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CONSUMER CREDIT GRIEVANCE AND REDRESS MECHANISMS: THE MALAYSIA PERSPECTIVE

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ABSTRACT

This study examines the redress mechanisms accessible to aggrieved consumers dealing with various consumer credit providers in Malaysia. The existing legal and institutional framework characterised by the piecemeal approach has led different groups of consumers to varying levels of access, which can be superior or inferior to one another. The study employs a doctrinal legal research methodology in analysing the two alternative dispute resolution bodies, namely, the Ombudsman for Financial Services, and the Tribunal for Consumer Claims. Primary sources of law, namely, the Consumer Protection Act 1999, the Financial Services Act 2013, the Financial Services

(Financial Ombudsman Scheme) Regulation 2014, the Hire-Purchase Act 1967, the Moneylenders Act 1951, and the Pawnbrokers Act 1972, are meticulously analysed along with secondary sources of law that principally comprise journal articles. The study reveals disparities in terms of access to cheap and simple redress mechanisms by various categories of consumers who are aggrieved by the actions of credit providers. The position of bank consumers and those entering into credit sale is accounted for, as there are particular ADR bodies established under relevant legislations to hear their respective disputes. On the contrary, the position of those who wish to lodge claims against moneylenders, pawnbrokers or credit companies offering hire-purchase is problematic. Several recommendations are proposed to resolve this opacity inter alia by referring to the approach adopted by South Africa. This study is significant in ensuring fair access to inexpensive and hassle-free dispute resolutions for all financial consumers, irrespective of the nature of their consumer credit transactions.

Keywords: Redress mechanism, consumer credit, alternative dispute resolution, consumer protection.

INTRODUCTION

Malaysian laws governing consumer credit are fragmented in nature. For example, banking transactions fall under the purview of the Central Bank of Malaysia (BNM), hire-purchase and credit sale are subject to the Ministry of Domestic Trade and Consumer Affairs (MDTCA), while the Ministry of Housing and Local Government (MHLG) regulates moneylending and pawnbroking. Similarly, credit transactions are governed by piecemeal laws, including the Contracts Act 1950, the Consumer Protection Act 1999 (CPA), the Hire-Purchase Act 1967 (HPA), the Moneylenders Act 1959 (MLA) and the Pawnbrokers Act 1972 (PBA). One of the adverse implications arising from this lack of uniformity is the absence of a dedicated redress mechanism body for all classes of affected consumers across the large-scale consumer credit industry. Consequently, access to alternative dispute resolution (ADR) bodies heavily relies on the regulators in charge of the respective industry. Undoubtedly, regulators have different priorities in establishing dedicated bodies to deal with consumer credit issues within their jurisdictions.

Under the present framework, the Ombudsman for Financial Services (OFS), the first company selected by the BNM to run its financial ombudsman scheme, is evidently entrusted to deal with consumer credit cases. However, it exclusively caters to banking consumers. Another institution established to deal with general consumer disputes is the Tribunal for Consumer Claims (TCC) which is under the purview of the MDTCA. Incontestably, the TCC can resolve disputes related to credit sales as this category of consumer credit is explicitly governed by the CPA. However, there is a lack of specific redress mechanisms established under respective statutes in favour of consumers who have complaints against pawnbrokers, moneylenders or credit companies offering hire-purchase. Against this backdrop, this study aims to analyse the relevant ADR institutions that can resolve consumer credit cases in Malaysia.

SIGNIFICANCE OF ALTERNATIVE DISPUTE RESOLUTION

Redressing consumer complaints is one of the pivotal elements of consumer protection (Malami & Yusoff, 2017). Importantly, the redress mechanism must be affordable, efficient and time-saving. Past literature has underscored the weaknesses of the conventional court system. As it is prone to be costly, worrisome, complicated and time-consuming, it fails to effectively deal with consumer cases (Rachagan, 1992). Harvey and Parry (1992) further emphasised the impracticability of court litigations by consumers against large corporations due to its inherent nature of being troublesome, costly and intricate. Furthermore, a redress system that is fairly simple, cheap and expedient is a preferable choice, especially as most cases involve small claims that are of low value (Amin & Abu Bakar, 2012).

The escalating need for an effective, inexpensive and informal redress mechanism is apparent among financial consumers. Surrounded by a variety of composite and unfamiliar financial products of different shapes and sizes, consumers sometimes face intimidating experiences (Yokoi-Arai, 2004). This need is correspondingly advocated by the World Bank (2012) which acknowledges that the existence of a redress mechanism symbolises a well-functioning consumer protection regime. The incorporation of access to adequate complaint management and redress mechanism in the G20 High-Level Principles on Financial Consumer Protection further emphasizes the significance of consumer protection element (Organisation for Economic Co-operation and Development, 2011). Hence, there is an imperative need for alternative dispute resolution institutions that possess the advantageous features of being efficient, affordable and less formal as compared to conventional litigation (David & Francis, 2012). Brown and Marriott (1999) enumerated the diverse ADR techniques practised globally with distinctive features including arbitration, negotiation, mediation, tribunal and ombudsman.

OVERVIEW OF CONSUMER CREDIT INDUSTRY IN MALAYSIA

Credit is defined as "the funding of the members of the public to purchase goods and services with money borrowed from finance companies, banks and other moneylenders" (Law & Smullen, 2008). Consumer credit, on the other hand, refers to "a credit to individuals and households, comprising residential mortgages, home loans, credit cards, overdrafts, personal loans either secured or unsecured and instalment or revolving credit" (Financial Stability Board, 2011). In Malaysia, credit providers can be generally divided into two, namely banks and non-bank institutions. Banking institutions, either conventional or Islamic, and non-bank institutions such as development financial institutions are under the jurisdiction of the BNM. Other non-bank institutions including credit companies, moneylending companies, pawnbroking firms, co-operatives are under the supervision of various government ministries and agencies. The existence of a wide range of credit products offered by numerous credit providers, both conventional and Islamic, signifies the importance of the consumer credit industry in Malaysia. Among the well-known consumer credit products offered in the market are hire-purchase, personal loans, credit sales, overdraft, credit cards, pawnbroking, easy payment schemes and moneylending.

Banking Industry

The conventional banking industry which has been in existence since 1900s remains a crucial substance for the economic growth of Malaysia. Ali et al. (2016) asserted that the banking industry has a firm foundation in the Malaysian financial system due to its vast experience, extensive presence, various investment options, more enhanced technology and human resources as compared to other industries. Based on section 2 of the FSA, banking business refers to "the business of accepting deposits on current accounts, deposit accounts, savings account or other similar accounts, the business of paying or collecting cheques drawn by or paid in by customers, provision of finance and other businesses to be prescribed by the Minister of Finance on the recommendation of the BNM". Consumer credit fits the scope of banking business since the provision of finance includes lending of money.

A fundamental characteristic of conventional banking is that it operates based on a pre-fixed interest rate. With respect to consumer credit products whether housing loans, vehicle loans or personal loan, the bank is always acting as a lender while the consumer as a borrower is obliged to pay the principal plus the agreed rate of interest. Thus far, there are seven local conventional banks and 19 foreign conventional banks currently operating in Malaysia.

Hire-Purchase Industry

Prior to the introduction of the Hire-Purchase Act 1967, hire-purchase transactions were subject to the Contracts Act 1950 and common law principles (Min Aun & Vohrah, 2003). Under the purview of the Ministry of Domestic Trade and Consumer Affairs, the HPA is legislated to enhance protection to the consumers by outlining the rights and obligations of the parties to the transactions (Azizan & Shaik Ahmad Yusoff, 2017).

Hire-purchase involves a hiring contract between the owner and the hirer, whereby the rental payment is made by way of instalment for an agreed term. The hirer is given an option to purchase the goods once the instalment is settled, either upon early settlement or at the end of the financing tenure (Buang, 2001). The case of *Helby v Matthews* [1895] AC 471 has long endorsed transaction of this nature. In this case, the piano owner agreed to let it on hire to Brewster. The agreement required Brewster to pay monthly rental on the basis that he was given an option to terminate the hiring by delivering the piano to the owner. However, Brewster continued to be liable for the outstanding arrears. The agreement also stipulated that the piano would become Brewster's property if he pays all the instalments. Failure to do so, the piano should remain to be the property of the owner.

Hire-purchase is regarded as one of the most important branches of consumer credit utilised by Malaysian consumers (Rahman, 2007). Industry players consist of banks and non-bank institutions. The majority of non-bank institutions offering hire-purchase are credit companies, car dealers, used car dealers, motorcycle companies, leasing companies and co-operatives. While banks are regulated by the BNM, non-banks are not. Nonetheless, they are equally subject to the regulations and enforcement by the MDTCA in the event of contravention with the HPA provisions. In principle, since these institutions are bound by the provisions of the HPA, modus operandi, salient features, as well as terms and conditions, the hire-purchase agreements offered by these institutions are similar in nature (Ilias, 2018b).

Moneylending Industry

Moneylending remains an informal source of credit to facilitate the needs of certain community groups who fall outside the eligible borrower requirements of the formal financing system (Teo, 2015). Historically, the business of moneylending can be said to have begun in Malaysia with the arrival of a banking sub-caste of the Chettiar community known as Nattukotai Chettiars in the middle of the nineteenth century who set up their businesses in Penang, Malacca and Singapore (Singh, 2003). Moneylending activities then prospered, especially when Chinese traders turned to Chettiars for quick credit to aid their businesses (Muhammad Arif, 2006). Moneylending became a choice as it involved fewer formalities, quick and hassle-free financing with minimal documentation as opposed to banks. If the loan was small, a signature on an "I Owe You" (IOU) document was acceptable while larger amounts required title deeds as collateral (Singh, 2003).

Currently, moneylending is regulated by the MLA which is under the purview of MHLG. According to the MLA, moneylending is the lending of money at interest either with or without security by a moneylender to a borrower. Section 17A(1) of the MLA stipulates the maximum interest rate chargeable for both secured and unsecured loan. For the former, the interest rate is 12 percent per annum while for the latter, the interest rate is 18 percent per annum.

Nevertheless, the application of the MLA is only confined to moneylending by a moneylender who falls within the definition of section 2 of the MLA. One crucial element of the definition of a moneylender within the said Act is that he must carry out the business of moneylending. In *Muhibbah Teguh Sdn Bhd v Yaacob Mat Yim* [2005] 4 CLJ 853, the High Court held that "one or two moneylending transactions (even in consideration of a larger sum) do not make the lender a moneylender within the purview of the definition of 'moneylender' in section 2 of the MLA". The case of *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1962] MLJ 74 highlighted that "as proof of business, some sort of continuity, system or repetition of similar transaction is required". Thus, evidence of a single interest-bearing transaction is insufficient to render a person a 'moneylender' under the MLA. However, there are certain institutions which are statutorily exempted from the application of the MLA as listed in the First Schedule of the MLA such as banks and co-operative society. Section 2A(2) of the MLA also allows the Minister to exempt certain company or society by notification in the Gazette. Commencing April 2019, licensed moneylenders are known as community credit so as to distinguish them from illegal moneylenders (The Sundaily, 2019).

Pawnbroking Industry

In Malaysia, the pawnbroking business originated as early as the fifteenth century, specifically during the glorious epoch of the Malacca Sultanate (Johari & Sanusi, 2007). It grew immensely when the Chinese immigrants arrived in the then Tanah Melayu to work in the tin industries and other commercial activities. The business was dominated by the Hakka clan of the Chinese until the early 1990s (Shanmugam, 1991). Until now, most of the pawnshops are privately owned and concentrate on financial gain.

This industry is governed by the PBA which is regulated by the MHLG, similar to the regulator of moneylenders. The PBA defines pawnbroking to include the business of taking articles in pawn. By virtue of section 3 of the PBA, loans covered by the PBA have a maximum amount of RM10,000, thereby excluding loans that exceed the amount from the purview of the PBA. The interest rate chargeable is 2 percent per month as prescribed by the Pawnbrokers (Control and Licensing) Regulations 2004. According to Ismail and Ahmad (1997), the most common articles in pawn are jewellery, watches, mobile phones and electronic devices while the maximum tenure of financing is 6 months subject to extension. The maximum loan amount is between 50 percent to 80 percent of the value of pledged asset (Ismail, 2014; Ismail & Ahmad, 1997; Ng, 2020).

Abdul Razak (2011) succinctly summarised a general modus operandi of pawnbroking. The process begins when the consumer approaches the pawnbroker for a fixed-loan and uses their collateral, also known as ‘pledge’, to guarantee the loan. Throughout the tenure of the loan, the pawnbroker is legally entitled to hold the said collateral until it is redeemed by the customers unless extension is granted. If the collateral is not redeemed within the fixed period, i.e. the loan is not paid at the agreed timeframe, it then becomes the property of the pawnbroker provided the loan is RM200 and below. If the loan exceeds RM200, it will be subject to an auction process. According to Ng (2020), the average number of customers for licensed pawnbrokers is 500 per month pawning between RM500 and RM1,000 worth of jewellery.

The noteworthy role of this industry in providing laidback and quick access to credit for the lower-income group is axiomatic, particularly as the cost of living soars (Achariam, 2017) and the underserved population face heightened economic uncertainties (Ng, 2020). Although pawnbrokers are usually treated as a ‘bank for the poor’, it is not necessarily the case these days, especially in urban areas whereby the middle-class who fall on hard times also turn to the pawnshop as a lender of last resort (Chew, 2011). Ismail and Ahmad (1997) postulated that the underlying reason for the popularity of this unconventional financial service is due to its convenience since the loan disbursement is fast and hassle-free.

Credit Sale Industry

Credit sale is another vital segment of consumer credit which facilitates the ownership of goods especially household items such as electrical equipment and home furniture. Prior to the introduction of the Consumer Protection (Credit Sale) Regulations 2012, this branch of credit was lamentably unregulated. However, protection has been further strengthened through the amendment of the CPA in 2017 and the enforcement of the Consumer Protection (Credit Sale) Regulations 2017 (2017 Regulation). The insertion of part IIIB in the CPA under the heading of credit sale indicates the constant effort by the MDTCA in exercising its mandate to protect the consumers. Prior to that, the major concern among consumer advocates was the imposition of excessive interest causing hardship on consumers as interest could go as high as 35 percent per annum (Ismail & Yunus, 2017). The 2017 Regulation expressly stipulates that the maximum interest rate chargeable is 15 percent per annum.

The credit facility is purposely defined to include credit for the purchase of goods which permits the payment of purchase price by way of instalment. Hence, other types of credit facilities such as pawnbroking, moneylending by moneylenders or hire-purchase do not fall within the scope of credit facility under the CPA. The goods are nevertheless restricted to nine types of goods as listed in the First Schedule of the 2017 Regulation. These are home appliances, mobile phones and related accessories, data processing device monitors, desktop computers, laptop computers, printers, fax machines and consoles alongside accessories, healthcare and fitness equipment, floor covering and home furnishing, kitchenware, musical instruments and its accessories, gold and jewellery, encyclopaedias as well as invalid carriages and motorcycles. Presently, companies providing credit sale facilities include Sengheng Electric (KL) Sdn Bhd, Courts Malaysia, Parkson Credit, AEON Credit Sdn Bhd and Singer (Malaysia) Sdn Bhd. Part IIIB of the CPA is inapplicable if the transaction is made with the co-operative society or if the transaction involves a credit card.

THE OMBUDSMAN FOR FINANCIAL SERVICES

BNM has appointed the OFS, the successor of the Financial Mediation Bureau, to operate the financial ombudsman scheme in 2016 (Ombudsman for Financial Services, 2016). BNM has initiated the establishment of the financial ombudsman scheme pursuant to the Financial Services Act 2013 (FSA) and Islamic Financial Services Act 2013 (IFSA) to fulfil the increasing demand for redress mechanisms, especially for general financial consumers (Bank

Negara Malaysia, 2014). The primary objective of the scheme is to ensure that financial disputes between financial service providers and financial consumers are handled fairly and effectively (Ombudsman for Financial Services, 2017). Incorporated under the Companies Act 1965, its operation started on 1st October 2016. The Financial Services (Financial Ombudsman Scheme) Regulation 2014 (FSR), the Islamic Financial Services (Financial Ombudsman Scheme) Regulation 2014 (IFSR) and Terms of Reference (TOR) are the fundamental sources of reference guiding the operation and management of the OFS (Bank Negara Malaysia, 2015).

Table 1 depicts the number of cases registered with the OFS by product type from the year of its establishment until 2019. Most of the cases lodged with the OFS fall under the category of card-based electronic payments such as stolen cards and unauthorised online transactions followed by cases related to electronic terminals and internet banking. Disputes on loan advances or Islamic financing usually relate to wrong or unreasonable charges of interest/profit rates, wrong instalment amounts calculation and method of computing interest/ profit (Ombudsman for Financial Services, 2019).

Table 1

Number of Disputes Registered by Product Type from 2016-2019

	Product Types						
Year	Card-based Electronic Payment	Internet Banking	Electronic Terminals	Operational Issues	Loan Advances	Islamic Financing	E-Money
2019	111	63	50	45	28	13	12
2018	77	21	60	21	11	4	5
2017	239	2	109	42	27	8	16
2016	282	101	129	40	37	nil	nil
Total	709	187	348	148	103	25	33

Source: Ombudsman for Financial Services

Jurisdiction

The OFS has jurisdiction to hear financial disputes if the prescribed requirements are fulfilled. Firstly, the disputes must be lodged by an eligible complainant namely a financial consumer. Secondly, the said financial consumers must be the one who uses or has used any financial service or product provided by a member of the OFS. It is compulsory for banking institutions to be members of the OFS alongside other financial institutions governed by the BNM (Paragraph 4 of the TOR). As of 31st December 2019, OFS had a total of 208 members comprising licensed banks (including Islamic banks), prescribed development financial institutions, licensed insurance companies and takaful operators, approved designated payment instrument issuers, approved insurance and takaful brokers, and approved financial advisers and Islamic financial advisers (Ombudsman for Financial Services, 2019). This highlights the exclusiveness of the OFS solely to financial consumers dealing with specific institutions which are members of the OFS. Hence, financial consumers who deal with pawnbrokers, moneylenders and credit companies are not eligible to lodge their claims to the OFS because these institutions are ineligible to become members as they are not regulated by BNM. Thirdly, the purpose of using the products must be either for personal, domestic or household purposes or in connection with a small business (Paragraph 9 of the TOR; section 121 of the FSA 2013).

Monetary Jurisdiction

The Third Schedule of the FSR highlights the monetary jurisdiction of the OFS. Accordingly, its monetary jurisdiction can be divided into three different categories. With regards to disputes related to financial services or products which are developed, offered or marketed by the OFS members, the limit is capped at RM250,000-00. Cases involving credit disputes, whether personal loans, home loans, or credit cards, fall under this category of monetary limit. It is stipulated that the monetary limit needs to be constantly reviewed considering the upward trend of market prices for houses (Valuation and Property Service Department Ministry of Finance, 2016). For the motor third party property damage dispute, the limit does not exceed RM10,000-00. Finally, cases pertaining to unauthorised transaction or an unauthorised use of cheques can also be brought to the OFS but the claim is restricted to RM25,000-00 (Paragraph 10 and Schedule 2 of the TOR). Nevertheless, if a monetary claim exceeds such prescribed limits, disputes can be brought to the OFS subject to the unanimous agreement of the OFS, the eligible complainant and the member involved in the dispute (subparagraph 12(3) of the TOR). If the two other parties disagree, the eligible complainant has no choice but to stick to the original limit or find other avenues for dispute resolution.

Limitation of Jurisdiction

Several types of disputes are outside the scope of the FOS (Paragraph 13 of the TOR). Firstly, disputes that exceed the monetary limit specified by the FSR and TOR are outside the OFS jurisdiction unless written agreement is secured from the disputing parties and the OFS. Next, the OFS also cannot decide issues pertaining to product features, pricing, credit or underwriting decisions or commercial decisions on the applications for loan restructuring or rescheduling. In respect of insurance or takaful-related issues, disputes on the actuarial standards, tables and principles are not within the purview of the OFS.

Other types of dispute which are outside the OFS jurisdiction include employment contracts between a member and its employees, disputes that have been filed in court, referred to arbitration or have been decided by a court or arbitrator and the dispute that had been formerly decided by the OFS (including a dispute decided under the predecessor scheme) unless new evidence is present. It is also a requirement that disputes must be submitted to the OFS not more than six months from the date the member has provided its final decision. The eligible complainant must also ensure that the dispute is not barred under the Limitation Act 1953, Limitation Ordinance (Sabah) or Limitation Ordinance (Sarawak). Furthermore, an eligible complainant cannot lodge any claim against a member for any disputes related to investment performance of a financial product, disputes on capital market services and products and disputes that results from claims involving physical injury or death of a third-party.

Regarding a dispute involving more than one eligible complainant, the OFS has a discretion to reject if the submission is made without the consent of all eligible complainants and the OFS opines that such submission is improper. Finally, the OFS does not have the jurisdiction to deal with disputes concerning the payment of policy moneys or takaful benefit as prescribed in Schedule 10 of the FSA.

Although a dispute falls within the jurisdiction of the OFS, it has a discretion to refuse to consider such disputes if the OFS is of the opinion that the dispute is frivolous, vexatious or lacking in substance, or the dispute has an element of fraud and therefore is more suitable to be handled by other relevant law enforcement agencies (Paragraph 14 of the TOR).

Award

The OFS may grant either monetary or non-monetary awards. In respect of the former, it should not exceed the prescribed monetary limit unless agreed by all parties. Examples of non-monetary awards include a direction that the member to take certain actions which are deemed appropriate by the ombudsman pertaining to the disputes and a direction for the repayment of the actual cost incurred by the eligible complainant pursuant to the dispute. The latter is subject to a maximum of RM1000 per dispute. Once accepted by an eligible complainant, the member is bound by the award granted by the OFS.

THE TRIBUNAL FOR CONSUMER CLAIMS

The establishment of the TCC in 1999 reflects the government's commitment towards providing a simple and cheap redress mechanism for general consumers (Amin & Abu Bakar, 2010). The TCC was established parallel with the introduction of the CPA, a prominent legislation in the sphere of general consumer protection in Malaysia. Pursuant to Part XII of the CPA, the TCC was statutorily created as an independent body under the MDTCA jurisdiction commencing 15th November 1999. Other than the CPA, the Consumer Protection (The Tribunal for Consumer Claims) Regulations 1999 (CPR) also guides the operation of the TCC. According to Amin (2007), the fundamental objective of establishing the TCC is to provide an alternate mechanism other than the court system for consumers to claim any loss endured in a less cumbersome and speedy approach at a cheaper cost.

For the year 2019, the highest categories of disputes were cases against travel agencies (384), followed by home renovation projects (371), faulty mobile devices (371), car and accessories (327), electrical items (350), maid agency services (204), car workshops (220), furniture (215) and other services (325) ("Travel tops complaints to Consumer Claims Tribunal," 2020).

Jurisdiction

The TCC has a jurisdiction to resolve a claim lodged by a consumer to compensate his loss affecting his interests as a consumer under the CPA (Darshan Singh, 2011). This requires the claimant to be a consumer within the scope of the CPA and the claims must be those provided under the same Act. Regarding the first requirement, the main criteria defining a consumer under the CPA are twofold; firstly, the acquisition or use of goods or services for personal, domestic or household purpose and secondly, the goods or services acquired or used must be of a kind ordinarily acquired for personal, domestic or household purposes (Ahmad Yusoff et al., 2011). The definition specifically excludes the acquisition or use of goods for business purposes. This is further reinforced by the definition of goods which refers to goods which are primarily purchased, used or consumed for personal, domestic or household purposes including immovable properties, animals, vessels and vehicles, utilities, trees, plants and crops. However, *choses in action* including negotiable instrument, shares, debentures and money are excluded. As far as services are concerned, they include any rights, benefits, privileges or facilities that are provided, granted or conferred under any contract. However, cases against health care professionals or other professionals governed by any written law are excluded from the ambit of the TCC's jurisdiction.

It is viewed that, with regard to the definition of services, the provision of loans can be regarded as a form of service whereby the consumers acquire credit facility services granted under loan contracts whether from moneylenders, pawnbrokers or a hire-purchase. For instance, the case of *Ong Siew Hwa v UMW Toyota Motor Sdn Bhd & Anor* [2014] 9 MLJ 640 decided that hire-purchase falls within the definition of services under the CPA. In that case, the High Court held that the plaintiff who acquires a car for his personal use under the hire-purchase agreement is a consumer under the CPA which defines a consumer as "a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption". On the other hand, in the case of *Chua Hong Yiah v MBF Cards (Malaysia) Sdn Bhd* TTPM –SAB-(P)-232-2007, the TCC held that the MBF as a card issuer was a supplier within the meaning of the CPA and made an award for the claimant. It is submitted that by applying the aforementioned decision, credit providers can be regarded as suppliers under the CPA. It is interesting to note that, in arriving at the decision, the TCC did not highlight the issue of purposed of acquisition. This is because credit cards can be used for various purposes which are outside the control of credit providers. It is also submitted that the similar issues may arise in proving the purpose of loan acquisition in regard to pawnbroking and moneylending as the cash can be used for numerous purposes.

In respect of credit sale, part IIIB of the CPA does not provide a specific definition for consumers. Thus, the definition of consumer is similar to the ones provided in section 2 of the CPA as discussed above. However, there is a qualification in respect of goods purchased as these are confined to those listed in 2017 Regulation as discussed in the foregoing section. Also, there are specific definitions provided for credit facility providers, dealers and sellers to cater to the distinct nature of credit sale which may involve different parties in different capacities. Thus, the TCC can hear a claim for a declaration that a credit sale agreement is void if the credit facility provider does not state the term charges. Likewise, it can hear a claim against the dealer for misrepresentation made in the course of negotiation leading to the supply of goods.

Concerning the second requirement, the types of claims under the CPA include those related to false representation or unfair practice, false or misleading conduct, safety of goods and services, breach of implied guarantees in relation to goods and services against supplier and manufacturer, as well as breach of express guarantee against manufacturer. The interpretation of this requirement renders that claims with respect to disputes under other laws cannot be lodged to the TCC unless the claimant can bring the claim within the provisions of the CPA. For example, if there is a breach of implied guarantee as to the merchantable quality of goods purchased by way of hire-purchase, instead of relying on the HPA, the case may be brought under section 32 of the CPA for breach of acceptable quality. Arguably, this condition may pose difficulties for the consumers in determining the appropriate provisions under the CPA since the CPA is a general consumer law and does not cater to the unique requirements of different credit products. For instance, under the HPA, if in the course of negotiations, it leads to the entering of a hire- purchase agreement, the owner, dealer or any person acting on their behalf misrepresents the hirer either orally or in writing, section 8(1) provides that the hirer may have two courses of action. Firstly, as against the owner, he may rescind the agreement and secondly, as against the person making the representation or his principal, he may claim damages. Although the hirer may bring claims to the TCC for false or misleading representation, the CPA does not provide the definition of owner; hence, it raises questions as to the rightful party to be sued to rescind the agreement.

In case of moneylending, section 17A(3) of the MLA prescribes that the rate must not exceed the prescribed rate. Otherwise, the agreement will be void and unenforceable. These provisions are clearly not available under the CPA. Likewise, it is questionable whether an action to claim compensation for non-delivery of pledge upon full settlement of debt or when the value of pledge is reduced due to default, neglect or misbehaviour of the pawnbroker can be brought to the TCC because the action is based on section 22 of the PBA. It is viewed that this incompatibility creates loopholes in the existing framework in providing a platform for unfortunate consumers to resolve their consumer credit cases. However, as it is explicitly embedded in the CPA, this requirement does not pose a problem for disputes related to credit sales to be heard by the TCC.

In addition, section 98(1) of the CPA also highlights that it can hear claims in respect of all goods and services if no redress mechanism is provided for under any other law. It is submitted that this provision which came in force in 2011 intends to avoid multiplicity of claims, disparity of decisions and interference with other redress mechanisms' jurisdictions. The generality of this provision allows consumer claims in respect of hire-purchase, moneylending and pawnbroking to be brought to the TCC since no redress mechanisms are provided under the HPA, the MLA and the PBA, respectively.

However, as far as credit facilities offered by banking institutions are concerned, the presence of the OFS may be considered as a redress mechanism established under written law because it is the first company appointed by BNM to operate the financial ombudsman scheme established under the FSA to settle disputes in relation to financial consumers. Prior to the establishment of the OFS, the TCC had decided cases related to credit cards despite the presence of the FMB. This is perhaps attributed to the fact that the FMB is not established under any written law. For example, in *Lim Wai Kuan v Public Bank Berhad* TTPM-WP-(P)-1351-2009, the TCC held that the claimant was required to pay only RM250 out of RM5,549 incurred with the use of her credit card. This is because the claimant's credit card was stolen and disputed transactions took place after the theft of the card. The TCC had referred to the High Court decision in Diana *Chee Vun Hsai v Citybank Berhad* (no. D10(D7)-24-511-2008) as well as the guidelines issued by the Central Bank of Malaysia which prescribed that the maximum liability of cardholder for unauthorised transactions due to lost or stolen credit card is subject to a limit specified by the credit card issuer which shall not exceed RM250. However, it is subject to the condition that the cardholder has not acted fraudulently or has not failed to inform the credit card issuer as reasonably practicable after having found that his credit card is lost or stolen. From the facts submitted before the TCC, the claimant had promptly informed the respondent bank on the day she found her card missing. It is evident in this case that the TCC has heard complaints against banking institutions in Malaysia and had adopted the guidelines endorsed by the Central Bank. Likewise, in the case of *Chua Hong Yiah v MBF Cards (Malaysia) Sdn Bhd* TTPM –SAB-(P)-232-2007, the award was made pursuant to a claim by the claimant that he was entitled to the gift as he had fulfilled the conditions in the 'free offer' made by the respondent in brochure and leaflets given to the claimant as a cardholder. The respondent argued that the conditions as set out in the brochure were not the complete terms and conditions for the free gift and a cardholder should also have referred to the respondent's website which imposed another condition. The TCC rejected the respondent's defence and held that the information on the website did not constitute terms and conditions for the free gifts. This decision of the TCC demonstrates the TCC's standing which is favourable towards consumers even against the credit institutions in Malaysia.

Monetary Limit

Additionally, the claim is subject to the monetary limit whereby it should not exceed RM50,000. This monetary limit was increased in 2019 in response to higher costs of living ("Travel tops complaints to Consumer Claims Tribunal," 2020). It is contended that consumer credit may involve greater value such as the purchase of motor vehicles under hire-purchase. For instance, the case of *Ong Siew Hwa v UMW Toyota Motor Sdn Bhd & Anor* cited above involved a claim against the car dealer for the defects in a new car and it was resolved via the conventional mode of litigation. The plaintiff bought a car from the first defendant for the price of RM151,706.45 and partly paid RM71,706.45. The balance of RM80,000 was financed by the second defendant under a hire-purchase agreement. The case was decided by High Court at the first instance. However, the appeal went to the apex court which issued a judgment in 2018 that the plaintiff's claim was unsustainable because the party to be sued is not the car dealer but the financier following the ratio decidendi of the Federal Court in *Ahmad Ismail v Malaya Motor Company & Anor* [1973] 2 MLJ 66. The case established the principle that once the appellant (plaintiff) entered into a hire-purchase agreement with the finance company, any contractual relationship between the appellant and a car dealer would be the terminated. Hence, *Ong Siew Hwa* revealed that not only do consumers have to endure the burden of losing the case but have to bear the financial hardship of paying legal fees and other incidental costs. The trials were also time-consuming as they went through an appeal process.

Even though the TCC may entertain claims which exceed the prescribed limit, pursuant to Section 100(1) of the CPA, both parties must agree with this arrangement. Section 100(2) of the CPA further clarifies that the agreement may be made either before the lodgement of claim or after the agreed settlement has been recorded or determined. If no consensus is reached, the limit remains unchanged. The claimant may opt to abandon part of the total claim to bring it within the jurisdiction of the TCC (Section 101 of the CPA).

Limitation of Jurisdiction

The TCC cannot hear claims that were submitted exceeding three years from the date the cause of action accrued. The CPA further provides a list of claims which are excluded from the TCC's jurisdiction, including claims for recovery of land or any estate or interest in land, claims arising from personal injury or death, disputes concerning a will, settlements or intestacy (including a partial intestacy), goodwill, *chose in action*, trade secrets or other intellectual properties.

Finally, the TCC cannot hear and determine a claim which is under the jurisdiction of other tribunals established by any other written law. As far as tribunals are concerned, currently in Malaysia, there exists the Tribunal for Homebuyers' Claim, Strata Management Tribunal in Peninsular Malaysia and the Tribunal for Housing Purchasers' Claim in Sabah and Sarawak, Co-operative Tribunal, Copyright Tribunal and Water Tribunal. It is submitted that the insertion of this provision pursuant to the amendment in 2003 intends to emphasise the demarcation of jurisdiction between the TCC and other specialised tribunals. This provision also can be relied on to be the justifications for consumers dealing with moneylenders, pawnbrokers, hire-purchase to bring their cases to the TCC since there is no dedicated tribunal established to hear and determine those cases.

Award

Pursuant to the hearing, section 112 of the CPA provides that the TCC may grant one or more awards to a party including to pay money, to supply or resupply the goods, to replace or repair the goods, to refund, to comply with guarantee or to pay compensation. Moreover, it can also issue an award that the contract be varied or set aside wholly or in part, payment of cost (not exceeding RM200), payment of interest or that the claim is dismissed.

As far as consumer credit transactions are concerned (other than credit sale), since the relevant legislations such as the HPA, the MLA, the PBA provide that the agreement is void in the event of breach with certain provisions, the applicable award is that the contract be set-aside. However, in view of the restriction that the TCC only entertain disputes due to non-compliance with the CPA, such an award is unfortunately not possible. With regards to credit sale, this is a clear gap. For example, in the event the credit facility provider imposes term charges exceeding 15 percent, section 24T(2) of the CPA allows the consumer to treat the agreement as void or to have the excess amount reduced from the total amount of the terms payable by him under the agreement. The consumer may however rely on the CPA provisions regarding unfair contract terms which entitle the TCC to declare the contract or the term as unenforceable or void and to grant the relevant award accordingly (section 24G).

THE INDUSTRY AND THE REDRESS MECHANISM: AN APPRAISAL

Consumers who are victimised while dealing with banking institutions in acquiring credit products such as personal loans, housing loans, hire-purchase and credit cards can submit their grievances to the OFS. This is pursuant to Paragraph 9 of the TOR which expounds the eligible complainant as referring to "a financial consumer who uses or has used any financial services or products provided by a member either for personal, domestic or household purposes or in connection with a small business". Membership is limited to institutions governed by the BNM. Thus, consumers dealing with credit providers other than banks are excluded from this free and flexible redress mechanism. Parallel with section 98(1) of the CPA, this segment of consumers cannot lodge their claims to the TCC.

It is submitted that the TCC can hear disputes associated with hire-purchase, moneylending and pawnbroking based on a literal interpretation of section 98(1) and 99(1)(d) of the CPA due to the lack of redress mechanisms created by any statute nor tribunal available with respect to these industries. Consumer credit also does not fall within other excluded areas enumerated in section 99. Moreover, by referring to the definition of service which includes any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract, it may include the service of providing credit. Also, in the case of *Ong Siew Hwa v UMW Toyota Motor Sdn Bhd & Anor* [2014] 9 MLJ 640, the High Court held that the plaintiff who acquired a car for his personal use under the hire-purchase agreement is a consumer under the CPA. In addition, the TCC itself held the MBF as a card issuer was a supplier within the meaning of the CPA in the case of *Chua Hong Yiah v MBF Cards (Malaysia) Sdn Bhd* TTPM –SAB-(P)-232-2007. Hence, it is viewed that credit providers are suppliers within the scope of the CPA. Credit sale, however, unambiguously falls under the TCC jurisdiction.

Nevertheless, to enable disputes on moneylending, pawnbroking and hire-purchase to be lodged with the TCC, several issues need to be considered. Firstly, the requirement that the loan is acquired for personal, domestic or household purposes, and ordinarily acquired for personal, domestic or household purposes needs to be fulfilled.

This may not be a problem for hire-purchase or credit sale since the loan is used to purchase the goods and the purpose of purchase can be proved by showing how the goods are being utilised. With regards to pawnbroking or moneylending, since the loan can be used for various purposes and not necessarily to purchase goods, the proper mechanisms to determine the actual purpose of acquiring the credit facility is uncertain.

Secondly, the types of claim must be based on the CPA provisions. This is a major hurdle which may complicate the process of lodging claims with the TCC because there is a distinction between the governing law of various credit transactions and the law which needs to be relied on to bring the claim within the TCC. Ordinary consumers who are mostly unfamiliar with diverse legal provisions may find this to be a real obstacle. Being a general consumer protection law, it is submitted that the CPA is insufficient to govern diverse consumer credit transactions. On that basis, it is repugnant to pursue moneylending or pawnbroking cases relying on the CPA as the likelihood that relevant provisions are available is relatively impossible. As for hire-purchase, an action may be taken for example for breach of implied guarantee as to merchantable quality under the CPA and not the HPA. However, there are still numerous other areas not covered by the CPA, such as an action for a declaration that the agreement is void because it is not signed based on section 4B of the HPA.

Thirdly, the claim must not exceed RM50,000. The monetary jurisdiction of the TCC has undergone several revisions and this monetary jurisdiction is pursuant to its latest amendment in 2019. It is questionable whether this figure can fit the claims on hire-purchase or personal loans which usually involve enormous monetary values exceeding RM50,000.

In view of the abovementioned discussion, the viability of the TCC as a redress mechanism for consumer credit disputes is vague. The preceding analysis reveals that the existing legal and institutional framework for redress mechanism vis-à-vis consumer credit disputes are still unsettled. Regrettably, consumers may face uncertainty in deciding the rightful body to lodge the claims. Zhao and Othman (2010) postulate that knowledge on consumer protection agencies is one of the crucial factors in determining consumer's complaint actions. Thus, the ambiguity may create an obstacle for consumers to pursue appropriate legal action against dishonest traders.

If the TCC embraces its stand that it does not hear consumer credit cases, this should be explicitly reflected in the relevant legislation, particularly the CPA. This step is critical in alleviating confusion among financial consumers in deciding the proper body to channel their disputes. However, the negative repercussion would be on the financial consumers dealing with non-bank institutions whereby there are no cheap, uncomplicated and seamless redress mechanisms available in their favour. Even though they can resort to Small Claims Court, the fact that it operates within the ordinary court mechanism coupled with lack of publicity on its existence hampers its effectiveness (Amin, 2007). The monetary jurisdiction is also limited to RM5000. In view of these shortcomings, consumers may have no choice but to rely on conventional civil litigation. Leff (1970) argues that consumers sometimes need "super-spite" to implement their rights. According to Cartwright (2001), "a rational individual will not enforce the law unless the expected benefit surpasses the expected costs and in the majority of consumer disputes, the costs of ensuring redress will be prohibitive".

To remedy this dilemma, the TCC may decide to hear consumer credit cases leveraging on its existing infrastructure and goodwill as an established ADR body in Malaysia. Section 98 of the CPA should also be amended to the effect that the TCC can hear consumer complaints within the CPA and relevant legislation in respect of all goods and services for which no redress mechanism is available under any other law. Improvements must be exercised especially in respect of refining the knowledge and expertise of the presiding officers on various consumer credit products, including inter alia the disclosure requirements, the loan calculation, events amounting to default as well as the subsequent procedures and rights of the parties in the events of defaults. It is equally fundamental that the presiding officers have familiarity with relevant consumer credit laws such as the HPA, the MLA and the PBA. In addition to that, continuous efforts should be concentrated in conducting efficacious programs to increase public awareness about its role as a cheap and hassle-free dispute resolution.

It is acknowledged that consumer awareness is significant in elevating individuals' capacity in protecting and upholding their rights against sellers' expropriations (Ishak & Zabil, 2012).

Another solution to be considered is to establish a specific ADR body to hear consumer credit cases for all class of consumers. It is suggested that for uniformity purposes, the establishment is made under a single consumer credit law which governs all consumer credit transactions. As a matter of fact, the need for a comprehensive consumer credit statute is generally accepted but the process "has been delayed due to turf wars between various regulators" (Rachagan & Sothirachagan, 2018) .

This approach of setting up one dedicated ADR body to hear all consumer credit cases has been adopted in several countries renowned for advanced consumer protection regimes such as South Africa. In South Africa, the National Credit Act 2005 (NCA) is acknowledged as a unique piece of legislation introduced as a single law to administer and regulate all credit transactions (Van Heerden, 2008). The National Credit Regulator (NCR) is the sole body entrusted to administer consumer credit in South Africa pursuant to the NCA (Schraten, 2014). The NCA also provides for the establishment of the National Consumer Tribunal (NCT). Established as an independent adjudicative entity, the NCT is mandated to adjudicate in matters concerning allegations of prohibited conduct by consumers against credit providers, debt counsellors, credit bureaux and other persons registered with the NCR (section 26 and 27 of the NCA). Examples of prohibited conducts include failure to furnish required information, charging excess fees or charges, non-compliance with debt collection procedures or procedures when goods purchased on credit are surrendered and failure on the part of pawnbroker to honour his obligation prescribed in the NCA.

A wide range of consumers fall within the scope of the NCA. According to section 1 of the NCA, consumer refers to "the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement; the party to whom money is paid, or credit granted, under a pawn transaction; the party to whom credit is granted under a credit facility; the mortgagor under a mortgage agreement; the borrower under a secured loan; the lessee under a lease; the guarantor under a credit guarantee; or the party to whom or at whose direction money is advanced or credit granted under any other credit agreement". Thus, it is submitted that the NCT plays a substantial role in resolving credit disputes among extensive groups of consumers who are mistreated by credit providers. This role is facilitated by the enactment of a uniform credit law, namely the NCA which is under the purview of a single regulator, i.e. the NCR.

CONCLUSION

The preceding discussion reveals disparities in terms of access to fast, flexible and affordable redress mechanisms by different categories of consumers who are aggrieved by the actions of credit providers. The position of bank consumers and consumers entering into credit sale is settled as there are specific ADR bodies established under the relevant legislation to hear their disputes. On the contrary, the position of those who wish to complain against moneylenders, pawnbrokers or credit companies offering hire-purchase is problematic. Unquestionably, they cannot forward their disputes to the OFS. Submitting their disputes to the TCC is similarly complicated since they need to rely on the CPA provisions as the basis of their actions despite the dissimilar laws governing the transactions. To a certain extent, these loopholes will create confusion among consumers as to the proper bodies they can refer to for help in resolving their disputes other than resorting to the ordinary court system. To alleviate this misconception, the TCC must clearly declare in the CPA that consumer credit disputes are outside its jurisdiction. Alternatively, it can opt to assume a role in resolving consumer credit disputes but issues such as proving the purpose of loan acquisition, monetary jurisdiction, the expertise of the presiding officers to handle consumer credit disputes and public awareness need to be addressed as well. Since the root of the problem is the piecemeal approach in governing consumer credit, the establishment of a single consumer credit law which encompasses the establishment of a specific ADR institution to hear consumer credit disputes should be seriously considered. In order to ensure equal access to justice irrespective of the nature of consumer credit transactions, it is worth considering South Africa's approach of establishing a dedicated ADR institution to deal with wide array of consumer credit issues including bank and non-bank consumers.

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