Complaint Management and Redress Mechanism: The Effect of Fragmented Institutional Approach in Regulating Consumer Credit in Malaysia

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Received 3 January 2018; accepted 2 February 2018; published 20 March 2018

ABSTRACT

Complaint management and redress mechanism constitute cardinal elements of financial consumer protection which should be provided by the financial consumer protection regulator. This study explores the role of the Central Bank of Malaysia, the Ministry of Domestic Trade and Consumer Affairs as well as the Ministry of Housing and Local Government to ensure proper complaint management and redress mechanism in favour of financial consumers of different segments of consumer credit. Applying doctrinal, qualitative and comparative law research methodology, the study finds that as a result of fragmented approach in regulating consumer credit in Malaysia, these aspects are pursued with different priorities and enthusiasm by respective regulators. Thus, the benefit of protection varies from one class of financial consumers to another. To ensure consistency and efficient protection, the study proposes for the establishment of a single regulator, the approach adopted by Australia, a jurisdiction renowned with an established track record in financial consumer protection regime. It is viewed that by establishing a single regulator, a uniform platform for complaint and redress will be provided thereby ensuring equal protection to wide array of financial consumers.

Key words: financial consumer protection, consumer credit, complaint management, redress mechanism

INTRODUCTION

Consumers incur credit due to a number of reasons including to smooth their consumption, dependence on future income as well as an escalation in the cost of living and housing price. Consumer credit industry in Malaysia is fast growing evidenced by the high percentage of household debt-to-gross domestic product namely 88.4% in 2016 although the ratio slightly contracted from 89.1% in 2015 [1]. It is commonly agreed that there is uneven playing field between credit providers and consumers when it comes to credit granting [2]. In the course of dealing, financial consumers are exposed to numerous malpractices whether during pre-contractual or post-contractual stage. For example, according to the National Consumer Complaints Centre Annual Report 2016, common complaints received against banks are an unreasonable hike in the interest rate due to complainant’s arrears in servicing the loans. Some complainants have their house auctioned off without proper
and justified notification. Complainants argued that their attempts to negotiate for repayment terms were unsuccessful due to unwillingness on the part of the bank to help them fulfill their loan obligation. With respect to hire-purchase, the usual types of complaint made are repossession of cars without proper documentation and with the use of force from the third party. Prevailing issues occur in pawnbroking services are items pawned are sold off without the permission of the owners or without sending notification beforehand; pawnbrokers taking unfair advantage over financially burdened consumer by selling the pawned items at a higher price to make unjust profit and consumers are pressured to pay extra in order to get back their items. This indicates the need to have efficient complaint management and redress mechanism to be set up by the regulators.

Organisation for Economic Cooperation and Development has incorporated access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient in the G20 High-Level Principles on Financial Consumer Protection [3]. Likewise, it has been recognised as one of the basic Good Practices for Financial Consumer Protection in ensuring a well-functioning consumer protection regime [4]. Brown and Marriot explain that tribunal, arbitration, negotiation, mediation and the ombudsman are among common alternative dispute resolution (ADR) techniques currently being applied and each has distinctive values and is useful in certain types of disputes [5].

In Malaysia, among prominent industry players are banking institutions, non-bank credit companies offering hire-purchase, moneylenders and pawnbrokers. The entities are regulated by different regulators namely the Central Bank of Malaysia (BNM), the Ministry of Domestic Trade and Consumer Affairs (MDTCA) and the Ministry of Housing and Local Government (MHLG). Against this setting, the paper analyses the role of these regulatory bodies in establishing the two important components of financial consumer protection namely complaint channel and redress mechanism.

**Complaint Management:**

Financial service providers under the purview of BNM such as commercial banks are required to establish dedicated complaints units in their respective organisations to address and respond to complaints of consumers in a timely manner. Another avenue to submit complaint set up by BNM is via Integrated Contact Centre comprising of BNMLINK, BNM MINILINK, BNM TELELINK as well as Complaint Management and Advisory. BNMLINK is a face-to-face customer service which enables rapid and effective responses on financial matters forwarded by financial consumers [6]. The similar service is extended to Johor Bahru, Pulau Pinang, Kuala Terengganu, Kota Kinabalu and Kuching by establishing BNM MINILINK at respective BNM branches in order to cater for outstation consumers. The service is also complemented by BNM TELELINK whereby financial consumers can make enquiries via SMS, telephone calls, facsimiles, letters and electronic mails [7]. In 2016, an average of 2,562 enquiries, advisory services and complaints were handled per day, 27% higher from 2015 [1]. It is viewed that BNM has established a good infrastructure to cater for complaint management.

Complaint Management Section under Enforcement Division of the MDTCA handles complaints related to hire-purchase. Complaints are received from various sources either internally from Consumer Complaint Management Centre, eAduan and Ez ADU or externally from Public Complaint Bureau, consumer associations, mass media and government agencies [8]. Consumer Complaint Management Centre is a one-stop centre for complaint handling under MDTCA. It receives complaints either through SMS, telephone, toll-free line, website, letters and walk-in.[8] The complaint will be subsequently channelled to the respective agencies or division. eAduan system is a conducive internet medium of receiving complaints from public developed by the MDTCA. Another initiative undertaken by the MDTCA to assist consumers to lodge their complaints handily is by introducing EzADU, a mobile smartphone application. It is submitted that the MDTCA has provided various options for consumers to forward their dissatisfaction. Table 1 shows the number of complaints related to hire-purchase received by MDTCA from 2013-2015 which indicates an upward trend probably due to growing awareness among the public on the role of the MDTCA.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Complaints Related to Hire-Purchase</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>339</td>
</tr>
<tr>
<td>2014</td>
<td>455</td>
</tr>
<tr>
<td>2015</td>
<td>494</td>
</tr>
</tbody>
</table>

Source: Ministry of Domestic Trade and Consumer Affairs

Table 1: Complaints on Hire-Purchase Received by the Ministry of Domestic Trade and Consumer Affairs from 2014 to 2015.

Complaint Unit under Moneylending and Pawnbroking Division of the MHLG handles complaints from various channels whether through a letter, phone, email, Public Complaint Bureau, mass media and non-governmental organisations on matters related to moneylenders and pawnbrokers. Internally, the Ministry has
developed an integrated online complaint system to enable easy and quick compliant process by the consumers. The number of complaints received as depicted in Table 2 is relatively low apparently due to lack of awareness of the function of the MHLG in protecting the interest of the financial consumers.

**Table 2**: Complaints Received by the Ministry of Housing and Local Government from 2014 to 2016.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Complaints related to Moneylending</th>
<th>Number of Complaints related to Pawnbroking</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>152</td>
<td>21</td>
</tr>
<tr>
<td>2015</td>
<td>105</td>
<td>20</td>
</tr>
<tr>
<td>2016</td>
<td>70</td>
<td>27</td>
</tr>
</tbody>
</table>

Source: Ministry of Housing and Local Government

**Redress Mechanism:**

BNM has approved external dispute resolution scheme namely financial ombudsman scheme (FOS) pursuant to section 126(2) of the Financial Services Act 2013 (FSA). In essence, the scheme aims at ensuring effective and fair handling of complaints for the resolution of disputes between financial service providers and financial consumers referred to as eligible complainant. The Financial Services (Financial Ombudsman Scheme) Regulation 2015 (FSR) has been passed to govern the operation and management of the said scheme. The Ombudsman for Financial Services (OFS) has been appointed as the first operator of the said scheme. Disputes may be referred to the OFS after an attempt to resolve at bank's level via its internal Complaint Unit fails to reach a satisfactory settlement.

The FSR prescribes the roles of BNM in relation to FOS. Firstly, BNM is responsible to approve the scheme operator of the FOS in accordance with considerations prescribed by the FSR (Regulation 4 of the FSR). Matters to be considered include the capability to operate the scheme in a fair and timely manner, the availability of clear and documented governance framework, the transparency of the terms of reference (TOR) which must also comply with sub-regulation 7(2), adequacy of both human and financial resources and compliance with the principles of independence, fairness, impartiality, accessibility, accountability, transparency and effectiveness (Regulation 5 of the FSR).

The second role is to withdraw or suspend the approval under certain circumstances including failure to commence operation within six months from the approval date; cease operation or inability to perform the duties; providing false, misleading, inaccurate or incomplete documents to BNM which are material in nature; breach of any FSA provision; winding up or dissolution of the scheme operator and finally when BNM opines that the scheme operator has not acted honestly or the approved FOS is operated in a manner that is or likely to be contrary to public interest or inconsistent with its constituent documents (Regulation 6 of the FSR).

Approving the TOR of the scheme operator is another crucial task of BNM. The FSR clearly prohibits the amendment to the TOR without prior consultation and approval of BNM (Regulation 7 of the FSR). Briefly, the TOR must specify the membership terms, types of disputes, the category of eligible complainants, awards, procedures and timeframe, circumstances where a dispute may be refused or dismissed, circumstances and time period for mediation and adjudication, and the procedure to ensure compliance with confidentiality duty by the disputing parties. BNM is also responsible for approving the appointment of the scheme operator's members of the board of directors. Paramount criteria to be considered is the fulfilment of the fit and proper criteria based on three main categories namely probity, integrity and reputation; competency and capability and lastly financial integrity (Second Schedule of the FSR).

Once approved, the operation, management and performance of the scheme operation are still subject to BNM’s oversight. This is exercised by imposing several obligations on the scheme operator such as to notify BNM on matter which may affect its ability to perform effectively Regulation 11 of the FSR) and also to submit report to BNM within three months after the end of each of its financial year on its activities carried out during that financial year (Regulation 12 of the FSR). Examples of matters to be reported are the number of disputes referred, types of disputes and the scheme operator’s audited annual account. In addition, if matters which may be systemic in nature arise from the operation of the scheme operator or in the event the operator has reasonable cause to believe that any member is involved in any serious misconduct, then the scheme operator must as soon as practicable report such matters to BNM. Other obligations cover disseminating information on its yearly operation and publication of documents specified by BNM (Regulation 13 of the FSR). With regards to the independent review, scope of the review and terms of appointment of the independent reviewer will be decided upon consultation with BNM. It is viewed that BNM as a regulator consumer credit offered by banking institutions assumes a significant role in the establishment and operation of the appointed scheme operator.

Other obligations imposed on the scheme operator include to ensure that the decision-making process is independent and fair, services offered are easy and affordable and procedures are easy to understand, clear and transparent. Every decision and the grounds of the decision must be informed in writing to the disputants. In creating public awareness on its services, the operator must regularly publish necessary information.
The OFS which is previously known as the Financial Mediation Bureau (FMB) has been appointed as the first operator of the FOS. The OFS is a company incorporated under the Companies Act 1965 and commences its operation on 1st October 2016. The OFS operation is subject to the Board of Directors’ oversight which comprises of members from various backgrounds including the representatives from consumer association. As to date, there is only one head office located in Kuala Lumpur. The OFS implements the scheme based on the duly approved TOR.

In respect of eligibility, only 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 are eligible to resort to the OFS to settle their grievances (Paragraph 9 of the TOR). Members are restricted to licensed bank, licensed Islamic bank, licensed insurer (excluding professional reinsurer and licensed insurer carrying on financial guarantee insurance business), licensed takaful operator (excluding professional retakaful operator), prescribed development financial institution, approved issuer of a designated Islamic payment instrument, approved insurance broker, approved takaful broker, approved financial adviser and approved Islamic financial adviser are required to be members of the OFS (Paragraph 4 of the TOR). Members are obligated to pay annual levy and case fee which is based on the number of disputes against those members (Paragraph 5(5) of the TOR).

Third Schedule of the FSR spells out three different categories of monetary limit. Firstly, in respect of dispute involving financial services or products developed, offered or marketed by a member, or by a member for or on behalf of another person; the monetary limit is up to RM250,000. Secondly, for a dispute related to motor third party property damage, the monetary limit is not exceeding RM10,000. Finally, the limit for dispute involving an unauthorised transaction through the use of a designated payment instrument or a payment channel such as Internet banking, mobile banking, telephone banking or automatic teller machine; or an unauthorized use of a cheque as defined in section 73 of the Bills of Exchange Act 1949 is RM25,000 (Paragraph 10 and Schedule 2 of the TOR). Accordingly, housing loan, hire purchase and personal loan are among common consumer credit products offered by banking institutions and subject to the monetary limit of RM250,000.

An alternative dispute resolution channel has also been established under MDTCA based on tribunal set-up. Statutorily created as an independent body pursuant to Part XII of the Consumer Protection Act 1999 (CPA), the Tribunal for Consumer Claims (TCC) came into existence on 15 November 1999 to provide speedy, inexpensive and expedient dispute resolution (Section 85 of the CPA). Part XII of the CPA contains 38 sections governing various aspects of the TCC, its jurisdiction, awards and other related matters.

The MDTCA through its Minister is empowered to make regulations under the CPA. For example, the Consumer Protection (The Tribunal for Consumer Claims) Regulations 1999 (CPR). Another role of the Minister is to appoint the Chairman and a Deputy Chairman of the TCC and other members of the Tribunal who are the officers from the Judicial and Legal Service (Section 86 of the CPA). Another responsibility is to enforce non-compliance of the TCC by the Enforcement Division of the MDTCA.

A dispute can be submitted by a consumer within the meaning of section 2 of the CPA namely a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption. The term ‘services’ includes any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract. Financial services fit into the definition of services. A dispute can be submitted by a consumer within the meaning of section 2 of the CPA namely a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption. The term ‘services’ includes any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract. Financial services fit into the definition of services. A literal understanding of these provisions indicates that financial consumers who acquire consumer credit products such as hire-purchase, moneymooning and pawnbroking are entitled to refer their cases to the TCC. However, there is a limitation in case of a financial consumer of banking institution whereby section 126(5) of the FSA explicitly forbid any complaint which has been referred to an approved FOS from being lodged to the TCC.

Nevertheless, based on the interview conducted and cases decided by the TCC, it was revealed that the TCC does not so far entertain cases related to banking, hire-purchase, moneymooning or pawnbroking even though complaints related to consumer credit issues offered by non-bank institutions are numerous as evidenced from consumer association’s reports. For example, alteration of the original terms of the contract by the moneymooners to their whim and fancies prejudicial to the interest of the borrowers, disposal of pledge items...
without prior notification to the pawner and tampering of the pledge when it becomes shorter or lighter upon redemption. Apparently, the awareness on the availability of the TCC as a redress mechanism is imperfect and its accessibility to these financial consumers is dubious. Another contributing factor is because moneylending and pawnbroking fall under the purview of the MHLG; thereby generating misperception among consumers as to the proper body to submit their dissatisfaction [9].

While two tribunals are established under the MHLG to deal with housing matters namely the Tribunal for Homebuyer Claims and the Strata Management Tribunal, there is no equivalent statutory redress mechanism established to hear disputes related to moneylending and pawnbroking disputes. Despite legally entitled to forward cases to the TCC, shortcomings discussed earlier put the borrowers and pawners at a disadvantage substantially owing to vagueness on the proper alternative dispute resolution body accessible to them.

Analysis:

All three regulators have established complaint management system in place with multifarious channels. According to the complaint statistics, it is submitted that BNM and the MDTCA complaint management systems are more accessible and known to the public as opposed to MHLG. Enquiries, advisory services and complaints are dealt with by BNM via BNMLINK and TELELINK which serve as the main contact point with the public. As for the MDTCA, its Consumer Complaint Management Centre, eAduan system, eADU smartphone application, toll-free telephone line are among facilities provided to enable hassle-free complaint channels to the consumers.

In so far as dispute resolution is concerned, ADR framework is available under BNM and the MDTCA. In the context of consumer credit, the OFS service is exclusively available for financial consumers dealing with banking institutions. Thus, a large population of non-bank consumers is excluded from the benefit of this redress mechanism. Despite being granted a statutory power to deal with consumer credit matters, in actual fact, the power is not well-utilised due to some deficiencies in particular lack of awareness on the role of the TCC to hear this class of disputes and limited monetary jurisdiction.

It is viewed that BNM plays a crucial role in the establishment of redress mechanism in the form of FOS including approving the scheme operator of the FOS, suspending the approval under circumstances, approving the TOR of the scheme operator, approving the appointment of the scheme operator's members of board of directors and overseeing the performance of the scheme operator by imposing post-approval obligations. Examples of the obligations are to notify BNM on matter which may affect its ability to perform effectively and to submit report to BNM within three months after the end of each of its financial year on its activities carried out during that financial year and to disseminate information on its yearly operation and publication of documents specified by BNM. Furthermore, BNM is also responsible to determine the scope of independent review and terms of appointment of the independent reviewer.

Although the TCC is set up under the MDTCA, its establishment is based on statute namely the CPA. Relevant terms on its jurisdiction, appointment of the members, procedures for hearing are clearly stipulated by the CPA and not MDTCA. However, details procedures are laid down by way of regulation proposed by the Minister of the MDTCA such as the CPR. The Minister is also responsible for the appointment of the TCC Chairman, Deputy Chairman and other members. Additionally, Enforcement Division of the MDTCA assumes responsibility for enforcing non-compliance with the TCC award.

Recommendation:

To ensure equal opportunities available to all class of financial consumers in respect of avenue to voice out their complaints and to redress their grievance, the establishment of a single credit regulator would be a viable option. The approach has been adopted by Australia whereby there is one national credit regulator namely Australian Securities and Investment Commission (ASIC) which is responsible to oversee consumer credit industry including complaint management and redress mechanism. One distinctive feature of complaint management and dispute resolution in the Australian consumer credit industry is the presence of internal dispute resolution (IDR) and membership with external dispute resolution (EDR) as a condition for license approval. The specialist credit tribunals that existed in some States and Territories such as the Australian Consumer, Trader and Tenancy Tribunal (now replaced by the New South Wales Civil and Administrative Tribunal) no longer have jurisdiction in credit matters. According to section 199 of the National Consumer Credit Protection Act 2009 (NCCP), financial consumers have an option to proceed with small claim procedure available in the lower tier courts such as the local or Magistrates court and the Federal Circuit Court albeit limited monetary claim which is up to $40,000 only.

or requirements relating to IDR (RG 165.41 of Regulatory Guide 165 Licensing: Internal and External Dispute Resolution).

In approving an EDR scheme under the NCCP, several principles which must be abide by are accessibility, independence, fairness, accountability, efficiency and effectiveness as stipulated in Regulatory Guide 139 Approval and Oversight of External Dispute Resolution Schemes. Currently, there are two ASIC-approved EDR schemes namely the Financial Ombudsman Service Australia and the Credit and Investments Ombudsman.

The proposed single regulator will assume the responsibility of establishing proper complaint management which is multi-choices and accessible to all financial consumers. Importantly, there should be one contact centre to handle these complaints effectively. Another significant aspect is the public awareness on the existence of various complaint channels under the new regulator. The regulator is also suggested to set up IDR scheme which complies with specific standards as established by ASIC is recommended as it will provide timely and cost-effective dispute resolution. Nonetheless, acknowledging the fact that dispute may not be able to be resolved internally, there is a need for an EDR. The existing redress mechanisms can be utilised on the basis of economies of scale and their experiences; subject to necessary enhancement such as increased monetary jurisdiction for the TCC and more awareness activities on the role of the existing ADR bodies especially among people in rural areas. Thus, pursuant to receiving complaints, the new regulator will determine whether the case is to be submitted to the OFS or the TCC. Coordination with the existing alternative dispute resolution bodies will be advantageous.

Conclusion:
Consumer complaints and redress mechanism are two aspects which are undeniably influential in devising strong financial consumer protection framework. The above discussions support the contention that fragmented regulatory approach leads to inconsistent commitment among regulators in implementing financial consumer protection initiatives. Diverse approaches are seen in the way the regulators manage the complaints and in providing good ADR mechanism parallel with international standards and practices. Consequently, the benefit received by different groups of financial consumers vary depending on the priorities of the respective regulators which may be superior or inferior to the other. It is proposed that the establishment of a single regulator will cure the problem as practised in Australia but with some modifications to suit local conditions. It is submitted that a dedicated regulator for all class of financial consumers guarantees efficient and comprehensive complaint handling and redress mechanism both internally and externally.

REFERENCES