



ALTERNATIVE DISPUTE RESOLUTION PROCESS IN THE TRIBUNAL FOR CONSUMER CLAIMS OF MALAYSIA: A WAY FORWARD



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ABSTRACT

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The Tribunal for Consumer Claims of Malaysia (TCC) is a quasi-judicial body which provides alternative dispute resolutions to consumers which provides the consumers with alternative dispute resolutions mechanism in the form of negotiation and hearing. The objectives of this article are to review the negotiation process at the TCC; to analyze its weaknesses; and to suggest an alternative mechanism in lieu of negotiation, that is mediation. The finding of this research shows that the negotiation conducted at the TCC fails to settle most of the consumer claims. The writers have identified weaknesses associated with the negotiation process conducted at the TCC. Among the weaknesses are, the negotiation is conducted without the help or presence of a third party; the imbalance of bargaining power between the dealers/manufacturers/suppliers of services or goods; and the difficulty to reach a settlement by the parties. To overcome these weaknesses, the writers are proposing mediation as an alternative dispute settlement at the TCC.

Contribution/ Originality: This article contributes to the existing literature on consumer redress mechanism in Malaysia, especially, the Tribunal for Consumer Claims. This article analyses the weaknesses of the negotiation process in the Tribunal for Consumer Claims and suggests mediation as an alternative redress mechanism in the Tribunal for Consumer Claims.

1. INTRODUCTION

The Tribunal for Consumer Claims (TCC) is an independent body established under the Consumer Protection Act 1999 (CPA 1999) with the primary function of hearing and determining claims lodged by consumers under the Act and subject to the provisions of the Act (Singh, 2011). The TCC is an alternative dispute resolution (ADR) mechanism. ADR has gained a place in society in relation to dispute resolutions (Kamal and Nursuhaida, 2014). ADR is proposed to overcome the weaknesses of the court system. The establishment of ADR is to fill up the lacuna that exists in the consumer protection regime which is considered as shortcomings due to failure to provide efficient access to justice (Mazlan and Sakina, 2010). Astor and Chinkin argue that what we now label as ADR has for a long time been the dominant method of resolving disputes worldwide, originating as a tribal customary method of resolving conflict (Gutman, 2009). The difference between ADR and the court system is that, in court, a judge will

determine a dispute before him. In ADR, a middle person, such as mediator or arbitrator will discuss with the parties involved in a dispute to find a solution, which is just for both parties.

Alternative dispute resolution (ADR) is a means of settlement in the Tribunal for Consumer Claims to assist consumers and business operators in negotiating an agreed settlement in relation to consumer's claim. The tribunal indirectly facilitates the fast disposal of disputes between the two parties (Abdullah, 2015). The objective of TCC establishment is to provide an alternative channel to consumers who seek redress against the trader/supplier of goods and services by a simple, inexpensive and quick manner. The establishment of the TCC is one of the best alternatives to consumers to get remedy from the dealers/manufacturers/suppliers of services or goods (Christie and Sakina, 2016). The main features of this *quasi-judicial* body are that consumers to file their claims without going through a lengthy and complicated legal process, with a reasonable fees of RM5.00 to file their claims and the claims will be heard and adjudicated within 60 days from the date of commencement of the hearing.

2. DISPUTE SETTLEMENT PROCESS IN THE TRIBUNAL FOR CONSUMER CLAIMS

One of the elements of ADR is informal. However, the TCC proceedings are bound by the Consumer Protection (Tribunal for Consumer Claims) Regulations 1999 (CPR 1999) that provide for the manner of the proceedings that should be conducted. At present, all claims will be heard in open court and the proceeding is bound by the regulations. No legal representations allowed. The consumers and dealers/manufacturers/suppliers of services or goods are barred to be represented by any legal practitioners except for full-time in-house lawyer of dealers/manufacturers/suppliers of services or goods. Nevertheless, according to section 107(1) of the CPA 1999, the TCC can assist the parties to negotiate an agreed settlement in relation to the claims. Where the parties have reached an agreed settlement, the TTC shall approve and record the settlement and the settlement shall then take effect as if it is an award of the TCC (section 107(3) of the CPA 1999). However, if it appears to the TCC that it would not be appropriate for it to assist the parties to negotiate an agreed settlement in relation to the claim, or the parties are unable to reach an agreed settlement in relation to the claim, the TCC shall proceed to determine the dispute. During the hearing of the claim at the TCC, the President will assist the parties on the subject-matter of the disputes raised by the claimant. Although the parties are given the opportunity to submit their respective arguments, the parties would still be bound by the TCC procedures and no element of confidentiality adopted in existing proceedings. Figure 1 summarises the dispute settlement process at the TCC.

2.1. Negotiation

One of the significant features of the TCC is where the President has been given the power to begin an alternative dispute resolution (ADR) process with negotiation. Negotiation is a discussion and mutual understanding of the requirements of the transaction or agreement. Definition of negotiation is also described in depth by Anstey (1991) that is to say;

an interactive process involving verbal in two or more parties are seeking ways to reach an agreement about a problem or conflict of interest where, they are trying to get as far as possible, to safeguard their interest, but adjust their views and their position in a joint effort to achieve an agreement.

The negotiation process adopted at the TCC is part of the TCC proceeding process (section 107(1) of the CPA 1999). The advantages of negotiation among others are;

- i) Parties are in the best position in assessing the impact of any proposed solution;
- ii) Parties "owned" the negotiation process and can interpret the terms in any way at the option of the parties;
- iii) Parties created a proposed settlement between them and they will be more committed to ensuring consensus;
and
- iv) Parties have the opportunity to participate for any purpose to be achieved.

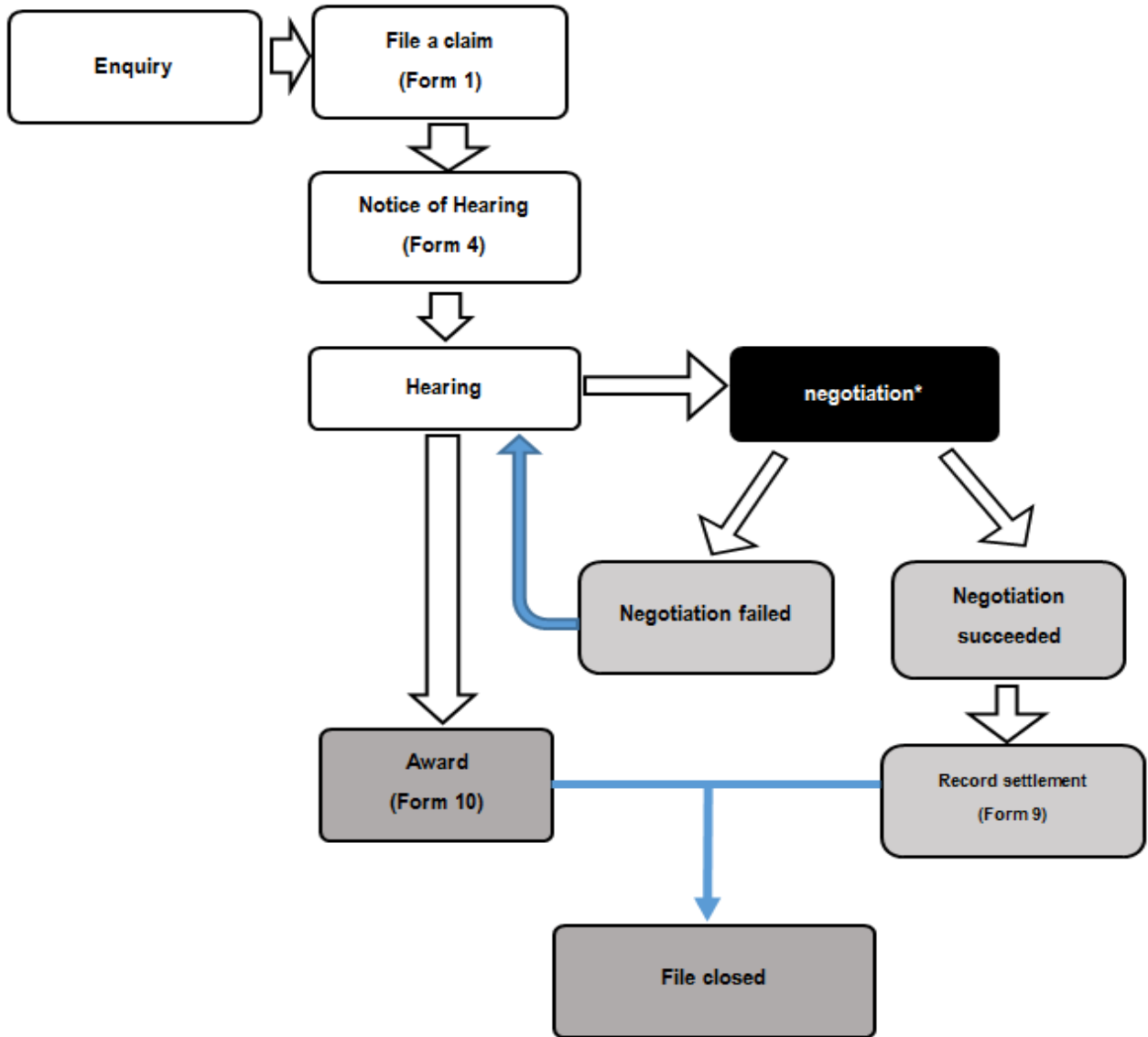


Figure-1. Dispute Settlement Process at the Tribunal for Consumer Claims.

Referring to the advantages of negotiation, the negotiation conducted between the parties is without the help of the referees or consultants. In the context of disputes between a consumer and the dealer/manufacturer/supplier of service or goods, disputes are mainly related to the content of the agreement. Based on the observation made by the writers in the TCC proceedings, dealer/manufacturer/supplier of services or goods are more dominant in the negotiation process. Imbalances of bargaining powers, lack or low literacy level of legal understanding and awareness on the rights of the consumers are part of the causes of the consumer rights are not well protected. The question that arises in the mind of writers is, does the negotiation process is the best approach to help consumers resolve disputes against the dealer/manufacturer/supplier of services or goods.

Based on Figure 2, statistics show that the Form 9 which represents a settlement by way of the negotiation process is on the average of 5%-15% as compared to the total Award issued between the years 2013 to 2017. There are several factors contributing to the above figure.

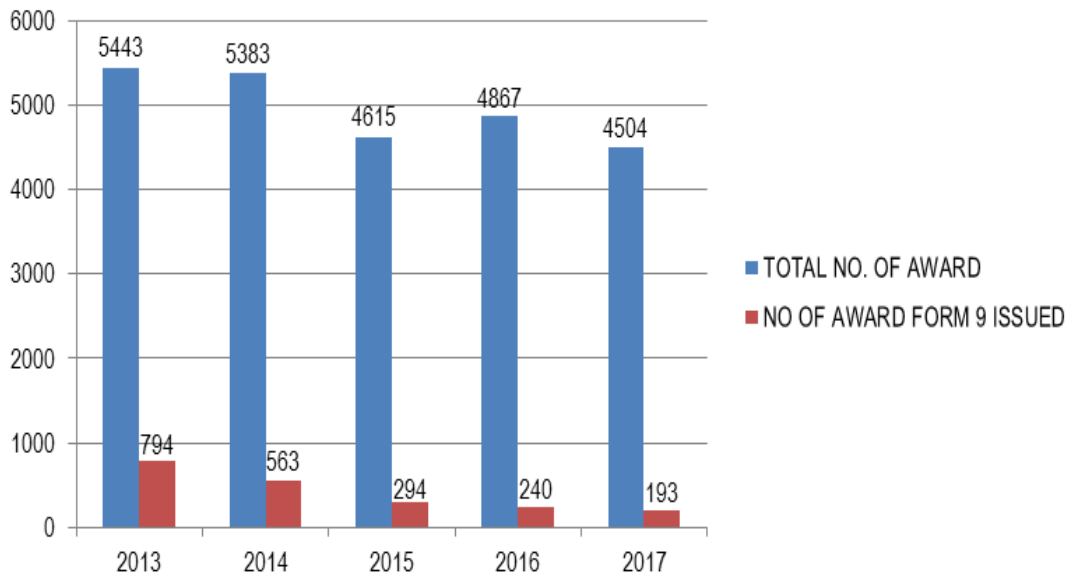


Figure -2. Number of Overall Award Issued by the TCC From 2013 – 2017.

Source: Tribunal for Consumer Claims Malaysia.

2.2. Weaknesses of Negotiation

2.2.1. The Difficulty to Reach Settlement by the Parties

Prior to the negotiation process, both parties must be present on the date of hearing before the President. During the hearing, the parties are given the opportunity to present claims and defense respectively. When disputes specifically identified, the President will propose the case to be negotiated. If the parties agree the case to be negotiated, the parties will discuss without involving third parties, including the President. The parties will discuss the possible proposals for settlement in private without the supervision of the President or any of the TCC officers. Once the discussion has been completed, the case will be called before the President to inform the President whether any settlement has been reached or vice versa. If the settlement has been reached, the President will record the settlement by issuing Award by Consent (Form 9) (Regulation 22(2) of the CPR 1999). If negotiation fails, then the hearing will be continued and the President will make a decision based on the merits and facts submitted by the parties. The President's decision will be recorded through the Award after Hearing (Form 10) (Regulation 23(5) of the CPR 1999).

2.3. Imbalance of Bargaining Power

In the negotiation process, the consumers are entirely dependent on contracts that have been signed. The contract normally designed with the objectives to protect dealers/manufacturers/suppliers of services or goods. For example, the consumers will normally be signing a contract in writing, and there are times where the contract signed by consumers, which the contents of the contract is not informed to the consumers. Most of the contracts between the consumers and dealers/manufacturers/suppliers of services or goods are standard form contracts which contain unfair terms on the consumers. The most significant cases referred which involves unfair contract terms are club membership/fitness center, beauty treatment, vehicle workshop, house renovation. In the event of breach of the contract terms, consumers are bound by the contract although the terms are one-sided and oppressive. At this stage, based on writers' observation, the parties are difficult to negotiate. The writers observed that the result of the negotiation is on dealers/manufacturers/suppliers of services or goods' advantage as the contract of goods or services were prepared by the dealers/manufacturers/suppliers of services or goods. Disputes on the one-sided contract is one of the causes of the difficulties in the process of negotiation. The dealers/manufacturers/suppliers of services or goods will ensure that contracts that have been signed are followed while the consumers feel that they are oppressed because the terms of the contract are not fair.

Besides that, when consumers file claims at the TCC, the consumers fail to prove their claims on the ground that do not know about the law. The level of literacy of the consumers also become one of factors that contributes to the failure of the consumers in the negotiation process. As a result, consumers failed to obtain a proper protection because negotiations are not monitored by certain parties, particularly President who hears that claim. The dealers/manufacturers/suppliers of services or goods are seen more dominant and the consumers are in a weak position. Although the CPA 1999 has specific provisions on unfair terms in a contract between a consumer and dealers/manufacturers/suppliers of services or goods,^[16] consumers still in need of the assistance of the TCC in defending their rights.

2.4. No Supervision in the Process of Negotiation

One of the advantages of negotiation is, the parties will discuss privately without involving a third party. In the context of the proceedings in TCC, the President will propose the negotiation process and to suggest the parties to discuss privately. Here, the President only suggests the scope of the solutions that can be reached by the parties. The President is not directly involved in the negotiation process. The President will be informed of the outcome of the negotiation and the President will continue with proceedings whether the parties have reached the agreement which will be recorded by the President or a full hearing will be continued if the negotiation failed.

Although the parties are given the opportunity to discuss privately in the negotiation process, this is normally is not an advantage to the consumers. The consumers do not know where to seek assistance when they have a problem in interpreting the terms of the contract. The dealers/manufacturers/suppliers of services or goods will take advantage out of the weaknesses of the consumers in oppressing them to reach a solution in the dealers/manufacturers/suppliers of services or goods' favour. Therefore, in the opinion of the writers, a middle person should present in the negotiation process.

3. MEDIATION

Mediation is a procedure, increasingly popular for commercial dispute resolutions, as well as domestic disputes. One of the primary reasons for the success of mediation is confidentiality. According to [Lovenheim and Guerin \(2004\)](#) one of the elements for a successful mediation process is confidentiality. [Black's Law Dictionary \(Bryan, 2014\)](#) describes a mediation 'as a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution'. Mediation is an alternative method of solving problems in a dispute. According to [Osborn's Concise Law Dictionary \(2009\)](#) 'mediation is a form of alternative dispute resolution which is not adversarial in nature ... the parties in the dispute have third party acting as a neutral intermediary that will work to promote communication between the parties'. Meanwhile, a mediation according to [Mediation Act 2012](#) is a voluntary process where a mediator facilitates communication and negotiation between the parties in order to assist the parties to reach an agreement regarding with dispute resolution (section 3 of the [Mediation Act 2012](#)). A mediation in contrary with negotiation practiced at the TCC, is an attempt by a third party to end a dispute between two or more people or groups to discuss between them in searching for things that allow all people reached an agreement. The difference between negotiation and mediation is where the mediation process is attended by a third party who is also a mediator. The third party acts as a neutral party that will guide and encourage the parties to argue, to communicate and to give an idea to the parties to reach an agreement. A mediator does not resolve a dispute. He only helps the parties to do so.

Advantages of mediation are [1] the parties are free to settle their dispute without bound by any rules or procedures of the law; [2] the parties also reserve the right to decide and may request the assistance of mediator in seeing the needs and interests of the parties; [3] it emphasizes the practical agreement to meet the needs of the parties differ from looking at the right or the wrong; [4] mediation is conducted confidentially and the entire process is in secret; [5] facilitator and mediator does not have the right to force the parties to settle the

agreement; and [6] if the agreement fails, the parties should refer to the court and whatever evidence was presented during the process of mediation is no longer be admissible in court (Abdul and Norjihan, 2014).

3.1. Development of Mediation in Judicial Systems

Based on historical background, mediation was first introduced in the court system in Australia in 1983 where the Victorian County Court Building Case List has made the provisions that the dispute should be referred to a mediator for settlement of the case. The Federal Court of Australia has initiated an alternative dispute resolution program in 1987 and began a trial program in New South Wales (North, 2005). In 1995, the Attorney General of the Federation had announced the establishment of National Alternative Dispute Resolution Advisory Council (NADRAC) where the Australian Government encouraged the expansion of alternative dispute resolution as one of the strategies in reducing legal costs and also increase the level of access to justice. The implementation of mediation has a significant impact to the total settlement of disputes where the parties have been able to reduce legal costs, resources and risks in accepting the decision of the Court could not be expected. In some countries, such as, Saskatchewan, mandatory mediation and pre-trial conferencing have been in place in for many years, and intend to obviate the need for trial where the parties can settle their issues under the guidance of a mediator or judge (University of Saskatchewan College of Law, 2016).

Malaysian mediation was derived from the Eastern principles which were further modernised by the Western legal system (Guru and Lee, 2015). In Malaysia, in June 2009, a mediation was initiated at the inaugural Mediation Court in Kota Bharu Kelantan for accident claims and as a result of the commencement of the mediation, a total of 41% of claims have been successfully resolved through the process of mediation. Then a Practice Direction No. 5 of 2010 dated 13 August 2010 was released in giving a guideline in the process of Court-Annexed Mediation. This practice direction allows any judge who hears lawsuit reserves the right to direct the parties in a legal process to initiate a settlement by way of mediation. There are two categories of civil suit mediation, that are, Judge-led Mediation and Non-judge Mediator who is appointed by the Court. If the mediation is successful, parties will draft a settlement or consent order which sets out the terms of the agreement of the parties. If the mediation fails, the case will be re-heard before the judge and any document or evidence was presented during the process of mediation shall not be admissible (Alex and Wickrama (2013) 5 AMR 363).

Former Chief Justice, Honourable (Ariffin, 2010) said that Court-Annexed Mediation is a program that integrates the court processes to ensure mediation available to all the parties and also the to encourage the litigation process at reasonable or no cost involved and no loss to the parties when it referred to mediation.^[34] In 2011, Court-Annexed Mediation was established and statistics showed that 28.3 per cent of 571 cases in the year 2012 were successfully resolved through mediation. The Honourable (Ariffin, 2010) has suggested that all accident cases are required to undergo the process of mediation.

3.2. Comparative Study on Mediation

A comparative study is chosen to analyse the mediation practiced in Singapore and Australia. These two countries are selected for comparative study as these countries have practiced ADR comprehensively either in court proceedings or out of court. Singapore is chosen because of the close socio-cultural background through historical background in which Singapore was once part of Malaysia until Singapore left Malaysia in 1965. Australia is selected because it has adopted mediation as best practices in the judicial system in their respective states. Through this comparative study, the writers intend to analyze the mediation mechanism in Singapore and Australia which is implemented in the judicial system. Although the TCC is not part of the judiciary, this study is important to seek a direction on mediation that could be part of TCC. If mediation is appropriate, at what stage of mediation is appropriate to be conducted according to the needs and suitability in the context of TCC.

3.3. Singapore

A Court-based mediation was first introduced as a pioneering project in 1994, when a District Judge who was specifically elected acted as mediators in various civil disputes. The Center for Mediation Court was established in 1995 and it was renamed as Main Dispute Resolution Center (PDRC) in May 1998. In addition, multi-door courts were established at the Main Dispute Resolution Center (PDRC) in 1999. The purpose is to assist and direct the disputing parties in seeking appropriate dispute resolution mechanisms within or outside the judicial system. Additionally, it aims to raise public awareness of the alternative dispute resolution process itself. In the speech of the Honourable the Chief Justice Sundaresh Menon, he recognized that arbitration and mediation in fact partner the courts in the first dispute resolution aspect of the judicial function (Suren, 2013).

Court-based mediations are gradually extended to other disputes in the Court. Mediation was introduced for minor criminal offenses in 1996. Magistrates' complaints involving interpersonal relationships, such as disputes between neighbors, were called upon to mediation. Since then, mediation for this small offense has been introduced in the State Court. Mediation also plays an important role in the family of justice. Court-based mediation and counseling were introduced in the Family Justice Court after the Family Court was established in 1995. The Family Resolution Board was established in 2006 to unite the court of the Family Court Mediation Program. In addition, the Center for Child-Focused Solutions (CFRC) was established in 2011 to carry out a mandate law requiring a divorce with at least one child undergoing counseling and mediation.

3.4. Australia

Mediation has become part of the judicial and tribunal system. Mediation has been assimilated in the judicial system through legislation, practice orders and court decisions (precedents). The mediation process is implemented in accordance with the requirements and suitability of the parties in the court or tribunal. Although the mediation has been implemented for a while in Australia, there are still some specific contents that need to be revised such as institutionalizing mediation, training and accreditation of mediation practitioners and the role of the court in accepting the mediation informal concept itself.

Australia is a large country and consists of states like New South Wales, Queensland, Victoria, Western Australia and others. Each state is given a certain autonomy in drafting laws according to their respective states. At the Federal level, the Federal Court of Australia and the Tribunal (Australian Competition Tribunal) have been involved in the mediation process since 1966. A program named as the Assisted Dispute Resolution Program began in 1987 until 1997 where the need to obtain the consent of the parties before the dispute was referred to the mediation process. This program is a mediation reference for the registrar of courts to initiate the mediation process to the parties. It is a more practiced mediation and conciliation than any other mediation process. Court officials play an important role in the mediation process. Among the examples of mediation practices are the National Native Title Tribunal which provides mediation services in complex cases.

In New South Wales, the mediation reference practice in court has been implemented since 2007 where most of the civil disputes have been referred to the arbitration process either at the district court or court level. The concept of mandatory referrals for mediation has been practiced in New South Wales and the Practice Note has provided alternatives to the court to refer a dispute to the mediation process without the consent of the parties. In Queensland, the Supreme Court of Queensland Act 1991 has provided that mediation is a mandatory process for disputing parties. This Act empowers the court to issue a referral order to the mediation process either with consent or without the consent of the parties. If any party disputes the referral order, the dispute may arbitrate by reasoning why the referral order cannot be made. In Victoria, the state is seen as the most active state in practicing the mediation process in the court system. Order 34A, County Court's Civil Initiative provides that the court may encourage parties to undergo mediation process and the court may also issue a referral order to the parties to proceed with the mediation process at the earliest hearing date. In Western Australia, the court has an ADR scheme

where references for mediation are forwarded to a court official, that is, the registrar or any other court official. The scheme was implemented after the Western Australian Law Review Commission reviewed the matter and suggested that mediation be addressed more seriously in resolving disputes. The review also shows that 30 percent of the dispute can be resolved after registrars have been trained in mediation to help them solve their cases.

The family court is a court that is so synonymous with mediation. At this court level, almost all forms of ADR are carried out in family court except for arbitration. It involves the process of mediation, conciliation, counseling, parenting, children's programs and others. In 2000, a review was conducted where mediation was designated as a process that must be passed by any case referred to a family court and a facilitative mediation model was chosen to assist parties in ADR services. The family court mediation scheme becomes the most comprehensive and complete mediation model in Australia.

Based on the facts of mediation practice in Australia, mediation has become an integral part of the judicial system in Australia. Although each state has its own ADR form and process, mediation is seen to play a significant role in the judicial system. It also shows that court officials are also able to resolve disputes at the early stages of court disputes without going through long litigation processes, saving time and costs of disputing parties. The ADR process is managed through a comprehensive training process to court officials.

4. TRIBUNAL FOR CONSUMER CLAIMS: A WAY FORWARD

The TCC in Malaysia has gained a place in the hearts of Malaysian consumers since its inception in 1999. However, the negotiation process which is implemented in the TCC proceedings doesn't really show a major impact in protecting consumer rights. The current negotiation process is initiated in a formal manner by the President. The President has the discretion to initiate the negotiation process at any time during the hearing as long as before the President make his/her decisions. Although the TCC adopts a mechanism of redress through *quasi-judicial*, consumers are still bound by the process and the rules of TCC. The consumers have to comply with the rules outlined in court proceeding [12].

4.1. Mediation as an Alternative Redress Mechanism for Consumers in Malaysia

As discussed earlier, mediation has been part of the legal landscape for years and it has given a significant impact in resolving disputes without going through the court process. The above discussion also mentioned the difference between negotiation and mediation. There are a few factors to discuss whether mediation is suitable to be part of TCC.

4.2. Why Do Consumers Need A Mediator?

As discussed earlier on the difficulties of consumers to uphold their rights against the dealers/manufacturers/suppliers of services or goods is the imbalance of bargaining powers faced by the consumers. Apart from the disputes over the interpretation of the law in an agreement, writers also observed that certain cases referred to TCC involved independent opinion to support their claims. For examples on the technical disputes in renovation and vehicle workshop disputes. In this juncture, mediators may assist not only consumers, to ease up the negotiation process in private and to call expert witness, if necessary to assist both parties to solve the dispute amicably.

4.3. Confidentiality VS Open Court

Section 107(1) of the CPA 1999 clearly states that the TCC shall assist parties to negotiate an agreed settlement in relation to the claims. Section 109 stated that all the proceedings shall be open to public. Confidentiality is the most important element in mediation. Confidentiality will allow the parties to be more focus on their disputes with the assistance of mediators. As compared to negotiation, mediation will promote more

secured position for parties, especially, consumers when it comes to the bargaining of the settlement. Role of mediator being a neutral party in the negotiation, parties will be more comfortable in the presence of mediator.

4.4. Legal Implications on Mediation

Section 107 of the CPA 1999 only provides the power for TCC to assist parties by way of negotiation and there are no specific provisions on how the negotiation shall be conducted either in the CPA 1999 or CPR 1999. Thus, it is proposed to amend section 107 of the CPA 1999. The word 'Negotiation' in the title of section 107 shall be substituted with 'mediation'. The CPR 1999 also needs to be amended, particularly, regulation 22. The word 'Negotiation' in the title of regulation 22 shall be replaced with the word 'Mediation'. The CPR 1999 has to provide clear guidelines on the mediation process.

4.5. When Mediation should be conducted?

Diagram 1 illustrates the workflow of TCC and negotiation will only be commenced after the case first called before the President on the hearing date. It means the negotiation will only be offered to the parties by the President after hearing is commenced. Based on Diagram 1, the negotiation will only be commenced after both parties agreed to initiate a negotiation process before the president. The writers would like to propose a Pre-trial Management Stage (PMS) is introduced for all the cases prior to the hearing date to be fixed by the TCC. The PPM will allow the parties to attend a mediation process before the Secretary of the TCC.

4.6. Does the Tribunal for Consumer Claims Ready for Mediation?

The TCC was set up as a *quasi-judicial* body which adopts simple court procedures compared to the court system. The TCC is headed by a Chairman assisted by the Deputy Chairman, both from Judicial and Legal Service. As a *quasi-judicial* body which designed specifically for consumers, based on the nature of the cases filed by the consumers, it is proposed that the Secretary and Assistant Secretary of the TCC play their role as a mediator before the date to be fixed for hearing. The President will concentrate on the full hearing process if the mediation at the PMS stage failed. However, there is a need for comprehensive training for Secretary and Assistant Secretary to be accredited as a qualified mediator.

5. CONCLUSION

The TCC has been playing its role with the best ADR mechanism in Malaysia. It is meant for the consumers to seek redress against the dealers/manufacturers/suppliers of services or goods. After more than 17 years, the TCC has provided a redress platform; it is high time for TCC to introduce mediation in its system. Mediation may be the best option for certain cases where it may involve emotional and personal issues as well as cases where they involve technical in which need further rectification in private. Mediation is also useful for parties who concern on the goodwill of the parties involved and it can be settled amicably without being heard in an open court. There are a lot of advantages of mediation that are useful for the betterment of the TCC in providing the best redress for consumers. It can be concluded that mediation would be the best method in providing a redress mechanism for consumers.

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