ESTEEM Journal of Social Sciences and Humanities
Vol. 7, No. 2, September, 2023
https://ejssh.uitm.edu.my

A New Proposed Features of Malaysian Legal Framework for Alternative Dispute Resolution in The Tribunal for Consumer Claims

Su'aida Safei[1*], Nuraisyah Chua Abdullah[2]

[1,2] Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia
**corresponding author: [1]suaida@uitm.edu.my*

ABSTRACT

ARTICLE HISTORY

Received:
20 July 2023
Accepted:
22 August 2023
Published:
26 September 2023

KEYWORDS

Tribunal for Consumer Claims
Alternative Dispute Resolution
Small Claims Tribunal Singapore
Court-annexed Mediation

The Tribunal for Consumer Claims (TCC), is established under section 85, Part XII of the Consumer Protection Act 1999 [Act 599] (CPA). Given the application of ADR under section 107 of the CPA, the vagueness of the provision, as regards the type of ADR to be applied in the TCC, is an issue raised on top of other issues surrounding the decision-making of the President of the TCC and unequal ability of the parties in negotiating their dispute without the supervision of the said President. In the absence of comprehensive discussions on the legal framework of the TCC in the existing literature, the main objective of this paper is to propose a workable ADR for the TCC to adopt in view of the issues faced by the TCC. Using the content analysis, doctrinal legal research, and comparative study with Singapore's Small Claims Tribunal, this paper provides new suggestions in the management of the TCC, such as case management, flexible numbers of Presidents, given the complexity of cases in the TCC and types of ADR being identified as facilitative mediation and evaluative mediation. These are possible innovations in the legal framework of the TCC, hence providing the practical implication of this paper. The findings of this paper also add to the body of knowledge in the domain of ADR at the TCC and expand the current literature. Most significantly, the findings of this paper answer its main objective by proposing a workable ADR for the TCC to implement, thereby enhancing the TCC's professional practice and satisfying the relevance of this study in terms of professional application.

e-ISSN 2600-7274

1. INTRODUCTION

The Tribunal for Consumer Claims (hereinafter referred to as "TCC") is established under section 85, Part XII of the Consumer Protection Act 1999 [Act 599] (hereinafter referred to as "CPA"). The TCC operates under the Ministry of Domestic Trade and Cost of Living. (Official website of Tribunal for Consumer Claims). The TCC can be seen as a form of alternative dispute resolution (hereinafter referred to as "ADR"). This is because it fits into the main features of ADR, which involves dispute resolution processes and techniques that fall outside the court system. (Jan et al., 2010). Some provisions of the CPA support this, one of them is section 107, which will be further elaborated in this paper. This paper highlights issues which relate to section 107 of the CPA as stated in the section for Problem Statement of this paper. It also examines ADR used in various institutions such as the Singapore's Small Claims Court and the court-annexed mediation practised by the Malaysian courts. The main objective of this paper is to propose a workable ADR for the TCC to adopt, hence, providing a proposed legal framework for its practice from the initiation of a case until its disposal at the TCC. The findings of this paper add to the body of knowledge in the domain of ADR at the TCC and expand the current literature. Most significantly, in answering its main objective, as mentioned earlier, the findings of this paper enhance the TCC's professional practice and satisfy the relevance of this study in terms of professional application.

2. PROBLEM STATEMENT

ADR components may be found in Section 107 of the CPA. It enables the TCC to determine whether it is appropriate to assist the parties in reaching an agreement on the claim. Section 107 (1) of CPA mandates the TCC in so doing where it is stated that "The Tribunal shall, as regards every claim within its jurisdiction, assess whether, in all circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement about the claim." However, the said section is somewhat unclear. It does not define the sort of ADR that the TCC may use to help parties in negotiating, whether it is a non-binding form such as mediation or conciliation or a binding one such as arbitration. In addition, there is no procedure on how the TCC handles negotiations between the customer and the suppliers/manufacturers/ traders.

In present practice, the negotiating process between customers and traders is flawed when undertaken without the supervision of the TCC President or any of its officers. There is an imbalance of negotiating power among the parties. Consumers, often in a weaker position than traders, would be denied proper protection if the President hearing the claim, did not supervise the discussions between the consumers and the traders. As the President is not actively engaged in the parties' negotiation process, he or she would be notified of the negotiation result after the conclusion of the process. If the parties can achieve an agreement, it will be recorded as an Award by Consent (Form 9). Nonetheless, if the negotiating process fails, the President will conduct a full hearing, and the decision will be recorded in an Award after Hearing (Form 10) (Ismail & Osman, 2019).

3. LITERATURE REVIEW

The TCC was introduced in 1999 and formal commentaries on the TCC started as early as the 2000s. Amin and Abu Bakar, in the year 2010, specifically discussed the deficiencies of the TCC and gave suggestions for improvements. Their discussion included the unclear provision on ADR and the ambiguity of the negotiation process within the ambit of section 107 of the C.P.A. They also pointed out various ADR methods used in the tribunals for consumers in Australia and New Zealand. (Amin and Abu Bakar, 2010). Similarly, nine years later, in 2019,

Ismail and Othman highlighted the same weaknesses of the negotiation process at the TCC as Amin and Abu Bakar mentioned in 2010 and suggested an alternative to negotiation, i.e., mediation.

Azmi, in an article in 2021, wrote about the history of the court-annexed mediation in Malaysia, which included the Practice Direction No. 5 of 2010 (Practice Direction on Mediation) (the "P.D. 2010") and the Practice Direction No. 4 of 2016 Practice Direction on Mediation, which revoked the P.D. 2010 (Azmi, 2021). She also made comparisons to court-annexed mediation in the United Kingdom and Australia. She concluded that the Australian model is superior because mediation is mandated on parties and forcing them to mediate regularly yields results. Comparably, Justice Kiat, a Malaysian Federal Court judge, agreed to a certain extent with Azmi on mandating mediation when he concluded in his 2020 article that court-annexed mediation will be instrumental in helping parties overcome their prejudices or lack of understanding. According to him, studies have shown that parties who entered mediation reluctantly benefited from the process even though their participation was not voluntary at the outset. As a result, court-annexed mediation is required as an expedient because parties do not use mediation voluntarily and should, therefore, be allowed to experience its benefits (Kiat, 2020).

In addition, Safei and Abdullah (2021), among others, wrote about the importance of having non-legal decision-makers, people with skills and competence in the dispute to sit with the President (who has a legal background), establishing mixed presidents.

Apart from TCC, another ADR that is becoming popular is the Ombudsman, and the commentaries on this concept and practice can be seen in more current literature. In Malaysia, Ombudsman can be seen being practised in the public sector and the private sector. Mohamad Bahri et al. (2023) gave an example of using an ombudsman in the public sector. Among others, they quoted the example of Universiti Sains Malaysia as the first higher institution to establish its office of Ombudsman in 2011 to ensure good governance and enhance the integrity of the university. They commented that it is not widely accepted yet since there are other departments within the university, such as the integrity unit and the legal advisor's office to settle complaints made by the complainants (Mohamad Bahri et al., 2023).

In contrast to Mohamad Bahri et al. (2022) wrote about the Ombudsman as practised in the private sector in Malaysia. They elaborated on the Ombudsman for Financial Services ("OFS") and suggested increasing its monetary jurisdiction to make it in tandem with the current market value. They used United Kindom and Australia as benchmark countries to justify the amendment to the monetary jurisdiction of OFS (Mohd Zain et al., 2022). Such proposal would align with the development in the TCC as seen in the discussion of this paper.

The relevant literature in Singapore's Small Claims Tribunal (hereinafter referred to as "SSCT") included those written by the Referee and the Senior Referee of the SSCT itself. In 2001, a senior Referee of SSCT gave an overview discussion on the processes and the programmes conducted within the SSCT (Heng, 2001). Earlier, another senior Referee of SSCT in 2000 also wrote on the growth of SSCT but focused on issues of natural justice within the operation of the SSCT (Chin, 2000). In both papers in 2001 and 2000, there were brief discussions on the practice of mediation (as a form of ADR) in SSCT.

Later in an article published in 2019, Fakriah and Afriana compared a few foreign jurisdictions with Small Claims Courts in their judicial systems, including the SSCT in Singapore. Their writing updated the development at the SSCT earlier-mentioned by Heng in 2001 and Chin in

2000. They emphasised on two ADR methods used in SSCT; mediation and adjudication, conducted by judges known as "referees" (Fakriah and Afriana, 2019).

Some literature in 2007 and 2008 appeared to introduce the features of SSCT without discussing the ADR practice at SSCT. For example, Tan in 2007 highlighted that the SSCT was established within the Subordinate Courts in 1985 to provide a quick and inexpensive resolution of small claims arising from disputes between consumers and suppliers, not exceeding SGD$10,000 (Tan, 2007). Equivalent to Tan, Gary 2008 shared the aim of the Small Claims Tribunals Act, which established the SSCT, to reduce costs and delays in Singapore and enhance access to justice for litigants with limited means. While Gary quoted the same monetary limit of SSCT, as quoted by Tan, he added that the monetary limit could be increased to SGD$20,000 where parties give their consent (Gary, 2008).

Likewise, echoing the same features of the “quick and inexpensive” nature of SSCT as stated by Tan & Gary earlier, Gramckow and Ebeid (2016) opined that SSCT is considered as an ADR mechanism because it resolved the disputes of the litigants in a simpler, quicker, and cheaper manner. They also emphasised that a small claims court is a specialised court created by law with specific duties and powers to adjudicate and resolve small-value monetary disputes (Gramckow and Ebeid, 2016).

In relation to the TCC, even though there are gradual writings on TCC in the literature, the literatures are sketchy and do not illustrate the latest development in the TCC and the similar platforms of TCC in foreign jurisdictions. In the absence of a comprehensive discussion on the legal framework of TCC, this paper seeks to fill the gap.

4. RESEARCH METHODOLOGY

This paper employs qualitative research since it incorporates doctrinal legal research technique and a content analysis approach that necessitate the examination of several documents. Content analysis is made on the CPA, the TCC Regulations, and related laws on ADR in courts, i.e. the Rules of Court 2012, the Practice Direction No 5 of 2010, Practice Direction on Mediation, the Practice Direction No.4 of 2016, Practice Direction on Mediation, and other relevant statute such as the Mediation Act 2012. The research consists of library-based research on the primary and secondary sources of the applicable Malaysian laws regulating the TCC and the practice of SSCT in Singapore. The Malaysian laws, as stated earlier, regulating court-annexed mediation are reviewed to depict the local practice of ADR in the form of mediation. The CPA and the TCC Regulations are the major sources to be considered for the TCC. For Singapore, the relevant statutes are the Small Claims Tribunal Act 1984, and the more updated law is the Small Claims Tribunals (Amendment) Act 2018. The secondary sources of law consulted include the relevant textbooks, articles from journals, seminar papers, theses, newspaper articles, and online sources. A semi-structured interview with the Head of Section at the office of the Tribunal for Consumer Claims, Shah Alam, was conducted on 20 December 2021 to obtain the statistics of cases for all TCCs in Malaysia and to gain more practical insights on the working of the TCC.

5. STATISTICS OF CASES AT THE TRIBUNAL FOR CONSUMER CLAIMS FROM THE YEAR 2018 UNTIL THE YEAR OF 2021

As stated in the above Research Methodology section, a semi-structured interview with the respondent at the office of the Tribunal for Consumer Claims, Shah Alam was conducted on 20 December 2021, and the statistics of cases of all the TCC in Malaysia were obtained, which supported the issues raised in the section of Problem Statement in this paper. In the year 2018,

out of 1937 cases filed in all TCC offices in Malaysia, 250 cases representing 12% were given Award by Consent (Form 9), compared to 863 cases representing 44% were given Award After Hearing (Form 10). In 2019, out of 2441 cases filed in all TCC offices in Malaysia, 386 cases representing 15%, were given Award by Consent (Form 9), compared to 1087 cases representing 44%, were given Award After Hearing (Form 10). In 2020, out of 1735 cases filed in all TCC offices in Malaysia, 299 cases representing 17%, were given Award by Consent (Form 9), compared to 799 cases representing 46%, were given Award After Hearing (Form 10). As of 15 August 2021, out of 148 cases filed in all TCC offices in Malaysia, 27 cases representing 18.24%, were given Award by Consent (Form 9), compared to 71 cases representing 47.97%, were given Award After Hearing (Form 10). The TCC's statistics of cases show a steady tendency of fewer cases being reported as Award by Consent (Form 9) instead of Award after Hearing (Form 10) from 2018 to 2021. This signifies that the parties' unsupervised negotiating process has not resulted in an acceptable settlement to both parties, which will be converted into an Award by Consent (Form 9).

6. ADR AT SINGAPORE'S SMALL CLAIMS TRIBUNAL (SSCT)

There are two layers of ADR at the SSCT, mediation and adjudication, conducted by judges known as "referees". Nevertheless, before the two ADRs are adopted, there is a consultation stage, an informal method of settling at the SSCT. The consultation stage is a quick period of time in the processes involved at the SSCT, whereby consultations are held in seven days for consumers and ten to fourteen days for company claims. The hearings are held within seven days of the last consultation day if an agreement is not reached. Once the claim is registered, the clerk will assist parties in reaching an agreement during the consultation stage. If no agreement is reached during the consultation stage, the clerk or an assistant court clerk will conduct a mandatory mediation. On the other hand, if the clerk cannot assist parties in reaching an agreement during the mediation stage, the clerk will set a date for the claim to be settled through adjudication by the referee. The same practice of the clerk that the referee employs, namely, to assist parties in reaching an agreement before a decision is made after parties have failed to do so (Fakriah & Afriana, 2019).

The newly amended section 24 of the Small Claims Tribunal (Amendment) Act 2018 allows mediation and conciliation to be used in its proceedings. This is possible either at the Tribunal's initiative or at the application of any party to the proceedings. Section 24 (2) (a) of the Small Claims Tribunals (Amendment) Act 2018 provides that "A tribunal may, on its own initiative or on the application of any party to the proceedings, and in such manner as may be prescribed, do any of the following: allow one or more individuals to assist in resolving the claim amicably through mediation or conciliation" (Section 24 (2) (a) of Small Claims Tribunals (Amendment) Act 2018).

A typical conciliation at the SSCT has the following stages: Firstly, there will be a preliminary meeting. The lawyers usually brief the Judge presiding over the conciliation session on the facts of the dispute and the issues to be discussed during the conciliation session. Both parties to the dispute need not be present in the Judge's chambers during this time. Secondly, there will be a joint meeting with all parties and lawyers present. The Judge will introduce all parties to the conciliation process and set out any ground rules applicable to the session. Each party will have the chance to speak about the dispute. The Judge will facilitate the discussion, offer his views, and guide the parties on possible solutions. Thirdly, there will be separate meetings. If necessary, the Judge will hold separate meetings with either one party or the other party, together with their respective lawyers. This is a time for each party to discuss further matters and raise its concerns with the Judge, who will provide suggestions for a possible settlement

and adjust the suggestions based on the parties' input. There may be several such meetings, depending on the circumstances of each dispute.

It should be noted here that the processes from the "preliminary meeting," the "joint meeting," and "separate meetings" are processes similarly practised in a facilitative mediation. Nevertheless, in separate meetings, when the Judge/conciliator give suggestions for the settlement to parties, that departs from the features of a facilitative mediation and transform into an evaluative mediation. Last but not least is the stage of Conclusion of Conciliation. If both parties have reached an agreement, everyone will meet the Judge with his/her lawyers to review and confirm the settlement terms. These terms will be recorded before the Judge. If both parties have not reached an agreement, conciliation ends and the case proceeds to trial (States Court Singapore., 2020).

7. ALTERNATIVE DISPUTE RESOLUTIONS IN MALAYSIA AND SINGAPORE: SIMILARITIES AND DIFFERENCES

In Malaysia, these processes of conciliation at the SSCT are similar to the practices of mediation in various institutions. Firstly, it is identical to the court-annexed mediation in the civil courts in Malaysia. On the fact that the judge/ conciliator at SSCT facilitates the discussion between parties, the judge/ mediator at the court-annexed mediation also facilitates the settlement between parties by using mediation. Paragraph 1 of the Practice Direction No. 4 of 2016 Practice Direction on Mediation (hereinafter referred to as "PD 2016 on Mediation"), a Practice Direction issued by the Chief Registrar on 30 June 2016 to explain further the practice of court-annexed mediation in the Malaysian Courts as allowed by Order 34 of the Rules of Court 2012 in the pre-trial case management, provides that "The Chief Justice of Malaysia hereby directs that with effect from 15 July 2016 that all Judges of the High Court and its Deputy Registrars and all Judges of the Sessions Court and Magistrates and their Assistant Registrars may, at the pre-trial management stage as stipulated under Order 34 Rule 2 of the Rules of Court give such directions that the parties facilitate the settlement of the matter before the court by way of mediation."

The practice of the judge/conciliator at SSCT to give suggestions to parties for a possible settlement is similarly practised by the judge/mediator at the court-annexed mediation. Paragraph 5.2 of the PD 2016 on Mediation states, "If a judge is able to identify issues arising between the parties that may be amicably resolved, he should highlight those issues to the parties and suggest how these issues may be resolved."

Similarly, the practice of the judge/conciliator to record the terms of the parties' settlement is also a similar practice at the court-annexed mediation in Malaysia. Annexure A, paragraph 4 of the PD 2016 on Mediation states, "If the mediation is successful, the Judge mediating shall record a consent judgment on the terms as agreed to by the parties."

This requirement of recording the settlement of parties in the court is similarly applicable not only to the first type of court-annexed mediation, the judge-led mediation (where judges become court mediators), but also to the second type of court-annexed mediation, the non-judge-led mediation (where non-judges become mediators). The PD 2016 on Mediation specifies that the non-judge-led mediation consists of the mediators from the Asian International Arbitration Centre (AIAC) [Annexure B of the PD 2016 on Mediation] and the mediators from the Bar Council's Malaysian Mediation Centre (MMC) [Annexure C of the PD 2016 on Mediation]. Paragraph 3 of Annexure C of the PD 2016 on Mediation states, "Any agreement consequent upon a successful mediation may be reduced into writing in a Settlement

Agreement signed by the parties but in any case, the parties shall record the terms of the settlement as a consent judgment."

It is worthy to note here that the other two institutions in Malaysia which have similarities with SSCT insofar as the facilitative model of mediation adopted and the same processes conducted during the mediation session (from setting the ground rules to having joint meetings and separate meetings) are the court-annexed mediation in the Syariah court (known as "*Majlis Sulh*") and the MMC (Safei, S.,2009). Similarly, the Malaysian Mediation Act 2012 (hereinafter referred to as "MD 2012") also has the same provisions regarding joint meetings and separate meetings ,where Section 11 (1) of the MD 2012 allows the discretion of the mediator either to meet with the parties together or with each party separately, and the mediator also has a role in relation to the record of parties' settlement agreement where he or she is required to authenticate such settlement agreement and furnish a copy of the agreement to the parties in accordance with section 13 (3) of the MD 2012. Another similarity of the MD 2012 with SSCT and the Malaysian court-annexed mediation is that even though the role of a mediator in MD 2012 is mainly facilitating a mediation between parties, at the same time, the mediator may also suggest options for the settlement. The long title and section 9(1) of the MD 2012 provide for this. The long title of the Act states "An Act to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters". Similarly, section 9(1) provides that "A mediator shall facilitate a mediation and determine the manner in which the mediation is to be conducted." Nevertheless, Section 9 (2) of the MD 2012 states that "A mediator may assist the parties to reach a satisfactory resolution of the dispute and suggest options for the settlement of the dispute" (Mediation Act 2012).

7.1 Evaluative Mediation and Facilitative Mediation

The TCC could adopt mediation as its choice of ADR. The most commonly practised styles of mediation in Malaysia are facilitative mediation and evaluative mediation. The difference between facilitative and evaluative mediation is that in facilitative mediation, the mediator would identify the issues, focus on the disputants' fundamental interests, and facilitate the discussion or negotiation between them. The disputants are assisted in arriving at their own conclusions (Low H., B., 2010). In facilitative mediation, the mediator neither makes recommendations to the disputants nor gives advice to them (Jan, M. N. I, 2010). In essence, in facilitative mediation, the mediator works to facilitate communication between the parties, ensuring that they understand the other's perspective. The end goal in facilitative mediation is to assist the parties in reaching their own agreement (Butlien, 2020).

In evaluative mediation, the mediator evaluates the disputants' position and point of view, the strength, and weakness of the respective parties' case, and offer suggestions to them (Low H., B., 2010). An evaluative mediator assumes that the disputants want and need him or her to provide some guidance as to the appropriate grounds for settlement based on law, industry practice, or technology and that he or she is qualified to give some guidance by virtue of his or her training, experience, and objectivity (Jan, M. N. I, 2010). In substance, in evaluative mediation, the mediator takes a slightly more active role by creating a non-binding evaluation of the dispute. Consistent with the voluntary nature of the process, the parties are free to accept or reject the mediator's assessment as the settlement of the dispute (Butlien, 2020).

7.2 Possibility of Using Ombudsman at the TCC

It is viewed that Ombudsman may not be suitable for the TCC to adopt, at least in the first instance. For the public sector, which adopts Ombudsman, such as in the public university, Ombudsman works as the second level of complaint resolution. For example, when a university department makes a decision that is considered unreasonable and biased, the complainant is to make a complaint to the ombudsman (Mohamad Bahri, N.A. et al, 2023). Possibly, if Ombudsman is to be adopted by the TCC, it may serve as an avenue for any consumers or traders to make a complaint to Ombudsman if they are not satisfied with the decision of the TCC, which they think is unreasonable or bias. This may be a cheaper and better option for parties rather than challenging the decision of the TCC by way of a judicial review. Nevertheless, there need to be new statutory provisions inserted in the CPA for this new practice to be adopted.

Similarly, in the practice of Ombudsman in the private sector, it was acknowledged that Malaysia has yet to implement an ombudsman for any sector other than financial services. As stated in the above section for literature review, the OFS is an example of an Ombudsman for the financial disputes between the financial consumers and the financial service providers. It is the first-ever implementation of an ombudsman service in Malaysian financial disputes, hence it may require some years to build awareness of OFS's service as a new scheme (Mohd Zain et al., 2022). This shows that the practice of Ombudsman in the private sector is also relatively new; hence it may not be a suitable ADR for the TCC.

The preceding discussions show that mediation may be a better choice of ADR for the TCC as it shares the same features as stated in section 107 of CPA in that the President of the TCC is supposed to assist parties in their negotiation. Mediation is also being practised in the Malaysian courts since the year 2010 by virtue of the PD 2010, and other public and private institutions in Malaysia also use mediation as their chosen method of ADR. Hence, all these provide a solid reason for the TCC to choose mediation as it is a widely used ADR in Malaysia. In addition, Singapore, as our neighboring country, which also practises the identical common law system to Malaysia, also uses conciliation/mediation as one of its ADRs in its SSCT.

8. SUGGESTIONS AND RECOMMENDATIONS

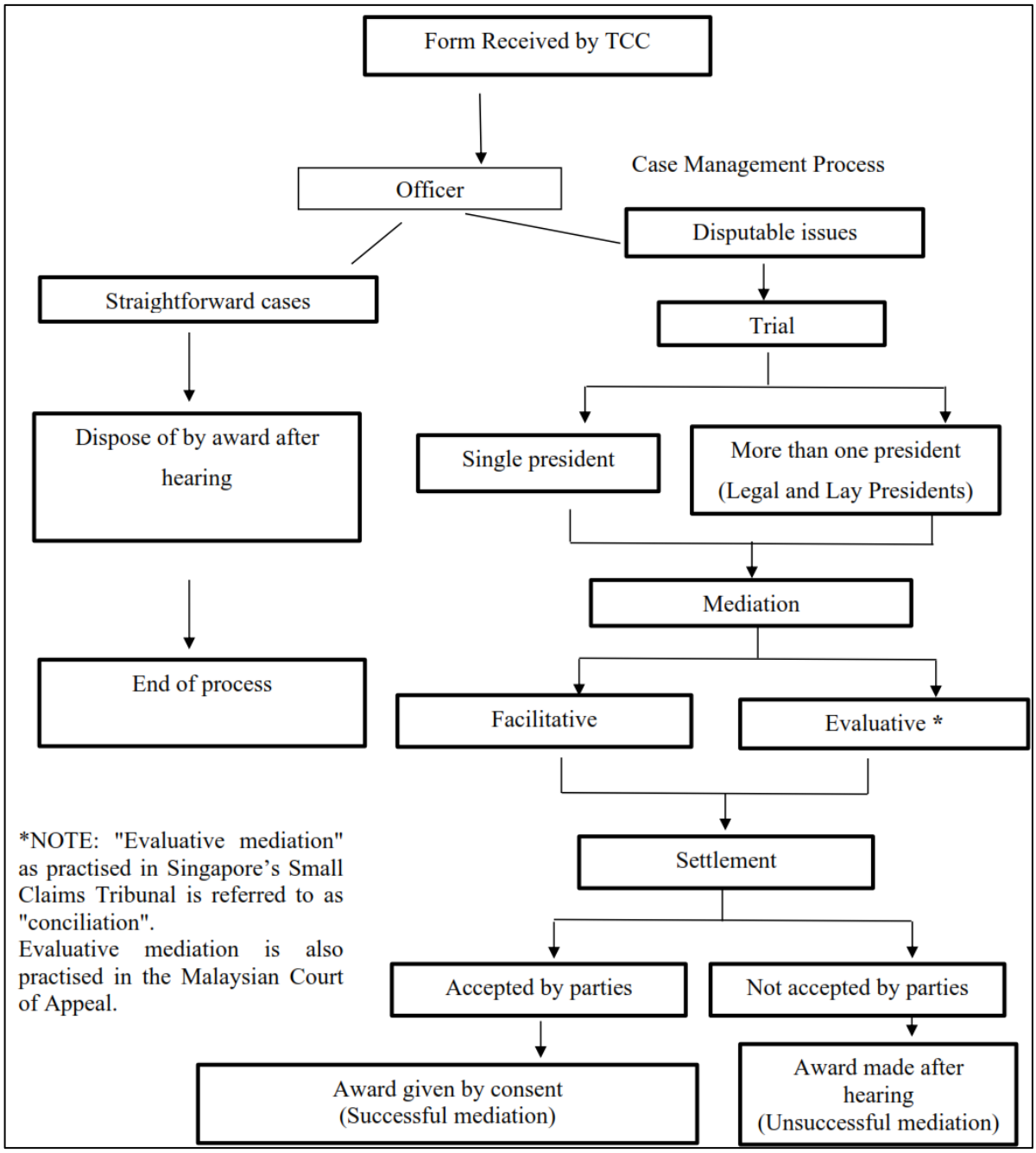

Figure 1: Summary of Flowchart of the Proposed Legal Framework of Alternative Dispute Resolution at Tribunal for Consumer Claims

8.1 Explanation of Summary Flowchart of the Proposed Legal Framework of Alternative Dispute Resolution at Tribunal for Consumer Claims

The initiation process at the TCC by the claimant is similar to the current practice where the claimant will file his or her case at the TCC by using Form 1 Statement of Claim. Subregulation 5 (1)(2) of the TCC Regulations provide that "Every claim lodged with the Tribunal shall be in Form 1 (the "Statement of claim"). (TCC Regulations). The claimant shall state in Form 1 the amount and particulars of the claim". Once Form 1 from the claimant is received by the TCC,

either through filling a case over the counter or through its online system, an officer-in-charge at the TCC will start with the case management process, or this may also be called a pre-trial process. By adopting the practice of the pre-trial process at the SSCT in Singapore, the said officer will decide whether the case is within the jurisdiction of the TCC or otherwise. If the case is not within the jurisdiction of the TCC, then the officer will inform the claimant of the same, and the case will be removed from the list of cases to be heard by the TCC. Nevertheless, if the case is within the jurisdiction of the TCC, then the officer will categorise the case into one of the two possible categories, namely, (i) a straightforward case or (ii) a case with disputable issues.

The first category of the case will proceed to trial without undergoing any ADR process (mediation). The case will undergo a short hearing, and it will be disposed of by an award after hearing (Form 10). Subregulation 23(5) of the TCC Regulations provides that an award made under this regulation (after "Hearing") shall be in Form 10. (TCC Regulations). Whereas, for the second category of the case, it will be forwarded to a trial of either before a single President or a trial before more than one President, which is a combination of one legal President and one lay President. The single legal President or the combination of the legal President and the lay President will conduct mediation before deciding whether a mutually acceptable settlement is possible or otherwise between disputing parties, without needing a full hearing.

The Head of Section for the TCC at each branch of the TCC in all Malaysian states is thought to be the best person to be the officer-in-charge for the task mentioned above of case management. This is because he or she is involved with administrative matters at the TCC rather than hearing cases like the President. As a result, he or she can play a role at the TCC during the initiation stage of the cases before the President begins hearings.

Additionally, it is opined that the TCC should adopt the above suggestion of adding a case management stage for classifying TCC cases into two possible categories: straightforward cases and cases with disputable issues. As mentioned earlier, this should also be handled by the TCC's Head of Section. There are cases at the TCC that are straightforward and thus can be resolved without the parties engaging in negotiation. The simplest example is when the consumer or claimant requests a refund from the trader or respondent after payment has been made. As illustrated earlier in the "Summary of Flowchart of the Proposed Legal Framework of ADR at TCC," this suggestion would improve the TCC's current practice of deciding only whether a case falls within or outside the TCC's jurisdiction.

Furthermore, this proposal will expedite the disposition of straightforward cases and provide the President with additional time to deal with cases involving contentious issues. With the President hearing an average of 20 to 25 cases daily, such classification is critical. (Information obtained from the interview with the TCC). It will ensure that the TCC's spirit of providing simple, fast, and inexpensive processes is carried out. This is also in line with one of the strategies to be used to achieve the goals of the National Consumer Policy, which is to provide a service delivery system that solves problems quickly and cheaply" (KPDNKK., n.d.).

For a case to be heard by a single President, this applies to the type of case which does not require the technical or expert knowledge of the lay President. For a case that is heard by more than one President, this applies to a case that requires the technical or expert knowledge of the lay President**.** Examples of a case requiring the technical or expert knowledge of the lay President include cases concerning vehicles, vehicle spare part, vehicle workshops and house renovation. If mediation is adopted as an ADR at theTCC, the lay President will be a co-mediator with the legal President in assisting the parties in negotiating their settlement. Whereas

for the single legal President, he will be the sole mediator who will also assist parties in negotiating their settlement.

Regarding the type of mediation, it is suggested that both facilitative and evaluative mediation should be adopted by the two mediators or a single mediator. It will be based on a case-to-case basis. If the situation requires the mediator or mediators to facilitate parties in negotiating without evaluating the weakness and the strength of the case, then the mediator or mediators will adopt facilitative mediation. Nevertheless, evaluative mediation may be possible in any one of the two situations. Firstly, evaluative mediation may be adopted in a situation where parties themselves request the mediator or mediators to evaluate their case by giving their views on the weaknesses and strengths of their case. Secondly, evaluative mediation may also be adopted when the mediator or mediators himself or themselves is or believe that he or they need to make the evaluation of the weakness and the strength of the case before him or them so that it will help parties to see the reality of their case hence they will be persuaded to reach a mutually acceptable settlement.

Last but not least, if the parties can reach a settlement, the mediation is deemed to be successful, and the award which the President or the Presidents of the TCC will give is in Award By Consent (Form 9). Subregulation 22 (1)(2) of the TCC Regulations provide that "At the hearing, the Tribunal shall, where appropriate, assist the parties to settle the claim by consent. An award obtained by consent shall be in Form 9". Nonetheless, suppose parties fail to settle. In that case, the mediation is deemed unsuccessful, and the President or the Presidents of the TCC will give the award in Award After Hearing (Form 10). Form 10 is an award given after the hearing is made in accordance with subregulation 23 (1)(2)(3)(4) (5) of the TCC Regulations where in essence both disputing parties adduce their evidence, call a witness or produce documents in support of their case. The President may at any time assist them in conducting their cases.

9. CONCLUSION

To conclude, the CPA, through section 107 does not provide any specific ADR for the TCC to follow in assisting parties to negotiate their mutually acceptable solution to their disputes. Hence, the method of assisting parties is left at the discretion of the individual President of the TCC, which may vary from one to another. The absence of any specific method of ADR also has contributed to the least number of cases at the TCC upon which Award by Consent (From 9) is issued, as shown by the statistics of cases at all TCCs in Malaysia from 2018 until 2021. The practice of conciliation/mediation at the SSCT and mediation which is also a familiar practice in the Malaysian courts and other institutions in Malaysia can be good examples for the TCC to emulate, as discussed in this paper.

Due to the page limitation of this paper, it only confines itself to discussing two possible ADRs; mediation and ombudsman. The other ADRs like conciliation, arbitration, med-arb, and many others are not considered. It would provide a better analysis if comparisons could be made to various other ADRs to justify the most suitable ADR for the TCC. Due to time constraints and the requirement of getting approval from the Ethics Committee of the Faculty, the paper also could not conduct any interviews with the Presidents of the TCC to have their views on the proposed use of mediation at the TCC.

The proposed framework should be tried as a pilot project in one of the TCCs, possibly in Shah Alam, as the most recorded cases filed compared to other branches or in the TCC's headquarter in Putrajaya. Further research can be made to evaluate the proposed framework's success in using mediation as an ADR method to assist parties in reaching their mutually accepted

solution. This is hoped to contribute more towards increasing Award By Consent (Form 9), which reflects the success of mediation.

ACKNOWLEDGEMENT

The authors would like to thank the Head of Section, the TCC of Shah Alam, who was interviewed on 20 December 2021. She provided the statistics of cases for all the TCCs in Malaysia and had also given valuable insights in the preparation of this paper.

CONTRIBUTIONS OF AUTHORS

SS prepared the first draft of the paper. NCA reviewed and edited the paper. All authors read and approved the final manuscript of the paper.

CONFLICT OF INTEREST

None Declared.

REFERENCES

Amin, N., & Abu Bakar, E. (2010). *ADR for Consumers: An Appraisal of the Tribunal for Consumer Claims in Malaysia* in Jan, M. N. I., Mohamed, A. A. A., & Ali, A. (2010). *Mediation in Malaysia: The Law and Practice*, Selangor: LexisNexis, 171 – 185.

Azmi, L. (2021, February 9). A discussion regarding the benefits of making mediation mandatory. Ravindran and Azmi Chambers. https://www.ravindranazmi.com.my/articles/blog-post-title-one-r87c3-fpcen-6J0sV-5z5hs-7faac-kj8lj-bfstl-kt2me-kktj5-an56g-ewrra.

Butlien, R. (2020). The Singapore Convention on Mediation: A Brave New World for International Commercial Arbitration, *Brooklyn Journal of International Law*. Vol.46 :1, pp. 183-213.

Chin, K., C. (2000), *Small Claims, Global Justice-The Singapore Small Claims Tribunals in the New Economy*. 3rd Australian Institute of Judicial Administration Conference, Melbourne, Australia.

Fakriah, E.L. and Afriana, A. (2019), The Existence of Small Claims Court in Settling Business Disputes in Indonesia: A Comparative Study with Singapore and the Netherlands. *International Journal of Innovation, Creativity and Change*. Volume 10, Issue 4, pp.153-167 https://ijicc.net/images/Vol10iss4/10418_Fakhriah_2019_E_R.pdf.

Gary,C.K.Y. (2008). Access to Justice for the Poor: The Singapore Judiciary at Work. *Pacific Rim Law & Policy Journal*, Vol. 17, No. 3, pp.595-648.

Gramckow, H., & Ebeid, O. (2016). Establishing small claims courts and the impact on service delivery in the justice system. *Just Development Issue 9*. http://documents.worldbank.org/curated/en/363681467994719303/pdf/104145-BRI-PUBLIC-SERIES-JUST-DEVELOPMENT-21-3-2016-23-32-58-Just-Development-Note-February2016-Issue9.pdf.

Heng, O.C. (2001), *Rethinking Tribunals Justice -Serving the Community.* Paper presented at 4th Annual AIJA Tribunals Conference, Sydney.

Ismail, R., & Osman, Z. (2019). Alternative Dispute Resolution Process in the Tribunal for Consumer Claims of Malaysia: A Way Forward. *International Journal of Asian Social Science*, *9*(5), 342-351, www.aessweb.com.

Jan, M. N. I., Mohamed, A. A. A., & Ali, A. (2010). *Mediation in Malaysia: The Law and Practice*. Selangor: LexisNexis.

Kiat, V.O.L. (2020). Court-Annexed Mediation — Myths and Misconceptions. *Journal of the Malaysian Judiciary*. http://www.jac.gov.my/spk/en/judicial-academy/judicial-academy-report/publications/journal-of-the-malaysian-judiciary.html, pp. 23-54.

KPDNKK. (n.d.). National Consumer Policy. https://kpdnkk-gov-my.page.tl/NATIONAL-CONSUMER-POLICY.htm.

Low H., B., (2010, October), *Mediation: The Way Forward, Challenges and Solutions*, at Seminar on "The Navigation of Malaysian Mediation -Route to Resolution", Attorney General Chambers.

Mediation Act 2012.

Mohamad Bahri, N.A., Amir, D., Abdul Hadi, K.A. (April 2023), Reception of the Ombudsman in Malaysia and its Application in Local Universities as an Alternative Dispute Resolution. *ESTEEM Journal of Social Sciences and Humanities*, Vol. 7, No.1, April 2023, https;//ejssh.uitm.edu.my.

Mohd Zain, M.I., Rahmat, N.E., and Ilias, Ibtisam @ Ilyana (2022). The role of Ombudsman: Resolving financial disputes in Malaysia. *Conflict Resolution Quarterly*, 1-4. https://doi.org/10.1002/crq.21366.

Official website of Tribunal for Consumer Claims, https://ttpm.kpdn.gov.my/portal/home.

Practice Direction No. 4 of 2016 Practice Direction on Mediation.

Safei, S. (2009). Majlis Sulh (Islamic mediation) in the Selangor Syariah Court and Malaysian Mediation Centre of the Bar Council: A Comparative Study. *5 M.L.J.* Ixxxiii, at pages Ixxxviii, Ixxxix, xc.

Safei, S., and Abdullah, N.C. (2021). Layperson Representation in Alternative Dispute Resolution (ADR): A Legal Analysis. International Journal of Academic Research in Business and Social Sciences, 11(11), 91-104.

Small Claims Tribunals (Amendment) Act 2018.

States Court Singapore. (2020, August 12). *Small Claims.* https://www.statecourts.gov.sg/cws/SmallClaims/Pages/GeneralInformation.aspx.

Tan, E.K.B. (2007). Harmony as Ideology, Culture, and Control : Alternative Dispute Resolution in Singapore. *Australian Journal of Asian Law*, pp.120-151.

AUTHOR BIOGRAPHIES

Su'aida Safei (Dip.in Law, LLB (Hons), LLM, PhD) holds a Diploma in Law from Kolej Agama Sultan Zainal Abidin (now known as Universiti Sultan Zainal Abidin) , LLB Hons from University of Aberystwyth, Wales, United Kingdom, LLM from Universiti Malaya and PhD from Universiti Teknologi MARA (UiTM). She has also written articles in the local and in the international journals. Her areas of interest in research include alternative dispute resolution, Malaysian legal system and Islamic law.

Nuraisyah Chua Abdullah (LL.B, MCL, PhD) holds PhD, Masters degree in Comparative Laws (MCL) and a degree in Law (LL.B) from the International Islamic University Malaysia (IIUM). She is also a consultant, trainer, and writer. She has to her credit written more than 10 academic books as a sole writer. Among others, she is the writer of the book, Legal Research Methodology published by Sweet and Maxwell in 2018.