

Part 2 Study on Dispute Resolution Process in Specific Cases III. Dispute Resolution Process in Consumer Protection

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journal or publication title	Dispute Resolution Process in Malaysia
volume	17
page range	8-22
year	2002
URL	http://hdl.handle.net/2344/00015054

PART 2
STUDY ON DISPUTE RESOLUTION PROCESS
IN SPECIFIC CASES

III. Dispute Resolution Process in Consumer Protection

A. Outline of consumers' cases

In order to understand the law as well as dispute resolution in consumer cases, it is important to note that a comprehensive statute pertaining to consumer protection only came into being on 15 November 1999. Prior to that date, the law as well as dispute resolution of cases pertaining to consumers were contained in several different pieces of legislation pertaining to different types of product as well as services. The scope of protection as well as the methods and their level of effectiveness tended to vary between the different types of legislation. The use of alternative means of dispute resolution was not greatly encouraged in the earlier legislation, as a result of which disputes were litigated in the ordinary civil courts based primarily on breach of contract as a cause of action.

For example, the Malaysian Sale of Goods Act 1957 is modelled upon the English Sale of Goods Act 1893. However, this Act [i.e., Sale of Goods Act 1893, UK] has been replaced in the UK by the Sale of Goods Act 1979 which greatly enhanced the rights of consumers. Malaysia however continued to lag behind statutory developments in the UK pertaining to consumer protection, as the Malaysian Sale of Goods Act 1957 was never amended to incorporate the changes in the UK Act. For example, in Malaysia the implied term that goods match the description, be of merchantable quality and be fit for purpose, can be excluded by an express term of the contract.⁹ This position remained until the passage of the Consumer Protection Act 1999.

There are specific statutes enacted to govern specific contracts, such as the contracts for the sale of houses developed by private housing developers [Housing developers (Control and Licensing) Rules] ; the Moneylenders Act 1951; the Hire 1 2 Purchase Act 1967; the Pawnbrokers Act 1972; the Contracts Act 1950 is the main enactment of the general principles pertaining to contracts generally, but within it is

⁹ S. 62, Sale of Goods Act 1957.

included provisions pertaining to contracts of indemnity and guarantee, bailment and pledges and principal and agent.

Another important point to note is that until the enactment of the Consumer Protection Act 1999, the law on product safety in Malaysia was likewise covered in different pieces of legislation dealing with different, specific products, for example: Sale of Drugs Act 1952, and the Control of Drugs and Cosmetics Regulations 1984; Electrical Inspectorate Act 1983, and the Electrical Inspectorate Regulations 1984; Pesticides Act 1974; Poisons Act 1952; and the Radioactive Substances Act 1968, to name but a few. Similarly, until the enactment of the 1999 Consumer Protection Act, Malaysia did not have a comprehensive statute on product liability. The law on product liability was expressed in the law of contracts, the common law principles of the tort of negligence, and several statutes, the most important being the Sale of Goods Act 1957. Both common law and statute provide different rights of compensation for loss or damage caused by goods to different classes of people.¹⁰ For a claim based on contractual or statutory liability, only the immediate party to the contract can claim compensation, and other affected persons such as the innocent bystander, a friend or family member who uses or receives the product as a gift has no right to claim. Unless privity of contract is established, no liability arises. These persons are required to base their claims under the tort of negligence. However, in view of the difficulty in proving fault, a claim based on tort would inevitably face in insurmountable complexities.

The Consumer Protection Act 1999 deals with selected areas of the law not yet provided for in other statutes, and it does not seek to repeal or replace existing law. However, by extending its protection only to consumers, it has the effect of differentiating the operation of general law, most significantly the law relating to contracts and the sale of goods.¹¹

The following is a broad overview of the matters covered under the Malaysian Consumer Protection Act 1999:

¹⁰ See S. Sothi Rachagan & Susheela Nair, "Consumer Protection Law in Malaysia", Asia Pacific Consumer Law – <http://www.ciroap.org/apcl/countries/malaysia>

¹¹ S. Sothi Rachagan & Susheela Nair, *op.cit.*

Part II : Misleading and deceptive conduct, false representation and unfair practice, including bait advertising, gifts, prizes, free offers; future services contract and presumption of liability for advertisement.

Part III : Safety of goods and services, including compliance with safety standards, general safety requirement for goods and prohibition against unsafe goods.

Part V : Guarantees in respect of supply of goods, including implied guarantee as to acceptable quality, implied guarantee as to fitness for particular purpose, implied guarantee that goods comply with description, implied guarantee that goods comply with sample, and implied guarantee as to repairs and spare parts.

Part VI : Rights against suppliers in respect of guarantees in the supply of goods.

Part VII : Rights against manufacturers in respect of guarantees in the supply of goods.

Part VIII : Guarantees in respect of supply of services, including guarantee as to reasonable care and skill; guarantee as to fitness for particular purpose; and guarantee as to time of completion.

Part IX : Rights against suppliers in respect of guarantees in the supply of services.

Part X : Product Liability.

Part XI : The National Consumer Advisory Council.

Part XII : The Tribunal for consumer claims.

Part XIII : Enforcement.

As comprehensive as the 1999 Act may appear to be, it is the opinion of experts that the major flaw of the Act is that it excludes from its ambit a number of important matters of interest to consumers:¹²

- (i) Professionals who are regulated by written law (lawyers, doctors, dentists, engineers, architects, nurses) and covered by separate statutes permitting either self-regulation or regulation by an administrative agency are not subject to the Act.
- (ii) The Act excludes any trade transactions effected by electronic means, as such activity is supposed to be governed by the Multimedia Development Commission Act 1999.

¹² S. Sothi Rachagan & Susheela Nair, *op.cit.*

- (iii) The Act does not apply to a person in respect of any defect in agricultural produce if such agricultural produce has not undergone any industrial process. There currently exist no specific legislation to govern genetically modified goods and other biotechnology products.
- (iv) The Act does not provide for public interest groups to bring an action on behalf of an aggrieved consumer, unlike similar provision found in other jurisdictions such as Thailand, India and China. The concept used is based on having *locus standi* or standing in the courts.

B. Organisations/Institutions for dispute resolution

Before the passage of the Consumer Protection Act 1999, all claims pertaining to consumer contracts, sales and product liability were litigated by the civil courts. The passage of the Act, which establishes the Tribunal for consumer claims now provides the public with an alternative to litigation in the civil courts, and this has proven to be beneficial particularly for claims involving small sums of money, such as claims against a laundry operator for damage to clothes sent for dry-cleaning and replacement for damaged goods sold. Such claims would have been too expensive and time-consuming for litigation in the civil courts and could probably have gone unaddressed prior to the establishment of the Tribunal.

1. The Tribunal for Consumer Claims

Membership of this Tribunal consists of a Chairman and a Deputy Chairman from among members of the Judicial and Legal Service, and not less than five other members. All members are appointed by the Minister of Domestic Trade and Consumer Affairs, a newly-created Ministry established to see to the needs and protection of consumers. The five appointed members need not necessarily be lawyers within the meaning of the Legal Profession Act 1976, and they are to hold office for a term not exceeding 3 years and are eligible for reappointment upon expiry of their terms of office, but may not be appointed for more than 3 consecutive terms.

The jurisdiction of the Tribunal may be exercised by any of the following persons sitting alone:

- (a) the Chairman of the Tribunal;

- (b) the Deputy Chairman; or
- (c) any member of the Tribunal selected by the Chairman.

A consumer may lodge with the Tribunal a claim in the prescribed form together with the prescribed fee (RM5/-) claiming for any loss suffered on any matter concerning his interests as a consumer. Currently, the Tribunal's jurisdiction is limited to where the total amount in respect of which an award is sought does not exceed RM10,000/-. The Tribunal does not have jurisdiction in respect of any claim –

- (a) for the recovery of land or any estate or interest in land;
- (b) in which the title to any land, or any estate or interest in land or any franchise, is in question, and
- (c) in which there is a dispute concerning –
 - (i) the entitlement of any person under a will or settlement,
 - (ii) goodwill;
 - (iii) any chose in action; or
 - (iv) any trade secret or other intellectual property.

The cause of action must accrue within 3 years of the claim in order for the Tribunal to exercise its jurisdiction to hear the claim. The Tribunal does not have the jurisdiction to deal with a claim arising from personal injury or death.

Notwithstanding that the amount or value of the subject matter claimed exceeds RM10,000/-, the Tribunal has the jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal is to have jurisdiction to hear and determine the claim. Such agreement may be made either before a claim is lodged, or where a claim has been lodged, at any time before the Tribunal has recorded an agreed settlement.

The Tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim. Where the parties have reached an agreed settlement, the Tribunal must approve and record the settlement, and the settlement shall then take effect as if it were an award of the Tribunal.

Where there is a hearing, the Act provides that no party shall be represented by an advocate and solicitor. All proceedings of the Tribunal are public, and for the purposes of hearing, the Tribunal is empowered to –

- (a) procure and receive evidence on oath or affirmation, whether written or oral, and examine all such persons as witnesses;
- (b) require the production before it of books, papers, documents, records and things;
- (c) administer the oath, affirmation or statutory declaration as the case may require;
- (d) seek and receive such other evidence and make such other inquiries as it thinks fit;
- (e) summon the parties to the proceedings or any other person to attend before it to give evidence or to produce any document, records or other thing in his possession;
- (f) receive expert evidence, and
- (g) generally direct and do all such things as may be necessary or expedient for the expeditious determination of the claim.

The Tribunal is to make its awards without delay and where practicable, within 60 days from the first day the hearing before the Tribunal commences.

2. Types of Claims Before the Tribunal

A consumer can lodge a claim with the Tribunal claiming for any loss suffered on any matter concerning his interests as a consumer under the Act arising from, among others:

- (a) a false or misleading representation that –
 - (i) the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model of every good;
 - (ii) the goods have had a particular history or particular previous use;
 - (iii) the services are of a particular kind, standard, quality or quantity;

- (iv) the services are supplied by any particular person or by any person of a particular trade, qualification or skill;
- (v) a particular person has agreed to acquire the goods or services;
- (vi) the goods are new or reconditioned;
- (vii) the goods were manufactured, produced, processed or reconditioned at particular time;
- (viii) the goods or services have any sponsorship, approval, endorsement or affiliation;
- (ix) the person has any sponsorship, approval endorsement or affiliation;
- (x) concerns the need for any goods or services;
- (xi) concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; or
- (xii) concerns the place of origin of the goods.

The word “**quantity**” in the foregoing paragraphs includes length, width, height, area, volume, capacity, weight and number.

- (b) a misleading or deceptive conduct as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity, of any good supplied to the consumer;
- (c) a misleading or deceptive conduct as to the nature, characteristics, suitability for a purpose, or quality of the services;
- (d) a misleading indication as to the price at which any goods or services are available;
- (e) a supplier demanding or accepting payments –
 - (i) without intending to supply the goods or services contracted;
 - (ii) intending to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is demanded for or accepted; or

- (iii) without reasonable grounds to believe he will be able to supply the goods or services within any specified period, or where no period is specified, within a reasonable time.
- (f) the cancellation of a future services contract, that is, a contract for consumer services that will be provided on a continuing basis;
- (g) in respect of supply of goods, the failure of any supplier to comply with any of the guarantees implied by the Act –
 - (i) as to title;
 - (ii) as to acceptable quality;
 - (iii) as to fitness for a particular purpose;
 - (iv) that goods comply with description;
 - (v) that goods comply with sample;
 - (vi) that reasonable prices be charged where the price of goods is not, inter alia, determined by the contract;
 - (vii) as to repairs and spare parts.
- (h) the failure of any manufacturer to comply with any express guarantee given by the manufacturer in respect of any good that is binding on the manufacture as to –
 - (i) the quality, performance or characteristics of the goods;
 - (ii) the provision of services that are or may at any time be required in respect of the goods;
 - (iii) the supply of parts that are or may at any time be required for the goods;
 - (iv) the future availability of identical goods; or
 - (v) the return of money or other consideration should the goods not meet any undertaking by the guarantor.
- (i) the failure of any manufacturer to comply with any guarantee implied by the Act in respect of any good –
 - (i) as to acceptable quality;
 - (ii) that goods comply with description;

- (iii) as to repairs and spare parts.

- (j) In respect of supply of services, the failure of any supplier to comply with any guarantee implied by the Act –
 - (i) as to reasonable care and skill;
 - (ii) as to fitness for particular purpose;
 - (iii) that the services will be completed within a reasonable time where the time for the services to be carried out is, inter alia, not determined by the contract;
 - (iv) that reasonable price be paid where the price for the services is, inter alia, not determined by the contract.

For the purposes of the foregoing paragraphs, the term ‘goods’ means goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes –

- (a) goods attached to, or incorporated in, any real or personal property;
- (b) animals, including fish;
- (c) vessels and vehicles;
- (d) utilities; and
- (e) trees, plants and crops whether on, under or attached to land or not.

The term ‘**consumer**’ means a person who –

- (a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and
- (b) does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of –
 - (i) resupplying them in trade;
 - (ii) consuming them in the course of a manufacturing process; or
 - (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

The term ‘**services**’ includes any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under

a contract of service or any services provided or to be provided by professionals who are regulated by any written law (such as doctors, engineers, lawyers and architects) or health care services provided or to be provided by health professionals or health care facilities (such as medical, dental, nursing, midwifery, pharmacy and ambulance services).

At the hearing the Tribunal may make any one or more of the following awards:

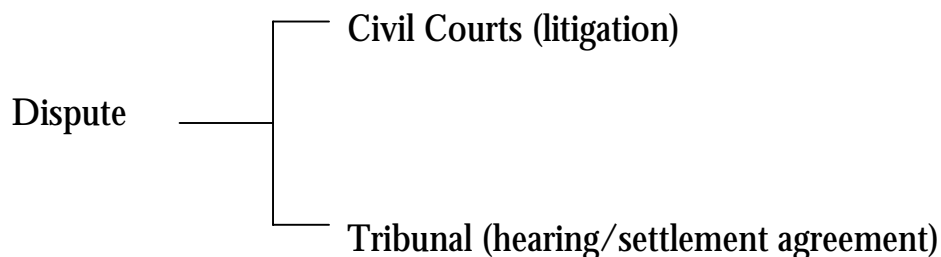
- (a) that a party to the proceedings pay money to any other party;
- (b) that goods be supplied or re-supplied in accordance with the Act or the contract to which the consumer is a party;
- (c) that goods supplied or re-supplied to the consumer be replaced or repaired;
- (d) that the price or other consideration paid or supplied by the consumer or any other person be refunded to the consumer or that person;
- (e) that a party comply with the guarantee;
- (f) that money be awarded to compensate for any loss or damage suffered by the claimant;
- (g) that the contract be varied or set aside, wholly or in part;
- (h) that costs (not exceeding RM200.00) to or against any party be paid;
- (i) that interest be paid on any sum or monetary award at a rate not exceeding eight per centum per annum, unless it has been otherwise agreed between the parties;
- (j) that the claim is dismissed.

Before the Tribunal makes an award, it may, in its discretion, refer to a Judge of the High Court a question of law –

- (a) which arose in the course of proceedings;
- (b) which, in the opinion of the Tribunal, is of sufficient importance to merit such reference, and
- (c) the determination of which by the Tribunal raises, in the opinion of the Tribunal, sufficient doubt to merit such reference.

The Tribunal is to give reasons for its awards. Every agreed settlement recorded by the Tribunal and every award made shall be final and binding on all parties to the

proceedings and shall be deemed to be an order of a Magistrate's Court and be enforced accordingly.



Institutional routes from outbreak to resolution of disputes

3. Statistical Data and Cases

According to its president, Puan Noor Azian Shaari, the Consumer Claims Tribunal had been successful in settling complaints. In 1999, 291 cases were brought to the Tribunal. Out of this, only 5 defendants failed to refund cash or exchange faulty goods to the complainants.¹³ As at December 2001, a total of 1,087 cases had been recorded with the Tribunal. This represents an increase of more than 200% compared with year 2000.¹⁴

The first case registered in the State of Selangor heard by the Tribunal concerned a claim for RM450 against the operator of a dry-cleaning shop for the loss of 4 T-shirts sent for cleaning. This claim was settled through conciliation initiated by the President of the Tribunal and the parties concerned, where as a result of discussion and negotiation, it was agreed that the operators of the shop pay RM200 in settlement of the claim.

Another case, also settled through conciliation and consent of the parties concerned faulty furniture. A furniture company was asked to pay RM4,500/- to a businessman after it was found that the furniture was in unsatisfactory condition. The consent award was made after an hour of negotiation between the parties before the President of the Tribunal.

Examples of claims heard on 23 October 2001

¹³ New Straits Times, 23 October, 2001, p. 2.

¹⁴ New Straits Times, 3 January 2002, p. 7.

- Sumuni Sdn Bhd, the operator of the Kadazandusun Cultural Association hall was instructed to refund RM450/- to Susy Lojimit after she cancelled her booking for the hall. The complainant had paid a RM500/- deposit to rent the hall for her sister's wedding, but cancelled the booking when the wedding was put off. Sumuni Sdn Bhd refused to refund the deposit. The company had failed to inform the complainant that there would be no refund or only partial refund would be given in the event of cancellation.
- Bacho Dahlan failed in his attempt to get a refund of RM300/- from a car dealer. Bacho failed to produce a receipt proving that he had paid RM3,000/-, while the car dealer showed a copy of a receipt stating that the complainant had paid only RM300/-, as a result owing the car dealer another RM2,700/-.

Examples of claims heard on 3 January 2002:

- Edaran Otomobil Nasional Sdn Bhd was ordered to pay compensation and cost of RM1,200/- to a businessman who had complained that his brand new car developed engine trouble a week after he received it, and that there had been no improvement despite several servicing. The company was ordered by the Tribunal to pay RM1,000/- for the cost of renting a car during the period his car was under service and RM200 as general costs.

Table 2
Claims Filed for the period between 1 January 2001 – 30 November 2001

States	No. of Claims Filed	Types of Claim		Claims Settled		Claims With-drawn	Claims Not Settled
		Product	Services	Through Hearing	Through Negotiation		
Perlis	3	3	0	0	2	0	1
Kedah	50	46	4	14	14	6	16
Penang	140	121	19	92	27	6	15
Perak	75	69	6	59	5	3	8
Selangor	137	105	32	67	24	5	41
N Sembilan	22	5	17	14	2	2	4
Malacca	56	41	15	26	9	8	13
Johor	176	145	31	47	19	78	32
Pahang	88	32	56	27	10	11	40
Terengganu	9	7	2	3	2	4	0
Kelantan	14		8	7	2	2	3
Sabah	60	32	28	20	8	22	10
Sarawak	2	2	-	0	1	0	1
Labuan	5	5	-	1	1	3	0
Federal Territory	188	120	68	71	20	38	59
TOTAL	1025	739	286	448	146	188	243

Source: Tribunal for Consumer Claims.

4. Choice of route for dispute resolution – contracts, sales methods, Product Liability

Tribunal for Consumer Claims	Civil Courts
1. Jurisdiction : value of claim or subject matter not more than RM10,000/-.	Magistrate's court: amount in dispute or value of subject matter not more than RM25,000/- Sessions court : not more than RM250,000/-.
2. Procedure : pay RM5/- and file claim in prescribed form. <ul style="list-style-type: none">• settlement through negotiation/mediation.• settlement through hearing	Originating process – by writ, originating summons, originating motion or petition. <ul style="list-style-type: none">• writ and statement of claim filed by plaintiff• appearance by defendant.• set for trial• requirement of pleadings
3. Time :Awards to be made within 60 days from the first day the hearing before the Tribunal commences	Depends upon court sittings required to complete trial – depends upon court time and lawyer's handling of cases.
4. Representation : Lawyers not allowed.	Lawyers must be used to bring the case to court.

As can be seen from the table above, for amounts in dispute of more than RM25,000/-, there is really no choice of route – the dispute has to be brought before the Magistrate's court. There is a choice only if the value of claim or subject matter is RM10,000/- and below.

It is obvious that for such a small amount, the better choice would be to bring the matter before the Tribunal rather than the civil courts. Legal fees alone would probably exceed RM10,000/-, and there is the possibility that there will be delays as the case is taken through the procedures before the civil courts. This probably explains the success of the Tribunal in settling disputes where the amount or value in question is less than RM10,000/-.

There is no difference in the legal meaning of outcomes between a dispute brought before the Tribunal for settlement, and a dispute brought before the civil courts. In both cases, the emphasis is on the legal settlement of disputes and the obtainment of remedies

for the party who has suffered as a result of the failure on the part of the other party. However, in cases brought before the civil courts, there is the avenue of appeal should a litigant be dissatisfied with a judgment handed down by a lower court, whereas in cases brought before the Tribunal, there is no appeal procedure. The only way in which a dissatisfied claimant could have his case “re-heard” would be by way of judicial review. At present, judicial review against Tribunal decisions have yet to be entertained. Given the present small amount of value of claim or subject matter, it would not be worthwhile to have Tribunal decisions reviewed, for judicial review would bring with it the negative elements associated with civil court proceedings, such as the need to employ lawyers and the attendant high legal costs.

IV. Dispute Resolution Process in Labour Disputes

A. Background to Labour and Employment Cases in Malaysia

There are a few main statutes which regulate labour and employment in Malaysia – the Employment Act 1955; the Industrial Relations Act 1967; and the Trade Unions Act, 1959. Apart from these 3 major statutes, there are other statutes which regulate specific matters, such as the Workmen’s Compensation Act 1952, the Employees’ Social Security Act 1969, the Occupational Health and Safety Act 1994, the Factories and Machinery Act 1967, the Employees Provident Fund Act 1991, the Pensions Act 1980, and the Statutory and Local Authorities Pensions Act 1980.

Other legislation pertaining to labour and employment:

- (i) the Children and Young Persons (Employment) Act 1966
- (ii) the Employment (Restriction) Act 1968
- (iii) the Employment (Information) Act 1953
- (iv) the Sabah Labour Ordinance 1949
- (v) the Sarawak Labour Ordinance 1952
- (vi) Wages Councils Act 1947
- (vii) Human Resource Development Act 1992
- (viii) Workers’ Minimum Standards of Housing and Amenities Act 1990.