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Access to Justice – Addressing Consumer Redress in Malaysia

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ACCESS TO JUSTICE - ADDRESSING CONSUMER REDRESS IN MALAYSIA

Member States should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are ***expeditious, fair, transparent, inexpensive and accessible***. Such procedures should ***take particular account of the needs of vulnerable and disadvantaged consumers***.

UN Guidelines on Consumer Protection, UN General Assembly, 2015¹

1. Introduction

Consumer law developed exponentially in the last quarter of the 20th century bequeathing a host of substantive rights to consumers. It however became painfully obvious that the creation of new substantive rights is a meaningless gesture unless the recipients are realistically in a position to enforce them when necessary. Substantive rights depend on procedural rights. Without redress, consumer rights can be ignored with impunity. Access to redress underpins all rights.

The legal systems in most countries have not been able to adequately cope with the task of consumer redress, particularly when it involves claims of

¹ Guideline 37. The Guidelines were first adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council (ECOSOC) in resolution E/1999/INF/2/Add.2 of 26 July 1999. It was revised by the General Assembly in resolution 70/186 of 22 December 2015. (See United Nations Conference On Trade And Development. (2016). United Nations Guidelines For Consumer Protection. Retrieved June 13, 2018, from http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf

small monetary value. Ewoud H. Hondius describes succinctly the obstacles consumers face when seeking redress before the courts:

First, going to court may be (1) expensive. There are (a) court fees to be paid; (b) the citizen has to bear his own costs; taking a day off to attend the process, travelling to court, etc.; (c) there are the costs of retaining counsel; (d) there is a risk of losing the case and having to pay the other party's (and one's own attorney's) costs; (e) there also are the costs of expert testimony or witnesses. This is aggravated by the fact that many consumer complaints are of minor financial importance. In such cases the risks involved do not warrant instituting proceedings. Secondly, going to court is (2) time consuming. This is due mainly to the (a) overload in the courts; and (b) written procedures, which in many jurisdictions may drag on and on. The (c) possibility of appeal threatens to prolong the procedure still longer. A third drawback of traditional court procedure is of (3) psychological nature. Elements such as a court being also competent in criminal matters, sitting in robes and wigs, using archaic language and customs, may be brought together under this heading. The fourth drawback is (4) the individual nature of civil procedure. Traditional procedure simply is not geared to the institution of mass procedures in case of mass disasters. Finally, it is agreed (5) that in court adjudication rather mediation or conciliation is arrived at.²

The term 'consumer' was first introduced into the Malaysian legal lexicon by the Consumer Protection Act 1999³ (CPA 1999) which conferred substantive rights in a wide range of areas.⁴ The CPA 1999 also provided a novel Tribunal for Consumer Claims for enforcing the substantive rights it conferred.

² Hondius, E. H. (1995). Consumer Redress Schemes: An Outline. *Consumer Law Journal*, (pp. 2-3).

³ Consumer Protection Act 1999, (henceforth CPA 1999), effective September 1999.

⁴ The CPA (1999) specifically excludes from its ambit the services provided by professionals who are regulated by any written law, healthcare services provided by healthcare professionals or healthcare facilities and any trade transactions effected by electronic means unless otherwise prescribed by the Minister. (subsections 2.2. e., 2.2.f., and 2.2.g.) The last of these exclusions relating e-commerce was removed by Consumer Protection (Amendment) Act 2007, effective 15 August 2007.

Progress towards establishing redress mechanisms that consumers could access however began earlier. In 1987, a small claims procedure at the level of the Magistrates' Court was introduced and in 1991, an Insurance Mediation Bureau (which has now morphed through a couple of permutations into the Ombudsman for Financial Services) was established. Since the adoption of the CPA 1999 and the Tribunal for Consumer Claims, two other statutory redress mechanisms have been established. The Tribunal for Homebuyers Claims was established in 2002,⁵ and in 2015, the Malaysian Aviation Commission was granted powers to resolve consumer disputes.⁶

The 'piecemeal' approach to consumer redress means that for matters not within the ambit of these redress mechanisms, notably health care, professional services and many forms of credit, consumers have to rely on litigation in the courts.

This paper describes and evaluates the five consumer redress mechanisms established in Malaysia. It highlights the areas of the substantive and procedural law that need to be amended to ensure a comprehensive and efficacious system of consumer redress.

⁵ Introduced into the Housing Development (Control and Licensing) Act 1966 by the Housing Development (Control and Licensing) (Amendment) Act 2002.

⁶ Malaysian Aviation Commission Act 2015 (henceforth MAVCOM Act 2015).

The evaluation is guided by the principles for dispute resolution and redress contained in the United Nations Guidelines for Consumer Protection. The Guidelines require that mechanisms to address consumer complaints are “expeditious, fair, transparent, inexpensive and accessible”, and “take particular account of the needs of vulnerable and disadvantaged consumers.”⁷

2. The Small Claims Procedure

The Malaysian experiment with a small claims procedure began even before the rules for it were put in place. Justice Harun Hashim, the then supervisory judge of the subordinate courts in Selangor and the Federal Territory, announced measures to provide for a “quick, simple and cheap” remedy. The special arrangement would follow procedures established by the lower courts and simplify them as it went on. Parties would be permitted to appeal to the High Court only on points of law. Representation by counsel would continue.⁸ In effect, what Justice Harun Hashim proposed was a First Magistrates’ Court observing all the then existing rules of procedure and evidence but confined to hearing small claims of RM5,000 or less.⁹ It was envisaged by Justice Harun Hashim that the procedure would be simplified

⁷ United Nations Conference On Trade And Development. (2016). United Nations Guidelines For Consumer Protection. Retrieved June 13, 2018, from http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf.

⁸ The Star. (1987, January 3). As cited in Rachagan, S. (1988, December 3-4). The Small Claims Court - Concept and Development. *Complaints Handling and the Small Claims Court - A Workshop for Complaints Officers Organised by the Selangor and Federal Territory Consumers Association for Federation of Malaysian Consumers Associations Small Claims Court Project*.

⁹ The monetary jurisdiction of ordinary First Class Magistrates’ Courts were at this stage up to RM10,000.

over time to the extent that all that the litigant would have to do was to fill in a form, after which the court would be ready to proceed with the case. On 2 January 1987, Senior Magistrate Tan Kim Siong presided over this prototype of a small claims court. The Star newspaper gave a graphic description of the near pandemonium that prevailed:

Some lawyers failed to turn up, some were unsure of the location and some cases had to be transferred to other courts because they involved claim of more than \$5000 (sic)...

The court presently shares a room with the magistrates Court 15 as its courtroom and Magistrates Chamber is still under renovation. The work is expected to be ready by next week...

... the Small Claims Court, which sat for the first time today, settled 37 cases. Another 103 cases were mentioned.

The court is expected to handle about 50 cases daily. About 9000 cases, which are currently handled by the magistrates' courts in Kuala Lumpur, will be transferred to the court.¹⁰

In its March 1987 sitting, the Dewan Rakyat passed the Subordinates Courts (Amendment) Act 1987¹¹ enabling the Subordinate Court

¹⁰ The Star. (1987, January 3). As cited in Rachagan, S. (1988, December 3-4). The Small Claims Court - Concept and Development. *Complaints Handling and the Small Claims Court - A Workshop for Complaints Officers Organised by the Selangor and Federal Territory Consumers Association for Federation of Malaysian Consumers Associations Small Claims Court Project.*

¹¹ The Subordinate Courts Act 1948 conferred jurisdiction upon the subordinate courts to try all actions and suits of a civil nature subject to specific monetary limits (the amount in dispute or the value of the subject matter). Sessions court: not exceeding RM25,000, First Class Magistrate: not exceeding RM10,000 and a Second Class Magistrate not exceeding RM250. These monetary limits were amended pursuant to the Subordinate Courts (Amendment) Act 1987 (Effective 22.5.1987). Section 65 of the Subordinate Courts Act 1948 was amended to increase the monetary jurisdiction of the Sessions Court from RM25,000 to RM100,000, that of the First Class Magistrate from RM10,000 to RM25,000 and the Second Class Magistrate from RM250 to RM3,000. The Subordinate Courts (Amendment) Rules 1990 which became effective 1 January 1991 increased the monetary jurisdiction of the second class Magistrates' Courts from RM3,000 to RM5,000 and changed the name to be Small Claims Procedure. All civil matters of the Second Class Magistrates' Courts were also brought under the jurisdiction of the First Class Magistrates' Court. Further amendments were made by the Subordinate Courts (Amendment) Rules 1993 effective 1 August 1993. The jurisdiction of the court was

Committee to put in place the required rules. The then Lord President, Tun Haji Mohamad Salleh Abas, made it clear that there would not be a small claims court:

There is no such thing as a small claims court but a Second Class Magistrates Court dealing with claims of not more than \$3000.¹²

On 30 July 1987 the Registrar of the High Court of Malaya issued Practice Direction 5 of 1987, Para 6.1 of which provided as follows:

With effect from 1 August 1987, all civil actions or suits to recover a debt or liquidated demand in money not exceeding RM 3000 shall be filed and heard as a second class magistrates' court case under Order 54 of the Subordinate Courts Rules.¹³

Also on 30 July 1987 the Registrar issued Practice Direction 6 of 1987, Para 2 of which provided as follows:

2.1 Second Class magistrates courts are hereby constituted at all places where there are magistrates' courts.

again amended to change it from "debt or liquidated demand" to include any matter where the amount in dispute or the value of the subject matter of the claim does not exceed RM5,000. The Subordinate Courts (Amendment) Act 2010 effective 1 March 2013 again increased the monetary jurisdiction of the various courts: Sessions Courts (RM1 million), First Class Magistrate (RM100,000) and Second Class Magistrate (RM10,000).

¹² The Star. (1987, April 16). As cited in Rachagan, S. (1988, December 3-4). The Small Claims Court - Concept and Development. *Complaints Handling and the Small Claims Court - A Workshop for Complaints Officers Organised by the Selangor and Federal Territory Consumers Association for Federation of Malaysian Consumers Associations Small Claims Court Project.*

¹³ The researcher would be perplexed by the dates and sequence of the rules being drafted, put into effect by way of Practice Directions and the dates on which the rules were gazetted. Practice Directions No 5 of 1987 and No 6 of 1987 were both issued on 30 July 1987 (signed by Siti Naaishah bte Hambali, the Deputy Registrar, o/b Registrar, High Court Malaya, Kuala Lumpur). Practice Direction No 5 of 1987 states in Para 6 1 (a) that "*With effect from 1 August 1987, all civil actions or suits to recover a debt or liquidated demand in money not exceeding RM3,000 shall be filed and heard as a second class magistrates' court case under Order 54 of the Subordinate Courts Rules.*" Order 54 was only included in the Subordinate Courts (Amendment) Rules 1988 (PU (A) 67/1988) but by Rule 1 of the amended rules "deemed to have come into force on 1st August 1987 in West Malaysia and on 1st September 1987 in Borneo" [Sabah and Sarawak].

2.2 Registrars of subordinate courts (in addition to their duties as registrar) shall preside in the second class magistrates court at the following places – Kangar, Alor Setar, Sg Petani, George Town, Butterworth, Ipoh, Taiping, Klang, Kuala Lumpur, Seremban. Kota Melaka, Johor Bahru, Muar, Kuantan, Temerloh, Kuala Terengganu, Kota Bharu.

2.3 At places where there is no registrar of subordinate courts, first class magistrates shall hear all cases within the jurisdiction of second class magistrates' courts.

The civil jurisdiction of the second class magistrates was specified as follows:

4.1 A second class magistrate shall only have jurisdiction to try original actions or suits of a civil nature where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, not exceeding three thousand ringgit.

4.2 The type of civil cases triable by a second class magistrate is set out in *Appendix B*.¹⁴

4.3 The procedure to be followed in civil case is set out in Order 54 of the Subordinate Courts Rules.

(Order 54 prescribing the structure of the Second Class Magistrates' Courts and the proceedings to be observed therein was only gazetted as part of the Subordinate Courts (Amendment) Rules 1988 but backdated to come into force on 1 August 1987 in West Malaysia and 1 September 1987 in Sabah and Sarawak.)

¹⁴ The examples provided in Appendix B were claims for: money paid for defective goods, payment of goods sold and delivered, return of money paid for work not carried out, repayment of money lent, refund of money, liquidated demand in damages, commission due, money owed to bank or any other institution authorised to lend money, e.g. Co-operatives, against drawer of cheque, debt or liquidated demand by the federal Government, services rendered, charges for facilities provided, use of credit facilities, cost of repairs, maintenance charges, cost of hiring.

Justice Harun Hashim's observation that "procedures would be simplified over time to the extent that all the litigant would have to do was to fill in a form, after which the court would be ready to proceed with the case"¹⁵ , has, over the years, become a reality as a consequence of numerous amendments to Order 54, which is now included as Order 93 in the unified Rules of Court 2012.

Order 93 has effect in proceedings in the Magistrates' Court between "an individual plaintiff and a defendant".¹⁶ Plaintiff is specifically defined as an individual person who is not an agent or assignee of any debt of another person.¹⁷ In *Subramaniam Iwn Raghbir Singh* [1993], the court held that even an individual who is a moneylender cannot institute an action through the small claims procedure.¹⁸ However, the Order does not require that the defendant be an individual. Hence, the Order can be utilised for an action against any legal entity including a company or agent. The claim can be

¹⁵ The Star. (1987, January 3 As cited in Rachagan, S. (1988, December 3-4). The Small Claims Court - Concept and Development. *Complaints Handling and the Small Claims Court - A Workshop for Complaints Officers Organised by the Selangor and Federal Territory Consumers Association for Federation of Malaysian Consumers Associations Small Claims Court Project.*

¹⁶ Rules of Court 2012, Order 93 rule 1(1). Subordinate Courts Rules 1980, Order 54 initially provided that a claim may be made in the Second Class Magistrates' Court to recover a debt or liquidated demand in money of up to RM 3,000. It was available to all parties – the consumer as well as the trader and producer, including companies, partnerships, sole proprietorships, societies, statutory bodies and the Federal and State Governments. Order 54 therefore proved to be a boon for debt collection. The current formulation prohibits this.

¹⁷ Rules of Court 2012, Order 93 rule 1 (2).

¹⁸ The court held that this was so because the Subordinate Courts Rules had special provisions for moneylenders under Order 45. *Subramaniam Iwn Raghbir Singh* [1993] 1 MLJ 355.

only where the amount in dispute or the value of the subject matter of the claim does not exceed RM10,000.¹⁹

The small claims procedure is meant to be simple low cost mechanism to be used by laypersons unfamiliar with the law and the procedural and evidentiary rules of court. A number of features assist to achieve this purpose.

The procedure functions on the basis of a number of simplified forms obtainable from any Magistrates' Court or online. A claim for instance is required to be filed in three parts: particulars of the plaintiff in the first part, that of the defendant in the second part and the particulars of the claim, including the exact amount claimed, in the third part. The filing fee is only RM20. Similarly simplified forms are available for defence and counterclaim, setting aside of judgement and for enforcement of judgement.²⁰

At the hearing, the magistrate "shall where possible assist the parties to effect the settlement of a case by consent".²¹

¹⁹ Refer Footnote 8.

²⁰ Claim (Form 198), defence (Form 199), counterclaim (Form 200), judgement where defence not filed in Form 199) (Form 201), judgement where defendant absent (Form 202), judgement where plaintiff is absent (Form 203), judgement where defendant in statement of defence admits the claim (Form 204), application to set aside judgement (Form 205), consent judgement (Form 206) and judgement after a hearing (Form 207).

²¹ Rules of Court 2012, Order 93 rule 13 (1).

The normal rules of evidence do apply: Order 93 requires that “the court shall consider the documentary or other evidence, including affidavit evidence, tendered by the parties and in their presence shall hear such oral evidence and argument, including written argument, as the parties may submit”.²²

The magistrate is meant to assist the parties to present their case and for this, is empowered before making a ruling to “ask the parties for further information and in particular for a short description of the claim and the defence, as the case may be, if such description has not been adequately supplied earlier”.²³

This is especially necessary because the plaintiff is prohibited from having legal representation whereas a defendant company is required to be so represented. This peculiar feature of the small claims procedure has been due to the failure to amend a provision of the Legal Profession Act 1976 that grants advocates and solicitors a monopoly to represent a company or corporation in court or in chambers. The developments leading to this and the manner in which the Chief Justice, the courts and the Subordinate Rules Committee vexed over the matter are discussed in 2.1 below.

²² Rules of Court 2012, Order 93 rule 14 (2).

²³ Rules of Court 2012 Order 93 rule 13 (3).

Obtaining a judgement in itself is no guarantee that it would be satisfied unless there is a convenient avenue for the judgement creditor to enforce the order that he has obtained. As initially introduced by the Subordinate Courts (Amendment) Rules 1988²⁴, Order 54 did not provide an avenue for the enforcement of judgements. This omission was addressed by an amendment to the rules in 1990.²⁵

Where the judgement is duly served on the debtor and he fails to comply, the judgement creditor can apply for its enforcement by filing a notice to show cause in a specified form, obtain the signature of the magistrate and serve it to the debtor to appear in court on a fixed date. The notice will require the debtor to, within ten days, pay the debt to the court. If the debtor fails to do so by the specified date, he is required to appear in court on the date fixed, failing which a warrant for the arrest of the debtor will be issued. When the debtor is brought to court, the court will examine the debtor to decide on how to enforce the judgement order. The court will then take one of four courses – order a writ of seizure and sale, allow time for settlement of the debt, require payment of the debt by instalments, or order the debtor to be committed to prison.²⁶

The small claims procedure is a simple mechanism that is accessible to all. This is, in part, due to its availability at all locations at which there are

²⁴ (PU (A) 67/1988).

²⁵ Subordinate Courts (Amendment) (No 3) Rules 1990.

²⁶ Rules of Court 2012 Order 93 rule 16.

Magistrates' Courts. The filing fee is a mere RM20. The court at its discretion may award costs not exceeding RM100 but costs for advocacy shall not be allowed.²⁷

Unfortunately, permitting legal representation for defendant companies deters many consumers from using the procedure. The monetary jurisdiction still remains at RM10,000, a sum that was determined more than fifteen years ago. These aspects of the small claim procedure need to be addressed as it is a crucial and only recourse (other than the regular courts) available for consumers for many types of claims.

2.1 Legal Representation in the Small Claims Procedure

It was initially intended that both parties to a suit in a small claims procedure shall not be represented by a solicitor. Accordingly, as originally drafted the relevant rule read as follows:

No party to any suit in a Second Class Magistrates Court shall be represented by an advocate and solicitor.²⁸

However, this was contrary to section 37 of the Legal Profession Act 1976 and Order 4 rule 6 of the Subordinate Courts Rules 1980.

Section 37 of the Legal Profession Act 1976 entitled 'No unauthorised person to act as advocate and solicitor' states the general proposition:

²⁷ Rules of Court 2012 Order 93 rule 15.

²⁸ Subordinate Courts (Amendments) Rule 1988, Order 54 rule 7

Section 37 (1) Any unauthorised person who –

(a) acts as an advocate and solicitor or an agent for any party to proceedings or in any capacity, other than as a party to an action in which he is himself a party, sues out any writ, summons or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person in any of the Courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such Courts; ... shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand five hundred ringgit or to imprisonment for a term not exceeding six months or to both.

Section 38 entitled 'Certain persons can act as advocate and solicitor' provides the exceptions to the general rule stated in section 37. Section 38 (1) (d), the exception that relates, *inter alia*, to a person acting for a company or organisation which he serves as a full time paid employee provides as follows:

[Section 37 shall not apply to] ... any person acting...solely for a company or organisation which he serves as a full time paid employee in any matter or proceeding in which the company or organisation is a party, **but such person shall have no right to represent the company or organisation in Court or in Chambers or attest documents for the company or organisation which are required to be attested by an advocate and solicitor;** (emphasis added)

And, Order 4 rule 6(2) of the Subordinate Courts Rules 1980 provides as follows:

Except as expressly provided by or under any written law a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor.

The Chief Justice sought to remedy this by way of a Practice Direction which provided as follows:

All claims by a company not exceeding RM 3,000 shall be filed in the First Class Magistrates Courts. As from 1. 1. 88 a company which is a party in a civil claim not

exceeding RM 3,000 shall be represented by a solicitor in Court or in Chambers in accordance with section 38(1)(d) of the Legal Profession Act 1976 and Order 4 rule (6)(2) of the Subordinates Courts Rules 1980.²⁹

This had the effect of prohibiting a company from filing an action in the Second Class Magistrates' Court and thereby preventing the court from being utilised as a debt collection centre. However, where an action is brought against a company, the company is still required to be represented by a solicitor though as a matter of practice no cost for advocacy is awarded by the court.

The Practice Direction was not reflected in the subsequently gazetted version of Order 54 rule 7. The gazetted version still reads as:

No party to any suit in a Second Class Magistrates Court shall be represented by an advocate and solicitor.

However, the earlier Practice Direction continued to be given effect in the Courts. The matter was considered by the High Court in *Tan Ah Chai v Loke Yee Fah* [1998].³⁰ Augustine Paul J held that a practice direction "has no force of law and cannot override the express provisions of law".³¹

His Lordship also considered the apparent contradiction between Order 4 rule 6 of the Subordinate Courts Rules (which permits a person to begin

²⁹ Practice Direction (No 6 of 1987) issued on 30 July 1987 as amended by Practice Direction (No 14 of 1987) issued on 29 December 1987.

³⁰ *Tan Ah Chai v Loke Yee Fah* [1998] 4 CLJ 73

³¹ Also see *Yap Chee Hoo v Tahir bin Yasin* [1970] 2 MLJ 138.

and carry on proceedings in a court by a solicitor) and Order 54 rule 7 (which prohibits representation by a solicitor in the use of the small claims procedure]. The learned judge cited from an Australian court:

...when there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.³²

Augustine Paul J therefore held:

In the premises it is my view that O. 54 r. 7 must be read as a proviso to O.4 r.6. Such a construction will enable both the provisions to operate harmoniously.³³

This decision was reflected in the amendment made to Order 54 rule 7 by the Subordinate Courts (Amendment) Rules 2006:

Notwithstanding Order 4 rule 6, no party to any suit in this Court shall be represented by an advocate and solicitor, except where the defendant is required by law to be represented by an authorised person.

The provision was again amended when Order 54 was incorporated as Order 93 in the Rules of Court 2012 to read as follows:

A party to a suit in this Court shall not be represented by a solicitor, except where the defendant is required by law to be represented by an authorised person.

The term authorised person is nowhere defined in the rules and is taken to mean the persons who are not advocates and solicitors but are by section

³² *The South-Eastern Drainage Board (South Australia) v The Saving Bank of South Australia* [1939]62 CLR 603

³³ *Tan Ah Chai v Loke Jee Yah* [1998] 4 CLJ 73 at 78.

38 of the Legal Profession Act 1976 permitted in special circumstances to perform the functions of an advocate and solicitor.

The effect of each of the several amendments to Order 54 rule 7 (now Rule 93 rule 7) have the same effect: the individual plaintiff who brings an action cannot be represented by an advocate or solicitor but the defendant company or corporation is required to be represented by an advocate or solicitor. In the Rules of Court 2012, the requirement that a company must be represented by a solicitor is now provided in Order 5 rule 6 (2):

Except as expressly provided by or under any written law, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor.

The matter needs to be addressed by amending the relevant section of the Legal Profession Act 1976. Such amendments have been made for arbitral proceedings governed by the Arbitration Act 2005 and for several categories of government officers who are authorized to perform their official functions which require their attendance in court.³⁴

3. Ombudsman for Financial Services

The Ombudsman for Financial Services (OFS) is established by statute. It was introduced by the Financial Services Act 2013 (FSA 2013) which for the first time explicitly provided for consumer protection as among the regulatory objectives of Bank Negara, the regulator of the financial services

³⁴ For a full list of exemptions see section 38 (1) (a) – (m) of the Legal Protection Act 1976.

sector.³⁵ The FSA 2013 empowers Bank Negara to require financial service providers to be members of a financial ombudsman scheme, and at all times, to comply with the terms of membership of such a scheme.³⁶ The provisions of the FSA 2013 on the financial ombudsman scheme are augmented by detailed regulations to govern the operation of the OFS.³⁷

The FSA 2013 permits Bank Negara to approve any financial ombudsman scheme for this purpose,³⁸ a provision that the already existing Financial Mediation Bureau (FMB) relied on to gain acceptance to become the operator of the Ombudsman for Financial Services and be renamed as such effective 1 October 2016. The Regulations provide detailed specifications as to the Terms of Reference of the approved scheme. The Terms of Reference amplify the Regulations relating to the OFS.

The FMB itself began as the Insurance Mediation Bureau (IMB) which was established by the General Insurance Association of Malaysia in 1991. Most of the features that characterised the IMB have been carried into the OFS.³⁹

³⁵ Financial Services Act 2013 (henceforth FSA 2013), Part II, section 6: "The principal regulatory objective of this Act is to promote financial stability and in pursuing this objective, the Bank shall— (a) foster—(i) the safety and soundness of financial institutions; (ii) the integrity and orderly functioning of the money market and foreign exchange market; (iii) safe, efficient and reliable payment systems and payment instruments; and (iv) fair, responsible and professional business conduct of financial institutions; and (b) **strive to protect the rights and interests of consumers of financial services and products.**" (emphasis added)

³⁶ FSA 2013, section 126 (1).

³⁷ Financial Services (Financial Ombudsman Scheme) Regulations 2015 and Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 came into force on 14 September 2015. Gazetted on 11 September 2015.

³⁸ FSA 2013, section 126 (2).

³⁹ The IMB was a direct consequence of a proposal made at a seminar organised jointly by the Selangor and Federal Territory Consumers Association and the Malaysian

Hence, the OFS is an out-of-court mechanism conducted in an informal manner. It operates on six guiding principles, namely independence, fairness and impartiality, accessibility, accountability, transparency and effectiveness. It is a company limited by guarantee, that as required by Bank Negara is comprised of all financial service providers under the purview of the Bank.⁴⁰ The Board of Directors of the OFS is comprised of nine members, with a majority of independents. The Directors are appointed by the members of the OFS but no appointment can be made without the prior written approval of Bank Negara and fulfilling the fit and proper criteria specified in a schedule to the Regulations.⁴¹ The Board of Directors is currently chaired by a retired judge of the Federal Court.

Insurance Institute in 1985. (See Rachagan, S. (1985, 14 October). The Principles and Practice of Insurance and Consumer Protection, *Seminar Proceedings: Towards a Consumer-Oriented Insurance Industry* (pp.6-32). Selangor and Federal Territory Consumers Association and the Malaysian Insurance Institute.; Rachagan, S. (1985, December). Consumer Protection vis-à-vis the Insurance Industry: Proposed Changes to Insurance Law and Practice, a Memorandum prepared for the Selangor and Federal Territory Consumers Association for submission to the Director-General of Insurance, Malaysia.; and, Rachagan, S. (1987, January). Feasibility Study and Draft Memorandum and Articles of Association of the Insurance Mediation Bureau, for the General Insurance Association of Malaysia.

Initially, the IMB only handled claims against general insurers of RM50,000. In 1996 the Life Insurance Association (LIAM) also extended support to the IMB and the IMB also handled claims against life insurers. The monetary jurisdiction was increased to RM100,000. In June 1996, a Banking Mediation Bureau (BMB) was established to deal with consumer disputes with banks and finance companies and granted a monetary jurisdiction of RM25,000. The IMB and the BMB were merged to form a one-stop dispute resolution centre for financial institutions called the Financial Mediation Bureau (FMB) in 2004. The jurisdictional mandate was increased from RM25,000 to RM100,000 for banking disputes and from RM100,000 for motor and fire insurance disputes. (See Financial Mediation Bureau. (n.d.). A Milestone in the History of Alternative Dispute Resolution and Financial Consumer Protection in Malaysia. In *Annual Report 2015* (pp. 10-15).

⁴⁰ Licensed banks and Islamic banks, licensed insurers and Takaful operators, prescribed development financial institutions, approved designated payment instrument issuers and designated Islamic payment instrument issuers, approved insurance and Takaful brokers; and approved financial advisers and Islamic financial advisers.

⁴¹ Financial Services (Financial Ombudsman Scheme) Regulations 2015, Regulation 8 and Second Schedule.

The Board of Directors are responsible for the management and oversight of the OFS.⁴² The task of mediation and adjudication is performed by two ombudsmen, one each for banking and insurance, who are supported by case managers.

The OFS is granted the mandate to resolve disputes between member companies and their customers.

It is important to note that the FSA 2013 does not regulate all forms of consumer credit. The Moneylenders Act 1951,⁴³ the Pawnbrokers Act 1972, the Hire-Purchase Act 1967, and the CPA 1999 (in relation to credit sale transactions only) also govern consumer transactions. Moreover, many forms of consumer credit are not governed by statutory stipulation of rights and duties in relation to individual transactions. The need for a comprehensive Consumer Credit Act is generally acknowledged but has been delayed due to turf wars between the various regulators.

The mandate of the OFS does not extend to all forms of consumer credit; it only extends to the types of credit governed by the FSA 2013. And even for the types of credit governed under the FSA 2013, the mandate does not extend to all areas of dispute between the member companies and their

⁴² Financial Services (Financial Ombudsman Scheme) Regulations 2015, Regulation 10.

⁴³ Moneylenders Act 1951, Revised 1989.

customers. The jurisdiction is limited by circumscribing the type and maximum monetary value of the claims the OFS is permitted to resolve.

The OFS is permitted to make awards of up to RM250,000, more than was specified for its predecessors, in all complaints/disputes that it is empowered to resolve. The monetary jurisdiction is lower for motor third party property damage insurance claims (RM10,000), unauthorised use of a cheque (RM25,000), and a complaint/dispute on unauthorised transactions through the use of designated payment instruments or payment channel such as Internet banking, mobile banking, telephone banking or automated teller machine (ATM) (RM25,000).⁴⁴ There is provision in the Regulations for the monetary jurisdiction to be revised over time.

Claims that are time barred, or already the subject of litigation or arbitration, or have earlier been referred to the OFS are barred. It is also required that the matter be first referred by the policy holder to the management of the company concerned before it is referred to the OFS. A reference can be made after 60 calendar days from the date the dispute was first referred to the member in respect of which no response has been received from the member. The regulations and terms of reference assume that the response will be prompt and the ensuing communication between

⁴⁴ Financial Services (Financial Ombudsman Scheme) Regulations 2015, Regulation 18 and Third Schedule.

the parties would not be protracted and punctuated by long intervals on the part of the member financial service provider. The referral to the OFS has to be within six months of the final decision issued by the member FSP.

The FSA 2013 provides in section 126 (5) that:

Where a dispute has been referred to a financial ombudsman scheme by an eligible complainant, the eligible complainant is not entitled to lodge a claim on such dispute with the Tribunal for Consumer Claims established under the Consumer Protection Act 1999 [Act 599].

This is to avoid the complainant filing a dispute at the same time, or consecutively, with the OFS and the Tribunal for Consumer Claims. The wording of the section however suggests that the complainant has an option to go to either one of the schemes.

The lodging of a complaint can be in person or by way of written communication to the office of the OFS. The OFS is governed by the existing law and guided by what would be good practice. For cases within the Klang Valley, the enquiries are usually held at the OFS's premises in Kuala Lumpur. Other cases are handled by way of statements recorded through questionnaires sent to the complainants. In some instances, enquiries/mediation is held via teleconferencing and video conferencing. Witnesses may be required to be present during the mediation. In the vast majority of cases, it is sufficient to produce copies of documents and

correspondence. This is necessary since the OFS is located only in Kuala Lumpur, the nation's capital city.

The Terms of Reference permits the OFS to use negotiation, conciliation, mediation and adjudication to resolve disputes.⁴⁵ In effect a two stage redress scheme is used – mediation and, when this fails to obtain the consent of both parties, adjudication by the Ombudsman. The task of mediation is largely carried out by Case Managers at the Case Management Stage (Stage 1). Where there is no settlement, a non-binding written recommendation is issued by Case managers and is given to the disputing parties. If either one party is dissatisfied with the Case Manager's recommendation, the dispute is referred to the Ombudsman for adjudication. At the Adjudication Stage (Stage 2), the Ombudsman adjudicates the dispute independent of the findings and recommendation of the Case manager and issues a final decision written 14 days from the receipt of full and complete documentation.

Throughout the resolution process neither the complainant nor the company may engage the services of a lawyer or a legal firm in relation to the dispute.⁴⁶ The procedure observed by the OFS is essentially informal.

⁴⁵ Financial Ombudsman Scheme. (2016), Terms of Reference for the Ombudsman for Financial Services, Para. 19.

⁴⁶ Financial Ombudsman Scheme. (2016), Terms of Reference for the Ombudsman for Financial Services, Para. 20.

As explained in the Terms of Reference, the approach that the OFS adopts to dispute resolution:

28. Since the OFS is an alternative dispute resolution body and not a court, its processes are “inquisitorial” in nature and are not bound by any rules of evidence, prosecution, defence by a lawyer, sworn witnesses, cross-examinations and formal legal procedures as adopted by the court. The Case Manager or the Ombudsman will investigate and examine the evidence on and relating to the Dispute to establish the facts of the Dispute or to seek further clarification.

29. A dispute is resolved on the basis of the documents or information submitted by the Parties to a Dispute to the OFS. Where it is deemed appropriate by the OFS, it may conduct an interview with the Parties to a Dispute either individually or jointly. Such interview or meeting is neither a mandatory procedure nor a compulsory step in resolving the Dispute. The OFS has the full discretion to decide on the most effective approach to resolve the Dispute.

The OFS endeavours to resolve disputes within three to six months. The Ombudsman’s final decision is issued within 14 days of full and complete documentation from the disputing parties.⁴⁷ The decision is binding on the company⁴⁸ but not on the complainant; the complainant can reject the decision and seek redress in the courts.

The FSA 2013 has added a number of new features to the Ombudsman Scheme. The scheme itself and the co-regulatory power of Bank Negara are now specified in the Act, whereas in the past, Bank Negara relied on its general powers of governance to influence the operation of the Insurance

⁴⁷ Financial Ombudsman Scheme. (2016), Terms of Reference for the Ombudsman for Financial Services, Para. 34 (20).

⁴⁸ FSA 2013, section 126 (4) (b).

Mediation Bureau, the Banking Mediation Bureau and the Financial Mediation Bureau.⁴⁹

The Regulations deal with the OFS framework, covering its scope, membership, funding, governance and resolution process. It provides for the periodic review of the monetary limit and imposes a clear duty on the directors of the OFS to act at all times in the best interest of the OFS and independently of any particular group or body which individual directors might belong to.

Where an agreement cannot be reached, a decision following on the adjudicative process must be supported by the reasoning for the decision.

The Board of the OFS is required to put in place procedures to accept referrals from the member financial service providers for the sole purpose of its internal review to continuously improve the effectiveness of the OFS. Such information is also to be made available to Bank Negara and to independent third party reviewers of the OFS's operations.

⁴⁹ The co-regulatory model first got its statutory expression in the Insurance Act 1996. Section 22 (1) provided that "No licensee shall carry on its licensed business unless it is a member of an association of—(a) life insurers for life insurance business; (b) general insurers for general insurance business; (c) insurance brokers; or (d) adjusters, the constituent documents of which have been approved by the Bank. (2) No amendment shall be made to the constituent documents of an association without the prior written approval of the Bank. (3) The Bank may direct an association to take, or refrain from taking, such action as it may specify."

The fee structure for funding the OFS is designed to incentivise the financial service providers to improve the management of complaints while preserving affordable access to the OFS for the public. Besides the annual financial levy, the member FSPs are required to pay a non-refundable case fee for each referral of its decision by a complainant.⁵⁰ Complainants are not required to make any payment.

Bank Negara has given itself wide powers of supervision of the OFS. It has imposed the duty on the scheme operator to submit reports to the Bank, the publication of reports, and has the right to issue directions to the scheme operator. A novel feature introduced in the Regulations is that the scheme operator, in consultation with Bank Negara, has to appoint an independent party with the relevant expertise to conduct an independent review of the ombudsman scheme. This is to be done three years from the date of commencement of operations and subsequently at least once in every five years.⁵¹

The OFS annual reports are comprehensive with a major portion dedicated to a presenting data on its performance by sector (insurance, banking and payment systems). It is a report worthy of emulation by other ADR

⁵⁰ Licensed banks, prescribed development financial institutions, insurance companies and takaful operators have to pay a flat fee of RM1,500. Payment instrument issuers, insurance and Takaful brokers, and approved financial advisers have to pay RM100 (Case Management Stage) and RM500 (Adjudication Stage). See Financial Ombudsman Scheme. (2016), Terms of Reference for the Ombudsman for Financial Services, Para. 45 and 46.

⁵¹ Financial Services (Financial Ombudsman Scheme) Regulations 2015, Regulation 19.

mechanisms. Bank Negara has the right to terminate the services of the company that has been granted permission to perform the functions of the OFS.⁵²

The OFS, as currently designed, is principally a mediation and adjudication centre to deal with disputes that have arisen. The regulatory authority of the financial sector identified in the FSA 2013 is Bank Negara, not the OFS. Hence addressing systemic issues in the sector is the responsibility of Bank Negara; it is hoped that Bank Negara will play a more proactive role in this than it has hitherto. This is especially so since the FSA 2013 categorically states that the mandate of Bank Negara is not only to be a prudential regulator but also to be a consumer protection regulator.

However, the use of the term 'Ombudsman' does raise expectations as to the role the OFS can play. As stated in the website of the Ombudsman Association:

[Ombudsman]...are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively.⁵³

Though this is not reflected in the Terms of Reference of the OFS, it is reflected in the Regulation:

⁵² FSA 2013, section 126 (3) (f).

⁵³ Ombudsman Association. (2018). The Role of an Ombudsman. Retrieved June 13, 2018, from <http://www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php>

The scheme operator shall - "As soon as possible, report to the Bank any matters which may be systemic in nature arising from operations of the approved financial ombudsman scheme".⁵⁴

This provision can be a potent source of consumer protection if the OFS so decides. It can be used to address systemic weaknesses in the supplier-consumer interface.

In financial services, policy and contract documents need to be provided in plain language without a distressing overload with legalese and jargon. It is currently not unusual, for instance, for a bonus-linked life policy insurance document to be of mangled legalese printed in 10-point font size on 78 pages of A4 sized paper! It would be duplicitous to suggest that the policy document could even be understood by the insurance agent who is tasked to explain it to the policy holder.

Specialised redress mechanisms such as the OFS are meant for those who are already customers of the member FSPs. The FSPs interact with their customers, not only when they first purchase the service, but also over the duration of the contract of service and when a dispute arises. The existence of the redress mechanism is best communicated to customers when these interactions take place. FSPs should be required to include the statement "Member of the Ombudsman for Financial Services" along with the name

⁵⁴ Financial Services (Financial Ombudsman Scheme) Regulations 2015, Regulation 12 (3) (a).

and logo of the member financial service provider in all publicity material. A prominent notice (in larger font size and different print colour) in the policy and all communication that a dispute may be referred to the OFS will be a very effective way of publicising the OFS. Expensive mass media campaigns may serve the marketing needs of the FSPs but are less effective when it comes to reaching existing customers.

As reported in the 2017 Annual Report:

In 2017, the OFS handled a total of 1672 disputes comprising 345 outstanding disputes which were carried forward from 2016 and 1327 new disputes registered in 2017. A total of 1237 disputes were disposed, of which 780 (63%) were insurance and takaful disputes and 457 (37%) were disputes related to banking and payment systems. Out of the 1237 disputes, 88% were disposed at the Case Management stage, whilst the remaining 12% were disposed at the Adjudication stage.⁵⁵

The OFS is of recent vintage and it needs time to work through the many systemic flaws that plaque the consumer-financial service provider interface. Whether the OFS will assume such a function is left to be seen. For now, consumers can rest assured that a promising consumer redress mechanism has been put in place.

4. Tribunal for Consumer Claims

The CPA 1999 of Malaysia is an omnibus law covering a wide range of areas which, when first enacted, had a total of 150 sections in 14 parts. Part II

⁵⁵ Ombudsman for Financial Services (OFS). (2017). *Annual Report 2017*. (p. 37). Malaysia.

of the CPA 1999 deals with misleading and deceptive conduct, false representation and unfair practice. Part III deals with safety of goods and services. Part IV treats breaches of the provisions of Parts II and III as offences for which defences are provided for. Also provided in Part IV are remedies for any person, whether or not a party to the proceedings, who has suffered or is likely to suffer loss or damage. The remedies include variation of the contract entered into, or its declaration as void *ib initio*, or refund of moneys paid or return of the property, or payment of damages. A substantial portion of the CPA 1999 (comprising Parts V to IX) deals with guarantees in the supply of goods and services and the rights against manufacturers and suppliers who fail to comply with the guarantees. Part X deals with product liability. The Act has since been amended on several occasions⁵⁶ and new parts dealing with unfair contract terms (Part IIIA), credit sale transactions (Part IIIB) and committee on advertisement (Part XIA) have been introduced.

The CPA 1999 was drafted to be applicable in respect of all goods and services that are offered or supplied to one or more consumers in trade.

⁵⁶ **The CPA 1999 has been amended six times: Amendment 2002**– Amended Subsection 17 (1) listing the types of Future Services Contract gazetted by the Ministry for the purpose of the section; **Amendment 2003** – increased the membership of The Tribunal for Consumer Claims to include members from judicial and legal services as well as increased the power of the tribunal to make an award from up to RM10, 000 to RM25, 000; **Amendment 2007** – widened the scope of the Act to include electronic commerce transactions; **Amendment 2010** – introduced part IIIA on Unfair Contract Terms and Part XIA on Committee on Advertisement; **Amendment 2015** - limited the jurisdiction of the Tribunal for Consumer Claims in respect of any claim relating to aviation service as defined in the MAVCOM Act 2015; and **Amendment 2017** – introduced Part IIIB on Credit Sale Transactions.

However, the Ministry of Domestic Trade and Consumer Affairs had to relent to the demands of the other Ministries that regulated the professions, healthcare and multimedia. In the event, services provided by professionals who are regulated by any written law,⁵⁷ healthcare services provided by healthcare professionals or healthcare facilities, and, transactions conducted through electronic means were exempted from the ambit of the CPA 1999. The last of these, the non-applicability of the law to electronic trade, was removed by an amendment in 2007.⁵⁸ The other exceptions still subsist.

The CPA 1999 not only provided for substantive rights but also for procedural rights for the exercise of the substantive rights. Part XII of the Act created the Tribunal for Consumer Claims (TCC) and specified the rules that govern its operation.

The TCC's jurisdiction is to hear consumer claims within the ambit of the CPA 1999 "including claims in respect of all goods and services for which no redress mechanism is provided for under any other law".⁵⁹ This was what the consumer organisations had long wanted. It meant that consumer

⁵⁷ There is no legal definition of "professional" in Malaysia. Research carried out by the Malaysia Competition Commission identified 131 bodies/ associations of 'professions' that are grouped into 34 sectors. (See Malaysia Competition Commission. (2013, August 1). Research on the Fixing of Prices / Fees by Professional Bodies under the Competition Act 2010. Retrieved June 8, 2018, from http://www.mycc.gov.my/sites/default/files/media-review/market_review_Executive_Summary_on_Professional_Bodies_Study.pdf)

⁵⁸ Consumer Protection (Amendment) Act 2007.

⁵⁹ CPA 1999, section 98.

redress would be available for all claims in respect of all goods and services – at the TCC, or other redress mechanisms provided under another law. But this was not to be.

As noted earlier, the CPA 1999 itself in its application clause specifically provides that the Act does not apply, *inter alia*, in relation to land or interests in land, services provided by professionals who are regulated by any written law, and healthcare services provided by healthcare professionals or healthcare facilities.⁶⁰ The TCC therefore cannot provide redress for disputes in these areas.

The jurisdiction of the TCC is also curtailed by section 99 of the CPA 1999. Of particular significance are two subsections which provide that the TCC shall have no jurisdiction in respect of any claim:

(d) where any tribunal has been established by any other written law to hear and determine claims on the matter which is the subject matter of such claim.

(ca) which may be lodged by a consumer relating to aviation service as defined in the Malaysian Aviation Commission Act 2015.

If there is another tribunal that can hear and determine the claim, the TCC will refer the claim to that tribunal. The manner in which housing claims are handled is illustrative. There exists a Tribunal for Homebuyer Claims (dealt with in the ensuing part of this paper). That tribunal is created under

⁶⁰ CPA 1999, section 2(2).

the Housing Development (Control and Licensing) Act 1966 and under the purview of the Ministry of Urban Wellbeing, Housing and Local Government.

The jurisdiction of that tribunal is limited to claims lodged by homebuyers and the immediate next purchaser from the first homebuyer. The rights of all homebuyers under the CPA 1999 are within the scope of the TCC except where they fall within the scope of the jurisdiction of the Tribunal for Homebuyer Claims. The TCC therefore refers matters that fall within the Tribunal for Homebuyer Claims to that Tribunal and handles the rest by itself.⁶¹

The second of the exclusions pertains to the Malaysia Aviation Commission (MAVCOM). The Malaysia Aviation Commission Act 2015 (MAVCOM Act 2015) did not provide for a third party tribunal to resolve consumer disputes. It chose to do address consumer disputes through an in-house mechanism of mediation and adjudication. This therefore required the insertion of a subsection that the TCC shall have no jurisdiction in respect of any claim which may be lodged by a consumer relating to aviation services as defined in MAVCOM Act 2015. So when the TCC receives a complaint relating to aviation services, it is referred to MAVCOM. The Malaysian Aviation Consumer Protection Code provides for a reciprocal arrangement. When MAVCOM rejects a complaint for want of jurisdiction it

⁶¹ Personal communication by Encik Hamidun bin Abdul Fatah, Deputy Chairman, Tribunal for Consumer Claims, 11 June 2018.

has to “provide guidance on alternative avenues of redress”,⁶² which in most instances will be the TCC.

It was noted in Part 3 of this paper that the FSA 2013 specifically permits the user of financial services under the purview of that Act the option to pursue redress either at the Ombudsman for Financial Services or the TCC.

The TCC was initially conferred jurisdiction to hear claims that do not exceed RM10,000 but this was increased in 2015 to RM25,000.⁶³ This is five times the monetary jurisdiction of the small claims procedure of the Magistrates’ Court. A claim with the TCC however needs to be filed within three years if at the TCC,⁶⁴ whereas an action in contract that is not against the government can be filed in the courts within six years.

The TCC is only for consumer cases, i.e. if the goods or services complained of are of a kind ordinarily acquired for personal, domestic or household use. The Tribunal will not hear claims from persons who acquire goods and services in the course of a business.

Typical claims at the Tribunal are that the trader made false or misleading claims; failure to supply goods after receiving payment; lack of safety of goods and services supplied; not meeting the obligations of the guarantees

⁶² Malaysian Aviation Consumer Protection Code 2016, Para 18(3) (a).

⁶³ CPA 1999 section 98(1) as amended by Consumer Protection (Amendment) Act 2010.

⁶⁴ CPA 1999 section 99(2).

provided. The guarantees often relate to such matters as performance or characteristics of the goods. Consumers often simply want a return of the money paid for the goods or services.

The procedure to be observed by the TCC is specified in regulations.⁶⁵ The filing of a claim with the Tribunal is relatively simple. The consumer has to merely fill in the relevant form which can be obtained free of charge from the Tribunal's office or be downloaded from www.kpdnhep.gov.my. The fee to file a claim is only RM5. The filing of the statement of defence and defence to counter-claim are also by way of simplified forms and the fee for each is only RM5.

The hearings are held at 23 locations throughout the country, and when required, can also be held at any of the 74 offices of the Ministry of Domestic Trade, Cooperatives and Consumerism in the various states and federal territories.

The procedure at the hearing is also simple.⁶⁶ It is similar to what was devised for the small claims procedure in the Magistrates' Courts. At the hearing, where appropriate, the Tribunal is required to assist the parties effect a settlement. Where this fails, the Tribunal will move towards adjudication of the claim. Both parties are entitled to adduce evidence, call any witness or produce any document, record or thing in support of the

⁶⁵ Consumer Protection (The Tribunal for Consumer Claims) Regulations 1999.

⁶⁶ Consumer Protection (The Tribunal for Consumer Claims) Regulations 1999. Regulation 23.

claim or defence. The parties are both entitled to make a brief oral or written submission – first the respondent and then the claimant. Very importantly, the Chairman may at any time assist the parties in conducting their cases.

Though the procedure is layman-friendly, the tasks of the Members of the Tribunal are onerous. Proceedings are open to the public,⁶⁷ the Tribunal has to give its reasons for any award made⁶⁸ and orders and settlements are to be recorded in all proceedings.⁶⁹ Membership of the Tribunal comprises a Chairman and Deputy Chairman from the Judicial and Legal Service and not less than five members from either the Judicial and legal Service or advocates and solicitors who have held office in the Magistrates' Courts.⁷⁰

Unlike the Ombudsman for Financial Services (and as will be seen, the dispute resolution mechanism of the Malaysian Aviation Commission), the Tribunal for Consumer Complaints and the Homebuyers Tribunal are quasi-judicial bodies that have to adjudicate on the basis of the substantive law contained in the statutes that established them. The substantive law in these statutes are not in every aspect settled law⁷¹ and it is for this reason that the Act provides that the Tribunal may at its own discretion refer to a

⁶⁷ CPA 1999, section 109.

⁶⁸ CPA 1999, section 114.

⁶⁹ CPA 1999, section 115.

⁷⁰ CPA 1999, section 86.

⁷¹ See for instance the decisions of the High Court in *Tenby World Sdn Bhd v Soh Chong Wan & Anor* [2013] 10 CLJ 822; and *Fairview International School Subang Sdn Bhd v Tribunal Tuntutan Pengguna Malaysia Sdn Bhd* [2015] 9 MLJ 581 as regards the concept of fairness in contracts governed by Part IIIA of the CPA 1999.

judge of the High Court a question of law. Where such a reference has been made, the Tribunal must make its award in conformity with the decision of the judge.⁷²

The CPA 1999 specifically provides that no party shall be represented by an advocate and solicitor at a hearing⁷³ and that notwithstanding section 37 of the Legal Profession Act 1976, a corporation may be represented by its full time paid employee.⁷⁴ This is different from the small claims procedure in the courts where the company has to be represented by an advocate and solicitor. Where possible, the Tribunal makes its award within sixty days from the first day of hearing.⁷⁵

The Tribunal's decisions can be enforced as though they are decisions by a Magistrates' Court.⁷⁶ Failure to comply after fourteen days with an award is an offence and attracts a fine up to RM5,000 or imprisonment for term of up to two years or both. Continuing non-compliance renders the offender liable to a fine not exceeding RM1,000 for each day the offence continues after conviction.⁷⁷

⁷² CPA 1999, section 143.

⁷³ CPA 1999, section 108 (2).

⁷⁴ CPA 1999, section 108 (3) (a).

⁷⁵ CPA 1999, section 112 (1).

⁷⁶ CPA 1999, section 116 (1) (b).

⁷⁷ CPA 1999, section 117(1).

The CPA 1999 specifically provides that the decisions of the Tribunal, be they agreed settlements or an award on adjudication, shall be final and binding on all parties to the proceedings.⁷⁸ Nevertheless, the courts have held that the awards are subject to judicial review and the Presidents of the TCC have to ensure the veracity of both their awards and the reasons for awarding them. They have to be to be mindful that their decisions may be subject to judicial review.⁷⁹

Respondents, particularly corporations, have made use of this avenue to challenge the awards made. The judicial review delays resolution of the claim. In a judicial review, it is the Tribunal that is cited as the first respondent and will be represented by a legally qualified person. The consumer is cited as the second respondent. The consumer need not secure the services of an advocate and solicitor. However, regardless, the court may award costs in case the decision of the court goes against the first consumer.⁸⁰

⁷⁸ CPA 1999, section 116 (1) (a).

⁷⁹Judicial reviews of course can go either way. In *Tenby World Sdn Bhd v Soh Chong Wan & Anor* [2013] 10 CLJ 822, Vernon Ong J held that the Tribunal for Consumer Claims had no jurisdiction to hear matters relating to private educational institutions as such matters were governed by the Education Act 1996. Yet a year later Lim Chong Fong JC held in *Fairview International School Subang Sdn Bhd v Tribunal Tuntutan Pengguna Malaysia & Anor* [2015] 9 MLJ 581 held that “there was no equivalent provision to s 2(2)(f) of the Act in respect of educational facilities, which would have otherwise been provided if that was so intended by Parliament. Parliament must have desired not to exclude educational facilities by necessary implication on the purposive interpretation of the statute.”

⁸⁰ In *Fairview International School Subang Sdn Bhd v Tribunal Tuntutan Pengguna Malaysia & Anor* [2015] 9 MLJ 581, where the second respondent was represented by an advocate and solicitor, the court ordered order costs of RM7,500 be paid by the second respondent to the applicant.

It is now almost twenty years since the Tribunal came into being and it is time that an independent of the effectiveness of the Tribunal is made. Some of the aspects that such a review can address are: Who are those who now use the Tribunal? Does the Tribunal cater for only the rich and advantaged or also for the less advantaged and vulnerable who need it most? What is the impression that those who use the Tribunal have of it? What do they think can be improved?

The number of disputes referred to the TCC increased steadily from 263 in 2000 to a high of 10,423 in 2011. Since then, there has been a steady decline to only 4498 in 2017. Why has there been a very significant decline in the number of consumers who use the services of the TCC since 2011?⁸¹ What has changed in the outreach of the TCC that has led to this? An independent review is urgently needed.

5. Tribunal for Homebuyer Claims

The Tribunal for Homebuyer Claims was established to deal with homebuyer's claims against housing developers for defects, delayed delivery or abandonment of housing development projects.⁸² It was

⁸¹ Personal communication by Encik Hamidun bin Abdul Fatah, Deputy Chairman, Tribunal for Consumer Claims, 11 June 2018.

⁸² The Ministry of Housing and Local Government also operates a Strata Management Tribunal to deal with the management aspects of properties with strata titles. Strata Management Act 2013.

established in 2002 by amending the Housing Development (Control and Licensing) Act 1966.⁸³

The terms 'homebuyer' and 'housing developer' are defined in the Act to have specific meanings. Homebuyer is defined as a "purchaser or a person who has subsequently purchased a housing accommodation from the first purchaser".⁸⁴ A housing developer is defined as any person, however described, who undertakes a housing development of more than four units of housing accommodation.⁸⁵

There are further limitations to the jurisdiction of the Tribunal. The Tribunal can only hear a claim brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation of the housing accommodation or the expiry of the defects period as set out in the sale and purchase agreement.⁸⁶

⁸³ The powers of the Tribunal were enhanced by the Housing Development (Control and Licensing) (Amendment) Act 2007 effective 12 April 2007. Malaysia's federal constitution confers the regulation of housing in the states of Sabah and Sarawak to their respective state governments. Similar Tribunals known as "Tribunal for Housing Purchasers' Claims" were established in Sabah by amendments to the Sabah Housing Development (Control and Licensing) Enactment 1978, and in Sarawak by amendments to the Sarawak Housing Developers (Control and Licensing) Ordinance 1993 which has since been repealed and replaced by the Housing Development (Control and Licensing) Ordinance, 2013. There are minor differences in the provisions in the three statutes. For a description of the differences, see Azlinor Suffian, *Housing Tribunals: Comparative Analysis of the Practices in Peninsular Malaysia, Sabah and Sarawak*, *International Journal of Business and Society*, Vol. 13 No. 2, 2012, 151 - 162. The analysis in this paper is confined to the Tribunal for Homebuyer Claims governed by the Housing Development (Control and Licensing) Act 1966 applicable to Peninsular Malaysia.

⁸⁴ Housing Development (Control and Licensing) Act 1966, section 16A.

⁸⁵ Housing Development (Control and Licensing) Act 1966, section 3.

⁸⁶ Housing Development (Control and Licensing) Act 1966, section 16N (2). In 2013, the Court of Appeal considered section 16N of the Housing Development (Control and Licensing) Act 1966 which provided a different limitation period than section 6 of the Limitation Act 1953. The Court of Appeal held that section 6 of the Limitation Act 1953

It must be noted that the Court of Appeal has been very accommodating of consumer interest. It adopted the purposive approach to pronounce that the Housing Development (Control and Licensing) Act applied to cases where the sales and purchase agreement had been entered into even before the Act was adopted by parliament; and this despite there not being a specific provision that gave the Act retrospective effect.⁸⁷

The monetary jurisdiction of the Tribunal may not exceed RM50,000 per claim⁸⁸ unless the parties have both agreed for an extension of the jurisdiction of the Tribunal.⁸⁹ All other claims as to housing have to be made in the Tribunal for Consumer Claims or in the courts.

The provisions pertaining to the Homebuyer Tribunal in the principal Act, the regulations prescribing the responsibilities of the members of the tribunal and the procedure to be observed, etc. are, except for essential variations, identical to that specified for the Tribunal for Consumer Claims in the CPA 1999 and its regulations.

(Revised 1981) is a general provision and that "It is a principle of construction of statutes expressed in the maxim *generalibus specialia derogant* that where there are two provisions of written law, one general and the other specific, then the special or specific provisions excludes the operation of the general provision." (See *House Buyer Tribunal and Abd Aziz Osma v. Unique Creations Sdn Bhd* [Civil Appeal No. W-01-503-10] [2013] 1 LNS 1309.)

⁸⁷ *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617

⁸⁸ Housing Development (Control and Licensing) Act 1966, section 16M (1).

⁸⁹ Housing Development (Control and Licensing) Act 1966, section 16O (1).

These variations pertain to monetary jurisdiction, limitation period for the making of a claim, the right to legal representation and the criminal penalty for failure to comply with an award of the tribunal.

The monetary jurisdiction of the homebuyers tribunal is up to RM50,000 for each claim whilst that of the Tribunal for Consumer Claims is only RM25,000. The limitation period for bringing a claim in the Homebuyers Tribunal is not later than twelve months from the date of issuance of the certificate of completion, the expiry date of the defects liability period as set out in the sales and purchase agreement or the date of termination of the sale and purchase agreement by either party. At the Tribunal for Consumer Claims, it is three years from when the cause of action accrued.

Both statutes provide that no party shall be represented by an advocate and solicitor at a hearing. However, only in the case of the Tribunal for Homebuyer Claims, an exception is made where in the opinion of the Tribunal the matter in question involves complex issue of law and one party will suffer severe financial hardship if not represented by an advocate or solicitor. Where a party is permitted so represented than the other party is also entitled to do so.⁹⁰ The award of the Tribunal for Homebuyer Claims may require that costs to or against any party be paid⁹¹ but this does not include costs for legal representation.

⁹⁰ Housing Development (Control and Licensing) Act 1966, section 16U.

⁹¹ Housing Development (Control and Licensing) Act 1966, section 16Y (2) (f).

Non-compliance with an award attracts a greater penalty in the case of the Tribunal for Homebuyer Claims: not less than RM10,000 but not exceeding RM50,0000 or to imprisonment for a term not exceeding two years or to both.⁹² In the case of the TCC, it is a fine not exceeding RM5,000 or to imprisonment for a term not exceeding two years or to both.⁹³

The Ministry of Housing regards the Tribunal for Homebuyer Claims as a specialised mechanism to deal with a specified set of claims and not as an alternative to the Tribunal for Consumer Claims. The Chairmen and Deputy Chairmen of the two tribunals ensure that there is coordination of their efforts and that their staff guide claimants as to which Tribunal they should file their claims.

The Tribunal for Homebuyer Claims is a much used redress mechanism. The total number of cases registered with the Tribunal since its inception in 2003 till end of May 2018 is 44,484 of which only 283 have not yet been resolved.⁹⁴

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⁹² Housing Development (Control and Licensing) Act 1966, section 16AD (1).

⁹³ Housing Development (Control and Licensing) Act 1966, section 117(1).

⁹⁴ Personal communication by T Thavarajasingam, Legal Officer, Ministry of Housing and Local Government, Malaysia, 26 June 2018.

The Malaysian Aviation Commission (MAVCOM) was established by the Malaysian Aviation Commission Act 2015 (MAVCOM Act 2015) with a mandate carved out from that of other already existing regulators. It assumed some functions of the Department of Civil Aviation (DCA) of the Ministry of Transport for matters related to licencing and the grant of permits, air traffic rights and slot allocation; for competition regulation it assumed the functions of the Malaysia Competition Commission (MyCC); and, for consumer protection in relation to aviation services, it assumed the powers of the Ministry of Domestic Trade, Cooperatives and Consumerism.

Since its inception on 1 March 2016, MAVCOM has embarked on a very impressive set of initiatives. In May 2016, it launched a Complaints Management System for consumers made available on its website and conducted a consumer survey to ascertain consumer awareness on passenger rights and general level of satisfaction towards aviation services. On 1 July 2016, it launched the Malaysian Consumer Protection Code 2016. A second consumer survey was conducted in September 2017, and proposed amendments to the Code were included in a consultation paper published on its website for a 30-day period in February and March 2018.

Progress has also been made on its Airports Quality of Service framework which is expected to be rolled out in the 3rd quarter of 2018 commencing

with the two largest airports (KLIA and KLIA2) and to cover all airports by 2020.

MAVCOM publishes a very detailed half yearly consumer report specifying the number and types of complaints received and the action taken to resolve these. It is also the only regulator that publishes complaints data by named service provider. MAVCOMS summary of the complaints received and resolved is as follows:

A total of 1,356 complaints were received in 2017, with 1,338 complaints on airlines and 18 on airports. This marked an increase of 89.4% compared to 2016 where MAVCOM received 716 complaints, though there is only 10-months data for 2016, considering that the Commission was set up in March 2016. Whilst in 2016 the Commission received the most complaints on AirAsia, in 2017 Malaysia Airlines was the highest contributor of complaints received, followed by AirAsia and Malindo Air. 99.6% of the complaints received in 2017 have been resolved and closed by MAVCOM. Based on the Commission's review, 52% of the complaints were found to have merit, resulting in the airlines reversing its initial decision for amicable resolution with the consumers.⁹⁵

MAVCOM has a three-member consumer protection committee comprised of its directors which determines the appropriate financial penalty to be imposed on a provider of aviation service for any compliance with the Malaysian Aviation Consumer Protection Code.

⁹⁵ Malaysian Aviation Commission. (n.d.). Consumer Report, July to December 2017, 3rd Issue (p 10). Retrieved June 20, 2018, from <http://www.mavcom.my/wp-content/uploads/2018/03/180313-MAVCOM-Consumer-Report-Jul-to-Dec-2017.pdf>

The MAVCOM Act 2015 deals with aviation services which it defines as carriage of passengers, mail or cargo; ground handling services; and the operation of an aerodrome.⁹⁶ However, this is not reflected in the Malaysian Aviation Consumer Protection Code 2016. The Code deals with the following: disclosure of air fare, prohibition on post-purchase price increase or automatically adding on services, disclosure of identity of operating airline, disclosure of terms and conditions of the contract of carriage, communication of change in flight status, and non-discrimination of persons with disability. Air passenger rights dealt with in the Code relate to denied boarding, flight delays and loss or damage to luggage and mobility equipment and devices. The Code does not deal with consumer rights in relation to the carriage of goods and carriage of mail. It also does not address consumer rights in relation to ground handling service providers; and for aerodrome operators it only specifies that they be responsible for ensuring the provision of structural amenities and facilities for persons with disabilities.⁹⁷

What then are the rights of consumers as against airlines, ground service providers and aerodromes?

Section 2 (1) of the CPA 1999 provides that the "Act shall apply in respect of all goods and services that are offered or supplied to one or more

⁹⁶ MAVCOM Act 2015 Act 2015, section 3.

⁹⁷ Malaysian Aviation Consumer Protection Code 2016, Para 18 and 19.

consumers in trade including any transaction conducted through electronic means.” Section 2 (2) lists the categories of trade to which the CPA 1999 shall not apply. Aviation service is not listed in this section. All the rights conferred by the CPA 1999 therefore apply as against airlines, ground handling service providers and operators of aerodromes.

The CPA 1999 however provides that the Tribunal for Consumer Complaints established under the CPA 1999 shall have no jurisdiction in respect of any claim “which may be lodged by a consumer relating to aviation service as defined in the Malaysian Aviation Commission Act 2015”.⁹⁸ The wording of this provision suggests that all goods and services supplied by airlines, ground service providers and aerodromes that are not within the definition of aviation service will remain within the jurisdiction of the Tribunal for Consumer Complaints. The wording of the provision could also suggest that, consumer redress for aviation services not covered in the Malaysian Aviation Consumer Protection Code 2016, and therefore may not be lodged with MAVCOM, need also to be referred to the Tribunal for Consumer Claims. MAVCOM has in fact received one dispute for the carriage of goods which it resolved by liaising with the service provider.⁹⁹ The lacuna in the Code will no doubt be addressed in the revised Code.

⁹⁸ Consumer Protection (Amendment) Act 2015, section 99 (1) (ca).

⁹⁹ Personal communication by Ms Pushpalatha Subramaniam, Director, Consumer Affairs, Malaysian Aviation Commission on 20 June 2018.

The MAVCOM Act 2015 itself contains provisions on consumer complaints processing. They are, as enacted, perhaps the harshest ever devised – harshest to consumers! A consumer complaint lodged with MAVCOM will result in the appointment of any member of the commission (including an alternate member¹⁰⁰) or a committee to hear and determine the complaint.¹⁰¹ In determining the complaint the member or the committee may require for costs to be paid to the party in whose favour the decision is made.¹⁰² In addition, any person found to have made a vexatious or frivolous complaint 'shall' be subject to a financial penalty of RM200.¹⁰³ Any penalty or unpaid cost imposed may be sued for and recovered as a civil debt due to MAVCOM and in addition, the High Court may order for a payment of a penalty for late payment up to an amount equivalent to twice the amount of the costs unpaid and the costs of recovering the amount including any costs of legal proceedings.¹⁰⁴

The provision in the MAVCOM Act 2015 that deals with enforcement reads as follows:

78. (1) A decision given by the Commission, upon application to the High Court to be registered as a judgement of the High Court, shall be enforced as such.

(2) For the purposes of subsection (1), if the High Court finds that a person referred to in the decision has failed to comply with the decision, the High Court shall make an order requiring such person to comply with the decision.

¹⁰⁰ Appointed under MAVCOM Act 2015 section 6.

¹⁰¹ MAVCOM Act 2015, section 71 (1).

¹⁰² MAVCOM Act 2015, section 71 (2).

¹⁰³ MAVCOM Act 2015, section 71 (3).

¹⁰⁴ MAVCOM Act 2015, section 72.

It is nonsensical to draft statutes that suggest that a penalty of RM200 could attract a High Court order for late payment of RM400 and the costs of recovering the amount including legal proceedings. It is presumed that the enforcement provision is meant to apply only to member aviation service providers and not to complainants, but that is not specified in the sections cited above. It must be noted however that MAVCOM, as a matter of practice, has neither required any costs to be paid by consumer complainants nor has it imposed any financial penalty for a vexatious or frivolous complaint.

The Consumer Code specifies that a complaint shall not be lodged with MAVCOM after the expiration of one year from the date the cause of the complaint accrued.¹⁰⁵ MAVCOM may, within seven days thereafter, notify the complainant the reason for rejection and provide guidance on alternative avenues for redress or accept the complaint and direct it to service provider concerned.¹⁰⁶ Rejection may be on the grounds that the complaint is frivolous or vexatious, lack of jurisdiction or that the matter has been or is being considered by a court of law.¹⁰⁷ If it is being considered by a court of law, the complainant may only bring the complaint before

¹⁰⁵ Malaysian Aviation Consumer Protection Code 2016, Para 18 (2).

¹⁰⁶ Malaysian Aviation Consumer Protection Code 2016, Para 18 (3) (a).

¹⁰⁷ Malaysian Aviation Consumer Protection Code 2016, Para 18 (4).

MAVCOM if the claim before the court is withdrawn, abandoned or struck out.¹⁰⁸

Where the complaint is accepted by MAVCOM, it will require the service provider to provide a 'substantive written response' to the complaint and provide a resolution to the complaint within 30 days.¹⁰⁹ MAVCOM may require further information from the complainant or service provider and thereafter, if it considers it appropriate, "make an order to provide a remedy to the complainant" and notify the parties of its Order.¹¹⁰ MAVCOM may impose a financial penalty not exceeding RM200,000 if the service provider fails to comply with an Order and in the case of a second or subsequent non-compliance with the Consumer Code, a penalty ten times the financial penalty imposed for the first non-compliance.¹¹¹

A peculiarity of the dispute settlement process of MAVCOM is that a decision given by MAVCOM is equated to a judgement of the High Court:

A decision given by the Commission under this Part, upon application to the High Court to be registered as a judgement of the High Court, shall be enforced as such.¹¹²

¹⁰⁸ Malaysian Aviation Consumer Protection Code 2016, Para 18 (5)

¹⁰⁹ Malaysian Aviation Consumer Protection Code 2016, Para 18 (6).

¹¹⁰ Malaysian Aviation Consumer Protection Code 2016, Para 8 and 10.

¹¹¹ Malaysian Aviation Consumer Protection Code 2016, Para 22.

¹¹² MAVCOM Act 2015, section 73.

This is unlike in the case of the Tribunal for Consumer Claims where adjudication is required to be made by persons qualified to be advocates and solicitors. In the case of the Tribunal for Consumer Claims which can make awards to consumers of up to RM25,000, the award:

...shall be deemed to be an order of a Magistrate's Court and be enforced accordingly by any party to the proceedings.¹¹³

The drafters of the MAVCOM Act 2015 appear to have overlooked that since 1 March 2013, the monetary jurisdiction the First Class Magistrates' Court and the Sessions Court have been raised to RM100,000 and RM1 million respectively.¹¹⁴

The dispute resolution process of MAVCOM is one where MAVCOM itself acts as adjudicator without the participation of any third parties and without any

¹¹³ CPA 1999, section 116 (1) (b).

¹¹⁴ Subordinate Courts (Amendment) Act 2010, sections 11 and section 7(a) (ii) respectively. Also by the same Amendment Act the Sessions Court has also been conferred with jurisdiction to try all actions and suits of a civil nature for the specific performance or rescission of contracts or for cancellation or rectification of instruments, within the jurisdiction of the Sessions Court [section 7(a) (iii)]. A Sessions Court may also, in respect of any action or suit within the jurisdiction of the Sessions Court, in any proceedings before it - (i) grant an injunction; and (ii) make a declaration, whether or not any other relief, redress or remedy is or could be claimed [section 7(b)]. In the case of the tribunal for Consumer Claims which is empowered to make awards up to RM25,000, the equivalent provision reads that the decisions of tribunal shall be "deemed to be an order of a Magistrate's Court and be enforced accordingly by any party to the proceedings". CPA 1999, section 116 (1) (b). In the case of the Tribunal for Homebuyer Claims which is empowered to make awards to consumers of up to RM50,000, the award "... shall be deemed to be an order of a Magistrate's Court or a Sessions Court, as the case may be, and be enforced accordingly by any party to the proceedings." Housing Development (Control and Licensing) Act 1966, section 16AC (1)(b). The reference made to a "Magistrate's Court or a Sessions Court" is because when the provisions were adopted in 2002 a Magistrates' Court only had jurisdiction for amounts up to RM25,000 and a Sessions Court had jurisdiction up to RM100,000. The current monetary jurisdiction of the Magistrates' Court is RM100,000 and that of the Sessions Court is RM1 million.

possibility of an appeal, except perhaps to the Court of Appeal since an award by MAVCOM is registered as a judgement of the High Court. There is no provision in the MAVCOM Act 2015, or in the Code, that requires that MAVCOM “must set out reasons for any conclusion about the merits of a dispute”¹¹⁵. Provisions that provide for decisions to be made by an undisclosed member (not necessarily a committee) with no grounds for the decision required, confer untrammelled discretion on MAVCOM and undermine basic natural justice.

The MAVCOM Act 2015 does not distinguish between member companies that do not comply with an award made by MAVCOM, and consumers who reject an award to seek redress in the courts. This is a basic requirement of any out-of-court dispute resolution mechanism that seeks to be fair, transparent and accountable.

In practice however, the consumer affairs division does distinguish between the two categories; the consumer is free to reject the decision without any consequence and exercise the right to file an action in court. Practice needs to be reflected in the law. The consumer affairs division which has the challenge of building consumer confidence in MAVCOM and its dispute resolution needs to be empowered with a better drafted statute.

¹¹⁵ As is set out for instance in Para 37 (3) of the Financial Ombudsman Scheme. (2016), Terms of Reference for the Ombudsman for Financial Services.

The MAVCOM Act 2015 envisages that the Code can be amended and this is a task MAVCOM has already embarked on. Clearly, the MAVCOM Act 2015 also needs to be amended. MAVCOM will be wise to commission an independent review of the operation of its current dispute resolution process before undertaking amendments to the MAVCOM Act 2015 and the Code. The independent review can be mandated to recommend whether an Aviation Services Consumer Tribunal or an Ombudsman for Aviation Services could better serve consumer interests.

This is especially so since MAVCOM is the only regulator that imposes a direct charge on all consumers (passengers) – the charge does not go into the government coffers; it goes into the Aviation Commission Fund to meet MAVCOM’s operational costs.¹¹⁶ By an amendment to the MAVCOM Act 2015, it is now empowered:

... to impose and collect charges on passengers at airports in Malaysia for regulatory services rendered by the Commission pursuant to this Act.¹¹⁷

As worded in the statute, the charge can be collected from all passengers at Malaysian airports, be they incoming, outgoing or even transiting

¹¹⁶ MAVCOM Act 2015, section 25.

¹¹⁷ MAVCOM Act 2015, section 18(2) (fa) as inserted by the Malaysian Aviation Commission (Amendment) Act 2018.

(estimated to be 100 million for 2018¹¹⁸). The regulatory charge of RM1 is at present only imposed on outgoing passengers in non-rural routes.¹¹⁹

7. Conclusion

The foregoing discussion has already identified the strengths and weaknesses in each of the five mechanisms that exist for consumer redress in Malaysia and suggests possible reform to law and practice. This conclusion makes general observations on the whole system of consumer redress.

Malaysia has a small claims procedure in the Magistrates' Court and four statutes based alternative consumer redress mechanisms. The four alternative mechanisms are – a Tribunal for Consumer Claims (CPA 1999) which was designed to apply to all goods and services offered to consumers. This is augmented by three other statute based specialised mechanisms that deal only with the rights conferred by the same statutes under which they were created - an Ombudsman for Financial Services (FSA 2013), a Tribunal or Homebuyer Claims (Housing Development (Control and Licensing) Act 1966), and a complaints handling and adjudication system by the Malaysian Aviation Commission for aviation services (MAVCOM Act

¹¹⁸ Malaysia's passenger traffic recorded 8.1 per cent year-on-year growth in 2017 which translated to 99.1 million international and domestic passengers. For 2018, MAVCOM forecasts a growth of 6.5 per cent to 7.0 per cent, which will see Malaysia surpassing the 100 million passenger mark for the first time. (See Malaysian Aviation Commission. (2018, May). Waypoint: Malaysian Aviation Industry Outlook. Retrieved on June 6, 2018, from <http://www.mavcom.my/wp-content/uploads/2018/05/Waypoint-Malaysian-Aviation-Industry-Outlook-May-2018.pdf>

¹¹⁹ Malaysian Aviation Commission (Regulatory Services Charges) Regulations 2018.

2015). On the face of it, such a system would appear as comprehensive and one that assures justice for all consumers. This is not the case.

Besides the regular courts, the only mechanism that all consumers can seek redress from is the small claims procedure in the Magistrates' Court. Unfortunately, the monetary jurisdiction of the procedure is only RM10,000, a figure determined fifteen years ago. The procedure also has a rule of court that prohibits legal representation for a plaintiff consumer but requires legal representation for a defendant corporation, leading to uneven access to legal expertise at the hearing. These features deter consumers from using the small claims procedure to resolve their claims. An ordinary First Class Magistrates' Court now has monetary jurisdiction of up to RM100,000, and there is no reason why the small claims procedure may not be granted a monetary jurisdiction of RM25,000. The initial proposal by the Subordinate Courts Committee that there be no legal representation for both parties in the small claim procedure may be achieved by an amendment to the Legal Profession Act 1976.

The Tribunal for Consumer Claims does not have jurisdiction to handle claims pertaining to all professional services and those relating to health care services and facilities. In relation to consumer credit, it only can deal with credit sale transactions. The Ombudsman for Financial Services only deals with financial services related to banking, insurance and payment cards. Moneylending, pawn broking and hire purchase are outside its

jurisdiction, and indeed, the jurisdiction of any other consumer redress mechanism. The Tribunal for Homebuyer Claims and the redress mechanism for aviation services only serve consumers for a limited range of their grievances with housing and aviation. (However, matters outside the jurisdiction of these specialised mechanisms fall within the scope of the Tribunal for Consumer Claims.) These gaps in consumer redress can be resolved by appropriately amending the regulations.

A further impediment is the lack of spatial reach of the alternative schemes that have been established. Only the small claims procedure and the Tribunal for Consumer Claims hold hearings outside of the nation's capital city, Kuala Lumpur. This may be overcome if there is an arrangement that, where necessary, the other schemes also use the facilities of the Tribunal for Consumer Claims.

Redress mechanisms cannot grant justice in the absence of substantive rights conferred by law. A comprehensive system of consumer redress calls for the supply of all services and goods to be governed by law that states the substantive and procedural rights of consumers. The professions and all healthcare service providers need to be brought within the ambit of the CPA 1999. The long-awaited law to govern all consumer credit needs to be adopted conferring both substantive and procedural rights.

Also, except where credible specialised redress mechanisms are established to deal with the supply of particular goods and services, they should all fall within the jurisdiction of the Tribunal for Consumer Claims.

The risk in industry based schemes is 'regulatory capture' of the regulators and operators of redress schemes. The slide, from being 'guard dogs, to watch dogs, and eventually lap dogs', needs to be a constant concern. All of Malaysia's specialised alternative redress schemes are governed by statute and subject to the oversight of regulators. The remuneration, and the duration and terms of service of the members of the Boards of Directors and principal officers of these schemes are not determined by the regulated industry but rather by the regulators. This will serve, to an extent, to prevent the 'capture' of the redress schemes by industry.

A common feature of the available reports of the alternative redress mechanisms is that they provide data on the number and value of claims received, and the number and value of the awards made. The data gathered needs to be more comprehensive. Consumer complaints that reach the redress stage are but the 'tip of the iceberg' of consumer distress. The data gathered must be able to identify systemic problems which regulators and industry need to remedy, and report on. A feature that has been introduced in the Ombudsman for Financial Services is for the scheme to be subject to periodic independent reviews. This should become a feature of all redress mechanisms.

The challenge that all redress mechanisms face is to ensure that their services reach those who most need them. As mentioned above, the data available in the reports focus mainly on the number and value of claims awarded. None reports on the backgrounds of the users of the system. Without this data, it is hard to measure the effectiveness of the schemes in totality, especially as to whether it has reached all levels of society, in particular, the vulnerable and disadvantaged consumers. Once this data has been gathered, the under-represented groups can be identified and outreach measures can be put in place, ensuring that the schemes are available and genuinely accessible to all.

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