SUMMARY OF REPORT

In Malaysia, resort to alternative means of dispute resolution has been pursued in earnest in the last few years mainly due to acute problems pertaining to backlog of cases in the civil courts. As such, alternative dispute resolution can be said to be still in its infancy, and its effectiveness remains to be tested over time.

In the resolution of consumer disputes, the Tribunal for consumer claims has proven to be effective in the settlement of "small claims" of not more than RM10,000/-. Settlement is mostly through conciliation and agreement of both parties, and although hearing does take place, the procedures involved are much less cumbersome and has been simplified for the benefit of consumers. The time taken for resolution of disputes is thereby reduced, and costs involved are minimal due to the absence of lawyers. There is no appeal from the decision of the Tribunal, making it the "final" and binding arbiter of the dispute in question.

Labour disputes, on the other hand, has had the benefit of a much longer history compared to consumer disputes, as the court of arbitration for industrial or trade disputes pre-dates Independence. When the first Industrial Court was established (FMS Enactment No. 12 of 1940), the system of arbitration was voluntary in nature in that it was left to the parties themselves (employer and employee) to decide whether or not they wish to refer their dispute for arbitration. If they did, then implicit in such a choice would be the agreement to be bound by the decision of the Court. However, as the nation continued to be beset by strikes, particularly in the civil service, a different concept of arbitration was pursued, that is, compulsory arbitration based on the Australian model. The Court which took over from the 1940 Industrial Court practiced this system from 1965 until the present time.[19]

Several key features of compulsory arbitration form the basis of the Malaysian Industrial Relations Act, 1967. First, that parties no longer have the choice of whether or not to refer their dispute to an institutionalised body, but that they *must* refer such dispute or risk having the Minister interfere in order to have the dispute referred. Secondly, parties

[19] Essential (Arbitration in the Essential Services) Regulations 1965, established the Industrial Arbitration Tribunal, subsequently re-named the Industrial Court.

are *legally bound* to accept the decision of, either the Minister or the court, to which the dispute has been referred. Once the dispute has been put through the compulsory arbitration mechanism, all strikes and lock-outs are prohibited by law.

Although the Industrial Relations Act provides for conciliation and other procedures, such as fact-finding and investigation, in practice it may be argued that the most important feature of the system is *adjudication*, and the impact of precedents established primarily through awards handed down by the Industrial Court. Although technically the Industrial Court is not bound by its own awards, it becomes a normal practice for Industrial Court chairmen to refer to earlier decisions based on the same or similar facts. This system of precedents has resulted in both positive as well as negative aspects. For example, in cases of terms and conditions in collective agreements and disputes pertaining to terms and conditions, this system of precedent has stifled the growth of free collective bargaining, in the process making it rigid and inflexible. For example, the principle applied by the Industrial Court in cases of wage increments by pegging such increments to the rise in the Consumer Price Index without taking into account the productivity factor has had a negative impact on industry.[20] In cases pertaining to dismissal of employees on the other hand, Industrial Court precedents have been most helpful in maintaining security of tenure in employment by providing that no one shall be dismissed unfairly and without adhering to proper procedures.[21]

Adjudication assumes greater importance in the resolution of industrial disputes due to the ever widening scope of judicial review exercised by the civil courts over decisions made by the executive, such as the Minister, as well as the Industrial Court. In 1995, the Court of Appeal handed down its judgment in the case of *Syarikat Kenderaan Melayu Kelantan v Transport Workers' Union.*[22] The significance of the case lies in the establishment of principle that an inferior tribunal or other decision-making authority, whether exercising quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law, regardless whether such error of law constitutes jurisdictional error of law or not. Thus, all errors of law are reviewable. There is then no

[20] See, among others, *Malaysia Shipyard & Engineering Sdn Bhd, Johor v Kesatuan Sekerja Pekerja-Pekerja MSE Sdn Bhd* [1989] 2 ILR 7; *Woodard Textile Mills Sdn Bhd v Pg. & S. Prai Textile & Garment Indus. Employees Union*[1987] 2 ILR 370; *E & O (1951) Sdn Bhd v NUHBRW*[1990] 1 ILR 337; *Art printing Works Sdn Bhd v Printing Indus. Employees Union* [1987] ILR 469; *Dah Yung Steel (M) Sdn Bhd v MIEU* [1990] 1 ILR 350.

[21] *Cleetus v Unipamol (M) Sdn Bhd*; I.C. Award No. 66/1975.

[22] [1995] 2 MLJ 317.

difference between a review and an appeal, and this paves the way for the civil courts to actively engage in the review of Industrial Court wards,[23] thus increasing the legalism surrounding industrial adjudication.

In cases pertaining to the environment, there is no ADR mechanism. The issues are not really centred an "disputes", but more on "enforcement", for matters pertaining to the environment are made the subject of offences against the environment, for which prosecution will ensue. These fall more under the realm of criminal matters as opposed to civil matters. Offenders are liable to be fined and even imprisoned for committing any of the offences against the environment as prescribed under the EQA.

On the whole, formal dispute resolution mechanisms remain as the centrepiece in the landscape of dispute resolution in Malaysia, with ADR in the fringes. It remains to be seen to what extent ADR will alter this landscape in the future.

[23] *R. Rama Chandran v The Industrial Court* [1997] 1 MLJ 145; *Harris Solid State (M) Sdn Bd v Bruno Gentil* [1996] 3 MLJ 489; *Amanah Butler v Yike Chee Wah* [1999] 2 AMR 1653.