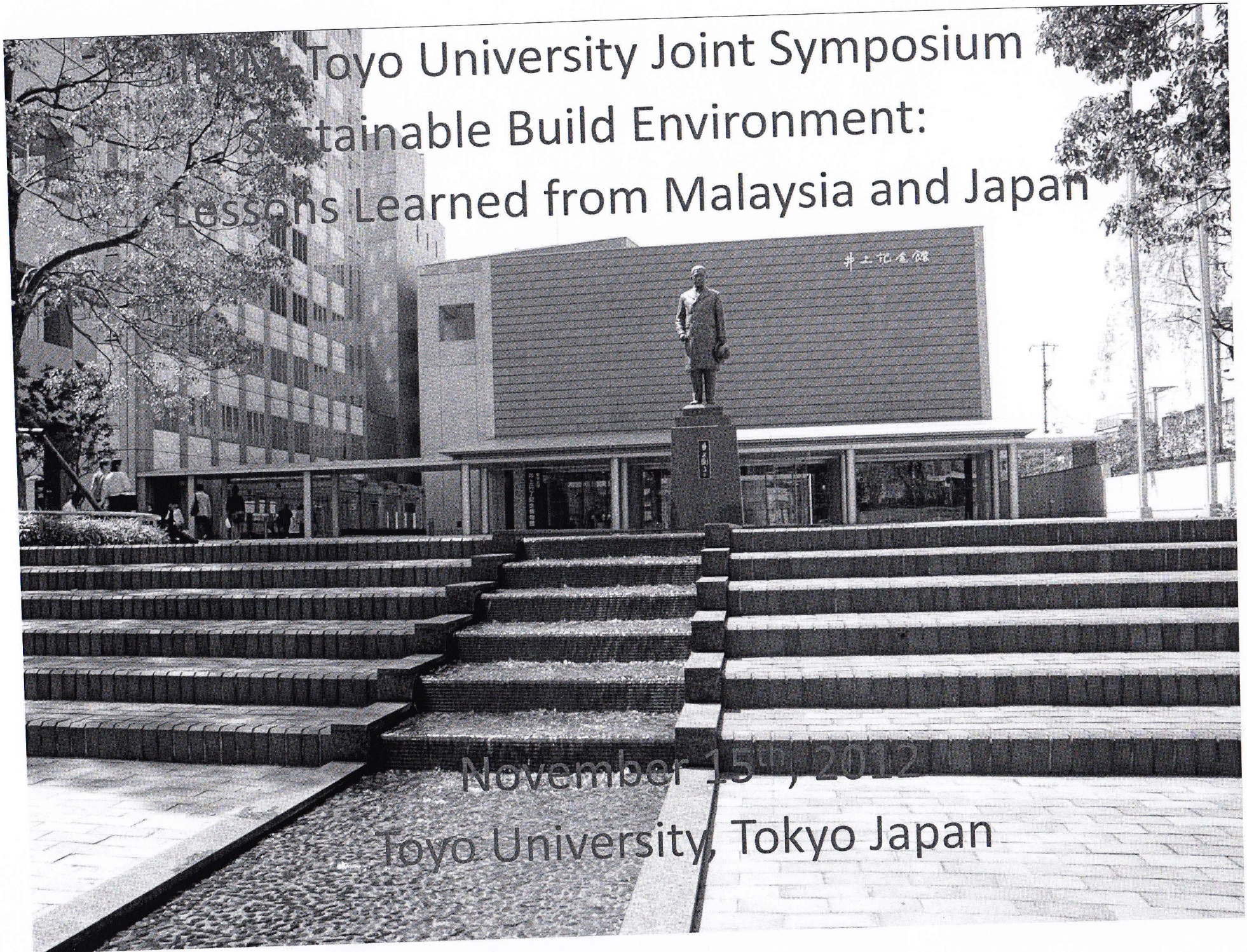

UTM – Toyo University Joint Symposium

Sustainable Build Environment:

Lessons Learned from Malaysia and Japan

November 15th, 2012

Toyo University, Tokyo Japan

IIUM – Toyo University Joint Symposium
Sustainable Built Environment: Lessons Learned from Malaysia and Japan
15th November 2012

TIME	VENUE: SKY HALL			
9.00am	**Plenary session 1**: Master of ceremony: Prof Sam Tabuchi -opening remarks by the President of Toyo University, Prof. Makio Takemura -opening remarks by the IIUM representative, Prof. Sr. Dr. Khairuddin Abdul Rashid			
9.10am	**Break 1**			
	SKY HALL	**Moderator**	**MEETING ROOM NO. 1**	**Moderator**
9.20am	**(1a) Dr Azila Ahmad Sarkawi, Nurul Aida Salim, Prof. Dr. Alias Abdullah** Islamic built environment vis.a vis. sustainable development: an overview	**Prof. Sang-Kyun Ahn**	**(1b) Dr Aniza Abu Bakar & Dr Noor Aziah Mohd Ariffin** The effect of ground surfaces-material,color & texture towards the adjacent thermal environment: A case study of plazas in Putrajaya, Malaysia	**Prof. Tsutomu Fukute**
9.40am	**(2a) Prof. Toshinobu Fujii & Ms Jung-Yeon Hwang** Formation of Multi-habitat toward Sustainable Asian Mega City		**(2b) Prof. Toshiya Aramaki** Potential of Greenhouse gas reduction and city's characteristics	
10.00am	**(3a) Prof. Dr. Hunud Abia Kadouf & Dr. Umar A. Oseni** Comparative dispute management in land disputes: Court-annexed ADR in Malaysia and Japan		**(3b) Dr Shamzani Affendy Mohd. Din & Nor madihah Mohamed Aminuddin** Airborne particulates matter (PM10 & PM2.5) exposure assessment towards building occupants at KL Sentral,Kuala Lumpur, Malaysia	
10.20am	QnA		QnA	
10.30am	**Break 2**			

10.40am	**(4a) Dr Nurul Syala Abdul Latip & S.Shamsuddin** The process of redeveloping waterfront as a public place: Efforts towards a more sustainable city	**Dr. Aniza Abu Bakar**	**(4b) Prof. Sr. Dr. Khairuddin Abdul Rashid** Review on the implementation of PPP in Malaysia	**Dr Azila Ahmad Sarkawi**
11.00am	**(5a) Prof. Sang-Kyun Ahn** Planning Implications of the Return of Population to Central Tokyo		**(5b) Prof. Tsutomu Fukute** Role of sustainable infrastructures	
11.20am	**(6a) Dr Nor Asiah Mohamad, Sharifah Zubaidah Syed Abdul Kader & Zuraidah Ali** *Waqf* lands and challenges from the legal perspectives in Malaysia		**(6b) Dr Khalili Khalil & Azrin Mohd Din** Towards a framework of factors that influence energy efficiency of an airport's air conditioning system	
11.40	**(7a) Prof. Dr. Kamaruzzaman & Prof. Dr. Ahmed Jalal Khan Chowdhury, Shahbuddin, Norhafizah** Bio accumulation of heavy metals in mangrove plant *Rhizophora apiculata* from Tanjung Lumpur, Kuantan, Malaysia		**(7b) Dr Nor Zalina Harun, Dr Nurul Syala Abd Latif & Dr Mazlina Mansor** Typology & Evolution of Urban Open Spaces in Kuala Lumpur City Centre	
12.00	**QnA**		**QnA**	
12.10noon	**Break 3**			
12.20pm	**Plenary session 2: Moderator: Prof. Sr. Dr. Khairuddin Abdul Rashid** -introduction of both Universities -exchange of opinions on future collaboration -lunch and further opinion exchange			

IIUM-Toyo Joint Symposium 2012. Sustainable Built Environment: lesson learned from Malaysia and Japan

COMPARATIVE DISPUTE MANAGEMENT IN LAND DISPUTES: COURT-ANNEXED ADR IN MALAYSIA AND JAPAN

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ABSTRACT

This paper provides a comparative study of sustainable dispute management practices in Malaysia and Japan. With a focus on land-related disputes, the tangible and measurable objectives of the study include the identification of common trends in court-annexed dispute management in Malaysia and Japan; sustainable practices in court-annexed ADR that would engender prudent land management; the rate of out-of-court settlement in land disputes and its impact on the interest of the parties and ends of justice; and some unique trends the two countries can learn from each other to ensure a sustainable case management programme for land-related disputes. This study utilizes both the doctrinal research method and the empirical method for the Japanese and Malaysian aspects respectively to establish the common trends between the two jurisdictions. The study is expected to show that a comparative study on court-annexed dispute management between the two Asian countries can help in defining new directions in law reforms for sustainable land disputes management in the two jurisdictions. Such settlement would bring about mutual satisfaction among the disputing parties, avoidance of appeal backlogs, and foster a sustainable peace within the environment.

Keywords: land disputes; sustainability; dispute management; Malaysia; Japan

1 Introduction

The complex web of relationships within the ecosystem in the built environment is often prone to inevitable disputes of different dimensions. In order to ensure a harmonious relationship of all the components of the built environment, sustainable practices are required to effectively manage emerging conflicts within the environment albeit through formal and enforceable processes. While providing access to justice through the creation of a sustainable environment for development to thrive, there has been significant development in court-annexed Alternative Dispute Resolution (ADR) processes to effectively manage land disputes in the modern world (Rashid, 2002). Against this backdrop, this paper provides a comparative study of sustainable dispute management practices in Malaysia and Japan with particular reference to land disputes.

With a focus on land-related disputes, the tangible and measurable objectives of the study include the identification of common trends in court-annexed dispute management in Malaysia and Japan; sustainable practices in court-annexed ADR that would engender prudent land management; the rate of out-of-court settlement in land disputes and its impact on the interest of the parties and ends of justice; and some unique trends the two countries can learn from each other to ensure a sustainable case management programme for land-related disputes.

This study utilizes both the doctrinal research method and the empirical method for the Japanese and Malaysian aspects respectively to establish the common trends between the two jurisdictions. For the doctrinal aspect, a number of theoretical constructs□are gleaned from related literature including case law and relevant statutes from the two jurisdictions under study to establish their practical implications in ensuring sustainability through land dispute management. The study is expected to show that a comparative study on court-annexed dispute management between the two Asian countries can help in defining new directions in law reforms for sustainable land disputes management in the two jurisdictions. Such settlement would bring about mutual satisfaction among the disputing parties, avoidance of appeal backlogs, and foster a sustainable peace within the environment.

Against the above backdrop, this article is organized into five major sections. The next section gives a general historical background on ADR in Malaysia and Japan with special reference to court-annexed ADR. Section III examines the nature of land disputes and the relevance of ADR in ensuring sustainability in the management of land disputes. In section IV, we examine common trends in court-annexed dispute management in both jurisdictions. The penultimate section reviews a number of best practices in some countries that have

developed key institutions for proper management of land disputes.

While reasonable steps have been taken to cover the scope of this study, there are however some limitations relating to the Japanese aspect of the research. Absence of full text of the relevant legislations as well as law reports of relevant cases in the High Court of Japan in English limited the extent of the study.

2 Historical Background of ADR in Malaysia and Japan

Being part of the traditional Asian culture from the time immemorial, amicable dispute resolution has been the norm in this part of the world. There is no doubt that most Asian communities, though based on their individual peculiarities, have a common culture of informal third party settlement of any dispute that arise in the course of normal human relationships (Funabashi, 2003). Hence, in tracing the historical background of informal ADR in Malaysia and Japan, a brief overview of cultural practices related to amicable dispute settlement is necessary. In doing this, a parallel approach is adopted without necessarily comparing the age-long practices of dispute settlement in the two jurisdictions.

2.1 Malaysia

In spite of the multicultural-cum-multireligious composition of Malaysia, there are overarching traits in the customary practices in each of the major races in the country. Notable examples are found in the Malay, Hindu and Chinese traditions which many believe is a major factor that has positively contributed to the social harmony and relative tolerance experienced in the country, particularly within the past four decades (Oseni, 2010). In highlighting some practices in the customary practices of the major three races in Malaysia, Rashid (2004) summarizes the foundations of amicable settlement of disputes in the religious leanings: "The idea behind ADR was known and recognized by nearly all the civilisations, particularly those in Asia ... In the past, civilisations such as Chinese, Hindu or Islamic always preferred compromise over confrontation" (Rashid, 2004: 96). One does not need to trace the history and dynamics of each of the major races in Malaysia to establish their age-long practices that seek to promote amicable settlement of disputes. Few examples would suffice to drive home the point on the correlation between amicable settlement of disputes and traditional customary practices of the three major races in the country.

Recent trends in the gradual institutionalization of the customary practices through enabling or subsidiary legislations have been widely embraced, particularly among the Malays (Ahmad, 2010). Apart from the court-annexed ADR framework of the Sharī'ah court which has been very efficient in resolving family disputes, significant reforms have been recorded in the civil court in Malaysia (Abdul Hak & Oseni, 2011). Besides the informal mediation sessions that were independently carried out by some judges in the High Court and even at the appellate stage at the Court of Appeal, there was a gradual institutionalization of such processes within the court system. This brought about the issuance of the Practice Direction No. 5 of 2010 on Mediation. This was introduced to clear the backlog of cases in the court through an accelerated procedure that does not compromise justice and fairness (Mathew, 2011: Mohamed, 2010). Land cases are being litigated almost every other day in the High Court. Table 1 below shows the number of reported and unreported judgments on disputes decided under the National Land Code 1965. These data were mined from the LexisNexis Malaysia based on the available cases reported on the database.

Table 1: Number of Land related Cases Decided under the National Land Code from 2001 to 2011

Year	High Court	Court of Appeal	Federal Court
2001	18	20	3
2002	14	19	7
2003	7	12	6
2004	10	11	1
2005	18	24	12
2006	18	28	11
2007	14	25	12
2008	19	28	10
2009	39	67	41
2010	31	45	21
2011	41	52	15
TOTAL	**229**	**331**	**139**

It thus appears that for a period of 11 years, the courts have been preoccupied with adjudication of land disputes

under the National Land Code. There are others that are not included in the above data which might have decided under the Land Acquisition Act 1960. The reason why the cumulative number of cases within the 11-year period at the Court of Appeal is greater than the number of decided cases at the High Court is the proliferation of a plethora of interlocutory inunctions within the same case. An alternative method that is more sustainable is mediation, which is the central point of this study.

The Kuala Lumpur Court Mediation Centre (KLCMC) was established on 25 August 2011 to provide a free mediation service for all litigants to create an avenue for parties to pursue a mutually beneficial win-win settlement. The High Court and the Sessions Court may refer parties to KLCMC. An order of referral may be made at any stage of the proceedings but it is preferable such order is made at the pre-trial case management stage. This judge-led mediation seems to be the predominant practice in the Malaysian courts as opposed to court referrals to third party neutrals who are not necessarily judges. Even before the establishment of KLCMC, the Practice Direction on Mediation earlier released has significantly increased the use of court-assisted mediation. According to the former Chief Justice of Malaysia, Tun Zaki Azmi, "court-assisted mediation had successfully ended disputes involving 1,986 cases in the first six months of this year [2011]. Of that number, 1,178 cases were at the Sessions Court level, 801 at the High Court and seven at the Court of Appeal" (Gomez, 2011). Subsequently, the Mediation Act 2012 came to consolidate the existing practice with a more formal legislation to regulate both court-annexed and private mediations. However, it is interesting to note that, by virtue of Section 2(b), the new Act does not apply to judge-led mediation pursuant to any civil action that has been filed in the court. Thus, it is clear that the Act only applies to mediation conducted by private individuals or entities.

2.2 Japan

The cultural background of mediation in Japan is often said to have significant relationship with the disputing culture or what we may better call the settlement culture in the country. Though it is often said that the amicable settlement culture is predominant in the diverse cultural heritage of the Asian continent, Japan has a unique proclivity for settlement of disputes outside the court. In the Tokugawa Japan (1603-1867) society, people generally considered disputes as a morally wrong phenomenon –a perception that is still seen in the modern Japanese society (Funken, 2002). Japanese terms such as *chotei* (court-annexed mediation), *wakai* (settlement-in-court), and *chusai* (arbitration) commonly float around on everyone's lips, which shows the cultural perspective of non-litigious settlement in the Japanese culture (Funken, 2002). According to a study conducted by Deck, Farmer & Zeng (2009), the average range of settlement of disputes within Japan is 64%. It is believed more recent empirical data should present a much higher rate of settlement in the country considering the continuous reforms taking place in the country and the paradigm shift to ADR.

Japan has consistently strived to reform the civil justice system but it has carved a niche for itself by embedding its traditional culture into the institutionalized dispute resolution process (Sugawara & Hou, 1994). Ohbuchi, et al, (2005) compares the trend in Japan with other industralized countries such as the United States, Germany and France:

> Japan has a similar civil trial system to Western countries, but the number of civil trials per 100,000 people in Japan was only one-tenth of those in Western countries such as the United States, Germany, and France in 1996...This suggests a possibility that Japanese perceptions and responses to civil trials differ from those of Westerners (Ohbuchi, et al, 2005: 877).

The main underlying cultural influence in issues relating to dispute settlement which has made the Japanese experience a unique model is its collectivism approach which is the prevailing culture in most Asian and African communities. There is some sort of a systematized hierarchy in the social milieu in the Japanese societies, which has been the major force promoting social harmony (Wall, Chan-Serafin, & Dunne, 2012). It has been argued: "Japanese are more concerned with the maintenance of social relationships and less concerned with fairness than Americans in conflict resolution" (Ohbuchi, et al. 2005: 877). This trend has led to a growing interest among lawyers and judges in Japan to specialize in mediation. As at 2011, Japan has over 300,000 mediators who complement the efforts of the 2850 judges in dispute management in the country. Yi (2012) presents some interesting data on the number of mediators who are lawyers, the corresponding number of judges as well as the number of public prosecutors as adapted in Table 2 below. While Yi (2012) provides comprehensive data spanning a period of 20 years (1991-2011), we have only adapted a ten-yea period (2001-2011) for the purpose of this comparative study.

Table 2: Comparative Data on Mediators (Lawyers), Judges and Public Prosecutors

Year	Amount of Judges (summary tribunals excluded)			Amount of Public Prosecutors(Alternate Public Prosecutors excluded)			Amount of Lawyers		
	Total (People)	Male (%)	Female (%)	Total (People)	Male (%)	Female (%)	Total (People)	Male (%)	Female (%)
2001	2243	—	—	1443	89.4	10.6	18,246	89.9	10.1
2002	2288	—	—	1484	88.4	11.6	18,851	89.1	10.9
2003	2333	—	—	1521	87.4	12.6	19,523	88.3	11.7
2004	2385	—	—	1563	87.2	12.8	20,240	87.9	12.1
2005	2460	—	—	1627	86.2	13.8	21,205	87.5	12.5
2006	2535	—	—	1648	85.2	14.8	22,056	87.0	13.0
2007	2610	—	—	1667	84.4	15.6	23,154	86.4	13.6
2008	2685	—	—	1739	82.8	17.2	25,062	85.6	14.4
2009	2760	80.4	19.6	1779	81.8	18.2	26,958	84.7	15.3
2010	2805	79.7	20.3	1806	81.0	19.0	28,828	83.8	16.2
2011	2850	79.1	20.9	1816	80.3	19.7	30,518	83.2	16.8

Source: (Yi, 2012: 104)

The third column in Table 2 above reveals the high level of professionalization in mediation among lawyers. Taking the total aggregates of each of the three major groups compared in the data, it is glaring that the total number of mediators as at 2011 is 30,518 compared to the 2,850 judges and 1,816 public prosecutors. As earlier observed, this underlying factor for this trend is the traditional cultural underpinings based on the concept of social collectivism (Smith & Bond, 1998).

The history of a formal legislation on ADR with special reference to mediation dates back to the period after the World War II where the need to introduce dedicate legislations to cushion the effects of war in the country. The Meiji government of Japan adopted a legal transplant process in its law reforms where it took a clue from relevant European legislations on mediation. Yi (2012) enumerates the following legislation that emerged in Japan as a result of the overarching law reforms:

> "Mediation Act on Land Leasing and House Renting", "Tenant Disputes Mediation Act", "Commercial Mediation Act", "Contemporary Mediation Act for Money Debts", "Mediation Law for Personnel", "Mediation Act on Mine Accident", and etc.. Japan carried out the "Family Affairs Mediation Act" in 1947, and in 1951 the Japanese congress passed the unified "Civil Mediation Act" which has made Japanese mediation system more complete (Yi, 2012: 103).

It thus appears the Civil Mediation Act (or Civil Conciliation Act) of 1951 ushered in a new era of a unified legislation for all forms of mediation and conciliation. It therefore follows that two significant legislations during the previous era directly relate to land tenure. These are the "Mediation Act on Land Leasing and House Renting" and "Tenant Disputes Mediation Act". Consolidating these legislations into a unified framework through the process of unification of laws has refocused the traditional culture of social harmony and collectivism of the Japanese society in a more formalized dimension.

3 Land Disputes and Sustainable Dispute Management

Without the fear of being contradicted, one may arguably emphasize that apart from family disputes, the most common dispute among people during the pre-colonial era is undoubtedly land disputes. This is undoubtedly a common trend in most societies across the world. Fighting over lands whether at the village level or at the international level has been a catalyst in most tribal wars and indeed regional hostilities. In fact, it is believed "the earliest recorded mediations occurred more than four thousand years ago in Mesopotamia when a Sumarian ruler helped avert a war and develop an agreement in a dispute over land" (Sky, 2003:2; Carnevale & Pruitt, 1992: 561). Recent happenings across the world and a number of boundary disputes that have been referred to the International Court of Justice support this argument. Within the built environment, numerous disputes arise within the neighborhood that require immediate response to forestall an unnecessary escalation of such disputes. This section focuses on the need to ensure proper management of such disputes to ensure the sustainable development of land. It is common in land dispute litigation for either of the parties to seek a perpetual injunction to prevent the other party from further developing such land. A similar event occurred in the recent case of *Plaza Rakyat Sdn Bhd v. Datuk Bandar Kuala Lumpur*[1], which arose from a joint venture agreement

[1] [2012] 7 MLJ 36.

(JVA) between the parties where they both agreed to refer any dispute arising from the JVA and the lease agreements to arbitration. In this case, the plaintiff applied for an interim injunction pending the final disposal of the dispute through the arbitration process since there were palpable steps on the part of the defendant to forcibly take possession of the project land. The plaintiff's application was granted in order to secure the subject matter of the dispute and encourage the parties to proceed with the arbitration process.

So, without sustainable means of resolving such disputes, land development may be impeded. A number of important construction contracts have been suspended as a result of protracted litigation. While describing the nature of land disputes and the significance of mediation or third party intervention in such disputes, Sky (2003) contends:

> Land is a *limited resource* and as an economic variable its importance is difficult to overestimate. Land registration is highly correlated with *economic growth* and the *development of a market economy* and land also forms the foundation for loans and other types of investment security (de Soto, 2000). Properties are *inherited* and often stay in families for generations. Owners become *intimately attached* to their property and this makes it difficult to separate people from land. In addition, people have *different relationships* to their property. This affects mediation and has to be taken into consideration in the dispute resolution process. Disputing parties often have *long term relationships*, at least as neighbours. Improvement of *communication* is a key issue in land disputes (Sky, 2003: 2).

Hence, the need for sustainable dispute management in disputes involving land. The nature of land disputes is diverse depending on the aspect of land issue that is involved. In disputes involving planning and land use, mediation has proved to be very effective (Wall & Rude, 1991; Rubino & Jacobs, 1990). In some other jurisdictions, as discussed below, land disputes have been successfully mediated and such disputes involve land use, land tenure, land development, border issues, environmental degradation involving illegal dumping (where fine and social services have been imposed), and land grabbing or land acquisition.

In the recent case of *Sabah Forest Industries Sdn Bhd v. Mazlan bin Ali*[2] the relevance of court-annexed mediation was brought to the fore in a case involving the public right of way through a land. The plaintiffs sought a declaration that they have acquired a public right of way through the defendant's land situated at Kg Pantai, Sipitang, Sabah. Though the defendant has originally owned the land since 2003 through a purchase agreement from the previous owner, the plaintiff had previously between 1989 and 1990 constructed a gravel road that cuts through the part of the land, which at that time it was still a state land. In 2004, the defendant erected a barrier on the gravel road to block the plaintiff's transportation of logs. In response, the plaintiff sought an injunction against the defendant for the dismantling of the barriers. While denying the claim, the defendant counterclaimed against the plaintiff for trespass on his private land. The trial judge mediated the dispute on 3rd November 2008 where the following settlement agreement was recorded by the judge:

1. The plaintiffs to withdraw the claim against the defendant,
2. The plaintiffs and the defendant are to jointly inspect the damage to the defendant's land (if any) from March 2003 - December 2004, and
3. That the assessment of damages be fixed before the Registrar in respect of the defendant's counterclaim on 26.11.2008.

The third point of the settlement agreement further triggered another dispute. The parties were not in agreement as to how the damages will be assessed. While the plaintiffs maintained that they only conceded and are willing to pay the damages, they did not admit the liability of trespass, and thus the assessment of damages should not include the liability of trespass. On the other hand, the defendant insisted that the element of trespass must be taken into account in the assessment of damages. After the failure of the Registrar to ascertain the intention of the parties, the case was referred to the judge for case management. The plaintiffs were directed to file in their application and it became apparent that the only issue the court was to decide is whether there was a binding agreement between the plaintiff and defendant at the conclusion of the mediation session dated 3 November 2008. The court therefore held:

> I have no hesitation in saying that there had been no agreement as to how the element of trespass was to be treated in relation of the assessment of damages. I am fortified in my conclusion by the parties' failure to come to any consensus after three mention sessions before the Registrars. In any mediation settlement, the Court must lean towards setting aside any settlement agreement whenever there is any hint of discontent by any party or that there is some ambiguity in the settlement agreement. In this case, this task is made easier by

[2] [2012] MLJU 238

> the fact that there was no mediation agreement signed between the plaintiff and the defendant which in the normal course of event there would be one. ... Accordingly I find that the terms of mediation dated 3 November 2008 had not been agreed between the parties.

The implication of the above decision is that before the parties append their signatures in a settlement agreement, the mediator must ascertain the intention of the parties and read and re-read the draft agreement to the parties. This is more important in cases involving land. Such is the nature of land disputes which require proper management for clarity sake.

3 Common Trends in Court-annexed Dispute Management

Being two important Asian countries, Japan and Malaysia share a number of things in their respective court-annexed dispute management frameworks. The following common trends in both jurisdictions have been identified: (1) underlying philosophy on mediation, (2) legislation on mediation, (3) mediation style, (4) approach to court-annexed mediation, (5) voluntary or compulsory referral of parties, (6) exclusions from mediation, and (7) settlement rate. Though some of these matrices have been adopted in earlier studies such as that of Funken (2002) where the dispute mangeemnt practices between Germany and Japan were compared, this study primarily compares Malaysia and Japan. However, apart from the common trends in the two jurisdictions, some areas of divergence may emerge in the course of analysis which would provide a good platform for the two countries to learn from each other. The approach to the comparative study here is more of a *Juxtaposition Plus* study. Such an objective analysis of comparable legal cultures, rules, practices, and institutions is expected to provide a good platform for further study of differences and lessons that can be learnt from one another (Frankenberg, 1985). Table 3 below presents a comparative table on court-annexed dispute management framework in Malaysia and Japan with special reference to mediation.

Table 3: Court-annexed Dispute Management Framework in Malaysia and Japan

	Issue	Malaysia	Japan
1.	Philosophy	Social harmony & beliefs	Social harmony & beliefs
2.	Legislation	Mediation Act 2012	Civil Conciliation Act 1951
3.	Mediation Style	Extra-legal considerations	Extra-legal considerations
4.	Court-annexed mediation	Judge-led	Judges & non-Judges
5.	Nature of Referral	Voluntary	Voluntary
6.	Exclusions from mediation	Land acquisition	Not applicable
7.	Settlement rate	50%	64%

3.1 Undelrying Philosophy on Mediation

The underlying philosophy of amicable dispute settlement through mediation or third party intervention and facilitation in Malaysia and Japan seems to be similar considering the Asian cultural values which give prominence to social harmony and the importance of strengthening ties among the people. This approach has been criticized on the ground of fairness. Certain legally enforceable rights may be compromised in mediation since in both Malaysia and Japan, the mediator is not bound by the law (Iwan, 1990-1991). Thus, the question of fairness of the mediation process is brought to the fore (Menzel, 1991). Perhaps, this is part of the reason why Malaysia excludes certain issues from mediation. Though the issue of fairness of the mediation process transcends the scope of this study, it suffices to add that Article 1 of the Japanese Civil Conciliation Act 1951 expressly provides that the law is enacted to facilitate the amicable settlement of civil and commercial disputes by applying general principles of equity, fairness and justice without necessarily applying the law strictly (Iwasaki, 2006: 217).

3.2 Legislation on Mediation

The two jurisdictions under study have dedicated legislations on mediation. While Japan has developed its legislation on mediation over a period of six decades, Malaysia enacted its legislation on mediation in 2012.

However, Malaysia also has a long history of ADR-related policies and legislations such as the Arbitration Act 2005,[3] and the different legislations on *sulh* (mediation) in the Sharī'ah courts in the country. These altogether form the framework for amicable dispute resolution in Malaysia. Meanwhile, the two legislations relevant to land disputes remain the Mediation Act 2012 (including the Practice Direction No. 5 on Mediation earlier introduced) and the Arbitration Act 2005. Though there is no evidence to justify the testing of these two legislations with particular reference to land disputes, it suffices to observe that the new framework will drastically reduce the tension and rancor often associated with land disputes in litigation.

In Japan, the Civil Conciliation Act of 1951[4] was enacted to consolidate all existing mediation laws in the country. As earlier mentioned, the integration or unification of several related laws ushered in a new era of civil and commercial mediation in the country (Davis, 1996). This new legislation is comparable to the Malaysian Mediation Act 2012 which also provides a general framework for voluntary court-annexed mediation.

3.3 Mediation Style

The mediation style in disputes involving land or other civil disputes is often left to the discretion of the mediator. However, the mediators are expected to adopt best practices in the global mediation sector based on western values. As Funken (2002) rightly put it, the "Japanese model is based on the pursuit for social harmony, moral, duties and other extra-legal considerations". Interestingly, these are also the principles that underpin the practice of mediation in Malaysia. As noted above, the three major races in Malaysia – Malay, Chinese and Hindu, are more concerned with social harmony and upholding moral duties based on their respective religious convictions when disputes arise. Therefore, the mediation style in the two jurisdictions seems to be very similar.

3.4 Approach to Mediation

Under the Japanese Civil Conciliation Act, conciliation refers to a judge-led conciliation. It does not involve an outside conciliator or court referral of parties to a conciliator appointed by the parties. However, according to Article 5 of the Act, either of the parties in a case may apply to the court to include not less than two commissioners outside the court in the committee of conciliators. Therefore, one can safely conclude that to a large extent, it is a judge-led conciliation (Iwasaki, 2006). In a similar vein, the mediation conducted at the High court of Malaya under the aegis of KLCMC is judge-led mediation. Under the Practice Direction No. 5 of 2010 on Mediation, two types of approaches could be adopted: Judge-led mediation and court-referred mediation. In the latter, the court may refer the parties to a mediator appointed by the Malaysian Mediation Centre (Mohamed, 2010). But with the establishment of KLCMC and the subsequent enactment of the Mediation Act 2012, court-annexed mediations are presided over by judges

3.5 Nature of Court Referral –Voluntary or Compulsory

In spite of the statutory backing for mediation in the civil justice system in Japan and Malaysia, referral of parties to mediation is absolutely on a voluntary basis. The consent of the parties is required to commence the mediation session under the two jurisdictions. However, in Japan, there is a slight variation of this rule. The court may order, if it deems fit that mediation is most appropriate for a case, that the parties proceed for mediation (Iwasaki, 2006). "As a result of revisions in 1992 to the Civil Conciliation Act, the conciliation proceedings must be exhausted before the case is filed with the district court when the case is concerned with the increase or decrease in rent for housing or land" (Supreme Court of Japan, 2006). This is similar to the practice in the English court in England where the court is required to actively manage cases. According to Rule 1.4 of the Civil Procedure Rules of the High Court of England, the court may encourage the parties to use an ADR procedure if it considers that appropriate for the case. Though this looks voluntary, there is an element of force in the power conferred on the court because if any of the parties fails to mediate or yield to the court's request, the court is bound to take such gesture of unreasonable refusal to mediate into consideration in awarding damages (Alexande, 2009: 226; Andrews, 2012: 205).

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[3] The Arbitration Act 2005 repealed the erstwhile Arbitration Act of 1952. The 2005 Act has further been amended to substantially comply with the UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended in 2006) with the enactment of the Arbitration (Amendment) Act 2011.

[4] Law No. 222, 1951 of Japan.

3.6 Exclusions from Mediation

Technical legal issues are often excluded from mediation proceedings, as lawyers are not ordinarily expected to dominate the negotiations during the mediation session. This is part of the reason why certain issues have been statutorily excluded from mediation in Malaysia particularly issues that have some bearing on public policy and enforceable rights. For instance, section 2(a) of the Malaysian Mediation Act 2012 clearly provides for the non-application of the Act on disputes involving matters specified in the Schedule to the Act. These include core constitutional issues, suits involving prerogative writs, suits involving temporary or permanent injunctions, election petitions involving certain offences, proceedings under the Land Acquisition Act 1960, cases that fall under the original jurisdiction of the Federal Court, Judicial review, appeals, revision, proceedings before a native court, and criminal matters.

One of the issues that directly relates to this study is the exclusion of proceedings under the Land Acquisition Act 1960. It is of common knowledge that the state has the power to compulsorily acquire any land for overriding public interest. Though it has been argued that this power has been misused in some cases, it is difficult to subject such issues to mediation because it falls under the general preview of public policy issues that should be exempted from mediation. However, the law protects the people by providing for the payment of adequate compensation for lands that have been compulsory acquired.

In Japan, civil and commercial disputes including land cases can be mediated or conciliated. Conciliation can be carried out in cases involving residential land buildings, traffic accidents, environmental pollution, etc. (Funken, 2002). It thus appears the Civil Conciliation Act is applicable to all kinds of civil disputes and does not necessarily exclude some cases as evident in the Malaysian Mediation Act (Supreme Court of Japan, 2006).

3.6 Settlement rate

There are diverse figures in the literature on the settlement rate in mediation cases. There are no specific data on the settlement rate in cases involving land. Perhaps, data may be collated when the mediation of land disputes in Malaysia has crystallized with the recent reforms in the adminsitration fo civil justive in the High Court. In a similar vein, there are no data on land disputes mediation in Japan but it might be instructive to review the settlement rate in a broader manner through the consideration of civil and commercial disputes generally. As indicated by Deck, Farmer, & Zeng (2009), the average settlement rate in mediation involving civil and commercial disputes was 64 per cent in 2009. Though there is no empirical data to justify this assertion, it is arguably believed the percentage should now exceed 70 per cent considering the increasing proclivity of Japanese for amicable settlement and the proliferation of expert mediators in the country.

According to a World Bank Report on *Court Backlog and Delay Reduction Program* in Malaysian courts in 2011, it was highlighted that global statistics on mediation are not easy to come by. The report further states:

> Global statistics on mediated cases were not reported, but numbers of those formally mediated (as opposed to informal settlements) still appear to be low although the system does work to the extent of reaching an agreement for those who choose it. The Commercial Division of the Kuala Lumpur High Court reported a 50 percent success rate (agreements reached) for the one month covered. The Family High Court Judge for Kuala Lumpur claimed that her success rate was about 75 percent; the number of cases mediated was not provided (World Bank, 2011: 27).

The World Bank report was released before the enactment of the Mediation Act 2012. So, it is expected that the with the new court reforms involving the court-annexed mediation and the important role played by KLCMC, the rate of settlement will increase significantly in the next few years. Specific data on land disputes are not available. Perhaps, this may be a good area of further research through an empirircal study to assess the success rate of the KLCMC in land dispute management.

4 Best Practices in Land Dispute Management

A number of best practices have emerged within the last decade focusing on the sustainable management of land disputes. Since land has remained a key issue in most societies, particularly countries, or cities that are water locked, the need the briefly examine some best practices in sustainable land management through mediation cannot be overemphasized. A number of countries have developed frameworks for sustainability of land dispute management. And among all the ADR processes, the stakeholders have preferred mediation at the

community level to reduce unnecessary tension over land use. For the purpose of this study, the best practices have been limited to three jurisdictions: United States, Norway and Timor. To crown it all, the commendable steps being taken in Malaysia at the court-assisted mediation programme of the High Court of Sabah and Sarawak are also highlighted through a case study.

4.1 United States

Apart from the broad legislation on ADR at the Federal level generally called the Alternative Dispute Resolution Act of 1998, different states across the U.S. have their respective land use mediation laws. These sate laws that are primarily focused on land are meant to reduce the time wasted on protracted litigation over land, create sustainable value for parties involved, and save the finite public resources that are often depleted in such litigations. For example, the Connecticut Land Use Mediation Law, Public Act No. 01-47 was passed in 2001. The title of the Act is "An Act Concerning the Mediation of Appeals of Decisions of Planning and Zoning Commissions" (Lincoln Institute of Land Policy, 2012).

Consensus building through is important in multiparty mediation of land disputes. According to Susskind, Wansem, & Ciccareli (2003), the role of the mediator is more of that of a facilitator who keeps the ball rolling and encourage the parties to reach a mutually beneficial settlement. "Mediators have greater substantive involvement as they help the parties move from a zero-sum mind-set to integrative bargaining" (Susskind, Wansem, & Ciccareli, 2003: 43). The role of mediators in land disputes complements that of the technocrats and advocates through the balancing of competition interests over land. Therefore, within the U.S., there is a paradigm shift in land use planning with the increasing importance of mediation. Hence, the mediation model has been incorporated into the existing paradigms to ensure proper land use planning. As presented in Table 4, Susskind, Wansem, & Ciccareli (2003) argue that for a fair allocation of land uses, a professional facilitator (mediator) is required in the process. The interplay and dynamics among the three models is shown below in Table 4.

Table 4: The Changing Conception of Land Use Planning in the United States

	Technocratic Model	***Advocacy Model***	***Mediation model***
Tasks	The planner operates as an apolitical and technically skilled advisor to elected decision makers.	The planner represents a particular interest group in the politics of land use decision making.	The planner tries to facilitate a balancing of concerns about efficiency and fairness by building an informed consensus.
Focus of Activity	Produces plans that offer the "best" solution, given a set of goals and limitations set by elected decision makers.	Seeks to redistribute resources to ensure equity and improved quality of life for those least able to fend for themselves.	Ensures that the interests of all stakeholders are taken into account along with the best possible technical advice.
Products/Solutions	Comprehensive plans that represent the most efficient allocation of resources for a specific point in time.	Policy proposals and plans that best serve the group being represented.	Negotiated agreements that are both fair and implementable.
Skills	Technical skills in preparing efficient plans.	Technical skills, plus a greater understanding of social and economic issues and political organizing.	Same as the advocacy model, plus the ability to facilitate interaction among contending stakeholders.
Primary Client	City Planning Commission and elected decision makers.	An interest group, usually poor/minority.	All stakeholders.
Basis of Legitimacy	Planners have the technical expertise necessary for this type of work and are unaffected by external	Planners contend that few problems can be settled on technical or efficiency grounds alone.	By playing a neutral role and pursuing mutually acceptable agreements, the planner enhances the

	influences that might otherwise compromise their professionalism.	probability that an implementable plan will result.

Source: (Susskind, Wansem, & Ciccareli, 2003: 42)

It therefore follows that a neutral third party plays an indispensable role in land use sustainability. The mediation model may be utilized in disputes involving environmental cleanup and land development.

4.2 Norway

Mediation is considered as part of the land consolidation plan in Norway. Land consolidation is falls entirely under the judicial process, which integrates mediation into the entire process. The dedicated land consolidation court is saddled with the responsibility of resolving land consolidation planning disputes as well as land boundary disputes. Section 2 of the Land Consolidation Act outlines the scope of dispute that fall under the plan. These include dissolution of joint ownership, reallocation of landed property through land exchange, prescribing rules relating to the use of land or area, elimination of outdated rights of use and assigning compensation, organization of joint measures for agricultural purposes and draining, reallocation of landed properties involving alienation of land, and clarification and determination of conditions relating to property and rights of use in joint ownership (Rognes & Sky, 1998).

Rognes & Sky (1998) contend that in the judicial process embarked upon in the land consolidation plan, mediation plays a crucial role. Judges tend to give preference to mediation in cases involving many parties, and a large expanse of land. This is similar to recent trends in the Sabah High Court, Malaysia where a judge recently referred a dispute to mediation during the pendency of the case. The case is discussed below. Such practices reemphasizes the need for a well-coordinated court-annexed mediation programme that is just and fair in its entire process with a view to building consensus among the parties and securing their family or business relationships.

4.3 Timor-Leste

In the southern part of the Malay Archipelago, there lies East Timor whose official name is Timor-Leste. Local mediation systems exit in this country and efforts have been made over the years to incorporate such systems into the formal dispute resolution system in order to tackle different types of disputes, particularly land-related disputes. In a study carried out by the Timor-Leste Land Law Program funded by USAID whose report was released in 2004, some significant policy recommendations were made for a sustainable legal framework for land dispute resolution in Timor-Leste (Timor-Leste Land Law Program, 2004). A specific land dispute resolution law has been proposed in the report. Meanwhile, the Land and Property Directorate of Timor-Leste has been implementing a model for managing conflicts over land since 2000. The UN Transitional Administration introduced this model. Between May 2002 and June 2007, a total of 749 land related disputes were brought before the Land and Property Directorate for mediation. Fitzpatrick () identified the following benefits of the Timor-Leste experience in land dispute mediation which can be adapted to other Pacific countries: (1) using interim no-violence and land-use agreements pending final resolution, (2) embedding the mediation system in land administration rather than judicial administration, which allows remedies unavailable in the courts, such as selling, leasing, dividing or swapping land, (3) avoiding problems associated with a lack of capacity in the court system and having greater access to self-funding opportunities than the courts, (4) creating a bridge between traditional dispute-resolution mechanisms and the courts and allowing use of ritual and customary institutions should the parties agree, and reference to the courts should the parties be unable to agree" (Fitzpatrick, 2008: 176). This model could be adapted to suit the local needs of some other Asian countries.

4.4 Sabah and Sarawak

It is often said that mediation is more effective in multi-party land disputes. The recent case of *Usahawan Borneo Sdn Bhd & Ors. v. Sipon @ Danniel Bin Tunjiang & Ors.*[5] which is still pending at the High Court of Tawau in Sabah has been referred for mediation. The case, which was registered on 17th January 2012, was adjourned by Sikayun J. for mediation. This land dispute involves seven companies and five representatives of

[5] Case No. TWU-22-1/1-2012.

127 Murut families. The form of mediation used in this case is Judge-led mediation where the judge hearing the case has temporarily assumed the duties of a mediator to amicable resolve the dispute. The case involves thousands of acres of land with claims and counter claims. The defence's clients are claiming a total of 1,381 acres of land. It was reported that Sikayun J. observed regarding the ongoing mediation process:

> Furthermore, contention that some of these claimants have abandoned the claims of their land and have settled elsewhere, this is a legal issue that I have to determine bearing in mind that NCR over claimed area established is transferrable and inheritable. Mediation process is long because we need to get the consensus of all the parties. I would advise parties to refrain from making any unnecessary comment that may adversely affect the mediation process (Kee, 2012).

While this case is still pending in the court, one may conclude that it is a bold step in the right direction. From the available facts, the land dispute involves Native Customary Rights (NCR), which makes the case more appropriate for mediation. It is pertinent to observe that the Sabah and Sarawak High Courts have the Rules for Court-assisted Mediation. While the consent of all parties is required before the Judge-led mediation can commence, judges and judicial officers are required to automatically refer cases involving personal injury, family issues, and goods sold and delivered, to mediation during the case management hearings (Paramaguru, 2011). Parties can request the court to adjourn a case for mediation at any stage during the pendency of court hearings. According to the available statistics, over 746 mediations were conducted between 2007 and 2009 in the courts of Sabah and Sarawak. The settlement rate in such mediations recorded by the courts is 44% (Ali & Paul, 2010). This is comparable to the 50% suggested for related cases in the High Court of Malaya.

5 Conclusion

While focusing on common trends, it is hoped the two countries would learn from each other to improve their respective models of court-annexed dispute management with special reference to land disputes. Though some best practices have been examined from three different jurisdictions, Japan and Malaysia should adapt good practices to suit their individual local variations. A model that is successful in a country might not be necessarily useful in another. However, the value of this kind of comparative study lies in its identification of common trends and consideration of some variations that would help in definition new directions for sustainable land dispute management in the two jurisdictions. There are indeed lessons to be leant from each other.

Finally, there is definitely the need for a dispute management framework for the integrated land administration system. This covers both the aspects of dispute resolution and dispute avoidance. The land administration system, when properly managed, serves the purpose of dispute avoidance in land related matters. So, apart from a dedicated legislation or subsidiary legislation in form of Regulations, a framework for sustainable dispute management should be embedded into the integrated land administration system.

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7 References

Abdul Hak, N. & Oseni, U.A., 2011. Syariah Court-annexed Mediation in Malaysia - Some Problems and Prospects. *Asian Journal on Mediation*, pp.1-10.

Alexande, N.M., 2009. *International and Comparative Mediation: Legal Perspectives*. The Netherlands: Kluwer Law International BV.

Ali, E. & Paul, E., 2010. *Mediation*. [Online] Available at: http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/mediation.php [Accessed 1 October 2012].

Andrews, N., 2012. *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England*. New York: Springer.

Carnevale, P.J.D. & Pruitt, D.G., 1992. Negotiation & Mediation. *Annual Review of Psychology*, 43, pp.561-72.

Davis, J.W.S., 1996. *Dispute Resolution in Japan*. The Netherlands: Kluwer Law International.

Deck, C., Farmer, A. & Zeng, D.-Z., 2009. Arbitration and Bargaining across the Pacific. *Southern Economic Journal*, 76(1), pp.183-97.

Fitzpatrick, D., 2008. Mediating land conflict in East Timor. In *Making Land Work: Case studies on customary land and development in the Pacific*. Canberra, Australia: Australian Agency for International Development (AusAID). pp.175-97.

Frankenberg, G., 1985. Critical Comparisons: Re-thinking Comparative Law. *HARV. INT'L L.J.*, 26, pp.411-55.

Funabashi, Y., ed., 2003. *Reconciliation in the Asia-Pacific*. Washington, DC: USIP Press.

Funken, K., 2002. Comparative Dispute Management: Court-connected Mediation in Japan and Germany. *German Law Journal*, 3.

Gomez, J., 2011. *Mediation relief for courts.* [Online] Available at: http://www.malaysianbar.org.my/legal/general_news/mediation_relief_for_courts.html [Accessed 1 October 2012].
Iwan, N., 1990-1991. Alternative Dispute Resolution in Court: The Japanese Experience. *Ohio St. J. on Dis. Resol.*, 6, pp.201-42.
Iwasaki, K., 2006. Japan. In M.C. Pryles, ed. *Dispute Resolution in Asia.* The Netherlands: Kluwer Law International BV. pp.201-36.
Kee, A., 2012. *Land dispute case adjourned for mediation.* [Online] Available at: http://www.theborneopost.com/2012/07/20/land-dispute-case-adjourned-for-mediation/#ixzz28uJotcBO [Accessed 1 October 2012].
Lincoln Institute of Land Policy, 2012. *Resolving Land Use Disputes.* [Online] Available at: http://www.lincolninst.edu/subcenters/resolving-land-use-disputes/learn-more/reading_detail.asp?id=4 [Accessed 2 October 2012].
Mathew, S.A., 2011. The Malaysian Practice Direction on Mediation: A Commentary. *Asian Journal on Mediation*, pp.49-59.
Menzel, K.E., 1991. Judging the fairness of mediation: A critical framework. *Conflict Resolution Quarterly*, 9(1), pp.3-20.
Mohamed, A.A.A., 2010. Practice Direction on Mediation. In *Mediation in Malaysia: The Law and Practice.* Malaysia: LexisNexis. pp.493-503.
Ohbuchi, K.-i., Sugawara, I., Teshigahara, K. & Imazai, K.-i., 2005. Procedural Justice and the Assessment of Civil Justice in Japan. *Law & Society Review*, 39(4).
Oseni, U.A., 2010. Reconciling Differences: Cross-cultural Mediation in Malaysia. In M.N.I. Jan & A.A.A. Mohamed, eds. *Mediation in Malaysia: The Law and Practice.* Malaysia: LexisNexis. pp.137-54.
Paramaguru, R.N., 2011. *Rules for Court Assisted Mediation.* [Online] Available at: http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/mediation.php [Accessed 1 October 2012].
Rashid, S.K., 2002. *Alternative Dispute Resolution: The Emerging New Trend of Informal Justice.* Kuala Lumpur: International Islamic University Malaysia.
Rashid, S.K., 2004. Alternative Dispute Resolution in the Context of Islamic Law. *The Vindobona Journal of International Commercial Law and Arbitration*, pp.95-118.
Rognes, J. & Sky, P.K., 1998. *Mediation in the Norwegian Land Consolidation Courts.* Working Paper, No. 14. University of Wisconsin–Madison.
Rubino, R.G. & Jacobs, H.M., 1990. *Mediation and Negotiation for Planning, Land Use Management, and Environmental Protection: An Annotated Bibliography of Materials for the Period 1980-1989.* Council of Planning Librarians.
Smith, P.B. & Bond, M.H., 1998. *Social Psychology Across Cultures.* 2nd ed. London: Prentice Hall.
Sugawara, I. & Hou, Y.J., 1994. Disputers in Japan: A Cross-Cultural Test of the Procedural Justice Mode. *Social Justice Research*, 7, pp.129-44.
Supreme Court of Japan, 2006. *Outline of Civil Litigation in Japan.* [Online] Available at: http://www.courts.go.jp/english/proceedings/civil_suit_index/civil_suit/index.html [Accessed 2 October 2012].
Susskind, L., Wansem, M.v.d. & Ciccareli, A., 2003. Mediating Land Use Disputes: Pros and Cons. *Environments -a journal of interdisciplinary studies*, 31(2), pp.39-58.
Timor-Leste Land Law Program, February 2004. *Report on Research Findings and Policy Recommendations for a Legal Framework for Land Dispute Mediation.* Timor-Leste: Timor-Leste Land Law Program.
Wall, J.A. & Rude, D.E., 1991. The Judges as a Mediator. *Journal of Applied Psychology* , 76, pp.54-59.
Wall, J.A., Chan-Serafin, S. & Dunne, T., 2012. Mediator Pressing Techniques: A Theoretical Model of their Determinants. *Group Decision and Negotiation*, 21(5), pp.601-19.
World Bank, 2011. *Malaysia -Court Backlog and Delay Reduction Program A Progress Report.* World Bank.
Yi, H., 2012. Research on Mediation Specialization in Japan. *Canadian Social Science*, 8(3), pp.103-06.