

# COUNTRY REPORTS ON THE JUDICIAL DISPUTE RESOLUTION PROCESS

## 1. Introduction to the country and its legal framework

### (a) Overview of the country's legal system

- i. What is the country's legal system based on? For example, is it based on the civil or common law system, or a hybrid of the two?

Malaysia practises a dual legal system, namely, the common law system and the Islamic legal system. This dual system of law is provided in Article 121 (1) and (1A) of the Federal Constitution.

The application of common law in Malaysia is provided under sections 3 and 5 of the Civil Law Act 1956.

For Muslims in Malaysia specifically, they are subjected to the general law enacted by Parliament as well as state laws of religious nature enacted by the Legislature of each State. These constitutional arrangements are stipulated in the various provisions of the Federal Constitution. Article 74(2) of the Federal Constitution gives the Legislature of a State in Malaysia the authority to make laws on the matters stated in List II (State List) in the Ninth Schedule of the Federal Constitution. (see ***Jabatan Pendaftaran Negara & Ors v A***

***Child & Ors (Majlis Agama Islam Negeri Johor, intervener) [2020] 2 MLJ 277 (FC) at [51]-[55]).***

- ii. How are the courts structured? Are there specialist courts like family courts or constitutional courts?

The Civil courts and the Syariah courts exist side by side in a dual court structure.

## **CIVIL COURT**

Malaysia's civil court structure consists of the Subordinate Courts (governed by the Subordinate Courts Act 1948) and the Superior Courts (governed by the Courts of Judicature Act 1964).

The Superior Courts are made up of the High Court of Malaya, the High Court of Sabah and Sarawak, the Court of Appeal, and the Federal Court.

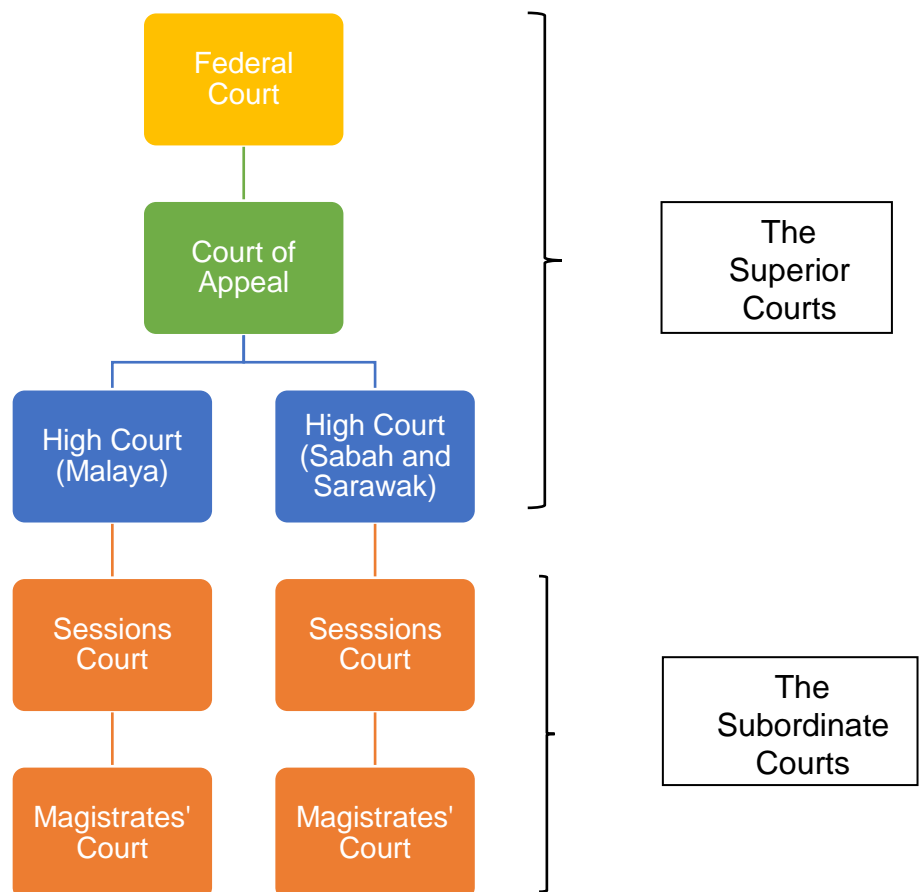
The Federal Court is the highest and final court of appeal. It has appellate jurisdiction, original jurisdiction, referral and advisory jurisdiction.

The Court of Appeal act as an appellate court to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter and to hear and determine any criminal appeal against any decision made by the High Court.

There are two High Courts of co-ordinate jurisdiction and status: the High Court of Malaya for the states of Peninsular Malaysia and the High Court of Sabah and Sarawak for the Borneo states.

The Subordinate Courts consist of the Sessions Court and the Magistrates' Court. The Sessions Court and the Magistrates' Court have general jurisdiction in both civil and criminal matters.

#### The overview of Malaysia's Civil Court Hierarchy



### Constitutional Court

There are no specific constitutional courts in the Malaysian legal system. The general scheme of the Federal Constitution is to empower all courts to interpret the constitution (see ***Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417 (FC)*** at [35]–[36]). The power to interpret constitutional provisions is not exclusive to any court. Even the Federal Court is not a constitutional court but only a final arbiter for all constitutional questions. It is only in a narrow category of exceptional cases — those expressly stipulated in Article 128(1) of the Federal Constitution — that such questions must be determined by the Federal Court at first instance. (see ***Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133 (FC)*** at [236]–[239]).

### Family Court

As for the Family Courts, family disputes are heard by the ordinary civil courts. Applications in relation to the dissolution of marriage and its ancillary issues are dealt with by the High Court. However, there are two specific High Courts referred to as Family Courts to hear family disputes, one in Kuala Lumpur and the other in Shah Alam.

## Special Courts

In Malaysia, special courts were established to deal with specific case type. They are the Construction Court, Environmental Court, Special Criminal Court on Sexual Crimes Against Children (JSKK), Cyber Court, Corruption Court, Intellectual Property Court, and Human Trafficking Court. In other words, these are dedicated courts.

The Court for Children is statutorily constituted under section 11 of the Child Act 2001 to deal with children in conflict with the law, having the jurisdiction to try civil and criminal cases except those punishable with death sentence.

## **SYARIAH COURT**

The Syariah Courts have jurisdiction only over the Muslims in the matters of family law and religious observances.

For the purpose of this report, we will be focusing on the Judicial Dispute Resolutions in the civil courts.

- iii. At which level of the judiciary is the JDR process or elements of that process implemented? To what extent is the JDR process implemented?

The Court-Annexed Mediation was first introduced into the Malaysian Court system in 2010 and various efforts have

been made to expand the use of mediation to the optimum level.

JDR process or more specifically mediation process is implemented in both the High Courts and Subordinate Courts (the Magistrates' and Sessions Courts).

Court-Annexed Mediation Centres are set up in every States in Malaysia and at least one (1) mediator will be placed in each Centre to mediate cases that are referred to the Centre. The list of Court-Annexed Mediation Centres can be accessed through the following website:

<https://www.kehakiman.gov.my/ms/hubungi-kami/senarai-pusat-mediiasi-mahkamah>.

Paragraph 7 of the Practice Directions of the Chief Justice of Malaysia No. 2/2022 ("PD 2/2022") provides that the mediation process can be carried out at any of the following stages:

- (a) during case management before trial;
- (b) during interlocutory application;
- (c) before the full trial;
- (d) during the full trial;
- (e) after a full trial but before a decision is made;
- (f) during the appeal stage; and
- (g) such stage or proceeding as it deems fit.

## 2. Objectives of the JDR process

- (a) What was the impetus for the introduction of the JDR process and the use of dispute resolution modalities?

The impetuses for the introduction of the JDR (in the Malaysian context, the Court-Annexed Mediation) process are as follows:

- (i) to encourage parties who file their cases in court, to use mediation as an alternative dispute resolution and a medium of settlement to resolve their legal disputes, rather than going by the usual trial process;
- (ii) to reduce the backlog of cases in Courts;
- (iii) to create awareness among the litigants that there are alternative ways to resolve their legal disputes other than litigation;
- (iv) to reflect the seriousness of the Judiciary in integrating mediation into the court process; and
- (v) to convey a strong message to the lawyers and litigants alike that mediation is encouraged as part of the civil litigation process.

- (b) What are the objectives and key outcomes of the JDR process?

The objectives and key outcomes of the Court-Annexed Mediation are as follows:

- (i) to create an accessible and approachable mediation centre to enhance the public's access to justice;
- (ii) to develop mediation programs and initiatives that are both relevant and sustainable;
- (iii) to give the parties a platform to resolve any disputes they bring to court by themselves, with the help of a mediator, rather than by way of litigation, thus, fostering party autonomy; and
- (iv) to provide a speedier and cheaper alternative for settlement of disputes and at the same time to assist the courts to dispose of cases.

### **3. Legal framework for the JDR process**

- (a) What is the source of the court's authority to implement the JDR process, including the use of dispute resolution modalities (e.g. legislation, rules of court, practice directions, convention, inherent case management powers, inherent jurisdiction of the court, case law, etc)?



## Legislation

In Malaysia, mediation is governed under the Mediation Act 2012 [Act 749]. This Act seeks to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.

However, this Act is not applicable to Court-Annexed Mediation as pursuant to section 2(b), this Act is not applicable to mediation conducted by a judge, magistrate, or officer of the court pursuant to any civil action that has been filed in court.

## Rules of Court

For Court-Annexed Mediation, reference can be made to **Order 34 rule 2(1A)** and **Order 34 rule 2(1B) of the Rules of Court 2012** (attached as **Appendix 1**) that reads as follows:

***“Pre-trial case management when directed by the Court (O. 34 r. 2)***

*(1) ...*

*(1A) If a judge of the High Court identifies that an issue arising in the action or proceedings between the parties can be resolved by way of mediation, the judge may refer the parties to mediation as prescribed by practice directions issued from time to time.*

*(1B) All running down cases shall be subject to mediation.”*

## Practice Directions

Reference may also be made to **PD 2/2022** that came into force on 1 April 2022.

In gist, **PD 2/2022** provides among others as follows:

- (i) it is compulsory for traffic accident cases to be referred to mediation before they proceed to trial.
- (ii) as for other civil cases, the parties may be referred for mediation on the following methods:
  - A. When it is in the opinion of the court that the matter could be resolved through mediation and the parties agree to the idea; and
  - B. When the parties make a voluntary application to refer their cases for mediation.
- (iii) The court may recommend to the parties to refer their case to Judge-led mediation.
- (iv) All communications made in mediation are confidential.

## Case law

- (i) ***Yap Yin Hing (trading under the name and style of Sunlite Electrical Engineering) v Hexatech Energy International Sdn Bhd and another case [2020] MLJU 1935 (HC)***

In this case, the High Court held as follows on the mediation issue:

- A. Mediation Act 2012 does not apply to Court-Annexed Mediation;
- B. However, pursuant to section 23 of the Evidence Act 1950, mediation matters are privileged and cannot be admitted as evidence in any legal suit.

- (ii) ***Terranova Builders Sdn Bhd (previously known as NisaConsolidated Sdn Bhd) v Repc Services Sdn Bhd (previously known as Ranhill Engineers and Constructors Sdn Bhd) & Anor [2018] MLJU 1995 (HC)***

In this case, the High Court held as follow on the mediation issue:

- A. Mediation is confidential in nature and matters with respect to who were present and what was

said are privileged from disclosure in a court proceeding.

(iii) ***Alex Nandaseri De Silva v Sarath Wickrama Surendre [2016] 7 MLJevi 52 (HC)***

In this case, the High Court held as follows on the mediation issue:

- A. The mediation had failed since there was no agreement in writing which was signed by both parties concerning the terms of the settlement arrived at in the mediation;
- B. The references to the mediation proceedings were inadmissible just like any other case involving correspondences marked 'without prejudice' or other communications to that effect between parties who were attempting to settle a dispute but which did not culminate in a settlement.
- C. All communications made in mediation are confidential pursuant to rule 15 of the Malaysian Mediation Centre's Mediation Rules. Hence, any communications made in mediation were privileged communications and were protected from production during the full trial.

(iv) ***Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors [2013] 7 MLJ 196 (HC)***

In this case, the High Court held as follows on the mediation issue:

- A. In mediation proceedings, the litigants themselves or the decision-makers involved in the claim before the court must personally attend the mediation;
- B. Generally, once a consent order which was arrived at by process of mediation has been properly and regularly drawn up and perfected, that order cannot be altered, varied or set aside in the same action or by the same court except under the slip rule as found in O 20 r 11 of the Rules of the High Court 1980. This is because, the court has no power under any application in the same action to alter vary or set aside an order regularly obtained after it has been entered or an order after it is drawn up. It was held that, upon perfection of the order, the court is *functus officio*. Even another court of coordinate jurisdiction cannot do the same with regard to that order;
- C. An order by consent is evidence of the contract between the parties and is binding on all parties

to the order. In other words, regardless of the fact that the terms of a court order were arrived at by consent, that consent order is nevertheless a judgment of the court which has every force of law;

- D. However, if an express provision for a 'liberty to apply' was incorporated in the consent order, such a term assured the parties that they could approach the court to deal with any matter arising from the implementation of the terms of the consent order;
- E. In determining whether the circumstances warrant a second look at the terms of the order, including one reached by consent, the terms and the conduct of the parties are relevant considerations. The provision of a 'liberty to apply' suggests that parties have expressly reserved their right to return to court for either further orders or directions. This phrase, 'liberty to apply', is a term agreed between the parties giving themselves an opportunity to approach the court again on matters relating to or for the purpose of implementing and giving effect to the order.

(v) ***Sabah Forest Industries Sdn Bhd v Mazlan bin Ali***  
***[2012] 5 MLJ 382 (HC)***

In this case, the High Court held as follows on the mediation issue:

- A. The mediation session should have been terminated once the defendant's counsel withdrew from the session. The withdrawal pointed to one thing; that there was no meeting of minds between the parties. Counsel's withdrawal left the defendant without legal representation which put him at a huge disadvantage. He was deprived of legal advice as to the 'orders' imposed by the judge;
  - B. In a mediation process, the resolution had to come from the parties and not from the neutral third-party mediator. No order could be made by or come from the mediator, nor could there be a right of appeal to the Court of Appeal by the unhappy party to the resolution.
- (b) Are there specific legislation, regulations or other guidelines to enable or allow the judge presiding over the JDR process to carry out judicial mediation, early neutral evaluation or employ other related JDR modalities (which traditionally are not regarded as part of the role of the judge)?

Reference can be made to Order 34 rule 2(1A) and Order 34 rule 2(1B) of the Rules of Court 2012 as well as PD 2/2022 as elaborated in paragraph 3(a).

#### 4. Details of the JDR process

##### (a) Description of the JDR process

- i. What are the characteristics of the JDR process? Which dispute resolution modalities (e.g. early neutral evaluation, judicial mediation) are practised?

At the moment, the JDR process which is available in the Malaysian Court System is the Court-Annexed Mediation. The characteristics of Court-Annexed Mediation in Malaysia are as follows:

- the mediators are amongst the High Court Judges and Judicial Officers who have been certified as mediators;
- it is an alternative to trial;
- it is voluntary in nature (except for running down cases);
- mediation is conducted in the Court Mediation Centre in a neutral and friendly atmosphere to remove the element of pressure on the parties to achieve a settlement;
- the service provided is free of charge; and



- an agreement reached by the parties will be recorded in the form of a consent judgment before the Judges or the Magistrates.
- ii. How is the JDR process carried out? Is the JDR process conducted online? Are technological tools used to facilitate the JDR process?

In 2016, the Mediation Department of the Office of the Chief Registrar, Federal Court of Malaysia (“CR’s Office”) was established to oversee the progress of the practice of mediation in the courts throughout Malaysia.

Among the functions of the Mediation Department of the CR’s Office are as follows:

- (a) to set up a Court-Annexed Mediation Centre in every States;
- (b) to provide training, consultation, and advice regarding the administration of the Court-Annexed Mediation Centre;
- (c) to supervise Court-Annexed Mediation Centre throughout Malaysia; and
- (d) to be a centre for data and information collection for the mediation process in Malaysia.

Prior to the Covid-19 pandemic, mediation was mainly conducted at the Mediation Centre in the physical

attendance of the parties and their lawyers. However, due to the Covid-19 pandemic, mediation was not done physically due to the implementation of the Movement Control Order (MCO). Hence, at present, mediation is conducted online without the physical presence of the parties involved, and for this purpose, a Standard Operating Procedures for Online Mediation has been issued.

In a statement issued by the CR's Office, the online mediation session is an alternative to the mediation conducted at the Court Mediation Centre. The statement further stated that there is no change in the procedure for online mediation procedure and mediation at the Court Mediation Center, except that the mode of communication is different, whereby the online mediation sessions can be conducted using applications approved by parties, such as Skype or Zoom.

For the online mediation to be conducted successfully, each mediator is equipped with technical tools such as a laptop and access to Zoom accounts as subscribed by the CR's Office.

In order to ease the public to understand the procedures for mediation, the CR's Office has issued the Online Mediation Procedures and the procedure for mediation at the Court Mediation Centre. Both

procedures involved pre-mediation, during mediation, and post-mediation processes. The infographic on the procedures can be accessed at the Malaysian Judiciary official portal [www.kehakiman.gov.my](http://www.kehakiman.gov.my)

- iii. Do judges conduct early neutral evaluation and judicial mediation or are these outsourced to third parties?

At present, the Malaysian judiciary conducts Court-Annexed Mediation only where a judge is allowed at the pre-trial case management to refer the parties to mediation if he identifies any issues that can be resolved by way of mediation (Order 34 rule 2(1A) of the Rules of Court 2012).

The PD 2/2022 nevertheless allows the parties to choose whether to have the mediation conducted by a judge or by a registered institution or a private mediator/s of their choice.

(b) Eligibility criteria for the JDR process

- i. Is the JDR process mandatory or optional? Is it mandatory for certain types of disputes only?

Mediation is done on a voluntary basis for all civil matters except for running down cases where mediation

is compulsory according to Order 34, rule 2(1B) of the Rules of Court 2012 and Paragraph 4 of the PD 2/2022.

- ii. When would the court recommend JDR process to parties?

The mediation process can be conducted at any of the following stages of proceedings:

- (a) during case management before trial;
- (b) during the interlocutory application;
- (c) before the full trial;
- (d) during the full trial;
- (e) after a full trial but before a decision is made;
- (f) during the appeal stage; and
- (g) such stage or proceeding as it deems fit.

- (c) Training of judges conducting the JDR process

Judicial officers who have been appointed as mediators are certified as mediators. Currently, there are two (2) incoming mediation workshops to train the High Court Judges, Judicial Commissioners, and Judicial Officers to become certified mediators. These workshops are in collaboration with renowned organizations such as the Asian International Arbitration Centre (AIAC) and the University of Malaya.

(d) Statistics on the JDR process

- i. The Mediation Department of the CR's Office is the centre for data collection on mediation related information, including quantitative data and statistics on the number of cases registered, disposed, and pending, successful and non-successful mediation etc.

Kindly refer to **Appendix 2** for the global statistics of Court-Annexed Mediation Centre 2021.

5. Any other relevant information on the JDR process.

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**LIST OF APPENDICES**

APPENDIX 1	Order 34, rule 2(1A) and Order 34, rule 2(1B) of the Rules of Court 2012
APPENDIX 2	Global statistics of the Court-Annexed Mediation Centre 2021