

Consumer Court: Towards a Better Consumer Protection in Malaysia

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Abstract: Consumers as the largest economic group play an important role in the government economic decision making. Two third of all spending in the economy is by the consumers, thus, they deserve protection when dealing with the traders. Currently, substantive law is the best protection available to the consumer. However, substantive law alone is not enough. Effective consumer redress mechanism should be established to enable consumer to channel their claims against the traders. The need to have consumer redress mechanism in handling consumer matters is due to the importance of consumers to the economy of the country. Consumer needs a specific court with experienced judges in the field of consumerism. Most consumer disputes involve trader who is well verse with the law and capable of employing lawyers specialising in the specific areas of law as opposed to consumer who is a first timer and knows nothing about his rights. By having the specific court, consumers will be well treated by the system. Based on doctrinal research and by applying content analysis method, this study will review small claims court and Malaysia Tribunal for consumer claim in providing redress to consumers in Malaysia. By looking at the situation in Thailand, the study propose the establishment of consumer court, so that consumers are able to be relieved promptly and effectively from the damage suffered.

Key words: Consumer protection, consumer redress, Consumer Protection Act 1999, Small Claims Court, Malaysian Tribunal for Consumer Claim, Malaysia, Consumer Protection Act 1979 (Thailand), Consumer Protection Board (Thailand), Consumer Case Procedure Act 2008 (Thailand), Thailand

INTRODUCTION

Globalization and trade liberalization brings with it open market. This phenomenon had contributed to the diverse range of goods in the market. The developing global market witnessed the production of complex goods in large quantities (Sutton, 1971). The situation had caused confusion to consumers. This new form of trade pattern leads to greedy traders whereby the traders will make money by selling as many goods produced as possible. Apart from this, the trade pattern also creates information gap regarding quality of goods. The era of trade liberalization will lead the consumer to obtain massive range of goods without adequate information. Since, the goods are produced in a complex manner, the consumer becomes a party without adequate information compared to the traders (Zakuan *et al.*, 2013). The well informed traders then will take advantage over the consumers, for example by providing defective goods (Trebilcock, 1971). The situation creates issue of trader's civil liability for goods. This issue encouraged the consumers to demand justice from the traders by making claims. The claims seek to reflect consumer dissatisfaction due to unfair practices by the traders. This situation is

one of the examples faced by the consumers in the era of globalization and trade liberalization. Besides the substantive law, the effective, respected and honoured dispute resolution mechanism should also be available for the interest of the consumers (Harris, 1993). According to Thomas (1988), consumer claims are mostly (but not all) are "small claims". Normally, injuries, damages or losses suffered by consumers are relatively small. Thomas, therefore, assumed that the conventional dispute resolution is not appropriate. Economically, small claims require redress mechanism that does not involve legal procedure. A reliable redress mechanism is important to ensure consumer protection in Malaysia.

Consumer protection in Malaysia: Consumer is defined under Section 3(1) Consumer Protection Act 1999 as "a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption". From the definition, consumer only acquires goods or services for domestic or household purposes, it is clear that consumer is quite fragile in today's expanding economy. Consumers might not be a party who is well equipped with scientific knowledge and technology. They also have no bargaining

power as oppose to the business operators who tend to take advantage over the consumers. Thus, consumer needs to be protected. Importance of consumer protection in Malaysia can be seen with the emphasis placed on various aspects of consumerism. In order to cater for consumer matters, the government has introduced the Ministry of Domestic Trade, Cooperatives and Consumerism. The Malaysian plan introduced by the government outlined the protection given to the consumers. The 7th Malaysian plan saw the enactment of Consumer Protection Act 1999 which makes the interest of consumers as its primary focus. Under the act, government has introduced Malaysia Tribunal for Consumer Claim under Section 85, Part XII of the Consumer Protection Act 1999. Government concerns can also be seen in the 8th Malaysian Plan whereby the government emphasizes on self protection by raising awareness among consumers to safeguard their own interests. In the 9th Malaysian Plan, the government realized the importance of consumer protection in the era of trade liberalization, hence the government proposed that the Consumer Protection Act 1999 to be reviewed. The scope of the Act to be expanded to cover areas such as electronic commerce, health, risk assessment products and services including genetically modified organisms. Initiative taken by the government clearly shows that the government is moving towards enhancing consumer protection in Malaysia. In 10th Malaysian Plan, under Chapter 3, the government realized the importance of consumer protection by enhancing competition law which is being enforced by from Ministry of Domestic Trade, Cooperatives and Consumerism in 2010. Enhancing competition law for the purpose of consumer protection is one of the government aspirations which is been listed down in 12 National Key Economic Areas and 8 Strategic Reform Initiatives under the umbrella of Economic Transformation Programme (ETP). Current situation illustrates the role played by the government in enhancing consumer protection in Malaysia. However, substantive law alone is not enough. Government should consider having a reliable consumer redress mechanism in Malaysia.

CONSUMER REDRESS IN MALAYSIA

Prior to 1999, consumer claims in Malaysia is dealt in Small Claims Court (SCC). However, there are problems associated with SCC. The procedure exercised by SCC is fast, simple and informal which is argued that the procedure is unfair to the claimants. The proceeding

which is conducted privately in the magistrate's chamber is said to be contrary to the fundamental principles of judicial proceedings and active participation by the magistrate will weaken the system as magistrates are unable to uphold justice. Procedure in SCC is stressful to the consumers as they had to undergoing a complicated trial process and also they have to bear the cost if they are the losing party. Due to the problems of SCC, the government has enacted Consumer Protection Act 1999 which established the Tribunal for Consumer Claims Malaysia (MTCC) as a mean to settle consumer disputes. However, there are drawbacks of the MTCC. The jurisdiction of MTCC is limited and MTCC has no power to hear cases whereby the award exceed RM 25,000. The power of the tribunal is limited to a cause of action which accrues within 3 years of the claim. As for the hearing, no representation is allowed and the hearing, is open to public. These situations are quite stressful to the claimants. Another problem of MTCC is that there is no appeal process. Thus, consumers are left without justice. These are the problem associated with the current consumer dispute resolution. Realizing this matter, it is timely for the government to consider having a specific consumer court to handle consumer disputes.

Small claims court: Before the existence of Malaysian Tribunal of Consumer Claim, Small Claims Court (SCC) is the place for the consumer to file their claim against the traders. SCC came into existence on January 2, 1987 when SCC had started its first proceeding in the Kuala Lumpur Magistrate's Court. The trial was conducted according to the jurisdiction of the Magistrate's Court. Claims in the SCC is made by the plaintiff against the defendant in which the plaintiff must be an individual who is not been represented. The claims in the SCC will be tried in the Magistrate's Court and chaired by a magistrate. In 1988, SCC has a jurisdiction to hear small claims where the claim does not exceed RM5,000. The SCC also plays a vital role in providing facilities to the consumers in obtaining redress from the traders. This is due to the fact that SCC is a user-friendly dispute resolution. However, there are a few problems associated with SCC.

The trial procedure in relation to small claims in SCC is a simple procedure. The objective of this trial is to find solution as quickly as possible with a very low cost. The trials are conducted informally in order to reduce technical legal process. However, the procedures carried out in a simple, cheap and fast way will resulted in unfair judgments to the plaintiff and the defendant (Baldwin, 2003). According to Baldwin: small claims hearings tend to be much more informal, more relaxed and less

adversarial, the role of legal representation is greatly diminished, litigants are expected to present their own case and the judges are encouraged to be much more interventionist in approach.

The proceedings in SCC are conducted privately in magistrate's chambers. This proceeding is contrary to the fundamental principles of judicial proceedings in which the proceedings should be conducted openly so that the public will have access to the proceedings and will also increase public confidence in the proceedings. Brennan J in *Richmond News Study Inc. v Virginia* 448 US 555 (1980) argued that: open trial is one of the essential "checks and balances" of government. Open trials protect the defendant by helping to ensure accuracy and they build public confidence by demonstrating the fairness of the law to our citizens.

Right to be represented is also one of the important contributing factors to the failure of SCC. The SCC does not allow the claimant and the defendant to be represented by a counsel. The absence of a legal counsel causing stress among the parties involved when undergoing a kind of complicated trial process. Legal jargon such as 'hearing', 'judgments' and 'adjourn' are foreign words to them. Thus, they need a counsel to represent them in court. Herman and Thompson (1979) agree with this. Junker (1968) rationalised the importance of right to be represented in his writing. According to him: the rationale of the right to counsel is much narrower, the argument continues, since it is designed not to benefit the public but to protect the accused interest in a reliable adjudication of his guilt or innocent

Cost is also one of the failures to the application of SCC by the consumer. The SCC has adopted "no cost regime" where the cost not to be borne by the losing party. The application of this regime prevents the consumer from using the legal services. Scott (1975) explained the importance of cost whereby according to him "the cost imposed on the defendant takes the form of a payment to the plaintiff is significant only in that it affords the needed incentive for the plaintiff to bring the action and activate the machinery".

The judgment is also a problem. In SCC, the magistrates play an active role in resolving disputes whereby the role is normally played by lawyers. The active participation by the magistrates will only result in the failure to uphold justice. If shorter period is taken to settle the claim, this will weaken the SCC system as the magistrate will make the judgment feverishly. Baldwin (2003) further argued that "as district judges are themselves fond of justice dispensed at small claims hearing almost invariably falls below Rolls Royce standard."

SCC has no appeal process. Appeal is not allowed unless there is an error in law. If this error occurs, the appeal will be made in the High Court. The absence of an appeal process would prevent the plaintiff from obtaining justice. Shavell (1995) argued that appeal process is important in order to amend the existing law.

The consumer's complaints and criticisms show the incompatibility of the court system which is the small claims court in resolving disputes (Zakuan *et al.*, 2012). Therefore, efforts have been taken by the Malaysian government to provide consumers with an alternative dispute resolution which is independent of the court system (Rashid, 2000). The effort leads to the establishment of Malaysian Tribunal for Consumer Claims which was established under the proviso of the Consumer Protection Act 1999 which is Malaysian Tribunal for Consumer Claims (MTCC) (Ismail *et al.*, 2012).

MALAYSIAN TRIBUNAL FOR CONSUMER CLAIMS

Consumer Protection Act 1999 (CPA 1999) introduced a specific consumer redress mechanism to the Malaysian consumer when section 85 of Part XII of the CPA 1999 provides for the establishment of Malaysian Tribunal for Consumer Claims (MTCC). MTCC is an independent body established to hear and adjudicate consumer claims subject to the provisions under the CPA 1999. MTCC was established with the objective of providing a channel and alternative dispute resolution facilities to consumer. However, there are many drawbacks of the MTCC.

The jurisdiction of the MTCC is limited in which the Tribunal has no power to hear cases involving land, wills, goodwill, rights in action and intellectual property according to Section 99 CPA 1999. The power of MTCC according to section 98 CPA 1999 is to award not >RM25,000. Regarding the power of the tribunal, according to Section 99(2) CPA 1999, it shall be limited to a cause of action which accrues within 3 year of the claim (Yusoff *et al.*, 2011) The proceeding of the tribunal shall be open to the public. During the hearing, the Tribunal will be chaired by a person who is the President. The duty of the President is to assist both parties to reach settlement (Section 23 CPA 1999). The trial conducted in the tribunal cannot be represented by counsel. Each party to the dispute should handle the dispute by themselves (Section 108(2) CPA 1999). If the parties to the dispute want to negotiate the settlement, the Tribunal shall record the hearing and if the solution is achieved through negotiations, it was regarded as the award of the tribunal. Each award issued by the Tribunal in a proceeding shall be final and binding on all parties to the

proceedings and deemed to be an order of the Magistrate's Court (Section 116 CPA 1999). An award issued by the Tribunal shall be enforceable by any party to the proceedings in the Magistrate's Court having jurisdiction in where the award is obtained. If one of the parties fails to comply with the award after 14 days from the date of the award, the party is considered as committing an offence and liable on conviction (Yusoff *et al.*, 2011).

Judicial review system is one of the drawbacks of MTCC. Judicial review cases will tarnish the reputation of MTCC as a reliable consumer redress mechanism. The cases below illustrate the weaknesses of MTCC in cases of judicial review. In *Hazlinda Hamzah v Kumon Method of Learning Centre* (2006) 3 MLJ 124, the appellant had put her three children in a tuition centre run by the respondent. She found the centre not providing good services and requested a refund of the fee she had paid the respondent. The appellant went to the MTCC ("the Tribunal") and filed her claim there. The Tribunal found for her and ordered the respondent to make a partial refund, concluding that the appellant had in fact received some benefit. The award was not put into writing until sometimes later. The respondent, however, was not satisfied with the decision and apply for judicial review to quash Tribunal's decision on ground of decision was not put in writing. The respondent claimed that the decision violates section 114 of the Consumer Protection Act 1999 which requires reasons for decision. In favour of the respondent, the High Court, set aside the decision made by MTCC. The claimant later appeal to the court of appeal. On appeal, Gopal Sri Ram JCA held that refund could be awarded by the Tribunal. According to him, "it is to overcome this sort of technical common law rule that the act conferred wide powers on the tribunal "tribunal has power to order a refund". It did so in this case. So, there is no error of law at all here."

Another case is *Telekom Malaysia Berhad v Tribunal Tuntutan Pengguna Malaysia & Anor* (2007) 1 MLJ 626. The second respondent had disputed the applicant's two bills of RM98 each pertaining to the use of telecommunication services provided by appellant. The second respondent filed a claim at MTCC (the Tribunal). He argued that he had not made the international calls in question and that the calls were generated by the internet services without his consent. Subscribing to the argument, the Tribunal allowed the claim, ruling that there was wire-tapping of the communications services by an unidentified person who made the international calls while the second respondent was surfing the internet. The applicant contended that the awards were ultra vires as

the Tribunal had no jurisdiction to hear the dispute since the service of telecommunications provided by them involved electromagnetic waves to which the CPA 1999 had no application by virtue of its Section 2 (2)(g). It was further argued, as a matter of law, that the trade transaction herein must come within the domains of the Communications and Multimedia Act 1998 (the CMA), and not the CPA 1999. The High Court allows the application. It is clear that the Tribunal has no jurisdiction to hear claim related to communication of electronically transmitted waves by virtue of Section 2 (2)(g) of CPA 1999. The second respondent had elected the wrong forum to bring the dispute to the Tribunal as it was outside the jurisdiction of the tribunal. Therefore, the award was made by the tribunal in respect of a subject matter beyond its jurisdiction and thus, ultra vires.

Due to these drawbacks, it is high time for Malaysia to consider having a specific consumer court to hear consumer cases. Malaysia should look into the experience of its counterpart in establishing a reliable and effective consumer court in Malaysia.

CONSUMER COURT IN MALAYSIA: LESSONS FROM THAILAND

Thailand has its own law to protect their consumer which is called Consumer Protection Act 1979 (Act, 1979). CPA 1979 provides for the establishment of Consumer Protection Board (CBP). This CBP has the right to represent consumer in court proceedings. The board according to Section 10 of CPA 1979, shall have the following powers namely to consider the complaints from the consumers who suffer hardship or injury resulting from the acts of the businessmen to proceed with the goods which may be harmful to the consumers, to issue or publicise information concerning goods or services which may cause damage to consumers, to institute legal proceedings regarding the infringement of the consumer's rights and to recognize an association to represent the consumer.

When it comes to consumer redress, Thailand has enacted Consumer Case Procedure Act 2008. The purpose of the act is to offer a fast track court procedure for the resolution of consumer cases. The act seeks to provide for consumer cases whereby consumer case is a civil case between consumer and business operator concerning rights and duties under law due to consumption of goods or services. The act simplifies the procedures and reduces the cost for consumer wishing to take an action against business operators. If the goods or services have caused damaged to the consumer, the consumer himself or CBP or an association approved by CBP can take an action on behalf of the consumer against the business operator in

the court of law. The consumer is not accountable for any court fees except for such fees arising from the court's final judgment. The complaint must be filed within 3-10 years from the time the damage accrued. After the consumer has filed his claim, the court shall quickly arrange a date for the trial without delay and issue a summons for the defendant to come to court for mediation. If agreement cannot be achieved during the mediation, the case should proceed to trial. During the trial, consumer needs to prove damage. No need for the consumer to prove fault or negligence. The Court's judgment shall be conclusive. The court has the power to re-assess the amount of compensation that the plaintiff has claimed if it appears unreasonably high or low. Appeals against judgments can be lodged at consumer case section in the court of appeal. The appeals must be lodged within one month from the date the said judgments was made. The judgment of the court of appeal is final. Appeal to the supreme court is permitted only if they are related to public interest or other important issues. This kind of court is much awaited by the consumers all over the world. The system facilitates the exercise of claims by consumers so that consumers who suffer damage are relieved promptly, economically and efficiently, thus protecting rights of the consumers.

CONCLUSION

Actions have been taken by the government of Malaysia to protect the interest of consumer in Malaysia. The government has come out with small claims court and Malaysian Tribunal for consumer claims to provide avenue for consumer redress. However, these avenues have their own problems. There are several factors that contributed to the failure of small claims courts as well as Malaysia Tribunal for Consumer Claim (MTCC). In particular, the failure is due to the trial procedures, proceedings, right to be represented, costs, judgments and appeals process. The weaknesses hinder the

consumers from using the existing consumer redress mechanism. Due to these weaknesses, it is vital for the government to consider having a specific consumer court to handle consumer disputes. Malaysia should have a look at Thailand for a change.

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