Introduction

Alternative dispute resolution (ADR) has been widely recognized as a method of dispute resolution. In ancient times, and practised by many religions and customs, ADR was seen as the most practical way in resolving all kinds of disputes especially in non-criminal matters. Whenever they were disputes between two parties, a third party, usually known as arbitrator or mediator, was appointed to resolve the disputes. ADR has also been resorted to in industrial or employment disputes. In many developed countries, ADR has been adopted and practiced to resolve such industrial or employment disputes and the system was said to very successful. In fact, ADR is nothing new in industrial dispute resolution. For example in Malaysia, the conciliation mechanism introduced under the Industrial Relations Act (IRA)1967 is actually a form of ADR. And recently the Industrial Court has introduced the mediation mechanism as an alternative for parties to settle their disputes although their cases are about to be adjudicated by the Chairman of the Industrial Court. In this article the author discusses ADR, especially its conceptual aspect, as a resolution mechanism in industrial adjudication.

Why ADR in employment law?

Why is there a need to suggest ADR in employment law or in particular in industrial adjudication or resolution? Is it not perplexing to suggest a new mechanism where the original system of dispute resolution in employment law was based on the concept of alternative or special dispute resolution, a mechanism that operates outside the mainstream judicial system? For example, the Malaysian Industrial Court was established as an alternative to the mainstream system, applying different principles and procedures. Or can it be contended that the present employment dispute resolution mechanism has failed to work to the extent that the current system another alternative? It is submitted that the Industrial Court has over time been bogged-down with problems that were peculiar to the ordinary courts such as delay and being legalistic. The problems have come to a stage where an alternative method of dispute mechanism ought to be proposed.
There are several reasons for the proposition that ADR needs to be introduced into the resolution system. First, there are delays in the disposal of industrial/employment cases by the Industrial Court. As mentioned in the earlier chapter, the backlog of cases has been increasing each year. Cases take longer time to be disposed. The Industrial Court has been criticized by many quarters that it has failed to achieve its role as a court that is capable of resolving disputes in a speedy manner. Therefore, it is proposed that a mechanism alternative to the Industrial Court ought to be established. A voluntary arbitration scheme for Malaysia is a feasible proposition. Therefore, it is submitted that an alternative dispute resolution such as mediation and/or voluntary arbitration, such as the English ACAS scheme, could be introduced. And it is also submitted that such scheme, although a foreign one, could be viable for Malaysia.

In England, the same reason of delay was the main drive for the introduction of the ACAS scheme. As a background, the Leggat Review of Tribunals had in 2001 announced to 'seek to lay down recommendations to ensure there are fair, timely, proportionate and effective arrangements for handling disputes' n3. Leggat concluded that the increasing workload of the employment tribunals was a matter of concern n4. Following that, the Employment Tribunal Task Force headed by Janet Gamer investigated potential reforms to resolve the government's concerns about the rising caseload n5. The main mission of the Task Force was how to make the services of the tribunal more efficient and cost-effective n6. Although the recommendation was meant for the reforms of the employment tribunal, however its effect has resulted in the establishment of the voluntary arbitration scheme. In the same vein, the Department of Employment Green Paper reviewed the tribunal's operation and considered various options which would relieve pressure on the system and reduce the delays in the disposal of cases n7.

Second, although the Industrial Court was originally based on a principle of informality and non-legalistic, it has now become a court of adjudication which resembles a working of an ordinary court. It can be safely said that the proceeding of the court is not that informal and to a certain degree is quite legalistic. This is because there are rules and procedures that need to be observed and legal representatives invariably advanced legal arguments in the proceedings. Undoubtedly, the presence of legal representation in the Industrial Court has largely contributed to the state of legalism in the proceedings. Since the proceedings of the court are based on the adversarial system, cross-examination of witnesses is a norm. And cross-examination usually entails a court-room battle between the two opposing parties. An arbitration scheme should be devoid of such situation. The proposed ADR proceedings will be operated without cross-examination.

In England, the need for an ADR in employment law was, in fact, first considered by labour academician and lawyers in the early 1980s n8. Since then, and due in part to the 1990s Woolf reforms, its impetus has gathered pace n9. For example, Doyle attributes recent developments, including the unfair dismissal arbitral route to Lord Woolf's Civil Justice Review of 1996: 'Lord Woolf envisaged a new landscape in civil justice, in which people will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using more appropriate means when these are available’ n10. Consequently, a movement towards ADR in employment law was furthered by the provisions contained in the Employment Act (EA) 2002.

Based on the above back-drop, it is submitted that an ADR in Malaysian employment law ought to be seriously considered and such a scheme if it were to be implemented in Malaysia would be able to substantially relieve the case-load of the Industrial Court. As in England where the ADR system concentrates on claims of unfair dismissal, the same arrangement should also be operated in Malaysia. Where the ADR mechanism concentrates on unfair dismissal, the Industrial Court can hear proceedings involving collective agreements and other technical cases. Further, ADR has its benefits particularly in terms of time, cost, confidentiality/privacy and convenience.

On the other hand there is scepticism in using ADR in employment law. In England, some lawyers suggested that ADR was amateurish and could be used as a ‘delaying tactics’ n11. Genn reported that ‘legal profession is still very cautious about using ADR outside commercial practice’ n12. This could be the reason why the level of voluntary take-up of the ADR scheme in England is still modest n13. It is submitted that even if similar scheme were to be introduced in Malaysia, it is very likely that such scheme would be treated with caution. Most litigants would prefer to leave their employment problems to lawyers and the fact that the ADR scheme does not encourage the involvement of
lawyers in its proceedings might not help the promotion of its usage.

However it must be noted that the industrial dispute resolution mechanism in Malaysia already has an element of ADR. As mentioned above, parties who make their representations of dispute to the Industrial Relations Department will have to undergo a process of conciliation handled by the officials of the department. Such mechanism is already in practice and to a certain extent has been successful. But the backlog of cases in the Industrial Relations Department and Industrial Court is still quite high and to overcome the problem, it is submitted that a different mechanism of ADR ought to be introduced.

**ADR -- its meanings and forms**

'Alternative dispute resolution or popularly known as ADR is a device aimed at resolving disputes between parties in a manner so as to find a resolution expeditiously and economically' n14. In its simple meaning, ADR is a method of resolution that is carried out outside the mainstream judicial system which is predominantly based on litigation or adjudication. ADR collectively refers to mediation, conciliation and voluntary arbitration and it describes a situation where a third party in involved to assist the parties in a settlement of their dispute n15. According to Aida, the boundaries of ADR are fixed only by the imagination and creativeness of its providers and their clients n16. Thus ADR can be in the form of a single method or a combination of various methods of dispute resolution as long as it is not in the form of adjudication. ADR has some common attributes: flexible in terms of procedures, quicker resolution, accommodate neutrals with substantive expertise, cordial atmosphere, guarantee confidentiality in the proceedings and results and more participation from the parties n17. In sum, ADR is antithesis to litigation and adjudication. It devoids of situation of a court-room atmosphere and the presence of legal representation is almost non-existence.

On the one hand, it has been argued that ADR should not be associated with arbitration as ADR is an alternative means to resolve disputes besides the avenue of arbitration and the court of law n18. The difference between the two was said to be that in an arbitration, a neutral party is involved in determining the disputes between the parties before him whereas the mechanism of ADR involves a voluntary submission by the parties of their disputes to a 'middle man' whose primary task is to get parties to meet and talk amongst themselves so as to come to an amicable resolution of the disputes between them n19. However, in the context of this chapter, we submit that voluntary arbitration is a form of ADR.

ADR has taken many forms in various jurisdictions all over the world n20. The various forms were coined in terms such as 'rent a judge system', 'mini-trials', 'amicable composition', 'mediation and conciliation'. The 'rent a judge system' is practiced in some parts of the United States where parties refer their disputes to a retired judge who acts as a referee, appointed by the court n21. The referee presides over an informal process and delivers an decision that is however enforceable through the court. The 'mini-trials system' is also practiced in United State where a neutral third person is appointed to conduct a meeting with representatives of the disputants. This three parties form a panel. They will discuss and sort out all the documents and facts involved to find a common ground. Then the representatives will meet again between themselves and try to find a settlement and agree upon it. The outcome of the meeting cannot be disclosed in any subsequent litigation.

The most popular forms of ADR are mediation and conciliation. Some views them as a similar form of ADR, however there are clear distinctions between them n22. In mediation, the mediators assist the parties to reach a settlement of their disputes. In the process, the mediator meets with each of the party and listens to the respective view point and also ensures that the other party understands the views of the other. Once he has satisfied that the parties understand and appreciate each other position and view points, he would seek to bring the parties together in the hope of achieving a compromise agreement. The mediator plays a very passive but subtle role and his ultimate aim is to endeavour that each party will understand the view points of the other party. His role is not very instrusive.

On the other hand, in conciliation, the conciliator plays a more instrusive role. He would ask the parties whether
they want to settle the case or not; he would suggest, cajole or even tell the one of the parties that 'it is better to get something rather than nothing at all'. In conciliation, the conciliator holds a meeting with the disputing parties, listening to their different stance of the matter, take notes and even asks questions. When the session is over, the conciliator may then decide to talk to each of the parties for which they would be prepared to settle the dispute. He would then propose a solution and would draw up a compromise memorandum of agreement. One may still argue that mediation and conciliation are still the same and interchangeable in its use during the resolution process, but we may say however that there is still a distinction between the two, as explained above.

**ADR: A global phenomenon**

The development and usage of ADR has proliferated throughout the world, particularly in developed countries such as United States, Canada, Australia, New Zealand and United Kingdom. International Organisations have also established internal dispute resolutions mechanisms in their constitutions and operations. Driven by these international movements, Asian countries have started to take notice and have been actively promoting ADR in their legal systems. Although still regarded as starters and still far away to replace litigation, Asian economies have begun to introduce and implement ADR as a method of disputes resolution.

Such global phenomenon has affected Malaysia and recent developments indicate that Malaysia is looking forward to place ADR in its legal system. The Malaysian government and the legal fraternity have voiced support and initiated concrete steps towards greater usage of ADR. However, it must be noted that some forms of ADR utilization is not wholly new or unusual to Malaysia. In fact ADR has been widely practiced in the fields of marriage and commercial disputes. Even in cases pertaining to industrial disputes, as indicated earlier, ADR in the form of conciliation is already within the system. However, what is lacking in Malaysia is a greater institutionalization of ADR based on a concrete and scientific theory of dispute resolution through ADR system. Arbitrators and ADR providers in Malaysia are mostly former judges and practitioners who discharge their duties by using their own wisdom and legal experience. There are no formal training and systematic courses on ADR. As such, at the moment it is a big challenge to promote and implement greater utilization of ADR in the Malaysian legal system.

We have seen ADR practised in industrial disputes in some jurisdictions, for example, Australia, New Zealand and Canada. Questions were asked in order to get their perception on arbitration as a mode settling. The success rate was very high where a high number of cases were resolved without resorting to court adjudication. A survey was carried out in Greater London to gauge the perception of the parties involved on employment arbitration disputes. Responses were obtained from 327 employees (42%) and 454 employers (58%) giving a 16% employer bias to the results. From the survey, 35% claimed to know what arbitration was without being prompted. On the positive side, arbitration was perceived as being independent, informal, private, voluntary and free. However, there were drawbacks that included limited right of appeal, it was a new scheme and full with uncertainty and employer might not be interested. Overall, 84% of the sample said they would prefer arbitration to an employment tribunal hearing.

There was success in resorting to mediation in resolving employment disputes in countries such as New Zealand and Australia. Corby notes that in 1996/97, 59% of cases lodged with the New Zealand employment tribunal were settled through mediation. This success is supported by the requirement of mediation in New Zealand legislation. The New Zealand Employment Realations Act 2000 provides that the Employment Relations Authority must "... consider whether an attempt has been made to resolve the matter by the use of mediation; and must direct that mediation ... be used before the Authority investigates the matter". In Australia, the success rate of conciliation is even higher, at 80-90% but the parties are obliged to attempt to settle the matter via conciliation. Likewise, in Malaysia 80% of trade disputes between employers and trade unions were resolved by way of conciliation, but only 37% of dismissal cases filed by individual employees to the Industrial Relations Department were resolved via conciliation. This means that conciliation for individual disputes cases has not been successful in Malaysia, and the majority of dismissal cases were litigated in the Industrial Court.
Mediation

Mediation has been used as a form of dispute resolution for many centuries. In modern western societies it is usually depicted as an alternative form of dispute resolution, and mediation is a prominent feature of the ADR movement. Here 'alternative' denotes qualitative differences to litigation, a set of principles and standards which can be contrasted with those under which the courts operate. In this context, 'alternative' also implies a choice, in the sense of parties deliberately choosing to go into mediation because of its perceived advantages over litigation. Mediation is not easy to define.

This is because it does not provide a single analytical model which can be neatly described and distinguished from other decision-making processes. However there have been attempts by many scholars to define mediation. We will see below that different writers define and describe mediation differently however the gist is still the same. Julie MacFarlane states that 'the process of mediation aims to facilitate the development of consensual solutions by the disputing parties. The mediation process is overseen by a non-partisan third party, the mediator, whose authority rests on the consent of the parties that she facilitates their negotiations. The mediator has no independent decision-making power, or legitimacy, beyond what the parties voluntarily afford her.' Gulliver described mediation as the gradual creation of order and co-ordination between the parties. And according to Judith McCormack and Stan Lanyon, 'the process of mediation is not bound by rules of procedures and substantive law, as as a result, the parties are free to negotiate a settlement in accordance with their own methods and priorities.'

Katherine Stone puts that 'mediation is a procedure in which a neutral third party facilitates communications and negotiations among parties to a dispute in an effort to achieve resolution by agreement of the parties. Mediation is non-binding. One of the essential features of mediation is the neutrality of the mediator. Without neutrality and the attendant trust of the parties, a mediator cannot succeed in resolving a dispute. There is no set format for a mediation. Indeed, one of the appealing aspects of mediation is that the parties can adopt whatever structure they agree is best for their particular dispute.'

Michael Noone said that the essence of mediation was the common-sense that the intervention, by invitation of the parties, of an experienced, independent and trusted person could be expected to help the parties settle their quarrel by negotiating in a collaborative rather than adversarial way. Folberg and Taylor described mediation as a process by which the participants, together with assistance of a neutral person or persons, systematically isolated disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. The table below summarily demonstrate the principles of mediation vis-a-vis litigation.

| Table 1 |
|---|---|
| **Contrasting principles between litigation and mediation** | **Mediation** |
| Litigation | Rights enforcement |
| Interests accommodation | Value creating |
| Value claiming | Voluntary and consensual |
| Coercive and binding | Procedural flexibility |
| Due process of law | Widely participatory |
| Privity of involvement | In formality |
| Formality | Norm creating |
| Norm imposing | Situational and individualized |
| Consistency and precedential | |
The Malaysian Minister of Human Resource proposed that a mediation system be introduced as an alternative to the Industrial Court system. The idea behind this court-annexed mediation system was mooted by the Minister as to lighten the burden of the Court that has been over-loaded by increasing number of cases. The Minister suggested that the Court's Chairmen to conduct the mediation to reach a settlement between the parties. However there was a view from a practitioner that such proposal would be inconsistent with the concept of justice especially where the mediation fails and the Chairman sits to adjudicate the case in the Industrial Court. His mind would then be clouded with facts which he has already known during the mediation process. It is admitted that this situation could be so if the the same Chairman who holds the mediation also presides over the same case in the Industrial Court's proceeding. However, if the Chairman who holds the mediation does not preside over the same case -- a in the event that the case has to be pursued in the Industrial Court -- such trepidation that it would cause injustice would be quite baseless.

Currently the Malaysian Industrial Court has in fact adopted and implemented mediation prior to adjudication. This court-annexed mediation is conducted by the Industrial Court's Chairmen. Upon agreement of both parties, mediation will be carried out by one of the Industrial Court's Chairmen, and if no settlement is reached between them the case will proceed with hearing to be heard by a different Chairman. According to the Registrar of the Industrial Court, the success rate of mediation practiced in the Industrial Court now has been fairly low. One of the reasons of such low rate of success is because the scheme is still in its infancy and arguably, the parties believe that the remedy that they would obtain in adjudication is higher than mediation. Since this mediation is an annexed-court arrangement, parties are represented by lawyers during the mediation. Experience has showed that mediation is not very likely to succeed with the presence of litigation lawyers. It must be borne in mind that mediation as a mode of dispute settlement is both a science and art that has to be learned and nurtured in a society for a long period. Every member of the society must accept it as a way of settling a dispute and he or she must understand his or her role in mediation. However, failure of settling a dispute by way of mediation at this infancy stage should not mean that ADR has no place in industrial dispute resolution.

**Voluntary Arbitration**

Voluntary arbitration is where the parties by consent willingly refer their disputes to an arbitrator who will arbitrate their dispute without being bound by the normal rules of procedures or evidence. At the end of the arbitration proceeding however, the arbitrator will make a decision and his decision will bind the parties. There was an attempt in England to divert some of the disputes especially relating to unfair dismissals from the tribunal system. A new scheme, which is based on the concept of voluntary arbitration is used as an alternative to the current system.

In England, the Employment Rights (Dispute Resolution) Act (ER(DR)A) 1998 provides a scheme for ACAS voluntary arbitration of unfair dismissal. The main focus of interest in the Act is that in certain cases where the parties so agree, ACAS rather than the employment tribunals should have a role in adjudicating unfair dismissal claims. This Act enables ACAS to prepare a scheme for arbitration of unfair dismissal claims that could otherwise be brought before a tribunal. The main thrust of the scheme is that where the parties to an unfair dismissal claim agree in writing to submit the dispute to arbitration, ACAS will refer the claim to an arbitrator. Since the majority of claims at the employment tribunals are on unfair dismissal claims, this scheme emphasized on them. It was believed that if most cases of unfair dismissal claims could be resolved and disposed, the backlog in the employment tribunals would be
substantially reduced. The scheme also envisages in entertaining claims of non complex nature. It is not suitable to hear cases which involve complex issues such as on human rights or employment rights.

The 'jurisdiction' of the arbitration scheme derived from a compromise agreement or a reference by the ACAS conciliation officer. It needs to be noted however that this scheme protects claimants from being pressured by any means to resort to the scheme. That is the reason why a compromise agreement or a conciliated settlement between the parties becomes the basis of the scheme. Its operation is triggered only when ACAS receives a copy of the compromise agreement or conciliated settlement \(^5\) . The ACAS arbitral scheme launched in May 2001 \(^5\) has established clear guidelines for the arbitrators, under which they will be able to decide whether the dismissal is fair or unfair, and to award a remedy such as reinstatement, re-engagement or compensation. It is not however expected, for this scheme to deliberate on jurisdictional matters, which are considered technical and question of law such as on whether the claimant is an 'employee' or not. If such a question were to arise, then parties would consider whether to refer it to an employment tribunal.

The scheme will appoint arbitrators who are not necessarily lawyers. They are to be responsible for the conduct of hearings, and the parties will be allowed to be represented and to call witnesses \(^5\) . The approach will be inquisitorial and there will be no direct cross-examination although questions may be put through an arbitrator. \(^5\) To ensure that there is privacy, the decision of the arbitrator will be issued directly to the parties. This is in contrast to the employment tribunal where the proceedings and decisions are open and made public. Generally speaking, the scheme does not contemplate an appeal either on point of law or fact. However, if a party feels that there is 'serious irregularity' in the conduct of the arbitrator or substantive jurisdictional issues, an appeal can be made to the High Court.

**ADR and Human Rights Issues**

It is pertinent to discuss the related issue of ADR and human rights. This issue was raised in England vis-a-vis the voluntary arbitration scheme in particular the protection accorded by the provisions in the UK Human Rights Act 1998 and the European Convention on Human Rights. The question was whether the characteristics of such a scheme contradicted with the protection accorded by those documents. It is submitted that the concern arose because the decision of the arbitrators was binding on the parties which was quite unusual in other arbitrations or ADR. Such binding decision was the result of a proceeding which was said to be devoid of common procedure of trial such as cross-examination of witnesses and appeal to a higher judicial body \(^5\) .

The main issue raised was on the manner the proceedings were conducted. As indicated above, the ACAS arbitration proceedings were based on the inquisitorial approach where parties were not permitted direct cross-examination of witnesses. The attack on the scheme from the human right perspective was that parties did not have the advantage of examining witnesses directly and hence were denied to a fair hearing \(^5\) . However, Lewis and Clark argued that fairness would not be compromised just because the inquisitorial approach was adopted. They alluded that adversarialism simply implies that 'one party should be allowed to comment upon the evidence and arguments of the other party with a view to influencing the eventual decisions' \(^5\) , and parties since in an inquisitorial system are still permitted to comment on each other's evidence and to put questions through the arbitrators, they submitted that the requirements surrounding to the right of fair hearing would still be met \(^5\) .

Perhaps the concern pertaining to the implementation of this scheme is the manner the arbitrator reaches his decision. In an employment tribunal, the judge is guided by statutory procedure and evidence whereas under this scheme, the manner in which the arbitrator arrives at his decision is shrouded with unclear terms of reference. Thus the main issue that arises here is the standard of fairness. How can the arbitrator be fair, or be seen to be fair, when his decision is based on 'vague' considerations, and not to mention the varied approaches among the arbitrators. The scheme says that the arbitrator's terms of reference require the issue of fairness to be determined by 'general principles of fairness and good conduct in employment relations'. Thus, it is unlikely that this will differ from the general principles in the ACAS handbook, *Discipline at Work*, which is also referred to by employment tribunals. Therefore, the skepticism that the arbitration scheme is less fair than the employment tribunal is unfounded.
If this sort of scheme were to be implemented in Malaysia, will it raise the same issue of human rights? Will similar voluntary arbitration schemes that have binding effect on the parties raise issues of human rights where at the same time the Industrial Court is still operating? Will the scheme be considered as inconsistent with the Federal Constitution under the doctrine of equality? There are possible issues that may arise because there might be accusation that the scheme encourages a sense of discrimination between parties who seek a claim for unfair dismissal and other types of claims. Under the proposed scheme, most cases of unfair dismissal, which involves individual employees, will be referred to the arbitration scheme whereas the other claims such as pertaining to collective agreements will be referred to the Industrial Court.

A question arises whether such linking to human right issues would be of any significance to Malaysia. It is submitted that if the arguments as in several decisions of Justice Gopal Sri Ram were raised - which were grounded on the point of equality as enshrined under the Federal Constitution - then the establishment of this voluntary arbitration scheme might be attacked on the same ground. In particular, it would be argued that this scheme lacks much of 'the elements of the adversarial and natural justice' that are contained in the ordinary adjudication system. However, a slight difference between Malaysia and England in this respect is that we have a written constitution whereas in England they have the Human Rights Act 1998 and the European Convention of Human Rights that govern possible acts of discrimination. But even in England, the argument that the ACAS voluntary arbitration scheme is inconsistent with the doctrine of human rights has not found much support. The failure of such argument is because resort to the ACAS scheme is not compulsory; it is just an alternative to the employment tribunals. Furthermore, the operation of the scheme is grounded on a compromised agreement between the disputing parties, although in some occasions the conciliated officers may recommend a case to the arbitrators.

What is the difference between employment arbitration and a tribunal hearing?

This question is pertinent as we have to demonstrate that there are material differences between the two systems, otherwise the establishment of another system will just add to the extra burden on the national budget. The ADR system must be able to provide not only an alternative mechanism but also an effective one. Such differences and benefits are important especially when we propose the establishment of the arbitration scheme in Malaysia. The new ADR system must be the answer to the problems of back-log cases in the Industrial Court. In England, the differences between employment arbitration and tribunal hearing were demonstrated, to show not only the differences but also the perceived advantages. The table below demonstrates the differences between the two systems:

Table 2

<table>
<thead>
<tr>
<th>Employment tribunal versus Arbitral scheme</th>
<th>Employment tribunal</th>
<th>Arbitration scheme</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing before a legally qualified chairman and panel of other members</td>
<td>Public hearing at tribunal venue</td>
<td>Private hearing at either an ACAS office, a hotel or the employer's premises</td>
</tr>
<tr>
<td>Witnesses cross-examined under oath as in a court</td>
<td>Hearing normally completed in a day</td>
<td>Hearing normally completed in half a day</td>
</tr>
<tr>
<td>Legal representation of the parties in</td>
<td></td>
<td>Hearing before a single ACAS appointed arbitrator experienced in industrial relations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Informal questions through the arbitrator</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Legal representation permissible but</td>
</tr>
</tbody>
</table>
a large number of cases afforded no special status
If dismissal found to be unfair, remedies of reinstatement, re-engagement or compensation
Hearing and decision in public
Appeals on point of law and power to review decisions

In analyzing the differences between the two mechanisms, Professor Bill Rees identified several benefits from the usage of the arbitral scheme: informality, speed, 'value for money', user-friendliness, flexibility, absence of legalism and confidentiality n63. It is submitted that some of these features are actually the original aims of the employment tribunals, but over time they have obliterated and resemble more of the court proceedings. Further, Rees points out in his analysis, that ACAS has not claimed that the scheme is better, only that it is different and that it offers parties a choice n64. Perhaps the cautious statement was made as such because what would be regarded as advantage by a person may possibly be considered as disadvantage by another.

Conclusion

From the foregoing discussion, it is concluded that alternative dispute resolution is the current accepted practice, especially in developed countries. And it is a way forward for dispute resolution in some developing countries, including Malaysia. The benefits that it can offer as a method of resolving disputes are immense. Actually, ADR in industrial or employment dispute mechanism is not something new. In Malaysia, the conciliation process under ss 18 and 20 of the IRA 1967 is already a form of ADR and it has thus far managed to resolve many disputes particularly under s 18. However, the proposition in this article go beyond the traditional form of conciliation undertaken under that sections. The ADR that is proposed above pertains to mediation and/or voluntary arbitration scheme that will be an alternative to the Industrial Court. If this proposition is accepted, we can safely say that half of the case-load in the Industrial Court will go to the mediation or arbitration scheme. This will consequently minimize the burden of the Industrial Court particularly in dismissal cases and to a large degree will manage to solve the problem of back-log at the Industrial Court.

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FOOTNOTES:

n1 Associate Professor, Faculty of Law, Universiti Kebangsaan Malaysia.
n2 See above discussion on the scheme, p 11.
n4 Ibid.
n5 Secretary of State, Mrs P Hewitt, MP (www.employmenttribunalssystemtaskforce.gov.uk/news.htm).
n6  Ibid.


n13 Ibid.


n17 A detailed analysis of these methods can be found in Stephen Goldberg, Frank Sander & Nancy Rogers, Dispute Resolution: Negotiation, Mediation and Other Processes (3rd Ed, 1999).


n19 Ibid.

n20 Ibid.

n21 Ibid.


n24 Such as WTO, WIPO and World Bank.


n27 Even in some local universities including Faculty of Law, Universiti Kebangsaan Malaysia, ADR has only recently been taught as a course. See Syed Khalid Rashid, 'The Importance of Teaching and Implementing ADR in Malaysia', [2000] 1 Industrial Law Reports.

n28 For Australia, see Jill Earnshaw and Stephen Hardy, 'Assessing an Arbitral Route for Unfair Dismissal', ILJ 2001, 30, p 289.

n29 Ibid.


n32 Ibid.

n33 Ibid.

n34 From statistic issued by the Department of Industrial Relations on conciliation conducted by the department in 2003.


n38


n45  Michael Noone, Essential Legal Skills - Mediation, pp 5.

n46  Datuk Dr. Fong Chan Onn, Minister of Human Resources, Malaysia: in Roy Rajasingham, "Is Industrial Court Adjudication on the Right Track?", Infoline, Malaysian Bar Council Newsletter, April 2004, pp. 10

n47  Started in August 2004.

n48  The author's unstructured interview (via telephone) with the Registrar of the Industrial Court on the 25 January 2005.

n49  From the author's interview with Mr Anand Ponnudurai (27 January 2005) , Deputy Chairman of the Bar Council Industrial Court Practice Committee and also an industrial lawyer, he was of the opinion that some Chairmen do not know how to conduct mediation. He noted that mediation is a good idea, but the way it was practiced was not a real practice of mediation. Mr Sivabalah (interview on the 31 January 2005) a prominent industrial lawyer, on the other hand, was of the opinion that the Industrial Court should not conduct mediation. It would be a sheer waste of time; it should be handled by a completely different entity.

n50  Since the scheme is still new in England, there has been no case or judicial pronouncement that emanates from it.

n51  Chris Chapman et al, ADR in Employment Law, pp.6

n52  See above on the 1998 Act and EA 2002.


n54  Chris Chapman et. al, ADR in Employment Law, pp 7

n55  Ibid

n56  However, an appeal on limited issue may be made to the High Court.

n57  Chris Chapman et.al., ADR in Employment Law, pp 10.

n58  Ibid.


n60  See for example Hong Leong Equipment v. Liew Fook Chuan [1996] 1 MLJ 481.

n61  See ACAS pamphlet, 'Choosing One Arbitration Scheme'; Appendix 1 of the ACAS Guide; Lewis and Clark, 2000.

n62  Chris Chapman, et.al, ADR in Employment Law, pp 53.

n64  Ibid.