

Chapter 3

ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution, which utilizes methods of dispute resolution such as mediation, conciliation and arbitration without resort to the ordinary civil courts, is not a new phenomenon in Malaysia. Numerous tribunals exist apart from the formal civil court system, and their function is to conduct hearings and make decisions on specified matters. They do not function as courts do, although they have been imbued with quasi-judicial powers and functions. Strict rules of evidence and procedure do not apply. Indeed, most of these tribunals establish their own procedures. Their decisions, as with decisions of all inferior tribunals and members of the administration, are subject to judicial review by the High Court based on judicially – established principles.

1. THE PUBLIC SERVICES TRIBUNALS

The Public Services are outlined under the Federal Constitution as follows: the armed forces; the judicial and legal service; the general public service of the Federation; the police force; the joint public services under Article 133; the public service of each state, and the education service.¹²⁸ For the purposes of regulating conduct and maintaining discipline in the Public Service, the Public Officers (Conduct and Discipline) Regulations 1993, and the Public Services Disciplinary Board Regulations 1993 have been enacted. The Public Officers (Conduct and Discipline) Regulations 1993 identifies types of conduct unbecoming on the part of civil servants, and provides for disciplinary procedure. The Public Services Disciplinary Board on the other hand is entrusted with the responsibility of conducting hearings and making a determination in each case whether any member of the civil service is guilty of the disciplinary offence,

¹²⁸ Art. 132.

as charged.

The Disciplinary board has jurisdiction over all civil servants, except officers holding or acting in the posts of Chief Secretary of the Government and Director General of the Public Service. These officers come within the purview of the Public Services Commission. Further, the Board is not empowered to dismiss or reduce in rank an officer in the Top Management Group and the Managerial and Professional Group, which is exercisable only by the Public Services Commission. The Disciplinary Board in any disciplinary proceedings may not order a dismissal or reduction in rank unless such officer has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard.¹²⁹ This requirement will not apply in the following cases:¹³⁰

- (i) where an officer is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him;
- (ii) where the Board is satisfied for some reason to be recorded in writing, that it is not reasonably practicable to carry out the requirement;
- (iii) where the *Yang di Pertuan Agong* is satisfied that in the interests of the security of the Federation it is not expedient to carry out the requirement;
or
- (iv) where there has been made against the officer any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such officer any form of restriction or supervision by bond or otherwise under any law relating to the security of the Federation.

Before making a decision regarding any matter upon which it is required to determine, the Board is empowered to require an investigation to be conducted for the purpose of obtaining an explanation and a recommendation in the said matter.¹³¹ Anyone dissatisfied with the decision of the Board may appeal to the Public Services Disciplinary Appeal Board, chaired by the Chairman of the Public Services Commission.¹³² The functions of the Appeal Board are to receive, consider and decide

¹²⁹ Reg. 10(1).

¹³⁰ Reg. 10(2).

¹³¹ Reg. 11.

¹³² Reg. 12.

on any appeal. An appeal must be made in writing by the officer concerned through his Head of Department within fourteen days from the date on which the decision of the Board is communicated to him in writing.¹³³ The Head of Department shall, not later than thirty days from the date of receipt of the appeal, submit such appeal to the Appeal Board together with his comments. It is the duty of the Board to prepare a copy of the records of proceedings, including the grounds on which the Board relied upon in arriving at its decision. These records must be sent to the Appeal Board not later than thirty days from the receipt of the appeal by the Board.¹³⁴

The Appeal Board is to decide an appeal solely on the merits of the grounds of appeal without receiving any further statement or evidence.¹³⁵ After considering the appeal, the Appeal Board may¹³⁶-

- (i) remit the case to the Disciplinary Board for reconsideration;
- (ii) confirm the decision of the Disciplinary Board;
- (iii) confirm the decision, but vary the punishment to that of a lesser one, or
- (iv) reverse the decision and punishment of the Board and acquit the appellant.

The decision of the Appeal Board is final.¹³⁷

2. MALAYSIAN MEDIATION CENTRE

The Malaysian Mediation Centre (MMC) is a body established under the auspices of the Bar Council with the objective of promoting mediation as a means of alternative dispute resolution and to provide a proper avenue for successful dispute resolutions. The MMC is based in Kuala Lumpur and shares premises with the Bar Council's Auditorium. Other centers will be established in other States if and when the need arises. The Alternative Dispute Resolution Committee of the Bar Council is responsible for the proper functioning and implementation of the Centre's objectives.

The Centre offers a comprehensive range of services, which include:

- (i) Professional mediation services by trained mediators who have been

¹³³ Reg. 15(1).

¹³⁴ Reg. 15(4).

¹³⁵ Reg. 16(2).

¹³⁶ Reg. 16(4).

¹³⁷ Reg. 16(5).

- accredited and appointed to the Panel of Mediators of the MMC;
- (ii) Assistance and advice on how clients may best look after their interests in using Alternative Dispute Resolution processes such as mediation;
- (iii) Provides training in mediation techniques, accredits and maintains a panel of mediators;
- (iv) Consultancy services in dispute management and conflict avoidance;
- (v) Administrative and secretarial support.

At present the MMC accepts only commercial matters but intends to expand its scope of services to cover civil matters at a later stage. The MMC may accept cases at any stage, whether pre-trial, commencement of legal proceedings, during proceedings etc. Cases deemed suitable for mediation include cases where there is a deadlock in the negotiation process or where parties face obstacles. Majority of cases mediated involve construction agreement clauses, business agreements etc. Matrimonial and defamation suits are unsuitable for mediation. The type of mediation offered by the MMC is the facilitative model of mediation where the mediator is 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 Mediator is subject to a Code of Conduct whilst the parties are bound by the Mediation Agreement, which they enter into. The mediator and all parties are subject to the Mediation Rules of the MMC.

The Mediation process involves the following steps:

- (i) Pre-Mediation Process – where parties sign a mediation agreement indicating their submission to mediation;
- (ii) Preliminaries – an introduction to mediation;
- (iii) Mediator’s Opening – ground rules are laid down by the mediator for the session; Mediators are provided with a brief statement of facts. No prior in-depth knowledge of the issues at dispute are required;
- (iv) Joint session – parties are invited to state their respective cases in each other’s presence;
- (v) Caucuses – optional and usually exercised to enable the parties to vent emotions and to speak freely. Allows mediator to pick out common issues and hidden messages;
- (vi) Settlement Agreement – parties sign a settlement agreement witnessed

by the mediator. Parties are at liberty to pursue court action should outcome be unsatisfactory. Either parties' solicitors may draw up agreement or mediator may do so if assistance is required.

The mediator's scale of fees is as follows*:

Quantum of Claim	Mediator's Fee Per Party
RM100,000 and below	RM500 per day or part thereof
RM100,001 – RM250,000	RM750 per day or part thereof
RM250,000 – RM500,000	RM1,000 per day or part thereof
RM500,000 – RM750,000	RM1,250 per day or part thereof
RM750,000 – RM1,000,000	RM1,500 per day or part thereof
RM1,000,001 – RM2,000,000	RM2,000 per day or part thereof
RM2,000,001 – RM3,000,000	RM2,500 per day or part thereof
RM3,000,001 – RM5,000,000	RM3,000 per day or part thereof
RM5,000,001 – RM10,000,000	RM4,000 per day or part thereof
Above RM10,000,000	RM5,000 per day or part thereof

(*The Mediator's Scale of Fees is subject to change from time to time)

In addition to the above, the following charges are shared by the parties on an equal basis:

- (i) Administrative charge of RM300 per case;
- (ii) Room rental rates at RM350 for a full day and RM175 for half a day, which is defined as a period of 3 hours or less;
- (iii) Refreshments/catering; and
- (iv) Secretarial services.

Members of the Bar have been encouraged to adopt the Mediation Clause in contracts and agreements prepared by them, that is where a dispute has arisen, and is not resolved within fourteen days, the parties must submit the dispute to the Malaysian Mediation Centre of the Bar Council. If the parties cannot agree on a Mediator, the Centre shall appoint a Mediator from the Panel of Mediators, and the dispute is to be mediated in accordance with the Rules of the Centre (see below).

Mediators registered with the Malaysian Mediation Centre must be of at least seven years' standing as an Advocate and Solicitor of the High Court, and a member of

the Malaysian Bar with a valid practicing certificate. All mediators are required to complete a minimum of forty hours of training conducted by the centre, and must be successfully assessed at the end of the training.

3. MEDIATION RULES

(1) The Mediation Process

The mediation process conducted by the Malaysian Mediation Centre (“MMC”) is to be governed by this mediation procedure/Rules.

(2) Agreement of Parties

Whenever by stipulation or in their contract, the parties have provided for mediation of existing or future disputes under the Rules of the Malaysian Mediation Centre, they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement.

(3) Initiation of Mediation

- (i) All parties to a dispute may initiate mediation by filing jointly with the MMC a submission (“the Joint Submission”) to mediation pursuant to these Rules, together with a non-refundable processing fee of RM100.
- (ii) Any party to a dispute may initiate mediation by filing with the MMC a request (“the Request”) to mediate pursuant to these Rules together with a non-refundable processing fee of RM100. The initiating party shall inform the MMC of the names and particulars of all other parties interested in the dispute.
- (iii) Upon receipt of the Request with the payment of RM100, the MMC will contact all parties involved in the dispute and attempt to obtain a submission to mediation within fourteen days from the date of the receipt of the Request and shall within twenty-one days from the date of receipt of the Request inform all parties whether mediation can proceed.
- (iv) In the event the parties proceed with mediation, the processing fee will be utilized as part payment of the administrative fee.

(4) Request for Mediation

- (i) The Joint Submission or the Request for mediation shall contain a brief statement of the nature of the dispute and the names, addresses, and telephone numbers of all parties to the dispute and those who will represent them, if any, in the mediation.
- (ii) The initiating party shall simultaneously file two copies of the Request with the MMC and one copy with every other party to the dispute.

(5) Appointment of Mediator

- (i) Upon the parties agreeing to submit to mediation, the MMC will forward a list of Mediators on the panel and in the event the parties not having agreed upon a Mediator on MMC's panel within seven days, the MMC shall appoint a person on MMC's panel to act as the Mediator.
- (ii) The MMC in the selection will choose a person who, in its view will be best placed to serve as the Mediator. In the event that any of the parties has reasonable cause to object to the choice, the MMC will appoint another person. The Mediator will:
 - (a) prepare himself appropriately before the commencement of the mediation;
 - (b) abide by the terms of the Mediation Agreement and the Code of Conduct;
 - (c) assist the parties in the drawing of any written settlement agreement; and
 - (d) in general, facilitate negotiations between the parties and steer the direction of the discussion with the aim of finding a mutually acceptable solution. Unless expressly requested by all the parties involved, the Mediator will not make any ruling/finding with respect to the dispute.
- (iii) The Mediator (or any member of his firm or company) should not act for any of the parties at any time in connection with the subject matter of the mediation. The Mediator and the MMC are not agents of, or acting in any capacity for, any of the parties. The Mediator is not an agent of the MMC.

(6) Disqualification of Mediator

- (i) No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by written consent of all parties.
- (ii) Prior to accepting an appointment, the prospective mediator shall disclose any circumstances likely to create a presumption of bias or prevent a prompt meeting with the parties.
- (iii) Upon receipt of such information, the MMC shall either replace the mediator or immediately communicate the information to the parties for their comments.
- (iv) In the event that the parties disagree as to whether the Mediator shall serve, the MMC will appoint another Mediator. The MMC is authorized to appoint another Mediator if the Mediator is unable to serve promptly.

(7) Mediation Agreement

Before mediation is carried out, the parties will enter into an agreement for appointment of Mediator (“the Mediation Agreement”).

(8) Vacancies

If any Mediator shall become unwilling or unable to serve, the MMC will appoint another mediator.

(9) Representation

- (i) Individuals should attend the mediation in person. In the case of corporate entities, the parties shall appoint representatives to the mediation who have the necessary authority to settle the dispute. The parties will supply the MMC and the Mediator with the names of the representatives.
- (ii) The Mediator will determine the steps to be taken during the mediation proceedings after consultation with the parties. The parties will be deemed, upon signing the Mediation Agreement, to have accepted and will be bound by the terms of this procedure.

(10) Date, Time and Place of Mediation

The MMC shall fix the date and the time of each mediation session. The

mediation shall be held at the appropriate office of the MMC or at any other convenient location as may be determined by the MMC.

(11) Identification of Matters in Dispute and Exchange of Information

- (i) At least five days prior to the Mediation, each party shall submit to the Mediator the following:
 - (a) concise summary not exceeding three pages (“the Summary”) stating its case; and
 - (b) if necessary, copies of all documents referred to in the Summary and which are to be referred to during the Mediation.
- (ii) Each party may also bring to the Mediator documents which it wishes to disclose only to the Mediator, stating clearly in writing that the contents of these documents are to be kept confidential by the Mediator.

(12) Authority of Mediator

- (i) The Mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The Mediator is authorized to conduct joint and separate meetings with the parties and to suggest options for settlement.
- (ii) Whenever necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the parties as the Mediator shall determine.
- (iii) The Mediator is authorized to end the mediation whenever, in the opinion of the Mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties.

(13) Settlement Agreement

No settlement reached in the Mediation will be binding until it has been reduced to writing and signed by and or on behalf of the parties.

(14) Privacy

Mediation sessions are private. The parties and their representatives may

attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the Mediator. Where appropriate, the Mediator is authorized to limit the number of representatives from each party.

(15) Confidentiality

- (i) All communications made in the Mediation, including information disclosed and views expressed are made on a strictly “without prejudice” basis and shall not be used in any proceedings.
- (ii) All records, reports or other documents including anything electronically or any other information produced or received by a mediator while serving in that capacity shall be privileged.
- (iii) The Mediator or the MMC (or any employee, officer or representative for or arising in relation to mediation) shall not be compelled to divulge such records or to testify as a witness, consultant, arbitrator or expert in regard to the mediation in any arbitral judicial or other proceedings.
- (iv) The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceedings:
 - (a) Views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
 - (b) Admissions made by another party in the course of the mediation proceedings;
 - (c) Proposal made or views expressed by the Mediator; or
 - (d) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the Mediator.

(16) No Stenographic record, Audio-Visual Recording or Formal Record

There shall be no stenographic record, no transcript or formal record. No audio-visual recording will be made of the proceedings.

(17) Stay of Proceedings

Unless the parties otherwise agree, the Mediation will not prevent the commencement of any suit or arbitration, nor will it act as a stay of such proceedings.

(18) Termination of Mediation

The mediation shall be terminated:

- (i) by the execution of a settlement agreement by the parties;
- (ii) by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or
- (iii) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

(19) Exclusion of Liability (Waiver)

- (i) Neither the MMC nor any mediator is a necessary party in judicial proceedings relating to the mediation.
- (ii) Neither the MMC nor any mediator shall be liable to the parties or any other person for any act or omission in connection with any mediation conducted under these Rules unless the act or omission is fraudulent or involves dishonest misconduct.

(20) Interpretation and Application of Rules

The Mediator shall interpret and apply these Rules in so far as they relate to the procedure of mediation, the Mediator's duties and responsibilities. All other Rules shall be interpreted and applied by the MMC.

(21) Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation including required traveling and other expenses of the mediation of the Mediator and representatives of the MMC and the expenses of any witness and the cost of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree otherwise.

- (a) Administrative and rental charges and the Mediator's fees are as prescribed by the MMC from time to time.
- (b) The administrative and rental charges of the MMC and the Mediator's fees for the first scheduled session shall be paid at least three days prior to the first scheduled session. The balance charges and fees, if any, shall be paid at least three days before the next scheduled session or upon termination

or conclusion of the mediation within seven days of receipt of the bill from the MMC.

4. THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

(1) Organization of the Kuala Lumpur Regional Centre for Arbitration and its Functions

The Regional Centre for Arbitration was established in 1978 in Kuala Lumpur under the auspices of the Asian-African Legal Consultative Committee (an inter-governmental organization) in co-operation with and with the assistance of the Government of Malaysia.

The Centre is a non-profit making institution and has been established with the objective of providing a system for settlement of disputes for the benefit of parties engaged in trade and commerce and investment with and within the region. The Centre functions under the supervision of the Asian-African Legal Consultative Committee and is headed by a Director.

One of the principal functions entrusted to the Centre is the provision of facilities for arbitration under the rules of the Centre for settlement of disputes in matters arising out of commercial transactions including investment disputes through fair, expeditious and inexpensive procedures, so that resort to arbitration institutions outside the region may no longer become necessary.

The facilities for arbitration under the auspices of the Centre can be availed of by the parties who may request for it, whether government, individuals or bodies corporate, provided the dispute is of an international character, that is to say, the parties belong to or are resident in two different jurisdictions, or the dispute involves international commercial interests.

(2) Request for Arbitration

Parties who may wish to avail of the arbitration facilities provided by the Centre should make a written request to the Director of the Centre for the purpose intimating at the same time that the parties have entered into an agreement under which they have agreed to refer their disputes and differences for settlement by arbitration under the auspices of and the rules of the Centre.

Such an agreement may be incorporated in a contract between the parties out of which the disputes and differences have arisen or by a separate agreement which the parties may enter into.

(3) Rules for Arbitration

The Rules for arbitration under the auspices of the Centre are the UNCITRAL Arbitration Rules of 1976 with certain modifications and adaptations. The UNCITRAL Rules have been recommended by the United Nations General Assembly by its Resolution No XXXI 98 adopted on the 15th December 1976 and has been widely accepted by the international community.

The rules of the Centre allow a great deal of flexibility in the conduct of proceedings of the arbitration and leaves a wide discretion to the parties in regard to the choice of arbitrators, the place of arbitration and the applicability of the procedural rules.

(4) Arbitrators

The parties are free to choose their own arbitrators in the manner indicated in the UNCITRAL Rules but where they have failed to agree on the choice of the sole arbitrator or the presiding arbitrator in the case of a three member tribunal, the appointment shall be made by an “appointing authority” chosen by the parties.

If the parties appoint the Centre as the appointing authority or where the parties have failed to nominate an appointing authority, the sole arbitrator or the presiding arbitrator shall be appointed by the Centre.

(5) Panel of Arbitrators

In its function as appointing authority, the Centre appoints qualified Arbitrators, such as eminent Jurists, Judges and Diplomats drawn from the countries in the Asian-African region as well as the countries which have close economic links or large investments in the Asian-African region.

(6) Place of Arbitration

The arbitration may be held either at the seat of the Centre at Kuala Lumpur or at any other place chosen by the parties.

(7) Facilities for Arbitration

The Director of the Centre shall, at the request of the arbitral tribunal or either party, make available or arrange for such facilities and assistance for the conduct of arbitral proceedings as may be required including suitable accommodation for sittings of the arbitral tribunal, secretarial assistance and interpretation facilities.

(8) Enforcement of Awards

The Centre shall, at the request of either party, render all assistance in the enforcement of awards, which may be made in the arbitration proceedings held under the auspices of the Centre.

(9) Costs of Arbitration

The costs of arbitration including the fees of arbitrators as also the expenses reasonably incurred by the Centre in connection with the arbitration as well as its administrative charges would be borne by the parties in such proportion as may be determined in the arbitral award.

The fees of arbitrators, which depend on several factors, such as the complexity of the case, the nature of the dispute, time spent and the expeditious conduct of the proceedings, would be fixed in each case in accordance with a schedule.

The fees and charges of the centre would be fixed taking into account the actual expenses incurred and also keeping in view the non-profit making character of the Centre.

(10) Provision of Facilities and Assistance in ad hoc Arbitration

The Centre also provides technical facilities and assistance for holding of *ad hoc* arbitration proceedings where parties request for such services upon payment of certain charges which would be fixed, taking into account the expenses incurred by the Centre in providing the facilities and the non-profit making character of the Centre.

(11) Provision of Facilities in Arbitrations Held Under the Auspices of Other Institutions

The Centre has arrangements with certain institutions such as the World Bank's International Centre for Settlement of Investment Disputes under which arbitration proceedings under the auspices of such institutions can be held at the seat of the Centre.

These facilities would be provided at the request of the institution concerned

with which arrangements have been made.

5. OTHERS

(1) The Insurance Mediation Bureau

In 1992, the Insurance Mediation Bureau (IMB) was established after a spate of complaints by policyholders 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.¹³⁸ 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 months 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 policyholder. In 1997 insurers were directed by the Central Bank to publicize 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 1999.¹³⁹

(2) 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

¹³⁸ The New Straits Times, 12 September 1999.

¹³⁹ The New Straits Times, 12 September 1999.

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.

(3) 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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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.¹⁴³ The Tribunal is to make its award without delay and where practicable within sixty days from the first day of hearing.¹⁴⁴

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.¹⁴⁵ Every agreed settlement and award of the Tribunal is final and binds all parties to the proceedings and

¹⁴⁰ Act 599, s 86(1).

¹⁴¹ *ibid*, s. 97.

¹⁴² S. 108(2).

¹⁴³ S. 108(3).

¹⁴⁴ S. 112(1).

¹⁴⁵ S. 107(3).

is deemed an order of a Magistrate's court and is to be enforced accordingly.¹⁴⁶

The Tribunal's jurisdiction however is limited to where the total amount in respect of which an award is sought does not exceed RM10, 000.¹⁴⁷ 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.¹⁴⁸

(4) Copyright Tribunal

The Copyright Tribunal was recently launched by the Domestic Trade and Consumer Affairs Minister.¹⁴⁹ The power to establish the Tribunal is given under the Copyright Act, 1991,¹⁵⁰ 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.¹⁵¹ 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.

(5) The Special Commissioners of Income Tax

The Income Tax Act 1967 provides for the establishment of a special body, called the Special Commissioners, consisting of three persons appointed by the Yang di Pertuan Agong. There is also provided the post of a clerk to the Special Commissioners. The Special Commissioners shall be persons with judicial or other legal experience.

A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment, or in the case of an appeal against assessment, within the first three months of the year of assessment for which the

¹⁴⁶ S. 116(a) & (b).

¹⁴⁷ S. 98(1).

¹⁴⁸ 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.

¹⁴⁹ The New Straits Times, 15 September 2000.

¹⁵⁰ Section 28.

¹⁵¹ The New Straits Times, 15 September 2000.

assessment was made, a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars.¹⁵² There is a right, given under section 100(1), to ask for an extension of the period within which notice of appeal against the assessment may be given.

On receipt of the notice of appeal, the Director General may review the assessment against which the appeal is made, and for that purpose may –

- (a) require the appellant to furnish such particulars as the Director General may think necessary with respect to the income to which the assessment relates and any other matter relevant to the assessment in the Director General's opinion;
- (b) require the appellant to produce all books or other documents in the appellant's custody or under the appellant's control relating to any source to which the assessment relates or any other matter relevant to the assessment in the Director General's opinion;
- (c) summon any person who in the Director General's opinion is able to give evidence respecting the assessment to attend before the Director General, and
- (d) examine any person so attending on oath or otherwise.

Where, as the result of the review the Director General and the appellant has come to an agreement in writing either as to the amount of the chargeable income and the tax chargeable thereon or the amount of tax or additional tax, or that there is no chargeable income or tax, the assessment against which the appeal is made shall be treated as having been confirmed, reduced, increased or discharged in accordance with the agreement.

As a result of the review, the appellant and the Director General may come to an oral agreement, which the Director General may have confirmed in writing and which will be regarded as an "agreement", unless repudiated earlier by the appellant.¹⁵³ Where there is deemed to be an agreement between the Director General and the appellant, one of the Special Commissioners on the application of the appellant made to the Special Commissioners within a period of thirty days after the agreement is deemed

¹⁵² Income Tax Act, 1967, s. 99(1).

¹⁵³ Income Tax Act, 1967, s. 101(4).

to be come to may, after giving the Director General an opportunity to make oral or written representations, set the agreement aside if he thinks it just and equitable to do so in the circumstances. The decision of one of the Special Commissioners on an application to set aside the agreement shall be notified by the clerk in writing to the applicant and the Director General and shall be final.¹⁵⁴

The Director General may send an appeal forward to the Special Commissioners at any time if he is of the opinion that there is no reasonable prospect of coming to an agreement with the appellant, and where he sends an appeal forward under this provision, he must give the appellant written notice that he has done so.¹⁵⁵ Where an appeal has been sent forward to the Special Commissioners, the Director General and the appellant at any time before the hearing of the appeal by the Special Commissioners is completed may come to an agreement with regard to the assessment to which the appeal relates, and where they do so, the proceedings before the Special Commissioners shall abate, and the agreement shall have effect.

(6) The Court (Land Acquisition)

Under the Federal Constitution, land is a state matter. There shall be no acquisition of land without the payment of adequate compensation (Article 13, Federal Constitution, and the Land Acquisition Act, 1960, Revised 1992). For the purposes of determining adequate compensation, a Special Court is constituted under the Land Acquisition Act, 1960.

This court consists of a Judge sitting alone. Where the objection before the court is in regard to the amount of compensation, the court is to appoint two assessors (one of whom shall be a valuation officer employed by the Government) for the purpose of aiding the Judge in determining the objection and in arriving at a fair and reasonable amount of compensation.¹⁵⁶ The assessors are to come from a list of names submitted to the court by the President of the Board of Valuers, Appraisers and Estate Agents. Every person appointed as an assessor is legally bound to attend and serve as an assessor unless excused by the Judge. The opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and recorded by the Judge.

¹⁵⁴ *ibid*, s. 101(6).

¹⁵⁵ Income Tax Act 1967, s. 102(1).

¹⁵⁶ Land Acquisition Act 1960, s. 40A.

In a case before the court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors. Where the assessors have each arrived at a decision which differs from each other, then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor. Any decision made under this provision is final and there shall be no further appeal to a higher court on the matter.¹⁵⁷

¹⁵⁷ *ibid*, s. 40D(3).