



## **ADJUDICATION HANDBOOK**

**This Adjudication Handbook is published by MAFB as part of the Public Consultation exercise. This Adjudication Handbook amplifies and operationalise the Dispute Resolution process set out in Section I of the Voluntary Access Code**

**Notes:[ To be used in Respect of Access Disputes under Article I of the Voluntary Access Code Published by the Malaysian Access Forum ]**

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# 1. Introduction

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Article I of the Voluntary Access Code dated [ **to be inserted** ] sets out the Dispute Resolution Process to be utilised by Access Seekers and Access Providers in respect of:

1. issues, disagreements or disputes arising between the parties prior to obtaining access;
2. refusals, delays or such other actions that frustrates negotiation of an access agreement between the parties; and
3. differences, disagreements, disputes or issues arising out of or relating to the Access Agreement.

## 1.1 Application of Article I

The dispute resolution process set out in Section I.4, I.5, I.6 to I.11 of the Voluntary Access Code, shall apply in relation to either a Standard Access Dispute as set out in Section I.2 or Specific Access Dispute as set out in Section I.3 of the Voluntary Access Code (hereinafter referred to as “**the Code**”). The standardisation of the dispute resolution procedure provides a common mechanism for both the Access Provider and the Access Seeker to resolve any disputes efficiently.

### 1.1.1 Standard Access Dispute

The details of the types of disputes that are categorised as a Standard Access Dispute is set out in Section I.2 of Article I of the Code. The latest version is reproduced below for ease of reference. Parties are advised to refer to Access Code for updates to this provision.

- 1.2.1 The following disputes or differences are categorised as Standard Access Disputes:*
- (a) differences, dispute, controversy or claim of any kind or nature arising under or in connection with the Access Agreement (including disputes as to the creation, validity, interpretation, breach or termination of the Access Agreement);*
  - (b) Technical disputes arising during the course of negotiation and/or implementation of the Access Agreements;*
  - (c) Billing Disputes as defined in sub-section 1.2.4 below;*
  - (d) any other dispute or disagreement which arises in respect of the application of the Access Code, which is not specifically captured in Section I.2 ;*
- 1.2.2 Subject to Section 1.2.3 below, the provisions in Sections I.4, I.5 and I.6 to I.11 shall apply to all Standard Access Disputes.*
- 1.2.3 With respect to Technical Disputes that cannot be resolved through the dispute resolution procedure set out in Sections I.4 and I.5 below, the following special procedure as set out in Section I.11 shall be applicable in lieu of the provisions in Section I.7.*
- 1.2.4 For the purposes of the Code (including any Access Agreements), “**Billing Dispute**” refers to a disagreement between the parties to an Access Agreement concerning the amount billed by the Access Provider to the Access Seeker and shall include errors, discrepancies, fraud, mistakes, and such other errors. All Billing Disputes shall be subject to the provisions in clause 36 [Disagreements as to payments ] of Article F Model Terms – General Conditions in the Code.*

### 1.1.2 Specific Access Disputes

The types of disputes that are categorised as a Specific Access Dispute is set out in Section I.3 of Article I of the Code. The latest version of Section I.3 is reproduced below for ease of reference. Parties are advised to refer to Access Code for updates to this provision.

*1.3.1 The following disputes or differences are categorised as Specific Access Disputes:*

- (a) all disputes arising between the Access Seeker and Access Provider from the time the Access Request is made until Parties enter into negotiations ;*
- (b) where a deemed rejection has occurred under Subsection E.3.5 of the Code;*
- (c) where a rejection of an Official Request for Access is made under Subsection E.4.5 of the Code; or*
- (d) where the parties are unable to enter into an Access Agreement after completing 120 days of negotiation as set out in Section E.5 (ante).*

*1.3.2 The provisions in Sections I.4 and I.5 shall not apply to Specific Access Disputes.*

*1.3.3 All Specific Access Disputes shall be referred to Adjudication in accordance with Section I.6.*

## **1.2 Scope of Handbook**

This Handbook covers the following :

- Chapter 2** Adjudicators – Matters connected with the appointment, qualification, disqualification, and duration of appointment;
- Chapter 3** The detailed Adjudication procedures and guidelines
- Chapter 4** The Forms relating to a Standard Access Dispute or a Specific Access Dispute;

The Handbook does not provide the Forms or processes that apply in respect of resolution of disputes by either the Inter-Party Working Group and/or the Senior Management (as referred to in Section I.4 and I.5 of Article I of the Code).

## 2. Adjudicators

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### 2.1 Introduction

**Annotation:** In order for MAF to operationalise Article I – Dispute Resolution Process, it is necessary that the members of MAF confirm the criteria to be used to appoint the Adjudicators, the duration of their appointment, and the terms and conditions of their appointment.

This Chapter 2 sets out the following:

1. the appointment process including the criteria to be used to appoint Adjudicators to the MAF Adjudication Panel;
2. the duration of the appointment of Adjudicators; and
3. the terms and conditions of the appointment of Adjudicators

### 2.2 Appointment of Adjudicators

Part 2.2 of Chapter 2 sets out the following:

1. the process by which Adjudicators are appointed;
2. the criteria to be used when selecting Adjudicators to be on the Adjudication Panel;
3. the size of the Adjudication Panel which is to be maintained by MAF (as set out in Section I.6.4 of Article I of the Code);
4. [            ]

#### 2.2.1 Selection Process

2.2.1.1 The first Adjudication Panel shall be constituted within 90 days of the Code being registered by the Commission. The Board of MAF shall, direct the Secretary to the Board to prepare and draw up a list of potential candidates for appointment to the Adjudication Panel.

2.2.1.2 **1<sup>st</sup> investigation process.** Upon such notification the Secretary shall undertake :

- (a) Identify the individuals who qualify to be considered as Adjudicators. (The number of candidates that the Secretary must identify shall not be less than twice the number of Adjudicators who are either resigning from the Adjudication Panel or whose term is not being renewed or all of the Adjudicators on the Adjudication Panel).
- (b) undertake a suitable background and qualification check of these individuals;
- (c) interview the individuals;
- (d) obtain a copy of their resume;
- (e) obtain their consent to be an Adjudicator using Form 2.2.1.2; and

2.2.1.3 Upon the completion of the first investigation process, the Secretary shall present a Nomination Report to the Board, which shall contain the following details:

- (a) the names and details of all individuals that the Secretary has met;
- (b) the results of the background and qualification check of the individuals;

- (c) the notes of the interview;
- (d) the resume of each candidate;
- (e) their consent to act as an Adjudicator; and
- (f) the list of recommended individuals.

2.2.1.4 The Board shall review the Nomination Report and may make changes to the list of recommended candidates. Once the list of candidates has been approved by the Board, the Secretary shall publish the list of candidates to all members of MAF and notify the Commission of the appointment of the Adjudicators.

2.2.1.5 The members of the MAF may object to the appointment of any of the Adjudicators within thirty (30) days from the date of last publication, providing sufficient particulars and reasons for such objection.

2.2.1.7 Upon the completion of the objection period, the Board of MAF shall remove from the list of candidates those who are objected to by at least one-third (1/3) or more members. If the Board agrees with the objection than such objected candidate shall be removed from the candidate list.

2.2.1.8 The final list of Adjudicators shall be published in MAF's website and also notified to the Commission. The list of Adjudicators shall contain the following information

1. List of names of the Adjudicators;
2. Contact details;
3. Areas of expertise and qualifications; and
4. The duration of their appointment.

Purpose: This enables Access Providers and Access Seekers to select a suitable Adjudicator for resolving their disputes.

2.2.1.9 The powers, functions and duties of the Secretary in the selection process may be delegated to such persons as the Secretary thinks fit, including third party external consultants to assist the Secretary in undertaking the tasks it has in this Part 2.2.1 of Chapter 2.

## 2.2.2 Qualification of Adjudicator

An individual who is eligible for nomination as an Adjudicator shall have the following qualifications :

1. He shall possess appropriate qualifications and experience to adjudicate Disputes;
2. He shall have extensive knowledge in the communications industry;
3. He need not be a Malaysian citizen or resident;

The qualification criteria may be amended from time to time by the Board of MAF.

**Annotation:** It is believed that the availability of individuals who meet both criteria in Malaysia may be few and far between. Therefore a more efficient approach is to allow individuals who satisfy some of the criteria to be nominated as an adjudicator. However if there are individuals who meet both criteria, those individuals are the first choice..

### 2.2.3 Disqualification from Appointment

A person who:

1. has been employed by or is a director of any member of the MAF in the last twelve (12) months prior to being nominated as an Adjudicator; or
2. has been or is convicted of any serious offence (particularly those involving dishonesty, breach of trust or cheating) or adjudicated a bankrupt; or
3. is or becomes an employee of a member of the MAF; or
4. becomes a director of MAF when he or she is an Adjudicator; or
5. is a substantial shareholder (whether directly or indirectly) of any member of MAF.

shall be not be nominated as an Adjudicator or continue to be an Adjudicator.

The grounds for disqualification may be amended from time to time by the Board of MAF.

**Annotation:** The disqualification grounds enable the sorting out of persons who may qualify as adjudicators at the nomination period or who having been empanelled become disqualified. In the latter case they are to be removed so that the impartiality and independence of the Adjudication Panel is preserved.

### 2.2.4 Eligibility Criteria

A person shall satisfy the following eligibility criteria before he or she can be nominated as an Adjudicator, namely:

1. shall be of good standing;
2. shall be recognized by the industry as a fit and proper person to be an Adjudicator; and
3. shall satisfy the qualification requirements set out in Part 2.2.2 above;
4. shall not be disqualified; and
5. is not in a position of a conflict of interest.

These eligibility criteria may be amended from time to time by the Board of MAF. Notwithstanding the above, the Board of MAF may waive or dispense with the application of any of the above criteria to an adjudicator nominee, if it has good cause to do so.

**Annotation:** In addition to a person satisfying the qualification requirements, he or she has to satisfy the eligibility criteria. If a person does not satisfy the eligibility criteria then he or she cannot be nominated. However recognizing that such strict application may cause difficulty, the eligibility criteria may be waived by the MAF Board if there is good cause. The good cause must be documented and all Board members made aware before a vote is taken as to whether to waive the eligibility criteria or not as it applies to a particular individual.

### 2.2.5 Size of Adjudication Panel

At all times, the number of adjudicators who are empanelled into the Adjudication Panel shall be more than six (6) but not more than ten (10) individuals.

## 2.2.6 Duration of Appointment

2.2.6.1 An individual shall be appointed to the Adjudication Panel for a term, not exceeding, three (3) years.

2.2.6.2 Upon the expiry of an individual adjudicator's term, he may offer himself up for re-selection by the members of MAF.

## 2.2.7 Terms of Appointment to the Adjudication Panel

The following are the terms and conditions of the appointment of Adjudicators to the Adjudication Panel:

1. The duration of the appointment shall be three (3) years.
2. The appointee may offer himself for re-selection prior to the expiry of the term, provided three (3) months prior notice is given to the Board of MAF of his intention.
3. The appointment to the Adjudication Panel does not mean that the appointee will be selected by parties to adjudicate a dispute.
4. The appointee shall make available his scale of charges so that parties in dispute may be aware of his charges prior to their selection as an adjudicator.
5. The fees (including all out of pocket expenses) that parties agree to pay the adjudicator may be retained by the adjudicator absolutely.
6. MAF may however charge the Parties for any facilities or services that the MAF provides to the Parties. Such costs shall be payable by the party referring the Dispute within seven (7) days of receiving an invoice form the MAF.
7. The information that is supplied to the adjudicator by the parties to a dispute shall be treated as confidential and shall not be disclosed to any other party (except in accordance with any written law). Such restriction shall not apply to a disclosure made to the Commission or the MAF.
8. MAF may remove any appointee from the Adjudication Panel prior to the expiry of the term, if it has sufficient cause to do so, if the appointee become a disqualified person (as per Part 2.2.3 of Chapter 2 of the Adjudication Handbook) or if the appointee is guilty of misconduct during any adjudication proceedings.
9. Apart from the fees paid to the Adjudicator by the Parties to the Dispute, the MAF will not be liable to the Adjudicator for any other fees, salary, out-of-expenses or other remuneration.

The Board of MAF may add, vary or delete any of the aforementioned conditions from time to time.

## 2.2.8 Amendments

Notwithstanding any provision to the contrary in Chapter 2, the Board of MAF may amend the matters set out in this Chapter 2 from time to time. Such amendments shall be submitted to the members of MAF for agreement prior to such amendments becoming effective. All prior appointments of Adjudicators shall not be nullified by reason of the amendments becoming effective, and such amendments shall only have prospective effective from the effective date.

## 3. Technical Experts

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### 3.1 Introduction

It is recognised in the Access Code that in lieu of referring a dispute to an Adjudicator, it may be more suitable to refer certain technical Disputes to a technical expert. The following parts sets out the matters relating to referral of Disputes to technical experts.

This Chapter 3 provides the rules for the creation of a Technical Expert Panel from which parties to a dispute may select a member of the panel to be a technical expert to resolve technical disputes.

**Annotation:** In order for MAF to operationalise Section I.11 (Technical Disputes) of Article I – Dispute Resolution Process, it is necessary that the members of MAF confirm the criteria to be used to appoint the Technical Experts, the duration of their appointment, and the terms and conditions of their appointment.

### 3.2 Appointment of Technical Experts

This Part 3.2 of Chapter 3 sets out:

- (a) the process to select candidates for the Technical Experts Panel;
- (b) their qualifications, disqualification and eligibility criteria;

#### 3.2.1 Selection Process

3.2.1.1 The first Technical Experts Panel shall be constituted within 90 days of the Code being registered by the Commission. The Board of MAF shall, direct the Secretary to the Board to prepare and draw up a list of potential candidates for appointment to the Technical Experts Panel.

3.2.1.2 **1<sup>st</sup> investigation process.** Upon such notification the Secretary shall undertake :

- (a) Identify the individuals who qualify to be considered as Technical Experts. (The number of candidates that the Secretary must identify shall not be less than twice the number of Technical Experts who are either resigning from the Technical Experts Panel or whose term is not being renewed or all of the Technical Experts on the Technical Experts Panel).
- (b) undertake a suitable background and qualification check of these individuals;
- (c) interview the individuals;
- (d) obtain a copy of their resume;
- (e) obtain their consent to be an Technical Experts using Form 2.2.1.2; and

3.2.1.3 Upon the completion of the first investigation process, the Secretary shall present a Nomination Report to the Board, which shall contain the following details:

- (a) the names and details of all individuals that the Secretary has met;
- (b) the results of the background and qualification check of the individuals;

- (c) the notes of the interview;
- (d) the resume of each candidate;
- (e) their consent to act as a Technical Expert; and
- (f) the list of recommended individuals.

3.2.1.4 The Board shall review the Nomination Report and may make changes to the list of recommended candidates. Once the list of candidates has been approved by the Board, the Secretary shall publish the list of candidates to all members of MAF and notify the Commission of the appointment of the Technical Experts.

3.2.1.5 The members of the MAF may object to the appointment of any of the Technical Experts within thirty (30) days from the date of last publication, providing sufficient particulars and reasons for such objection.

3.2.1.7 Upon the completion of the objection period, the Board of MAF shall remove from the list of candidates those who are objected to by at least one-third (1/3) or more members. If the Board agrees with the objection than such objected candidate shall be removed from the candidate list.

3.2.1.8 The final list of Technical Experts shall be published in MAF's website and also notified to the Commission. The list of Technical Experts shall contain the following information

- 5. List of names of the Technical Experts;
- 6. Contact details;
- 7. Areas of expertise and qualifications; and
- 8. The duration of their appointment.

Purpose: This enables Access Providers and Access Seekers to select a suitable Technical Expert for resolving their disputes.
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3.2.1.9 The powers, functions and duties of the Secretary in the selection process may be delegated to such persons as the Secretary thinks fit, including third party external consultants to assist the Secretary in undertaking the tasks it has in this Part 3.2.1 of Chapter 3.

### 3.2.2 Qualification

An individual who is being nominated as a Technical Expert shall have the following qualifications:

- 1. He shall possess sufficient engineering and technical expertise and experience in the communications industry ; and
- 2. He shall be appropriately qualified to be able to appreciate the nature of the Technical Dispute that may arise from time to time; and/or

The qualification criteria may be amended from time to time by the Board of MAF.

### 3.2.3 Disqualification

A person who:

1. has been employed by or is a director of any member of the MAF in the last twelve (12) months prior to being nominated as a Technical Expert; or
2. has been or is convicted of any serious offence (particularly those involving dishonesty, breach of trust or cheating) or adjudicated a bankrupt; or
3. is or becomes an employee or director of a member of the MAF; or
4. is a substantial shareholder (whether directly or indirectly) of any member of MAF.

shall be not be nominated as a Technical Expert or continue to be a Technical Expert.

The grounds for disqualification may be amended from time to time by the Board of MAF.

**Annotation:** The disqualification grounds are less strict as compared to Part 2.2.3 of Chapter 2 post. It is only where there is a risk of conflict of interest will the disqualification apply.

### 3.2.4 Eligibility Criteria

Individuals who are to be nominated as Technical Experts must first satisfy the eligibility criteria, namely:

1. shall be of good standing;
2. shall satisfy the qualification requirements set out in Part 3.2.2 above;
3. shall not be disqualified; and
4. is not in a position of a conflict of interest.
5. non-Malaysians citizens or permanent residents are eligible to be appointed as a Technical Expert

The criteria may be amended from time to time by the Board of MAF. Notwithstanding the above, the Board of MAF may waive or dispense with the application of any of the above criteria.

**Annotation:** In addition to a person satisfying the qualification requirements, he has to satisfy the eligibility criteria. If a person does not satisfy the eligibility criteria then he cannot be nominated. However recognizing that such strict application may cause difficulty, the eligibility criteria may be waived by the MAF Board if there is good cause. The good cause must be documented and all Board members made aware before a vote is taken as to whether to waive the eligibility criteria or not as it applies to a particular individual.

### 3.2.5 Size of Technical Expert Panel

At all times, the number of Technical Experts who are empanelled in the Technical Experts Panel shall not be more than eight (8) individuals.

### 3.2.6 Duration of Appointment

- 3.2.6.1 An individual shall be appointed to the Technical Expert Panel for a term, not exceeding, three (3) years.
- 3.2.6.2 Upon expiry of his term, the Technical Expert may offer himself for re-selection by the members of MAF.

### 3.2.7 Terms of Appointment of Technical Experts

The following are the terms and conditions of the appointment of Technical Experts to the Technical Experts Panel:

1. The duration of the appointment shall be three (3) years.
2. The appointee may offer himself for re-selection prior to the expiry of the term, provided three (3) months prior notice is given to the Board of MAF of his intention.
3. The appointment to the Technical Experts Panel does not mean that the appointee will be selected by parties to adjudicate a dispute.
4. The appointee shall make available his scale of charges so that parties in dispute may be aware of his charges prior to their selection as a technical expert.
5. The fees (including all out of pocket expenses) that parties agree to pay the Technical Expert or may be retained by the technical expert absolutely.
6. MAF may however charge the Parties for any facilities or services that the MAF provides to the Parties. Such costs shall be payable by the party referring the Dispute within seven (7) days of receiving an invoice from the MAF.
7. The information that is supplied to the Technical Expert by the parties to a dispute shall be treated as confidential and shall not be disclosed to any other party (except in accordance with any written law). Such restriction shall not apply to a disclosure made to the Commission or the MAF.
8. MAF may remove any appointee from the Technical Experts Panel prior to the expiry of the term, if it has sufficient cause to do so, if the appointee become a disqualified person (as per Part 3.2.3 of Chapter 3 of the Adjudication Handbook) or if the appointee is guilty of misconduct during any adjudication proceedings.
9. Apart from the fees paid to the Technical Expert by the Parties to the Dispute, the MAF will not be liable to the Technical Expert for any other fees, salary, out-of-expenses or other remuneration.

### 3.2.8 Amendments

Notwithstanding any provision to the contrary in Chapter 3, the Board of MAF may amend the matters set out in this Chapter 3 from time to time. Such amendments shall be submitted to the members of MAF for agreement prior to such amendments becoming effective. All prior appointments of Technical Experts shall not be nullified by reason of the amendments becoming effective, and such amendments shall only have prospective effective from the effective date.

## 4 Technical Dispute Resolution Process

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The following amplifies and explains the Technical Dispute Resolution Process set out in Article I of the Code.

### 4.1 *Timing of reference*

If a Technical Dispute has arisen, the parties may refer the matter to a Technical Expert, only after they have exhausted the Dispute Resolution process set out in Sections I.4 and I.5. of the Code, without the necessity to first initiate the Adjudication Process in Section I.6 of the Code. However once a dispute is referred to a Technical Expert, it may not be referred back to the IPWG or to the senior management (as set out in Section I.4).

To refer a dispute to a Technical Expert, one Party to the Access Agreement must serve onto the other Party a Notice to Refer the Matter to a Technical Expert. Such notice shall be in accordance with Form 3.3.1.

### 4.2 *Appointment of Technical Expert*

4.2.1 In the Notice to Refer the matter to a Technical Expert, a Party shall set out its choice of Technical Expert for the other Party's acceptance. The selection shall not be more than two (2) technical experts from the list of Technical Experts on the Technical Experts Panel. The other Party shall within ten (10) days, communicate its decision on the choice of Technical Expert to the first Party.

4.2.2 If the Parties fail to reach agreement on the Technical Expert within 10 days of the Notice, either party may apply to the Commission to appoint a Technical Expert.

4.3.3 The Chairman of the Commission may appoint such person from the Technical Experts Panel to be the technical expert in respect of the technical Dispute. Such appointment shall be communicated to the Parties and to the Technical Expert so appointed.

4.3.4 Where the Parties agree to the choice of Technical Expert, then the Party who proposed the names of the technical expert, shall notify the Technical Expert of his or her appointment and shall fix a first preliminary meeting.

### 4.3 *First Preliminary Meeting*

4.3.1 The appointed Technical Expert shall convene a first preliminary meeting of the Parties within thirty (30) days of being notified.

4.3.2 At the first preliminary meeting, the matters to be agreed are:

1. Confirmation of the appointment of the Technical Expert;
2. Fees of the Technical Expert;
3. The payment mechanisms and sharing of the fees and cost of the technical expert by the parties;
4. Length of time to be allocated to resolving the technical dispute;
5. Timing of the submissions of the relevant documentation as identified in Part 4.4 below.
6. Whether there will be a hearing or not. If a hearing is to be held, then each Party will have the opportunity of making oral submissions;
7. the procedure for hearing technical disputes will be determined by the Technical Expert;

8. such other matters as are relevant to the technical dispute.

For the avoidance of doubt, the Technical Expert will not have the power to appoint any other technical experts, unless the Parties agree.

#### **4.4 Timing of Submissions**

The Technical Expert, shall require:

- (a) the Parties to present written submissions to the Technical Expert and serve a copy to each other within fifteen (15) Business Days of the appointment of the Technical Expert. The written submissions shall contain such documentary evidence and witness statements (in **Form 5.6**) to support the contention of a party; and
- (b) each Party may respond to the other Party's submission in writing within fifteen (15) Business Days from the date of the other Party's submission. In making such a response, the responding party shall serve a copy of the response to both the Technical Expert and to the other party.
- (c) During the period of exchange of submissions by the Parties, The Technical Expert may make his or her own inquiries and investigations, and may offer his preliminary view to both Parties through a Statement of Preliminary Opinion. Such a statement shall not be binding but provide an indication of the possible technical solutions to the matter in dispute.
- (e) If the hearing is by documents only, the Technical Expert may make a decision within five (5) Business Days of the last written submission.
- (f) If the hearing is by oral submissions, a hearing of the Parties shall be held within fifteen (15) Business Days of the last written submission

#### **4.5 Hearings**

- 4.5.1 The Technical Expert may determine in the interest of time and justice whether or not an oral hearing is required. If an oral hearing is required, then the Technical Expert must provide each Party with the opportunity of making oral submissions. All such hearings will be conducted in private, and such hearing will last no longer than three (3) Business Days.
- 4.5.2 If the Technical Expert decides that an oral hearing is not necessary, then there shall be no oral hearing, and the Parties shall be permitted to make written submissions to the Technical Expert in addition to the Technical Expert investigating for himself the matters pertaining to the technical dispute.

#### **4.6 Decision of Technical Expert**

- 4.6.1 The Technical Expert will deliver his award within fifteen (15) Business Days of the conclusion of the hearing whether by way of documents only or through oral hearing.
- 4.6.2 The Technical Expert's decision will be binding on the Parties.
- 4.6.3 The Parties shall comply with the decision of the Technical Expert within the time prescribed therein by the Technical Expert. A failure to do so will entitle the innocent Party to treat the defaulting Party as being in breach of the Code and seek a direction from the Commission requiring the Party to so comply.

4.6.4 **Costs of Technical Expert.** The parties' costs of, incidental to and arising from the reference to reference to the Technical Expert irrespective of the outcome of the reference shall be decided by the Technical Expert and be treated as costs of the hearing.

## 5. Adjudication Procedures & Guidelines

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In accordance with Article I of the Code, the Adjudication Procedure is set out below:

### 5.1 Reference to Adjudication

- 5.1.1 If the parties to the Standard Access Dispute fail to arrive at a negotiated settlement or resolution after utilizing the processes set out in Sections I.4 and 1.5 of Article I of the Code, or if there exist a Specific Access Dispute (referred to collectively as “**the Disputes**”), then either Party may refer the Disputes for Adjudication, by giving a notice (“**Adjudication Notice**”) in **Form 5.1** to the other Party with a copy to MAF, specifying the nature of the Dispute and the reason for disagreement.
- 5.1.2 **Role of MAF.** The role of the MAF in the Adjudication process is purely as an observer, and to keep a record of the adjudication references made by Access Seekers and Access Providers and the corresponding awards made by the Adjudicators, for the sole purpose of future Code Reviews.
- 5.1.3 If the Parties agree on a selection of Adjudicator, they must jointly issue a notice in **Form 5.2** to the Adjudicator. If the Parties cannot agree on a choice of Adjudicator, then either Party may ask the Chairman of the Commission to appoint the Adjudicator. The Chairman shall appoint an Adjudicator and send a notice in **Form 5.3** to the Adjudicator, the MAF Berhad and the Parties.

<p><b>Annotation:</b> There is no form by which a party can ask the Chairman to appoint an adjudicator. This can be done by way of a letter sent to the Chairman.</p>
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- 5.1.4 **Acceptance of Appointment.** Upon receiving Form 5.2 from the Parties to the Disputes or Form 5.3 from the Chairman of the Commission (as the case may be), the Adjudicator shall immediately notify the Parties and the MAF of his/her acceptance of the appointment to act as the Adjudicator in the reference by issuing **Form 5.4**.
- 5.1.5 **Unable to Act.** In the event the Adjudicator appointed under either Form 5.2 or Form 5.3, is unable or refuses to act, the parties may choose another Adjudicator or (in the case the parties are unable to agree) the Chairman of the Commission shall make another appointment. The time periods and processes as set out in Section I.6.5 of the Code, shall apply in respect of the making of such re-appointment.
- 5.1.4 Upon acceptance of the appointment, the Adjudicator is required to hold a first preliminary meeting with the parties. A notice (in **Form 5.5**) of the first preliminary meeting is to be given to the parties. This should be done not later than 14 days after his appointment.

### 5.2 Role & Power of Adjudicator

- 5.2.1 Under Section I.6.7 of the Code the role of the Adjudicator is identified. He is not only an arbitrator where differences are resolved by him but as an adjudicator to adjudicate the dispute. The function of an adjudicator is more than an arbitrator and it is thus necessary to state with some clarity what the role is.
- 5.2.2 The role of the Adjudicator shall be:

- (a) to arrive at a decision which is fair and reasonable to both parties, which means that the Adjudicator is able to make a decision which is not a decision specifically sought by the parties;

*illustration*

*If the Dispute revolves around two different interpretations of the terms of the access agreement which are canvassed by the parties, the Adjudicator may instead of either agreeing with the access seeker or the access provider, produce a third possible interpretation.*

- (b) to find a suitable compromise to enable the access agreements or the procedures and processes set out in this Code, to be adhered to and the access services to be continually provided or an access agreement entered, so as to ensure that the interests of the consumers are served and the objectives of the CMA are achieved;

**Annotation:** The Adjudicator can come to his own decision and finding not based on what the parties have submitted. He can therefore avoid taking sides of either party but consider the fact that a decision by him helps the national policy objectives in the Communications and Multimedia Act 1998 be realized. This reduces time and cost of the parties in resolving disputes.

5.2.3 **Interlocutory Relief.** Interlocutory relief may be sought by a party to Adjudication in the appropriate Court in Malaysia, where the relief relates to seeking interlocutory relief in relation to such matters as infringement of intellectual property rights, breach of confidentiality or restraint pending publication of the Adjudicators decision.

### **5.3 Adjudication Proceedings.**

5.3.1 **Number of Adjudicators.** Pursuant to Section 1.6.5 of Article I of the Code, all adjudications shall be by a **single** adjudicator. Parties are encouraged to agree on their choice of Adjudicator within twenty eight (28) days, failing which either party can request the Chairman of the Commission to appoint an adjudicator.

5.3.2 **General Rules of Adjudication.** All adjudications must have procedural rules to govern them. In this regard the general rules of the adjudication are:

- (a) The Adjudicator shall be the master of the rules of the adjudication proceedings. He will decide on any additional rules or procedure as required.
- (b) The basic rules of the adjudication are the Rules of the Kuala Lumpur Regional Centre for Arbitration.

**Notes:** The detailed rules are available at <http://www.rcakl.org.my/pdf/RulesAppendixA.pdf> (accessed on 6 September 2006). You may also contact the Regional Centre directly at No 12, Jalan Conlay, 50450 Kuala Lumpur, Malaysia. Tel: 603-21420103 or 603-21420702  
Fax: 603-21420384 or 603-21424513 Email: [enquiry@rcakl.org.my](mailto:enquiry@rcakl.org.my)

5.3.3 **First Preliminary Meeting.** Following the Notice of Reference and the appointment of Adjudicator, the first preliminary meeting must be held within the time limit set out in Part 5.1.4 above. At the first preliminary meeting the parties and the Adjudicator shall determine matters of procedure of the adjudication including:

- (a) setting the date by which the claimant is to submit the statement of claim, which should contain the nature of the claim, all documentary evidence as is necessary to establish the claimant's claim and witness statements which are being relied upon.
- (b) setting the date by which the respondent is to submit the statement of response which should contain the nature of the response, all documentary evidence as is necessary to rebut the claimant's claim or establish the respondent's response and any witness statement which are being relied upon.
- (c) setting the last date by which the claimant is to submit a statement of reply to the statement of response by the respondent, and which shall contain further documentary evidence or witness statements, as necessary.

The documents in (a), (b) and (c) are called "**Proceedings Documents**".

**Annotation:** As per Section I.7.6 of Article I of the Code, all statement of claim, statement of response, and statement of reply (as referred to in Sections I.7.3, I.7.4 and I.7.5 of the Code), may contain such legal arguments (including any case law precedents) as may be necessary to support the party's contention or position. This enables a quicker resolution to be made to the case rather than wait for the arguments to be developed along the way.

**Notes:** *Because the Proceedings Documents are detailed documents, unless specifically requested by both the parties, no further submissions or arguments will be permitted to be made to the Adjudicator. The parties have to rely on what is set out in the Proceedings Documents. An Adjudicator should take note of this, since to allow otherwise the time to resolve the Dispute may be prolonged beyond the maximum time limit of 240 days.*

5.3.4 **The venue for the Adjudication proceedings.** The parties can agree on a venue but if they are unable to then the Adjudication shall be held at the premises of the Kuala Lumpur Regional Centre for Arbitration using the facilities available at that Centre.

5.3.5 **Witness Statements & Documents.** These documents submitted to the Adjudicator must be affirmed and/or certified before a Commissioner of Oaths in accordance with the Statutory Declaration Act 1960. The form of witness statements is as set out in **Form 5.6**.

**Notes:** *Documents include emails sent by the parties to each other.*

Furthermore Section I.7.8 of Article I of the Code allows the Adjudicator to interview witnesses (if necessary) whether the parties are there or not, or he may request for additional documentary evidence to be provided by the parties.

5.3.5 To avoid unnecessary delays to the adjudication proceedings, the Code specifies that the proceedings must be concluded within 240 days after the first preliminary meeting referred to in Part 5.3.3 above.

## **5.4 Decision of Adjudicator and Appeal**

- 5.4.1 All decisions of the Adjudicator shall be in writing, and should contain the grounds of decision. This helps the parties understand the basis for the Adjudicator's decision and enable them to avoid the same type of dispute in the future. It also enables MAF to use the decision to reform or revise the Code as necessary.
- 5.4.2 All decisions of the Adjudicator must be complied with immediately by the parties.
- 5.4.3 **Right of Appeal.** If a party feels dissatisfied with the decision of the Adjudicator, he may submit an appeal against the decision to the Commission for resolution pursuant to section 151 and Chapter 7 of Part V of the Act. The process of resolution of appeal is set out in the Act.

**Annotation:** Parties should read the provisions and the processes as set out by the Commission in the document entitled Guideline for Dispute Resolution dated July 2003 which is available at [http://www.mcmc.gov.my/facts\\_figures/codes\\_gl/guidelines/pdf/Guidelines\\_Dispute\\_Resolution\\_.pdf](http://www.mcmc.gov.my/facts_figures/codes_gl/guidelines/pdf/Guidelines_Dispute_Resolution_.pdf) (accessed on 6 September 2006).

- 5.4.4 **Costs of Adjudication.** The parties' costs of, incidental to and arising from the reference to Adjudication irrespective of the outcome of the Adjudication shall be decided by the Adjudicator and be treated as costs of the adjudication. This means that cost may be ordered to be shared equally amongst the parties or the winning party is paid his costs of the adjudication. However the amount of the costs ordered by the Adjudicator must be reasonable costs of prosecuting adjudication and is not on a full indemnity basis.

## 6. Forms

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The following are the forms to be used in the Adjudication proceedings.

<b>Form 2.2.1.2</b>	Consent to be Appointed as an Adjudicator
<b>Form 3.2.1.2</b>	Consent to be Appointed as a Technical Expert.
<b>Form 3.3.1</b>	Notice to Refer Technical Dispute
<b>Form 5.1</b>	Adjudication Notice.
<b>Form 5.2</b>	Notification of Appointment of Adjudicator
<b>Form 5.3</b>	Appointment of Adjudicator by Chairman of the Commission
<b>Form 5.4</b>	Consent/Refusal to act as Adjudicator
<b>Form 5.5</b>	Notice of First Preliminary Meeting
<b>Form 5.6</b>	Witness Statements

## **Form 2.2.1.2 Consent Form**

To:

Malaysia Access Forum Berhad

### **CONSENT TO BE APPOINTED AS AN ADJUDICATOR**

I, [name], (NRIC/Passport No: ) currently residing at [residential address] hereby consent to be appointed as an Adjudicator to the Adjudication Panel of the Malaysian Access Forum Berhad, to arbitrate on disputes arising between parties to an Access Agreement entered into under the Access Code.

I understand that this consent does not mean that I will be automatically empanelled as such empanelment is subject to the acceptance of the members of MAF.

Dated:

.....

Name:

## **Form 3.2.1.2 Consent Form**

To:

Malaysia Access Forum Berhad

### **CONSENT TO BE APPOINTED AS A TECHNICAL EXPERT**

I, [name], (NRIC/Passport No: ) currently residing at [residential address] hereby consent to be appointed as a Technical Expert and be a member of the Technical Experts Panel of the Malaysia Access Forum Berhad to arbitrate on technical disputes arising between parties to an Access Agreement entered into under the Access Code .

I understand that such consent does not mean that I will be automatically empanelled as such empanelment is subject to the acceptance of the members of MAF.

Dated:

.....

Name:

### **Form 3.3.1 Notice to Refer Technical Dispute**

**Purpose of form:** This Form 3.3.1 shall be used for the reference of a technical dispute to a technical expert. This Notice is issued to the Other Party with a copy to MAF, specifying the nature of the Technical Dispute and the reason for disagreement, in accordance with Sub-section I.11.1 of the Code.

In the matter of a dispute arising between [name of Claimant] and [name of respondent]

And In the matter of Section I.11.1 of the Code.

To:

[Name of respondent]

[Address]

And To

Malaysia Access Forum Berhad

[Address]

#### **TECHNICAL DISPUTE REFERENCE NOTICE**

**Take Notice** that [Name of respondent] and [name of Claimant] are [set out the stage the parties are in the Access Arrangement. Eg,

(a) at the access request stage, or

(b) have already entered into an access agreement

and a Technical Dispute has arisen in respect of [set out what dispute is all about],.

**The reasons for the disagreement** are;

[set out reasons/basis]

In accordance with Section I.11.1 of the Code, we [name of sender of this notice] hereby refer the aforesaid technical dispute to be resolved by the Technical Expert.

Further in accordance with Section I.11.1 of the Code, we propose appointment of either one of the following individuals selected from the Technical Experts Panel.

[Set out names of technical experts]

And Further **Take Notice** that you are required to respond to this Notice within ten (10) days of receipt from the date of this Notice.

Kindly acknowledge receipt of this Technical Dispute Reference Notice.

Dated:

.....

Signed by [name of signatory] the authorised representative  
of the [name of Claimant]

## Form 5.1 Adjudication Notice.

**Purpose of form:** This Form 5.1 shall be used when a reference to Adjudication is to be made. This Adjudication Notice is issued to the Other Party with a copy to MAF, specifying the nature of the Dispute and the reason for disagreement, in accordance with Sub-section I.6.2 of the Code.

In the matter of a dispute arising between  
[name] and [name]

And In the matter of Section I.6 of Article I of the  
Code.

To:

[Name of respondent]

[Address]

And To

Malaysia Access Forum Berhad

[Address]

### ADJUDICATION NOTICE

Take Notice that [Name of respondent] and [name of Claimant] [*set out stage where parties are in – eg.*

- (a) *at the access request stage, or*
- (b) *have already entered into an access agreement*

and a Dispute has arisen in respect of [set out what dispute is all about], which is a [Standard Access Dispute/Specific Access Dispute\*] as defined by Section [I.2/I.3\*] of the Code.

The reasons for the disagreement are;

*[set out reasons/basis]*

In accordance with Section I.6 of Article I of the Code, we [name of Claimant of this notice] hereby refer the aforesaid dispute to Adjudication.

Further in accordance with Section I.6.5 of Article I of the Code, we specify the [date] being a date which is not more than **28 days** of the date of this Adjudication Notice, to meet to agree on the appointment of the single Adjudicator to be chosen from the Adjudicators Panel.

Kindly acknowledge receipt of this Adjudication Notice.

Dated:

.....

Signed by [name of signatory] the authorised representative  
of the [name of party referring]

## **Form 5.2 Notification of Appointment of Adjudicator**

**Purpose of form:** This Form 5.2 shall be used the parties have agreed on the Adjudicator, the party who is the claimant in the Disputes, shall notify, in writing, the Adjudicator of his appointment.

In the matter of a dispute arising between  
[name] and [name]

And In the matter of Section I.6 of Article I of the  
Code.

To:

[Name of Adjudicator]

[Address]

And To

Malaysia Access Forum Berhad

[Address]

### **NOTICE OF APPOINTMENT OF ADJUDICATOR**

We, the parties set out below, hereby wish to notify you [Name of Adjudicator] that we have agreed to appoint you as our Adjudicator in respect of the dispute as described below:

[set out the nature of the Dispute ], which is a [Standard Access Dispute/Specific Access Dispute\*] as defined by Section [I.2/I.3\*] of the Code.

Please confirm whether you are accepting or declining the appointment within [ ] days from the date of this Notice.

Dated:

.....

Signature

Name:

Position:

[Name of Claimant]

.....

Signature

Name:

Position:

[Name of Respondent]

## **Form 5.3 Appointment of Adjudicator by Chairman of the Commission**

**Purpose of form:** This Form 5.3 is used when the parties are unable agree on an Adjudicator, and the appointment is made by the Chairman who uses this form to notify the Adjudicator and the parties. In such a case the parties shall ask the Chairman of the Commission to appoint an Adjudicator. Such appointment by the Chairman shall be made in accordance with Sub-section 1.6.2(c) of the Code.

In the matter of a dispute arising between  
[name] and [name]

And In the matter of Section 1.6 of Article I of the  
Code.

To:

[Name of Adjudicator]  
[Address]

And To  
**Malaysia Access Forum Berhad**  
[Address]

And To:  
**Claimant**  
[name of party as Claimant]  
[Address]

And To  
**Respondent**  
[name of party as respondent]  
[Address]

### **NOTICE OF APPOINTMENT OF ADJUDICATOR**

I, the Chairman of the Malaysian Communications and Multimedia Commission, being the Regulator of the Communications and Multimedia Industry, hereby appoint you [Name of Adjudicator] as the Adjudicator in respect of the Dispute between [name of party] and [name of party] in accordance with Article I of the Access Code.

A summary of the dispute is as set out in Adjudication Notice enclosed herewith.

Please confirm whether you are accepting or declining the appointment within [ ] days from the date of this Notice.

Dated:

.....  
Signature  
Chairman  
Malaysian Communications and Multimedia Commission

## **Form 5.4 Consent/Refusal to act as Adjudicator**

**Purpose of form:** This Form 5.4 is to be used by the Adjudicator to notify the parties that he either consents or refuses to act as Adjudicator in respect of their dispute.

In the matter of a dispute arising between  
[name] and [name]

And In the matter of Section I.6 of Article I of the  
Code.

To:

**Claimant**

[name of party as Claimant]  
[Address]

And To

**Respondent**

[name of party as respondent]  
[Address]

And To

**Malaysia Access Forum Berhad**

[Address]

### **NOTICE OF CONSENT/REFUSAL\* TO ACT AS ADJUDICATOR**

I, [Name of Adjudicator] hereby consent/refuse\* to act as the Adjudicator in respect of the dispute between [name of Claimant] and [name of Respondent].

Dated:

.....

Signature

Name: [Adjudicator's name]

\* delete as appropriate

## Form 5.5 Notice of First Preliminary Meeting

**Purpose of form:** This Form 5.5 is to be used by the Adjudicator to notify the parties of the first preliminary meeting.

In the matter of a dispute arising between  
[name] and [name]

And In the matter of Section 1.6 of Article I of the  
Code.

To:

**Claimant**

[name of Claimant]

[Address]

And To

**Respondent**

[name of respondent]

[Address]

### NOTICE OF FIRST PRELIMINARY MEETING

TAKE NOTICE that a **first preliminary meeting** of the Adjudication will be held on [date] at [time] at [venue].

The agenda of the first preliminary meeting is as follows:

[Set out agenda]

- (a) to set the last date by which the Claimant is to submit the Statement of Claim, which should contain the nature of the claim, all documentary evidence as is necessary to establish the claimant's claim and witness statements which are being relied upon.
- (b) to set the last date by which the Respondent is to submit the Statement of Response which should contain the nature of the response, all documentary evidence as is necessary to rebut the claimant's claim or establish the respondent's response and any witness statement which are being relied upon.
- (c) to set the last date by which the Claimant is to submit a Statement of Reply to the statement of response by the respondent, and which shall contain further documentary evidence or witness statements, as necessary.

The documents in (a), (b) and (c) are called "**Proceedings Documents**".

- (d) to confirm the venue of the hearings;
- (e) such other matters as may be relevant.

Dated:

.....

Signature

Name: [Adjudicator's name]

Adjudicator

## Form 5.6 Witness Statements

**Purpose of form:** This Form 5.6 sets out the form of witness statements to be used during an Adjudication Process as referred to in Section I.7.7 of the Code.

In the matter of an Adjudication by [name of Adjudicator]/[a resolution of a Technical Dispute by [name] (Technical Expert)\*].

And In the Matter of the [Access Agreement dated [ ] between [name of party] and [name of party]

### BETWEEN

[Claimant's name]

...Claimant

### AND

[Respondent's name]

...Respondent

### WITNESS STATEMENT FOR [CLAIMANT/RESPONDENT\*]

I, (name of witness), of full age and residing at [state residential address] do hereby solemnly and sincerely affirm and state as follows:

1. [The contents of the witness statement must be in numbered paragraphs.]
2. [Monetary values or other numbers must be stated in numbers not words]

Affirmed by [name of witness] on )  
the [day] Of [month] [Year] ) [Witness signs here]  
in [location – e.g. Kuala Lumpur] ) .....

Before me,

Commissioner of Oaths

This Witness Statement is submitted by [name of party filing this in]/[Messrs [name of firm] [State Address details]\* the Solicitors for the [Claimant/Respondent\*]

\* delete as appropriate