

Alternative Dispute Resolution as an Alternative Means of Accessing Justice in Malaysia

| | |
|---------------------------------|--|
| journal or publication title | Proceedings of the Roundtable Meeting Law, Development and Socio-Economic Changes in Asia |
| volume | 1 |
| page range | 71-78 |
| year | 2001 |
| URL | http://doi.org/10.20561/00033182 |

Alternative Dispute Resolution as an Alternative Means of Accessing Justice in Malaysia

Sharifah Suhana Ahmad*
Christina Suvariaru**

Introduction

In 1858 an English judge delivered judgment on a case concerning an absconding labourer on the island of Penang off the west coast of Malaysia, then a colony of Great Britain, which firmly entrenched the position of English law as the law of the land for the island.¹ The application of English law to Penang, and subsequently the entire of Malaya and the Borneo States of Sabah and Sarawak delivered a uniform legal system based on the English legal system to the diverse inhabitants of the nation which is now known as Malaysia. Malaysia came to accept English common law and rules of equity as the cornerstone of its legal system² and fashioned a judiciary modeled closely upon the judicial structure of the English court system.³ The common law system, with all its attendant adversarial rules of civil and criminal procedure, became the mainstay also of the Malaysian legal system. Since independence in 1957, the Malaysian legal system, especially the judicial system, has witnessed several changes⁴ and has been faced with several challenges, some of which have been severe and have cost it dearly in terms of integrity.⁵ It is not within the limited scope of this paper to delve deeply into all the issues pertaining to the challenges to the Malaysian judicial system, and this paper will therefore focus on the current problem besetting the judicial system and the developments consequent thereupon.

I. “Justice Delayed Is Justice Denied”

In March of this year, statistics were revealed showing the enormous amount of backlog of cases in the Malaysian courts:

* Associate Professor, Faculty of Law, University of Malaya.

** Attorney-at-law, Legal Executive of Olympia Industries, Malaysia.

Cases pending in the courts as at February, 2000

| | | |
|--------------------|--------------|----------------|
| Magistrate's Court | Civil | 173,898 |
| | Criminal | 472,273 |
| | Total | 646,171 |
| Sessions Court | Civil | 91,603 |
| | Criminal | 3,037 |
| | Total | 94,640 |
| High Court | Civil | 50,245 |
| | Criminal | 1,682 |
| | Total | 51,927 |
| Court of Appeal | Civil | 5,123 |
| | Criminal | 444 |
| | Total | 5,567 |
| Federal Court | Civil | 35 |
| | Criminal | 36 |
| | Motions | 164 |
| | Total | 235 |

Source: The New Straits Times, 24 March 2000, p. 1.

A Law Co-ordination Committee was formed, chaired by Minister in the Prime Minister's Department, and involving interested parties such as the Bar Council, the Attorney-General's Chambers and the police. With regard to the backlog of criminal cases, one of the ways identified to resolve the problem was to have the court determine whether a case was still active. If witnesses could not be traced or exhibits had gone missing, the court should order a discharge not amounting to an acquittal.

For civil cases, the parties were unanimous that mediation should be made an integral part of case management, and that since at present mediation was not compulsory, there might be a need to amend the law to incorporate it into case management.

In the Industrial Court,⁶ with eight Industrial Court Chairmen serving at the eight Industrial Courts in the country, the number of backlog of cases rose from 535 in 1995 to 1,027 in 1999. The Ministry of Human Resources, under which the Industrial Court is placed, has established a task force to find ways to settle the cases. The Ministry admits that one of the most effective ways of reducing the backlog of cases is to have the parties settle their dispute through mediation and conciliation without having to refer to the Industrial Court for arbitration.⁷

The Civil Courts System, with its limited number of judges,⁸ has shown that it

is unable to cope with a growing population that is increasingly better educated and which has become more litigious. The demand for better access to justice has led to the growing importance of alternative dispute resolution in Malaysia, and in recent years, a number of mediation bureau and specialized tribunals have been established to settle cases which would otherwise have landed in the civil courts.

II. Alternative Dispute Resolution Centres in Malaysia

1. The Kuala Lumpur Regional Centre for Arbitration

One of the earliest alternative dispute resolution centres to be established is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) established as a non-profit organization in 1978 under the auspices of the Asia African Legal Consultative Committee. The Centre has established its own arbitration rules which are similar to the UNCITRAL Arbitration Rules, with certain modifications and adaptations. Its jurisdiction is limited to resolving disputes of an international nature, where the parties must either belong to or be residents of different jurisdictions or the dispute must involve international commercial interest. International arbitration conducted by the Centre are excluded from the jurisdiction of the courts.⁹ The High Court is empowered to enforce an award once it has been rendered in a KLRCA proceeding.¹⁰ The KLRCA Arbitration Rules create a great deal of flexibility in the conduct of the proceedings of the arbitration, and provide the parties with wide discretion as to the choice of arbitrators, the place of the arbitration and the applicability of the procedural rules.

2. The Insurance Mediation Bureau

In 1992, the Insurance Mediation Bureau (IMB) was established after a spate of complaints by policy holders against insurers. The Bureau is designed along the lines of the British Insurance Ombudsman Bureau, and the “mediator” does not merely assist parties to resolve their dispute but also makes decisions.

The IMB is established as a company limited by guarantee which has a membership comprising all insurance companies. The mediator is appointed by a council which includes representatives from outside the industry. The Bureau’s jurisdiction is confined to complaints in respect of awards of up to RM100,000. Complaints may be received from individuals as well as companies and currently, over 90% of the complaints are from individuals.¹¹ The mediator’s jurisdiction is limited to

settling disputes on general and life policies, excluding third party claims. Cases which have gone to court cannot be brought for mediation.

A case is normally resolved within two to three months¹² and it can be initiated by a letter and the process can be conducted entirely through correspondence. The service is free and while the complainant may engage a lawyer, he has to bear his own legal fees as costs will not be awarded. The mediator's decision is binding on the insurer but not the policy holder. In 1997 insurers were directed by the Central Bank to publicise the Bureau. As a consequence, the number of cases heard by the Bureau rose from 375 in 1998 to 483 in the first eight months of 1999.¹³

3. The Banking Mediation Bureau

Established in 1997, its structure is very much like the IMB. It is a company limited by guarantee with a membership comprising all the banks, finance companies and merchant banks. The mediator is appointed by a council which has representatives from outside the industry. The mediator can hear disputes involving the charging of excessive fees, misleading advertisements, ATM withdrawals, unauthorized use of credit cards and guarantors. The bulk of cases so far comprise of ATM withdrawals. A case is normally resolved within two to three months and matters which have gone to court cannot be mediated by the Bureau. A case may be initiated by letter, but the Mediator must meet the parties. Such sessions normally take only about two hours.

Once again, the service is free and while the complainant may engage counsel, costs will not be awarded. The mediator's decision is binding on the bank but not the complainant. The mediator is limited in his jurisdiction to awards of up to RM25,000. The Bureau handled about 144 cases in 1999.

In both the IMB and the Banking Mediation Bureau, the procedures established are flexible and informal and strict rules of evidence do not apply.

4. Tribunal for Consumer Complaints

This new tribunal is established under the Consumer Protection Act, 1999. Membership of the Tribunal is by appointment of the Minister and consists of a Chairman and Deputy Chairman from among members of the Judicial and Legal Service and not less than five other members from the legal profession.¹⁴ Proceedings before the Tribunal have been simplified in that a consumer only needs to lodge a claim in the prescribed form and pay a prescribed fee.¹⁵ At the hearing of a claim every party

is entitled to attend and be heard, but no party is to be represented by an advocate and solicitor.¹⁶ A corporation or unincorporated body of persons may be represented by a full-time paid employee while a minor or any other person under a disability may be represented by his next friend.¹⁷ The Tribunal is to make its award without delay and where practicable within sixty days from the first day of hearing.¹⁸

A point of interest is section 107 which enjoins members of the Tribunal to assess whether, in all the circumstances, it would be appropriate for the Tribunal to assist the parties to negotiate an agreed settlement. Where the parties have reached an agreed settlement, the Tribunal must approve and record the settlement and the settlement shall then take effect as if it were an award of the Tribunal.¹⁹ Every agreed settlement and award of the Tribunal is final and binds all parties to the proceedings and is deemed an order of a Magistrate's court and is to be enforced accordingly.²⁰

The Tribunal's jurisdiction however is limited to where the total amount in respect of which an award is sought does not exceed RM10,000.²¹ The Tribunal does not have jurisdiction over matters in respect of land, wills or settlement, goodwill, any chose in action or any trade secret or other intellectual property.²²

5. Copyright Tribunal

The Copyright Tribunal was recently launched by the Domestic Trade and Consumer Affairs Minister.²³ The power to establish the Tribunal is given under the Copyright Act, 1991,²⁴ but it is only now that the Tribunal has been set up with limited jurisdiction confined to settling disputes on royalties for translation of Bahasa Malaysia literary works.²⁵ The power includes the power to settle disputes relating to the calculation of royalty and determination of rates on literary and creative works.

The Chairman of the Tribunal is appointed by the Minister from the ranks of lawyers and other professionals who are experts in copyright laws. Proceedings before the Tribunal are heard of and disposed by the Chairman and three other members selected by the Chairman. There is a right of appeal from the decision of the Tribunal to the High Court to be made within 30 days of such decision.

6. Malaysian Mediation Centre

The Malaysian Mediation Centre (MMC) recently established under the auspices of the Bar Council joins a growing line of alternative dispute resolution centres in Malaysia. At present the MMC accepts only commercial matters but it has every

intention of expanding its scope of services to cover civil matters at a later stage. The majority of cases mediated so far involve construction agreements and other business agreements. The type of mediation offered by the MMC is the facilitative model of mediation, with the mediator as a neutral party who assists the parties to negotiate a settlement. The mediator will not make a ruling or finding unless expressly requested by all parties involved.

The MMC may accept cases at any stage, whether pre-trial, commencement of legal proceedings, during proceedings, etc. Parties may initiate mediation by filing a joint submission or request for mediation together with a non-refundable processing fee of RM100. Mediators registered with the MMC must be of at least seven years' standing as an Advocate and Solicitor of the High Court of Malaya and a member of the Malaysian Bar with a valid practicing certificate. In order to encourage the use of mediation as a means of resolving disputes, members of the Bar have been encouraged to adopt a Mediation Clause in contracts and agreements prepared by them, to the effect that in the event a dispute is not resolved within fourteen days, "the parties must submit the dispute to the Malaysian Mediation Centre (MMC) of the Bar Council Malaysia..."

III. Specialist Courts

Among specialist courts, or courts dealing exclusively with one main subject matter, the Small Claims court, the Juvenile Court and the Industrial Court have been established.

Recently, The National Advisory Council for the Integration of Women in Development (NACIWID) submitted a proposal to the government for a unified system of family courts.²⁶ With this new system, it was hoped that there would be improvement in the judicial system, "where there is a huge back-log of unsettled family dispute cases, as well as long processes and delays in reaching settlements."²⁷

The proposed Family Court is to include facilities such as childcare and counselling services which are provided in other Asian countries, such as Singapore. The Family Court would emphasise "conciliation and co-operation, rather than conflict and contention."

Conclusion

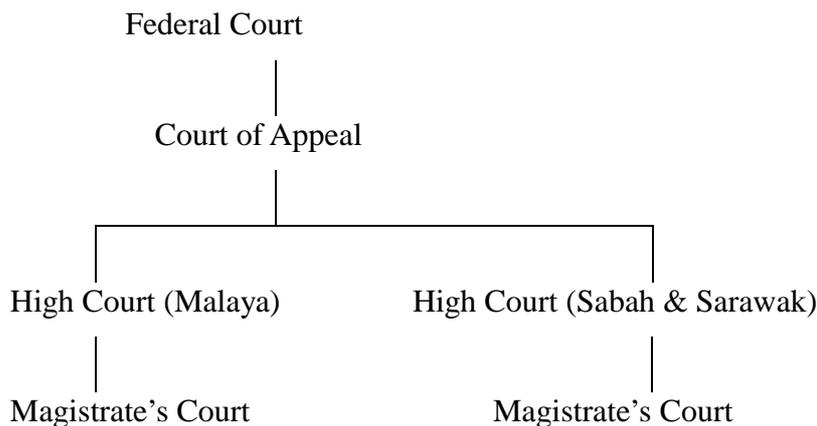
The growth of alternative dispute resolution within the Malaysian Legal System perhaps is in response to a public cry for justice which has become increasingly difficult to obtain at the hands of the traditional adversarial system of litigation. There is a demand for a system which is cheaper, simpler, speedier, more effective and also less adversarial in nature. There is, therefore, a growing affinity for conciliatory methods of dispute settlement, preferably without the presence of lawyers, where the procedures are easy enough for the layman to follow and strict legal rules do not apply.

ENDNOTES

¹ Regina v Willans (1858) 3 Ky 16.

² Civil Law Act, 1956, s. 3(1); s. 5.

³ Current Malaysian Court Structure – Article 121, Federal Constitution.



⁴ For example, when all appeals to the Privy Council were finally abolished in 1985, a Supreme Court was instituted. Subsequently, in 1995, a Court of Appeal was created, and the Federal Court became the final Court of Appeal.

⁵ For example, the crisis in the Judiciary which saw the removal of the then Lord President, Tun Salleh Abas, and recently, the erosion of confidence in the Malaysian Judiciary consequent upon the Anwar Ibrahim trials, leading to the publication of the Report "Justice in Jeopardy – Malaysia 2000".

-
- ⁶ The Industrial Court is established under the Industrial Relations Act 1967 as a special court to deal with industrial relations and industrial disputes between employer, employee and their trade unions.
- ⁷ There is provision for conciliation to be conducted by officials of the Industrial Relations Department (Director General of Industrial Relations) of the Ministry of Human Resources, but due to shortage of trained officials, many disputes still end up at the Industrial Court, causing a severe backlog.
- ⁸ There are 51 High Court judges, for the whole of Malaysia; 7 judges in the Court of Appeal, and 4 judges of the Federal Court.
- ⁹ Arbitration Act, 1952, s 17, awards are final and conclusive, but questions of law may be stated for deliberation by the High Court – s. 22.
- ¹⁰ Arbitration Act, 1952, s. 27; s. 31.
- ¹¹ The New Straits Times, 12 September 1999.
- ¹² *ibid.*
- ¹³ The New Straits Times, 12 September 1999.
- ¹⁴ Act 599, s. 86(1).
- ¹⁵ *ibid.*, s. 97.
- ¹⁶ S. 108(2).
- ¹⁷ S. 108(3).
- ¹⁸ S. 112(1).
- ¹⁹ S. 107(3).
- ²⁰ S. 116(a) & (b).
- ²¹ S. 98 (1).
- ²² S. 99(1); see also s. 100(1), where the Tribunal may have jurisdiction to hear and determine the claim even if the value of the subject matter exceeds ten thousand ringgit; and s. 101(1), where a claimant may abandon so much of a claim that exceeds ten thousand ringgit in order to bring the claim within the jurisdiction of the Tribunal.
- ²³ The New Straits Times, 15 September 2000.
- ²⁴ Section 28.
- ²⁵ The New Straits Times, 15 September 2000.
- ²⁶ The New Straits Times, 25 September 2000.
- ²⁷ *ibid.*