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**Groupe de travail sur la médiation dans le cadre du processus de Malte
Questionnaire**

établi par le Bureau Permanent

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**Working Party on Mediation in the Context of the Malta Process
Questionnaire**

drawn up by the Permanent Bureau

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Identification

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The Permanent Bureau kindly requests responses to the Questionnaire to be sent to < secretariat@hcch.net > by 20 July 2009 at the latest.

I – EXISTING STRUCTURES

1. Are there existing mediation services / structures in your country for **international** family disputes involving children?

[] No. [✓] Yes

As far as the written Syariah Laws which are applicable in the Syariah Courts in Malaysia are concerned, there is no specific existing mediation services / structures in our country for international family disputes involving children per se. However there is a provision in the Syariah Court Civil Procedure (Federal Territories) Act 1998 [Act 585] which generally provides for mediation or also known as *sulh*. Section 99 of Act 585 stipulates that—

"The parties to any proceeding may, at any stage of the proceedings, hold sulh to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with Hukum Syarak."

The above provision can also be found in the

Syariah Court Civil Procedure Enactment/ Ordinance in various states in Malaysia.

By virtue of this provision, parties are encouraged to solve their disputes by way of mediation (*sulh*) which was initially conducted informally by their Syarie Counsel. Nevertheless, starting from 2002 the Syariah Court of Selangor has established an official council on mediation which is known as the *Sulh* Council. This was later followed by several states in Malaysia.

By the establishment of the *Sulh* Council, all family disputes including disputes regarding children which have been filed in the Syariah Court must go for the mediation process before they are brought before the Syariah judge for trial. However, this process is not applicable for the dispute of the dissolution of marriage.

Furthermore, the mediation process is normally applied for local disputes. This is because the jurisdiction of the Syariah Court is generally territorial in nature. For instance, section 4 of the Islamic Family Law (Federal Territories) Act 1984 [Act 303] stipulates that—

“Save as is otherwise expressly provided, this Act shall apply to all Muslims living in the Federal Territory and to all Muslims resident in the Federal Territory who are living outside the Federal Territory.”.

Therefore, by virtue of section 4, Act 303 is only applicable to all Muslims who are living in

the Federal Territory and all Muslims who are residence in the Federal Territory but living outside of the Federal Territory. This provision also exists in the Islamic Family Law in various states in Malaysia.

In spite of this, if the defendant/respondent of the dispute is a Muslim foreigner, the court will allow the plaintiff/applicant to summon the defendant/respondent to attend the court proceedings provided that the residence of one of the party to the dispute is within the Federal Territories. This is in line with paragraph 52(1)(d) of the Syariah Court Civil Procedure (Federal Territories) Act 1998 [Act 585] which states as follows:

“(1) The court may order service of a summons or an application out of the jurisdiction—

(a).....

(b).....

(c).....

(d) if in any case arising from marriage, the residence of one of the parties to the marriage is at the time of the application within the Federal Territories.

(2) Subject to section 54, any order giving leave to effect service out of the jurisdiction outside Malaysia shall direct in what mode the service is to be effected and how such service may be proved.”.

By virtue of this section, a Muslim foreigner is actually allowed to appear in the Syariah

Court as well as to access mediation process. In this regard, **the mediation process indirectly caters for international family disputes including disputes regarding children.**

Besides the mediation process in the Syariah Court, there is a mediation process in the Legal Aid Bureau of Malaysia (LAB) which is governed by *Legal Aid (Mediation) Regulations 2006* [P.U. (A) 163/2006]. In contrast with the mediation process in the Syariah Court, which is required under the Rules of Civil Procedure (*Sulh*) in various states in Malaysia, the mediation process in LAB is established to reduce the number of dispute cases handled by the officers of the LAB. The cases which have been resolved through the mediation service, would be recorded as a mutual/consent judgment in the Syariah Court. Nevertheless this mediation process is only applicable for disputes involving local applicants/plaintiffs unless by special approval from Minister, **the mediation process (which is also considered as one of the legal aid services) can be extended to foreign applicants/plaintiffs.** This exception is stipulated under subsection 10(2A) the *Legal Aid Act 1971* [Act 26] which states as follows:

“(2A) Notwithstanding subsection (1) and sections 15 and 16, where the Minister is satisfied that in any particular case of hardship it is in the interests of justice to do so, he may authorize, in writing, the Director General to give legal aid in connection with any proceedings, whether or not of a description specified in the

	<p><i>Second Schedule”.</i></p> <p><u>In addition, the mediation process can be also extended to a foreigner whereby the defendant/respondent of the case is a foreigner.</u></p>
<p>2. If so, are the mediation services / structures provided:</p> <p>a) within the judicial or administrative system?</p>	<p><input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes. Please specify:</p> <p><u>The mediation services / structures for family disputes involving children under Syariah law are provided within the judicial system in every State in Malaysia.</u></p> <p><u>The Ministry of Women, Family and Community Development also provides mediation services for family disputes under the Population and Family Development Regulations (Fee and Charge) 2008 which is enacted under the Population and Family Development Act 1966 (Revised 1988). The services are extended to foreigners and charges are imposed for the services rendered.</u></p>
<p>b) by NGOs?</p>	<p><input type="checkbox"/> No.</p> <p><input checked="" type="checkbox"/> Yes. Please name them and give details of the services they provide:</p> <p><u>The Bar Council established the Malaysian Mediation Centre in 1999. It is funded by the Bar Council but those who use its services are required to pay the requisite fees for mediation. The mediators are drawn from a panel of trained and accredited lawyers, who are trained as mediators, as well as professionals from other fields. Currently, the Centre accepts commercial, civil and family disputes and intends to expand the scope to other matters at a later stage.</u></p> <p><u>Anyone, including foreigners, may approach the Centre to request for mediation, and the Centre would commence the process by appointing a mediator. However, to date, the Centre has not received any application from a foreigner. Parties may either attend the mediation themselves or may be represented</u></p>

	<p><u>by lawyers. The parties are not allowed to use any information given during mediation in any subsequent legal proceeding. The mediator cannot subsequently be called up as a witness in court proceedings.</u></p> <p><u>The process may be withdrawn at any stage by the mediator or either party if it is felt that no benefit may be derived out of it.</u></p> <p><u>There are a number of practising lawyers in Malaysia who are certified as mediators by the Accord Group from Australia. The Certificates held by them are internationally recognized and also qualify them to be a member of the Associate of the U.K Chartered Institute of Arbitrators. These people are well trained and qualified to conduct mediation processes for any local family dispute as well as international family disputes. They are also registered under the Centre.</u></p>
<p>3. If there are mediation services / structures in your country for international family disputes, how can parties to such disputes access mediation?</p>	<p><input checked="" type="checkbox"/> The parties can apply to participate in mediation services <u>which are provided by the practicing lawyers.</u></p> <p><input type="checkbox"/> A referral to mediation by a judicial or administrative authority is possible.</p> <p><input checked="" type="checkbox"/> Other. Please specify:</p> <p><u>If a Muslim foreigner is a party to a dispute in this country, he/she must try to appear before the Syariah Court once he/she receives a summons regarding his/her family dispute. By appearing before the Syariah Court, he/she will have the opportunity to access mediation process and solve his/her family dispute through that process.</u></p>
II – SCENARIO – CURRENT APPROACH IN NON-HAGUE CONVENTION CASES	
<p>How would the following scenario currently be approached in your country?</p> <p>Parents with shared custody of their minor child split up, and one parent takes the child to your country with the intention of settling there without the permission and contrary to the wishes of the other parent. The left-behind parent would like the child to be returned or to have regular contact with the child. (The Hague Child Abduction Convention is not in force between the States involved.)</p>	
<p>1. What course of action would currently be recommended to the left-behind parent in your country</p>	<p>Please specify: <u>Both, Civil and Syariah Courts do not have any jurisdiction to hear an application from a left-</u></p>

<p>(being that to which the child has been taken) in such a situation?</p>	<p><u>behind parent or an application to get an order for the child to be returned to her/him or to have regular contact with the child unless there is an application i.e. a custodial application made by the parent who takes the child. In this regard, the left-behind parent can apply from the Civil Court (for non-Muslims) and Syariah Court (for Muslims) for an order for the child to be returned or to have regular contact with him/her as his/her counterclaim to the application. This action can only be made after the left-behind parent receives the summons and statement of claim from the Court.</u></p> <p><u>Apart from this, if there is no case filed in the court, the left-behind parent may seek assistance from the respective Court administratively to solve the dispute by way of mediation since one of the party to the dispute resides in this country. In this case, the left-behind parent may consult the Registrar of the respective Court and requests for mediation to be carried out administratively.</u></p> <p><u>In addition, the left-behind parent can also go to any certified mediator in our country (Malaysia) in order to settle his/her dispute.</u></p> <p><u>See comment on the Question I (1, 2 & 3)</u></p>
<p>2. Would your country, being that to which the child has been taken, assist the left-behind parent in any way?</p>	<p><input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes, by facilitating contact with information-giving bodies</p> <p><input type="checkbox"/> Yes, by referring the left-behind parent to existing mediation services for international family disputes</p> <p><input checked="" type="checkbox"/> Yes, by giving legal advice</p> <p><input checked="" type="checkbox"/> Yes, by giving practical assistance to the parent</p> <p><input type="checkbox"/> Yes, by taking other measures. Please specify:</p> <p><u>All assistance will be given subject to the local laws.</u></p>
<p>3. Does a central contact point exist in your country for such cases?</p>	<p><input checked="" type="checkbox"/> No</p> <p><input type="checkbox"/> Yes. Please specify:</p> <p>.....</p> <p>.....</p>
<p>4. Are there NGOs in your country that help parents in such situations?</p>	<p><input checked="" type="checkbox"/> No</p> <p><input type="checkbox"/> Yes. Please specify:</p>

	<p>.....</p> <p>.....</p>
<p>5. If you were to identify the main problems that the left-behind parent might have to face in your country (being that to which the child has been taken) with her / his wish to have contact with the child / to have the child returned, what would they be?</p>	<p><input checked="" type="checkbox"/> Lack of specific structures for international family disputes</p> <p><input type="checkbox"/> Inefficiency of existing structures</p> <p><input type="checkbox"/> Lengthy processes under the existing structures</p> <p><input checked="" type="checkbox"/> Language problems</p> <p><input type="checkbox"/> Legal obstacles to agreed solutions</p> <p><input type="checkbox"/> Problems because of parallel asylum procedures regarding the other parent and child</p> <p><input type="checkbox"/> Difficulties in obtaining information on your legal system</p> <p><input type="checkbox"/> Problems locating the child within your country</p> <p><input type="checkbox"/> High costs of available mediation services</p> <p><input type="checkbox"/> Other. Please specify:</p> <p>.....</p> <p>.....</p>
III – EXISTING RULES / LEGISLATION ON FAMILY MEDIATION	
<p>Is family mediation regulated in your country?</p>	<p><input type="checkbox"/> No.</p> <p><input checked="" type="checkbox"/> Yes, there is general legislation on mediation in every state in Malaysia, which also applies to family mediation as follows:</p> <p>(1) <u>Section 99 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 [Act 585];</u></p> <p>(2) <u>Section 99 of the Syariah Court Civil Procedure (Selangor) Enactment 2003 [Enactment 4 Of 2003];</u></p> <p>(3) <u>Section 99 of the Syariah Court Civil Procedure (Negeri Sembilan) Enactment 2003 [Enactment 14 Of 2003];</u></p> <p>(4) <u>Section 99 of the Syariah Court Civil Procedure (Malacca) Enactment 2002 [Enactment 13 Of 2002];</u></p> <p>(5) <u>Section 99 of the Syariah Court Civil Procedure (Penang) [Enactment 6 Of 2004];</u></p> <p>(6) <u>Section 89 of the Syariah Court Civil Procedure (Perlis) Enactment 1991 [Enactment 5 Of 1993];</u></p> <p>(7) <u>Section 99 of the Syariah Court Civil</u></p>

- Procedure (Pahang) Enactment 2002 [Enactment 9 Of 2002];
- (8) Section 99 of the Syariah Court Civil Procedure (Johor) Enactment 2003 [Enactment 20 Of 2003];
- (9) Section 99 of the Syariah Court Civil Procedure (Perak) Enactment 2004 [Enactment 7 Of 2004];
- (10) Section 94 of the Islamic Civil Procedure (Kedah) Enactment 1979 [Enactment 2 Of 1984];
- (11) Section 99 of the Syariah Court Civil Procedure (Kelantan) Enactment 2002 [Enactment 7 Of 2002];
- (12) Section 99 of the Syariah Court Civil Procedure (Terengganu) Enactment 2001 [Enactment 4 Of 2001];
- (13) Section 99 of the Syariah Civil Procedure Sarawak Ordinance 2001 [Ordinance 44 Of 2001];
- (14) Section 99 of the (Syariah Court Civil Procedure (Sabah) Enactment 2004 [Enactment 10 Of 2004]; and
- (15) Part VA (Sections 29A-F) of Legal Aid Act 1971 (Act 26).

Yes, there is specific legislation on family mediation in several states in Malaysia as follows:

- (1) Civil Procedure Rules (Mediation)(Federal Territories)2004 [P.U. (A) 18/2004];
- (2) Civil Procedure Rules (Mediation) Selangor 2001 [Sel. P.U. 44/2001];
- (3) Syariah Court Civil Procedure Rules (Mediation) Malacca 2004 [M.P.U. 6/2004];
- (4) Syariah Courts Civil Procedure Rules (Mediation) Penang 2006 [Pg. P.U. 5/2006];
- (5) Syariah Courts Civil Procedure Rules (Mediation) Pahang 2005 [Phg. P.U. 19/05];
- (6) Syariah Courts Civil Procedure Rules (Mediation) Johor 2004 [J. P.U. 64/2004]; and
- (7) Legal Aid (Mediation) Regulations 2006 [P.U. (A) 163/2006].

Other. Please specify:

	<p><u>Practice Directions by the Director General/Chief of Syariah Judge of the Department of Syariah and Judiciary of Malaysia as follows:</u></p> <p>(1) <u>Practice Direction No. 4 of 2006 on Consent Agreement For Mediation;</u></p> <p>(2) <u>Practice Direction No. 5 of 2006 on Effect Of The Consent Agreement For Mediation;</u></p> <p>(3) <u>Practice Direction No. 3 of 2002 on The Implementation Of Mediation;</u></p> <p>(4) <u>Practice Direction No. 8 of 2003 on Procedure For Service Of The Mediation Notice Sulh; and</u></p> <p>(5) <u>Practice Direction No. 11 of 2005 on The Jurisdiction of Syariah Subordinate Court to Record the Mediation and the Consent Agreement.</u></p>
IV - ADDITIONAL REMARKS	
<p>Further remarks or questions:</p>	<p>.....</p> <p>.....</p> <p>.....</p>

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Thank you.