO, please give your reasons?

Q44. What do you think about judges sitting as mediators in a court setting?

SECTION 8: PARTICIPATION IN MEDIATION

The following questions are based on the mediation cases in which you have participated and to ask about your attitudes and experiences with mediation.

Q45. In the past 4 years, how many cases have you referred to mediation or were referred by the court for mediation or/and by judge-led mediation? If there are any, state reasons why mediation is preferred to resolve the dispute?

Q46. What is the nature of the dispute involved in the mediation processes above?

Q47. Please list the mediation skills training workshops you have attended in the past 4 years, if any?

Q48. Can you rate your ability in presenting your client's case at mediation process in terms of the following skills and abilities?

1 = Very Adequate 2 = Adequate 3 = Neutral 4 = Less Adequate 5 = Not Adequate

	1	2	3	4	5
Knowledge of the mediation process	<input type="checkbox"/>				
Ability to define the underlying problems behind the dispute	<input type="checkbox"/>				
Ability to identify the issues in the dispute	<input type="checkbox"/>				
Ability to gain trust from clients with confidential information or strategy	<input type="checkbox"/>				
Creative problem solution skills	<input type="checkbox"/>				
Other (please specify) _____	<input type="checkbox"/>				

Q49. Can you relate your experiences at the mediation process in particular your view on how it was conducted and managed?

Q50. Can you tell your attitudes and reactions when your case is referred by the court to mediation service through court annexed mediation?

Q51. Can you tell your attitudes and reactions when your case is dealt with through judge-led mediation where the judge acts as a mediator to resolve the dispute?

Q52. Do you think lawyers play a more prominent role than their client in deciding whether to take matter to mediation or not? Why or why not?

Q53. If the dispute was not settled, why do you think this was the case? Please tick (v) where applicable.

Parties' unrealistic expectation	
Parties refuse to negotiate	
Parties' demands were unreasonable	
Parties were not well advised	
Parties did not act in good faith	
Parties were too far apart	
Other reasons (please indicate)	

SECTION 9: RECOMMENDATIONS

The following questions ask your opinion or suggestion on ways to improve and develop court annexed and judge-led mediation in Malaysia.

Q54. What is your suggestion to make court annexed mediation more efficient?

Q55. What is your suggestion to make judge-led mediation more efficient?

We thank you for your participation,



Appendix B: A semi-structured interview instrument (judge interviewees)



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FACULTY OF BUSINESS AND LAW

"Court Annexed and Judge-led Mediation in Civil Cases: The Malaysian Experience"

INTERVIEW QUESTIONS

(Judge interviewees)

Interview Date: _____

Interviewed by: _____

Respondent position: _____

This study will not attribute any comments to you personally or to your organization, as responses are confidential. The information gathered from this interview will be used for academic purposes only.

RESEARCH QUESTION 1: WHAT ARE THE KEY FACTORS THAT HAVE LED TO THE GROWTH AND DEVELOPMENT OF COURT-ANNEXED AND JUDGE-LED MEDIATION IN MALAYSIA?

1. Could you tell me an overview scenario of mediation practice in Malaysia? Would you say it is predominantly court referred mediation or judge-led mediation?
2. What do you think of court-annexed mediation and judge-led mediation?
- 3 (a) Do you foresee any problems when a case is referred for mediation to a non judicial forum?
(b) Do you foresee any problems when judge mediates case?
4. What do you think are the key factors that have led to the growth and development of court-annexed and judge-led mediation in Malaysia?
5. What do you think are the reasons for the use of court-annexed and judge-led mediation?
6. What do you think are the benefits associated with mediation in comparison to other dispute resolution processes?
7. Do you think that the drafting of Mediation Act leads to a significant development of the practice of mediation in Malaysia?

RESEARCH QUESTION 2: WHAT ARE THE KEY FACTORS THAT HAVE MADE COURT ANNEXED AND JUDGE-LED MEDIATION SUCCESSFUL IN OTHER JURISDICTIONS?

8. Why do you think that court annexed and judge-led mediation have been successful in other jurisdictions?
- 9 (a) One factor which has made mediation successful in other jurisdictions is the reduction of court backlogs. Court-annexed mediation can ease the problem of case backlogs, would you agree? Please explain?
(b) What about judge-led mediation?

RESEARCH QUESTION 3: WHAT ARE THE KEY FACTORS THAT HAVE CAUSED BARRIERS TO COURT-ANNEXED AND JUDGE-LED MEDIATION IN MALAYSIA?

- 10 (a) What do you think are the stumbling blocks to court-annexed mediation?
(b) What about judge-led mediation?
- 11 (a) What do you think will be the general attitudes of the legal communities and the public to court-annexed mediation?
(b) What about judge-led mediation.

12. What do you think are the key reasons for the low response among judges, lawyers and disputants towards court-annexed and judge-led mediation should that being the scenario?
- 13 (a) Have you had any experience of referring and or conducting mediation in your court? What were your personal experiences when you referred case for mediation in particular the attitudes and reactions of lawyers towards the referral and the whole process?
- (b) What about judge-led mediation?
14. Do you think lawyers play a more prominent role than their client in deciding whether to take matter to mediation or not?
15. (a) What are the key factors that you would consider in referring cases for mediation?
 (b) What are the key factors that you would consider in mediating cases in your court?
16. Did you use any standard practice of mediation when mediating cases like facilitative approach or different techniques which involve more intervention such as evaluative and determinative?
17. Do you think by referring parties to mediate (either court annexed mediation or judge-led mediation) may violate their right of access to trial by way of adjudication when they are entitled to it, particularly if they have requested it and would prefer it? Why?
- 18 (a) Do you think that court-annexed mediation is effective in achieving its goal to deliver distributive justice including the delivery of an outcome that:
- is consistent with the rule of law
- is responsive to litigants' needs
- is consistent with the parties' self-determination
- is durable
- maintains or improves relationships
- parties' perceived as fair?
- (b) Do you think that judge-led mediation is effective in achieving its goal to deliver distributive justice including the delivery of an outcome that:
- is consistent with the rule of law
- is responsive to litigants' needs
- is consistent with the parties' self-determination
- is durable
- maintains or improves relationships
- parties' perceived as fair?
- 19 (a) Do you think that court-annexed mediation is effective in achieving its goal to deliver procedural justice which includes:
- A process that is perceived as fair by the parties
- An opportunity for parties to express their views ('voice')
- An opportunity for parties' views to be heard and considered
- Treatment that perceives by parties as dignified and respectful?

- (b) Do you think that judge-led mediation is effective in achieving its goal to deliver procedural justice which includes:

A process that is perceived as fair by the parties
An opportunity for parties to express their views ('voice')
An opportunity for parties' views to be heard and considered
Treatment that perceives by parties as dignified and respectful?

OBJECTIVE 4: TO MAKE RECOMMENDATIONS HOW TO DEVELOP THE USE OF COURT ANNEXED AND JUDGE-LED MEDIATION IN MALAYSIA.

20. What do you think the best strategies to overcome the pitfalls of mediation in the following issues:
- (i) Power imbalances due to unequal bargaining which is exacerbated in the absence of representation.
 - (ii) The lack of procedural safeguards given the flexibility and reduced rules around mediation process.
 - (iii) The lack of reliance on judicial precedent.
 - (iv) Confidentiality/Privilege communication
 - (v) Enforceability of mediated settlement agreements.
21. Do you have any suggestions or strategies how to develop the use of mediation (either court annexed or judge-led mediation)?
- 22 (a) Please give your opinion on how court-annexed mediation can be implemented within the supervision of the court system?
- (b) How about judge-led mediation?
23. Do you think there should be some judicial codes of ethics to provide the necessary ethical structure to support judicial involvement in mediation?
24. Do you think mediation in certain cases should be made compulsory before they can be filed in court or keep mediation as a voluntary process? Why or why not?
25. What cases are most suitable for pre-court mediation?

'We thank you for your participation'



Appendix C: A semi-structured interview instrument (non-judge interviewees)



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SCHOOL OF MANAGEMENT AND INFORMATION SYSTEM
FACULTY OF BUSINESS AND LAW

"Court Annexed and Judge-led Mediation in Civil Cases: The Malaysian Experience"

INTERVIEW QUESTIONS
(Non-judge interviewees)

Interview Date: _____

Interviewed by: _____

Respondent position: _____

This study will not attribute any comments to you personally or to your organization, as responses are confidential. The information gathered from this interview will be used for academic purposes only.

RESEARCH QUESTION 1: WHAT ARE THE KEYS FACTORS THAT HAVE LED TO THE GROWTH AND DEVELOPMENT OF COURT-ANNEXED AND JUDGE-LED MEDIATION IN MALAYSIA?

1. Could you please tell me an overview scenario of mediation practice in Malaysia? Would you say it is predominantly court referred mediation or judge-led mediation?
2. What do you think of court-annexed mediation and judge-led mediation?
- 3 (a) Do you foresee any problems when a case is referred for mediation to a non judicial forum?
(b) Do you foresee any problems when judge mediates case?
4. What do you think are the key factors that have led to the growth and development of court-annexed and judge-led mediation in Malaysia?
5. What do you think are the reasons for the use of court-annexed and judge-led mediation?
6. What do you think are the benefits associated with mediation in comparison to other dispute resolution processes?
7. Do you think the drafting of Mediation Act leads to a significant development of the practice of mediation in Malaysia?

RESEARCH QUESTION 2: WHAT ARE THE FACTORS THAT HAVE MADE COURT-ANNEXED AND JUDGE-LED MEDIATION SUCCESSFUL IN OTHER JURISDICTIONS?

8. Why do you think that court-annexed and judge-led mediation have been successful in other jurisdictions?
- 9 (a) One factor which has made mediation successful in other jurisdictions is the reduction of court backlogs. Court-annexed mediation can ease the problem of case backlogs, would you agree? Please explain?
(b) What about judge-led mediation?

RESEARCH QUESTION 3: WHAT ARE THE KEY FACTORS THAT HAVE CAUSED BARRIERS TO COURT-ANNEXED AND JUDGE-LED MEDIATION IN MALAYSIA?

- 10 (a) What do you think are the stumbling blocks to court-annexed mediation?
(b) What about judge-led mediation?
- 11 (a) What do you think will be the general attitudes of the legal communities and the public to court-annexed mediation?
(b) What about judge-led mediation.

12. What do you think are the key reasons for the low response among judges, lawyers and disputants towards court-annexed and judge-led mediation should that being the scenario?

13. Do you think lawyers play a more prominent role than their clients in deciding whether to take matter to mediation or not?

14. Do you think by referring parties to mediate (either court-annexed mediation or judge-led mediation) may violate their right of access to trial by way of adjudication when they are entitled to it, particularly if they have requested it and would prefer it? Why?

15 (a) Do you think that court-annexed mediation is effective in achieving its goal to deliver distributive justice including the delivery of an outcome that:

- is consistent with the rule of law
- is responsive to litigants' needs
- is consistent with the parties' self-determination
- is durable
- maintains or improves relationships
- parties' perceived as fair?

(b) Do you think that judge-led mediation is effective in achieving its goal to deliver distributive justice including the delivery of an outcome that:

- is consistent with the rule of law
- is responsive to litigants' needs
- is consistent with the parties' self-determination
- is durable
- maintains or improves relationships
- parties' perceived as fair?

16 (a) Do you think that court-annexed mediation is effective in achieving its goal to deliver procedural justice which includes:

- A process that is perceived as fair by the parties
- An opportunity for parties to express their views ('voice')
- An opportunity for parties' views to be heard and considered
- Treatment that perceives by parties as dignified and respectful?

(b) Do you think that judge-led mediation is effective in achieving its goal to deliver procedural justice which includes:

- A process that is perceived as fair by the parties
- An opportunity for parties to express their views ('voice')
- An opportunity for parties' views to be heard and considered
- Treatment that perceives by parties as dignified and respectful?

OBJECTIVE 4: TO MAKE RECOMMENDATIONS HOW TO DEVELOP THE USE OF COURT-ANNEXED AND JUDGE-LED MEDIATION IN MALAYSIA.

17. What do you think the best strategies to overcome the pitfalls of mediation in the following issues:
- (i) Power imbalances due to unequal bargaining which is exacerbated in the absence of representation.
 - (ii) The lack of procedural safeguards given the flexibility and reduced rules around mediation process.
 - (iii) The lack of reliance on judicial precedent.
 - (iv) Confidentiality/Privilege communication
 - (v) Enforceability of mediated settlement agreements.
18. Do you have any suggestions or strategies how to develop the use of mediation (either court-annexed or judge-led mediation)?
- 19 (a) Please give your opinion on how court-annexed mediation can be implemented within the supervision of the court system?
- (b) How about judge-led mediation?
20. Do you think there should be some judicial codes of ethics to provide the necessary ethical structure to support judicial involvement in mediation?
21. Do you think mediation in certain cases should be made compulsory before they can be filed in court or keep mediation as a voluntary process? Why or why not?
22. What cases are most suitable for pre-court mediation?

'We thank you for your participation'



Appendix D: Letter asking for permission to conduct survey to SAA/SLA



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School of Management and Information Systems,
Faculty of Business and Law,
Victoria University,
PO Box 14428 Melbourne,
VICTORIA, 8001, AUSTRALIA

4th December 2009

The President
Sabah Law Associations/Sarawak Advocates Associations,

Dear Datuk/Tuan/Puan,

Re: "Court Annexed And Judge-led Mediation in Civil Cases: The Malaysian Perspective"

Kindly be informed that I am conducting a survey on solicitors and advocates of Sabah and Sarawak to ask about their attitudes and experiences with court annexed and judge-led mediation as part of my PhD program at Victoria University under the supervision of Associate Professor Bernadine Van Gramberg.

The purpose of this research project is to examine the growth and uptake of mediation as an alternative to litigation. This study will also investigate the factors that have led to the development of court annexed and judge led mediation as well as to examine the stumbling blocks to mediation. The project has approval of the University Human Research Ethics Committee.

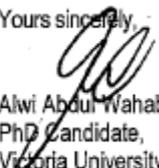
In this regard, I am seeking your co-operation to keep the members of Sabah Bar/Sarawak Bar informed and encourage them to participate in the survey through questionnaires. It is estimated about 100 advocates each from Sabah and Sarawak will be selected randomly to participate in this project.

I also wish to inform you that we will treat the information provided in the survey with confidentiality. The data will be presented in aggregate form in the thesis and will not allow for individuals to be identified.

Your attention and support in this matter is very much appreciated.

Should you have any queries about the research project, please contact my principle supervisor Associate Professor Bernadine Van Gramberg or me using the contact details below.

Yours sincerely,


Alwi Abdul Wahab
PhD Candidate,
Victoria University,
Phone: +61430439511
03 9919 5540
Email: alwi.abdulwahab@live.vu.edu.au

Associate Professor Bernadine Van Gramberg
Chair Education and Research Board,
Victoria University,
PO Box 14428 Melbourne MC Vic 8001
Phone 03 9919 4489 Fax 03 9919 427
Email : Bernadine.VanGramberg@vu.edu.au

Appendix E: Information to participants involved in research (Survey)

 VICTORIA UNIVERSITY	 A NEW SCHOOL OF THOUGHT
INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH (SURVEY)	
YOU ARE INVITED TO PARTICIPATE	
You are invited to participate in a research project entitled 'Court Annexed and Judge-led Mediation in Civil Cases: The Malaysian Experience'. This project is being conducted by a student researcher Mr Alwi Abdul Wahab as part of a PhD study at Victoria University under the supervision of Professor Bernadine Van Gramberg of School of Management and Information System and Professor Neil Andrews, School of Law under the Faculty of Business and Law, Victoria University, Australia.	
PROJECT EXPLANATION	
Mediation has become one of the most prevalent alternative dispute resolution (ADR) processes in recent years. Whilst its use in tribunal settings has had a long history, it now also appears as an alternative to litigation in the courts either through referral to a mediator or by judge-led mediation. Litigation in Malaysia like many parts of the world has been increasing steadily resulting in a serious backlog faced by the court system due to its inability to cope with disposing those cases in a reasonable time and cost. As experienced by other nations, greater use of court annexed mediation could ease the backlog of cases as it is said to be cheaper, quicker, more informal, flexible and can bring creative and long lasting settlements. However, there is resistance to court annexed mediation, often from people within the legal system itself including judges, lawyers as well as disputants. At the same time there are some courts which actively practise mediation either by referral to a mediator or through judge-led mediation. Despite the resistance to court annexed mediation on one hand and its uptake on the other hand in Malaysia there is a dearth of research on the subject. It is in this context that this research investigates the attitudes of stakeholders in Malaysian court annexed mediation in light of the development of the theory and practice internationally as well as to examine the potential stumbling blocks to mediation. Investigating drivers and resistance forces to change in the Malaysian court system will allow us to understand the prevailing attitudes towards court annexed and judge led mediation. Court annexed mediation is when a dispute is referred to a mediation service while judge-led mediation is where the judge acts as a mediator to resolve the dispute.	
WHAT WILL I BE ASKED TO DO?	
You are invited to participate in answering a questionnaire which will take about 30 minutes to complete. The purpose is to gain your opinion in relation to court annexed mediation and judge-led mediation.	
WHAT WILL I GAIN FROM PARTICIPATING?	
The findings of this research will provide a better understanding of the mediation process within the court system as well as the barriers and enablers to court annexed and judge-led mediation in Malaysia	
HOW WILL THE INFORMATION I GIVE BE USED?	
Your information provided in the survey will be treated confidentially. Data will be aggregated in such a way that you would not be identified.	
WHAT ARE THE POTENTIAL RISKS OF PARTICIPATING IN THIS PROJECT?	
Minimum risks have been identified from participating in this project. Throughout the exercise, if you feel uncomfortable or require some form of explanation, please feel free to raise the issue with the researcher. As indicated, you are free not to reveal any information that you think is too confidential to your company or to withdraw at any time. However, you will not be identified as the source or author of any statement. Also, statements or comments will not be used in a way which will enable you to be identified.	
HOW WILL THIS PROJECT BE CONDUCTED?	
Data collection will occur through questionnaires administration, interviews, documentation review and through the international literature. An endorsement to conduct the study has been received both from the Chief Registrar's office of the Federal Court and the Law Reform and Law Revision Division of the Attorney General's Chambers.	
WHO IS CONDUCTING THE STUDY?	
The study is being conducted under the supervision of Professor Bernadine Van Gramberg (Phone: +613 99194489 or email bernadine.vangramberg@vu.edu.au and Professor Neil Andrews (Phone: +613 9919 4640 or email neil.andrews@vu.edu.au). The research is being undertaken by Mr. Alwi Abdul Wahab, (Mobile: +61430439511 or email alwi.abdulwahab@live.vu.edu.au)	
Any queries about your participation in this project may be directed to the Principal Researcher listed above. If you have any queries or complaints about the way you have been treated, you may contact the Secretary, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4781	

Appendix F: Consent form for participants involved in research (Survey)

CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH (SURVEY)



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INFORMATION TO PARTICIPANTS:

We would like to invite you to be a part of a PhD study into alternative dispute resolution particularly mediation, titled; "Court Annexed and Judge-led Mediation in Civil Cases: The Malaysian Experience". As you would be aware, mediation has been influential in the light of its success in other nations. In Malaysia a draft mediation bill has been developed to help ease case backlogs in Malaysian courts. This will be the first large scale study to examine the growth and uptake of mediation as an alternative to litigation in Malaysia. As part of the study we will investigate the driving forces and the resisting forces to court annexed and judge-led mediation. The study will examine stakeholders' perspectives to court annexed mediation and assess the degree of satisfaction with the use of mediation in courts, particularly in relation to the theory of justice as it applies to the formal court system. Specifically, the aims of this research are:

- (i) To trace the growth and the development of court annexed mediation in Malaysia;
- (ii) To determine the key factors which have made court annexed mediation successful in other nations;
- (iii) To identify the barriers and enablers to court annexed mediation;
- (iv) To make recommendations for the use of court annexed mediation in Malaysia.

Your participation in this research is voluntary. This research is a PhD study being undertaken by a student researcher: Alwi Abdul Wahab. If you have any questions about the research please contact: Prof. Bernadine Van Gramberg, on +61399194489 or Alwi Abdul Wahab on +61430439511.

CERTIFICATION BY RESPONDENT

I, _____ (insert your name here)
of _____ (insert your suburb of residence here)

certify that I am at least 18 years old* and that I am voluntarily giving my consent to participate in the study: "Court Annexed and Judge-led Mediation in Civil Cases: The Malaysian Perspective", being conducted at Victoria University by: Professor Bernadine Van Gramberg, Prof. Neil Andrews and Mr Alwi Abdul Wahab.

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by: Mr. Alwi Abdul Wahab

and that I freely consent to participate involving a survey into court annexed and judge-led mediation.

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

I have been informed that the information I provide will be kept confidential.

Signed:

Date:

Any queries about your participation in this project may be directed to the researcher Prof. Bernadine Van Gramberg (Phone: +61399194489, Email: Bernadine.VanGramberg@vu.edu.au). If you have any queries or complaints about the way you have been treated, you may contact the Secretary, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4781

Appendix G: Information to participants involved in research (Interview)



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INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH (INTERVIEW)

You are invited to participate

You are invited to participate in a research project entitled 'Court Annexed and Judge-led Mediation in Civil Cases: The Malaysian Experience'

This project is being conducted by a student researcher Mr Alwi Abdul Wahab as part of a PhD study at Victoria University under the supervision of Associate Professor Bernadine Van Gramberg of School of Management and Information System and Professor Neil Andrews, School of Law under the Faculty of Business and Law, Victoria University, Australia.

Project explanation

Mediation has become one of the most prevalent alternative dispute resolution (ADR) processes in recent years. Whilst its use in tribunal settings has had a long history, it now also appears as an alternative to litigation in the courts either through referral to a mediator or by judge-led mediation. Litigation in Malaysia like many parts of the world has been increasing steadily resulting in a serious backlog faced by the court system due to its inability to cope with disposing those cases in a reasonable time and cost. As experienced by other nations, greater use of court annexed mediation could ease the backlog of cases as it is said to be cheaper, quicker, more informal, flexible and can bring creative and long lasting settlements. However, there is resistance to court annexed mediation, often from people within the legal system itself including judges, lawyers as well as disputants. At the same time there are some courts which actively practise mediation either by referral to a mediator or through judge-led mediation. Despite the resistance to court annexed mediation on one hand and its uptake on the other hand in Malaysia there is a dearth of research on the subject. It is in this context that this research investigates the attitudes of stakeholders in Malaysian court annexed mediation in light of the development of the theory and practice internationally as well as to examine the potential stumbling blocks to mediation. Investigating drivers and resistance forces to change in the Malaysian court system will allow us to understand the prevailing attitudes towards court annexed and judge-led mediation. Court annexed mediation is when a dispute is referred to a mediation service while judge-led mediation is where the judge acts as a mediator to resolve the dispute.

What will I be asked to do?

You are invited to participate in a semi-structured interview. The interview session will take about one and a half hours. The purpose is to gain your opinion in relation to court annexed and judge-led mediation.

What will I gain from participating?

The findings of this research will provide a better understanding of the mediation process within the court system as well as the barriers and enablers to court annexed mediation in Malaysia.

How will the information I give be used?

Your information provided in the interview will be treated confidentially. Your statements or comments may be republished, but not in such a way that you would be identified.

What are the potential risks of participating in this project?

Minimum risks have been identified from participating in this project. Throughout the exercise, if you feel uncomfortable or require some form of explanation, please feel free to raise the issue with the researcher. As indicated, you are free not to

reveal any information that you think is too confidential to your company or to withdraw at any time. However, you will not be identified as the source or author of any statement. Also, statements or comments will not be used in a way which will enable you to be identified.

How will this project be conducted?

Data collection will occur through questionnaires administration, interviews, documentation review and through the international literature. An endorsement to conduct the study has been received both from the Chief Registrar's office of the Federal Court and the Law Reform and Law Revision Division of the Attorney General's Chambers.

Who is conducting the study?

The study is being conducted under the supervision of Associate Professor Bernadine Van Gramberg (Phone: +613 99194489 or email bernadine.vangramberg@vu.edu.au) and Professor Neil Andrews (Phone: +613 9919 4640 or email neil.andrews@vu.edu.au).

The research is being undertaken by Mr. Alwi Abdul Wahab,
School of Management and Information Systems
Faculty of Business and Law
Victoria University
Melbourne, Australia 8001
Mobile: +61430439511

Any queries about your participation in this project may be directed to the Principal Researcher listed above. If you have any queries or complaints about the way you have been treated, you may contact the Secretary, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4781

Appendix H: Consent form for participants involved in research (Interview)

<p>CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH (Interview)</p> <p>INFORMATION TO INTERVIEW PARTICIPANTS:</p> <p>We would like to invite you to be a part of a PhD study into alternative dispute resolution particularly mediation, titled; "Court Annexed and Judge-led Mediation in Civil Cases: The Malaysian Experience". As you would be aware, mediation has been influential in the light of its success in other nations. In Malaysia a draft mediation bill has been developed to help ease case backlogs in Malaysian courts. This will be the first large scale study to examine the growth and uptake of mediation as an alternative to litigation in Malaysia. As part of the study we will investigate the driving forces and the resisting forces to court annexed and judge-led mediation. The study will examine stakeholders' perspectives to court annexed mediation and assess the degree of satisfaction with the use of mediation in courts, particularly in relation to the theory of justice as it applies to the formal court system. Specifically, the aims of this research are:</p> <ul style="list-style-type: none">(i) To trace the growth and the development of court annexed mediation in Malaysia;(ii) To determine the key factors which have made court annexed mediation successful in other nations;(iii) To identify the barriers and enablers to court annexed mediation;(iv) To make recommendations for the use of court annexed mediation in Malaysia. <p>Your participation in this research is voluntary. This research is a PhD study being undertaken by a student researcher, Alwi Abdul Wahab. If you have any questions about the research please contact: Assoc.Prof. Bernadine Van Gramberg, on +61399194489 or Alwi Abdul Wahab on +61430439511.</p> <p>CERTIFICATION BY INTERVIEWEE</p> <p>I, _____ (insert your name here) of _____ (insert your suburb of residence here)</p> <p>certify that I am at least 18 years old* and that I am voluntarily giving my consent to participate in the study: "Court Annexed and Judge-led Mediation in Civil Cases: The Malaysian Perspective", being conducted at Victoria University by: Associate Professor Bernadine Van Gramberg, Prof. Neil Andrews and Mr Alwi Abdul Wahab.</p> <p>I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by: Mr. Alwi Abdul Wahab</p> <p>I freely consent to be interviewed by telephone or in person.</p> <p>I consent to the interview being recorded on audio tape.</p> <p>I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.</p> <p>CERTIFICATION: Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>I have been informed that the information I provide will be kept confidential.</p> <p>Signed:</p> <p>Date:</p> <p>Any queries about your participation in this project may be directed to the researcher Associate Professor Bernadine Van Gramberg ,(Phone: +61399194489 ,Email: Bernadine.VanGramberg@vu.edu.au) If you have any queries or complaints about the way you have been treated, you may contact the Secretary, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4781</p>	 <p>VICTORIA UNIVERSITY</p>	<p>A NEW SCHOOL OF THOUGHT</p>
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Appendix I: Ethics Approval



**VICTORIA
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**A NEW
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THOUGHT**

MEMO

TO A/Prof Bernadine Van Gramberg
School of Management & Information Systems
Footscray Park Campus

DATE 23/12/2009

FROM Professor Michael Muetzelfeldt
Chair
Faculty of Business & Law Human Research Ethics
Committee

SUBJECT Ethics Application – HRETH 09/200

Dear A/Prof Van Gramberg,

Thank you for submitting your final amendments for ethical approval of the project entitled:

HRETH 09/200 Court Annexed Mediation in Civil Cases: The Malaysian Perspective.

The proposed research project has been accepted and deemed to meet the requirements of the National Health and Medical Research Council (NHMRC) 'National Statement on Ethical Conduct in Human Research (2007)', by the Chair, Faculty of Business & Law Human Research Ethics Committee. Approval has been granted until 31 June 2011.

Please note that the Human Research Ethics Committee must be informed of the following: any changes to the approved research protocol, project timelines, any serious events or adverse and/or unforeseen events that may affect continued ethical acceptability of the project. In these unlikely events, researchers must immediately cease all data collection until the Committee has approved the changes. Researchers are also reminded of the need to notify the approving HREC of changes to personnel in research projects via a request for a minor amendment.

If you have any queries, please do not hesitate to contact me at Michael.Muetzelfeldt@vu.edu.au.

On behalf of the Committee, I wish you all the best for the conduct of the project.

Prof. Michael Muetzelfeldt
Chair
Faculty of Business & Law Human Research Ethics Committee

**Appendix J: Approval letter from the Commissioner of Law Reform and Law
Revision of the AG's Chambers, Malaysia**

	<p>JADUAN PEQUAM NEGARA, MALAYSIA ATTORNEY-GENERAL'S CHAMBERS, MALAYSIA BAGIAN PENYEMAKAN & PEMBARUAN UNDANG-UNDANG LAW REVISION & LAW REFORM ARANS, BLOK C, KOMPLEKS C PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN 62512 PUTRAJAYA</p>	
		<p>Tel: 03-88855000 Fax: 03-8889370</p>

Our Ref Date	: PN(SU.2) 1/ref/25 Jld II : 14 August 2009
-----------------	--

Tuan Hj. Alwi bin Hj. Abdul Wahab
PhD Candidate,

c/o Associate Professor Bernadine Van Gremberg
Chair Education and Research Board
School of Management & IS
Footscray Park Campus
Victoria University
PO Box 14428 Melbourne MC Vic 8001
AUSTRALIA

Dear Sir

PERMISSION TO CONDUCT RESEARCH, INTERVIEWS AND
DATA COLLECTION ON COURT ANNEXED MEDIATION

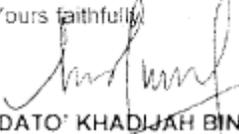
The above matter and your letter dated 29 June 2009 are referred.

2. Pursuant to your request to do research, interviews and collection of data on "Court Annexed Mediation" for your PhD studies at the Attorney General Chambers of Malaysia (AGC), we are pleased to grant you permission to have access to information and documents related to the said subject matter at the Law Revision and Reform Division, AGC. However the permission granted is subject to AGC's policy and the law relating to confidentiality. Copies of any documents are subject to AGC's prior approval and any cost incurred thereto shall be borne by you.

3. Kindly inform us in advance of the date when you expect to commence and the time frame to complete your research at AGC. Lastly, AGC wish you success in your PhD studies.

Thank you

Yours faithfully


(DATO' KHADIJAH BINTI IDRIS)
Commissioner
Law Revision and Law Reform Division
On behalf of the Attorney General of Malaysia

Appendix K: Approval letter from the Chief Registrar of the Federal Court, Malaysia

	PEJABAT KETUA PENDAFTAR <i>Office of the Chief Registrar</i> MAHKAMAH PERSEKUTUAN MALAYSIA <i>Federal Court of Malaysia</i> ISTANA KEHAKIMAN PRESINT 3 62506 PUTRAJAYA	Telefon : 03-88803782 03-88803500 03-88803700 Faks : 03-88803886
	<i>"BUAT KERJA"</i>	Laman Web : http://www.kehakiman.gov.my

	Ruj Tuan :
	Your Ref :
	Ruj. Kami : JK/MP 74 Jld. 5
	Our Ref :
	Tarikh : 30 September 2009
	Date :

Mr. Haji Alwi bin Abdul Wahab
PhD Candidate
Victoria University
PO Box 14428, Melbourne
Victoria, 8001, Australia

Mr,

RE: PERMISSION TO CONDUCT RESEARCH AND FIELD WORK STUDY ON COURT ANNEXED MEDIATION PRACTICE IN MALAYSIA

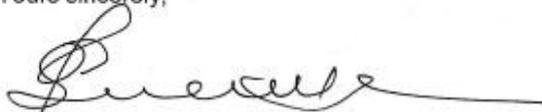
This letter serves to indicate that the approval is hereby granted to the above-mentioned researcher to proceed with the study.

2. The Judiciary supports this effort and will provide any assistance necessary for the successful implementation of this study. I believe that such research is not only beneficial to the Judiciary and your goodself but also contribute towards fulfillment for your thesis. The Judiciary also feels that a research and field work study on court annexed mediation practice in Malaysia is crucial and perhaps the analysis from the study could contribute the betterment of the mediation practice in Malaysian legal system.

3. Hence, the Judiciary endorses the research and field work study to be carried out and will give its full cooperation to make the research a success.

Thank you.

Yours sincerely,



(HASNAH BINTI DATO' MOHAMMED HASHIM)
Chief Registrar
Federal Court of Malaysia
Istana Kehakiman
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Appendix L (1-10): The lawyer respondents' answers to the survey

Appendix L1

Uncategorised responses of 20 respondents who agreed that mediation can bring quicker and fairer settlements as the parties themselves design their terms of settlement

ID	The Respondents' opinions/views
SR75	<i>Parties are allowed to share and speak out on their disputes/disagreements and their proposed terms of settlement and which could be immediately negotiated upon between the parties.</i>
SR3	<i>Usually it is a win-win process.</i>
SR7	<i>The reasons are as per statement in Q10 above.</i>
SR10	<i>There is insufficient awareness.</i>
SR13	<i>They are empowered; one advocate has no application decisive role to play.</i>
SR15	<i>Because the parties do not have to wait for too long and undergo the tedious and protracted cross-exam of them and their witnesses.</i>
SR34	<i>As above - parties can know their respective boundaries.</i>
SR35	<i>It depends on the context of the case and what form of justice either hope to achieve be it procedural justice/emotional justice.</i>
SR36	<i>Both parties would emerge as winners; it's just a matter of how much.</i>
SR38	<i>Parties in dispute negotiate their matter in a win-win situation. However parties must be at arm's length.</i>
SR41	<i>To resolve parties' issues at the early stages of dispute.</i>
SR49	<i>I will say depend on the issue of the dispute.</i>
SR58	<i>It also saves time and costs.</i>
SR62	<i>Experience</i>
SR69	<i>It's effective in cases involving relationships and personal issues. It's less effective where law issues are involved as parties become totally dependent on their lawyers for opinion on the success of their claim.</i>
SR71	<i>Realities set in for the parties.</i>
SR79	<i>Because it is an informal process.</i>
SR82	<i>Less informal environment allows parties to speak freely on what is in their mind hence easier to thrash out the issues among the parties.</i>
SR92	<i>Informality of the process</i>
SR93	<i>Parties get to negotiate</i>

Appendix L2

Mediation settlement is tailored according to the disputants' needs and interests

ID	Respondents opinions/views
SR23	<i>Clients may feel more satisfied if they feel that they have some control in settling the matter.</i>
SR83	<i>Both parties would be able to forward their terms ... and ... address their concerns and issues which they are willing to negotiate and would therefore be in control of the outcome.</i>
SR51	<i>Through mediation, both parties may have a sort of 'common-agreement' as to the terms of settlement.</i>
SR81	<i>If the parties could settle between themselves based on their needs, the process would sure be a lot faster and without dispute on the judgment given.</i>
SR52	<i>The terms of settlement drafted is based on both parties' willingness.</i>
SR54	<i>Mediation is based on mutual understandings. Whatever solution's achieved is based on a two-sided settlement.</i>
SR5	<i>The resolutions achieved are tailored to respective parties' needs.</i>
SR21	<i>It brings about solution that both parties agreed ... through discussion during the mediation. Parties are facing the reality of their respective case.</i>
SR2	<i>If their terms are met and agreed, mediation is quicker and fair to both parties.</i>

Appendix L3

Mediation is quicker and fairer because of the role played by the mediators

ID	Respondents opinions/views
SR32	<i>Mediators can guide parties and bring them back to reality as regards time, costs and continuing uncertainty.</i>
SR20	<i>Parties must be realistic of their own strengths and weaknesses, having the benefit of a neutral third party who makes comment on the merits of the case.</i>
SR28	<i>Open up channels of communication between parties with the assistance of a neutral and impartial mediator.</i>
SR50	<i>After the mediator explains about the advantage or disadvantage of the case, either party can decide whether to go on with the trial or agreed with the offer by the other party.</i>
SR70	<i>At times parties are not willing to look at their next best alternative. Some encouragement is therefore required.</i>

Appendix L4

Parties are aware of their needs and interests

ID	Respondents' opinions/views
SR68	<i>Disputants know what they want on the remedy/quantum of damages.</i>
SR85	<i>Parties expect some results and they are willing to compromise a reasonable outcome.</i>
SR64	<i>They may be able to settle their disputes face to face and come to a final decision and terms of settlement.</i>
SR61	<i>Both parties are well aware on the terms of agreement reached by them ...</i>
SR44	<i>Parties can decide for themselves.</i>

Appendix L5

Mediation settlement is quicker and fairer if parties are consensus

ID	Respondents' opinions/views
SR37	<i>I am more to agree than neutral because if both parties are genuine then that is definitely the direction ...</i>
SR45	<i>It takes both parties to agree.</i>
SR60	<i>Only on the assumption that both parties are willing to compromise.</i>
SR46	<i>At the end of the day it is the parties who must be satisfied.</i>

Appendix L6

Uncategorised responses of four respondents who were neutral on whether mediation can bring quicker and fairer settlements as the parties themselves design their terms of settlement

ID	Respondents' opinions/views
SR17	<i>As stated earlier, it all depends on the view of the parties involved as well as their sincerity.</i>
SR43	<i>Again parties might not be as flexible as proponents for mediation presume. Feelings are not as easily dealt with as presumed. We are dealing with humans here.</i>
SR55	<i>As parties design their terms of settlements based on their needs, there will be a tendency of the terms be change from time to time.</i>
SR84	<i>If proper mediation according to the Rules is done, may be.</i>

Appendix L7

On whether mediation could bring quicker and fairer settlements depend on the nature of cases

ID	Respondents' opinions/views
SR6	<i>One party may be prejudiced. Again dependent on each case.</i>
SR24	<i>Depends on the mediator, legal advisors and circumstances surrounding the case.</i>
SR48	<i>Depends on what type of dispute. Sometimes it seems to prolong matters.</i>
SR65	<i>Differ from case to case.</i>
SR66	<i>Not always unless it is a simple commercial/ construction dispute or between banker/customer.</i>
SR72	<i>It depends on the nature of the dispute.</i>
SR100	<i>Depends on the circumstances of each case.</i>

Appendix L8

Mediation would only be settled quickly according to the parties' own terms of settlement if parties have the desire to settle and compromise

ID	Respondents opinions/views
SR18	<i>Yes, if both parties are willing to compromise. Most of the time, they come to mediation with only one goal, to win against the other party without having to go for trial.</i>
SR22	<i>It depends very much on the parties themselves. Not every lay person involved in a dispute knows how to design their term of settlements.</i>
SR30	<i>Only effective if all parties involved participate in mediation with the common intention/aim of settlement, willingly – otherwise it is a waste of time and resources.</i>
SR97	<i>Depends on both parties' willingness to settle and reconcile the matter, so it might help to bring about quicker and fairer settlement.</i>

Appendix L9

The attainment of a fair outcome in mediation depends on the ability of the mediator

ID	Respondents opinions/views
SR4	<i>Whether fair or not sometimes depend on the image of the mediation as projected by the mediator, e.g., hints of a weak case or weak issue in front of the other party.</i>
SR98	<i>It depends whether the mediator could bring the parties to some kind of consensus. But I do not deny that if the mediator is competent, mediation would serve its purpose.</i>
SR16	<i>It is not always possible to enable parties to settle e.g. if one party is adamant or recalcitrant, unless a mediator is able at private sessions to hammer the point home to the parties with the worst scenario or there are other reasons such as a settlement would cost less if the matter is brought to court. It is an open and shut case, statutory interest at 8% p.a. is payable on the judgment.</i>

Appendix L10

Responses by the 11 respondents who were neutral on whether mediation can ease backlogs according to their categories

ID	Dependent on the disputants' attitudes
SR23	<i>Not necessary if parties are hard and cannot see eye to eye, clients would still revert back to the court.</i>
SR93	<i>Mediation – depending on the attitude of the parties.</i>
SR40	<i>We do need cooperation of all parties involved.</i>
SR55	<i>Yet to be proven, there are parties who insist to proceed with trial as they refuse to settle the matter through consensus.</i>
ID	Dependent on the mediators' role
SR1	<i>To be successful, the mediator must be acquainted with the facts and law. Often the mediator just puts the parties together and hopes for a miracle.</i>
SR44	<i>Mediators, who are not trained, as in most judges, tend to make decisions rather than to help parties to compromise.</i>
ID	Dependent on the disputants' attitudes towards mediator
SR83	<i>Much would also depend on whether both parties believed that the mediator ... is impartial.</i>
SR16	<i>Also the choice of a mediator can also cause delay. The process could be prolonged if parties do not comply with the directions of the mediator.</i>
ID	Dependent on who is the mediator
SR46	<i>Mediation must be handled by a judge ... the decision making factor is faster.</i>
SR76	<i>... Some people need the pressure of a courtroom situation to come to terms with the strengths/weaknesses of their case. Informal mediation may prove to be less effective.</i>
ID	Dependent on the lawyers' advice
SR8	<i>Depends on parties' counsel, whether they are persons of integrity or have a win at all costs mindset.</i>

Appendix PD: Practice Direction No. 5 of 2010



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Our Ref: JK/MA 38 Jld.5

Date : 13 August 2010

All High Court Judges;
All Judicial Commissioners of the High Court;
All Sessions Courts Judges;
All Registrars of the High Courts;
All Magistrates;
All Registrars of the Subordinate Courts;
Malaysia.

Practice Direction No.5 of 2010 Practice Direction on Mediation

1. The Chief Justice of Malaysia hereby directs that with effect from 16 August 2010, all Judges of the High Court and its Deputy Registrars and all Judges of the Sessions Court and Magistrates and their Registrars may, at the pre-trial case management stage as stipulated under Order 34 Rule 4 of the Rules of the High Court 1980 or by order for directions provided in Order 19 Rule 1(1) (b) of the Subordinate Courts Rule 1980, give such directions that the parties facilitate the settlement of the matter before the court by way of mediation.

1.1 The term "Judge" in this Practice Direction includes a Judge or Judicial Commissioner of the High Court, Judge of the Sessions Court, Magistrate or a registrar of the High Court.

2. Objective

2.1 The objective of this practice direction is to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal. The benefit of settlement by way of mediation is that it is accepted by the parties, expeditious and it is final.

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2.2 This Practice Direction is intended to be only a guideline for settlement. The Judge and the parties may suggest or introduce any other modes of settlements so long as such suggestions or directions are acceptable to the parties.

2.3 Advocates and Solicitors shall cooperate and assist their clients in resolving the dispute in a conciliatory and amicable manner.

3. When to suggest

3.1 Judges may encourage parties to settle their disputes at the pre-trial case management or at any stage, whether prior to, or even after a trial has commenced. It can even be suggested at the appeal stage. A settlement can occur during any interlocutory application, e.g. at an application for, summary judgment, striking out or at any other stage.

4. Types of cases

4.1 The following are examples of cases which are easy to settle by mediation, e.g;

- (a) Claims for personal injuries and other damages due to road accidents or any other tortious acts because they are basically monetary claims;
- (b) Claims for defamation;
- (c) Matrimonial disputes;
- (d) Commercial disputes;
- (e) Contractual disputes; and
- (f) Intellectual Property cases.

5. Modes of Mediation

5.1 Mediation may be in the following modes:

- (a) Judge-led mediation; or
- (b) by a mediator agreeable by both parties.

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 counsel, 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.

5.4 The procedure in Annexure A will apply to a judge-led mediation and the procedure in Annexure B will apply if it is referred to other mediator.

6. General

6.1 Agreement to Mediate

(a) When the parties agree to mediate, each of the parties shall complete the mediation agreement as in "Form 1".

6.2 Confidentiality

(a) All disclosures, admissions and communications made under a mediation session are strictly "without prejudice". Such communications do not form part of any record and the mediator shall not be compelled to divulge such records 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.

6.3 Results of Mediation

(a) 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.

(b) Where mediation fails to resolve the dispute, the Court shall, on the application of either of the parties or on the Court's own motion, give such directions as the Court deems fit.

(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.



(DATO' HASHIM BIN HAMZAH)
Chief Registrar
Federal Court of Malaysia
Istana Kehakiman
PUTRAJAYA

c.c

Chief Justice of Malaysia
Istana Kehakiman
PUTRAJAYA

Attorney General of Malaysia
Attorney General's Chambers
PUTRAJAYA

President Court of Appeal
Istana Kehakiman
PUTRAJAYA

Chief Judge of Malaya
Istana Kehakiman
PUTRAJAYA

Chief Judge of Sabah and Sarawak
Istana Kehakiman
PUTRAJAYA

Deputy Chief Registrar
Istana Kehakiman
PUTRAJAYA

Registrar of the Court of Appeal
Istana Kehakiman
PUTRAJAYA