

**PROCEDURES FOR THE RESOLUTION
OF CONSUMER GRIEVANCES
WITH BANKING SERVICES**

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Introduction

The terms 'bank' and 'banking services' are not easily defined with precision. There is no statutory definition of a bank which can be applied in all circumstances; statutory definitions are invariably limited by the scope of the statute. For example, the Malaysian Banking and Financial Institutions Act 1989 (hereinafter referred to as BAFIA 1989) distinguishes between licensed¹, scheduled², and non-scheduled institutions³, and empowers the central bank with differing powers of licensing, supervision and control over these three categories. The term bank is utilised for institutions licensed as performing 'banking business' under section 6(4) of the Act. The term "banking business" is however not defined. There are, moreover, in Malaysia institutions which do not fall within this category which nonetheless use the term 'Bank'.⁴ The most notable of these exceptions is the National Savings Bank (BSN), which is an extremely important banking institution catering in particular to the lower-income and those in the rural areas. The BSN even has a monopoly over certain services, including serving as the sole receiving bank for

¹ A list of licensed institutions is required to be published in the Gazette not later than 31 st March in each year. Section 18(I) BAFIA 1989.

² "Scheduled business" means any business specified as such in the Third Schedule of BAFIA 1989.

³ "Non-scheduled institution" means- (a) any statutory body; or (b) any person, being an individual, or a body or organisation, not being a statutory body, whether corporate or unincorporate, whether or not licensed, registered or authorised under any written law, who or which is neither liable to be licensed under BAFIA 1989, nor subject to the provisions of its Part III. Section 2(I) BAFIA 1989.

⁴ Bank Islam Malaysia Bhd is licensed under the Islamic Banking Act 1983.

certain categories of government pensions. Such a situation applies in most countries.

The traditional view of the courts is that no one may be considered a banker unless he pays cheques drawn on himself. The three characteristics of banking, usually accepted by the courts, have been described as:

- (i) the acceptance of money from, and collection of cheques for, customers and the placing of them to their customers' credit;
- (ii) the honoring of cheques or orders drawn on the bank by their customers when presented for payment; and
- (iii) the keeping of some form of current or running accounts in their books in which the credits and debits are entered.⁵

These 'traditional' functions or services are of course no longer the only functions or services offered by 'banks'. Banks today offer an increasing array of services. Figure 1 lists a range of services offered by banks and this is by no means an exhaustive list. It is crucial for this discussion on procedures for the resolution of consumer grievances with banking services, to note that many of these services are also offered by a variety of other institutions which do not term themselves as 'banks'.

⁵ *J. Milnes Holden, The Law and Practice of Banking: vol 1 Banker Customer, Pitman, 1982.*

Given the fact that the terms bank and banking services are subject to various definitions it is necessary to set a focus. Whilst much of the discussion will be of relevance to all institutions (whether termed a bank or otherwise) that offer the wide range of services listed in Figure 1, the proposals made in this paper are directed to the regulating authorities of banks and to the associations of banks.

FIGURE 1*

The range of services offered by banks include:

- (i) *Deposits and savings*
current/cheque accounts
automated teller machines (ATMs)
deposit/savings accounts including investment and high interest deposit accounts
special types of savings account e.g. mortgage deposit, holiday savings budget/credit account
- (ii) *Money transmission*
cheques
credit transfer
standing orders
direct debits
bank drafts
- (iii) *Lending*
overdrafts
personal loans
house purchase schemes
bridging loans
credit cards

Figure 1 (cont)

- (iv) *Travel and foreign*
foreign currency
travellers' cheques
international cheque-cashing arrangements

- international money transfer
- (v) *Investment, trust and taxation*
 - safe deposit
 - executor and trustee
 - insurance
 - life assurance
 - pension plans
 - tax planning
 - investment e.g. unit trusts, share plans
- (vi) Specialised advice, information and services
Often tailored to suit the needs of specific market segments, such as pensioners, students, members of the Armed Forces, people working abroad.

* Adapted from National Consumer Council (1983), *Banking Services and the Consumer*, London: Methuen & Co. Ltd.

The substantive part of this paper is presented in three parts. The first part deals with three underlying reasons for consumer grievances in the banking sector and the difficulties consumers face in obtaining redress:

- i) the law governing banker-customer relations;
- ii) inequitable standard form contracts; and
- iii) absence of appropriate redress mechanisms.

The second part of the paper makes suggestions for addressing these problems.

These are:

- i) a code of good banking practice;
- ii) an internal complaints handling procedure in each bank; and

- iii) an alternative dispute resolution mechanism for the entire banking industry.

The final part of the paper details a set of criteria useful for assessing the efficacy of any alternative mechanism established to handle consumer grievances.

1. The Underlying Causes for Consumer Grievances

(i) The law governing banker-customer relations.

Much of the law of banking developed during the nineteenth century and ignores two important subsequent developments. First, the nature of bank customers has changed. When the law was being developed, bankers catered only for a small minority of the population; indeed the possession of a bank account was presumed to be the hallmark of financial respectability and wealth. This is no longer the case. Today virtually all adults and even minors hold bank accounts; many of whom hold more than one account in the same or different banks. Second, the law was designed to cope with a few functions in a paper-based system and it cannot, without amendment, be extended to cover a variety of new functions, many reliant on computerised banking technology.

There is often no single statute which defines the relationship between bankers and their customers. Instead this relationship has been built up over the years and is governed by "custom and usage". The "customs and usage" however are not all codified and not always equitable to the customer, "Custom and usage"

may be applicable in governing transactions between those in the trade. However, in relation to consumer transactions it is inappropriate. Frequently the "custom and usage" have been accepted or sanctified by the common law, that is, by legal arguments and judgments in specific cases.

As noted in a 1983 study by the National Consumer Council of UK "The basic relationship between banker and customer is contractual. The parties have entered an agreement, or a 'contract' (even if unwritten and unsigned), which is normally that of creditor and debtor. When the customer's account shows a surplus, the bank is his or her debtor, and when the account is overdrawn the roles are reversed."⁶

This debtor/creditor relationship was stated by Lord Cottenham L.C. in 1848, in Foley v. Hill, as follows:

'Money, when paid into a bank ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into a bank is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places or, the principal and a small sum of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with as he pleases, he is guilty of no breach of trust in employing it: he is not answerable to the principal if he puts it in jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is, of

⁶ National Consumer Council (1983), *Banking Services and the Consumer*, London: Methuen & Co. Ltd., p. 88. This part of the paper relies heavily on this excellent study.

course, answerable for the amount because he has contracted, having received the money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer.’⁷

The relationship between banker and customer is contractual. However, personal customers may not even be asked to sign a written contract specifying the rights and obligations of both parties; the terms of the contract are thus not embodied in any written agreement executed by the parties. In such cases, rights and obligations are governed by 'implied terms' of the contract established at common law. Commenting on the position in England which also holds largely true for many jurisdictions, Professor J. Milnes Holden states:

The contractual relationship which exists between banker and customer is a complex one founded originally upon the customs and usages of bankers. Many of those customs and usages have been recognised by the courts, and, to the extent that they have been so recognised, they must be regarded as implied terms of the contract between banker and customer. It follows, therefore that this is a branch of the law where implied terms are of vital importance. Little does a new customer realise when, with a minimum of formality, he opens a bank account, that he is entering into a contract the implied terms of which would, if reduced to writing, run into several pages.’⁸

The terms implied into the contract between bank and customer impose obligations on both parties. Failure to observe these obligations can prove costly. The principal rights and obligations of bankers concern the duty to exercise reasonable care and skill, receiving money, repaying money, honouring cheques, confidentiality, the provision of advice, the termination of accounts, and the

⁷ *Foley v. Hill* (1848)(2) HL Cas. 28.

charging for services. The two chief duties of customers are the duty to draw cheques carefully, and the duty to disclose forgeries.

These duties clarified by common law, impose high standards on banks, and the basic law covering the conventional current and deposit account seems satisfactory. As Borrie and Diamond say in *The Consumer, Society and the Law*:

‘...a bank customer cannot complain that the law is loaded against him... it would seem that the customer's interests are fairly protected by the law. The law seems to lean over backwards in looking after his interests.”

(ii) Inequitable Standard Form Contracts.

Although the common law may be broadly acceptable, it is very often varied by the terms and conditions contained in standard form contracts used by banks. This could be illustrated by the **Kepitigalla Rubber Estates v. National Bank of India Ltd.**¹⁰ case, which held that, although passbooks and bank statements would help customers detect possible frauds, they are under no obligation to check statement entries, either at all or within a specified period after receiving it.

Despite this principle, it is open to banker and customer to agree in a standard form contract, that the customer must check the entries in his passbook or statement within a stated number of days and point out any errors. After that period that agreement could provide that it is to be conclusively presumed that the entries are

⁸ J. Milnes Holden, *The Law and Practice of Banking*.- vol I *Banker Customer*, Pitman, 1982.

⁸ Gordon Borrie and Aubrey L. Diamond, *The Consumer, Society and Law*, Penguin, fourth edition 1981, pp.219 and 235.

correct. Such is the inequality of bargaining power between the banks and their customers, and potential customers, that consumers seem to have very little say, if any, in the terms and conditions of the standard form contracts drawn up by the banks. The disadvantages of standard form contracts have been succinctly summarised by Professor Hondius¹¹ as follows:

- a) a consumer will usually not go through the trouble of looking at standard contract terms which are lodged in a Chamber of Commerce or company headquarters (or even, as required in some countries, with a Court) and which have subsequently been incorporated into the contract by reference;
- b) even if the consumer receives the full text of the general conditions, their length and typography do not invite the consumer to read the small print;
- c) even if the consumer does read the text, a consumer will often not grasp its full meaning;
- d) even if the consumer grasps the full meaning, a consumer may think that the event dealt with will not take place or that the supplier will not invoke the terms in such cases;

¹⁰ *Kepitigalla Rubber Estates Ltd v. National Bank of India Ltd* (1909) 2] 1010.

¹¹ Hondius, E.H. Standard Form Contracts - A Better Way for Both Parties in National Consumer Affairs Advisory Council (Australia) (1990) *New Directions in Consumer Financial Services*, pp 93-103.

- e) a consumer may be under the false impression that the contract terms have been officially endorsed or at least are in compliance with the law;
- f) a consumer will usually not succeed in altering the contract terms - the agent or employee of the supplier will usually lack the authority to do so;
- g) these make it possible for suppliers to draft standard form contracts to the detriment of consumers.

There is less room for satisfaction here. Until codification of the laws governing many banker/customer transactions are effected, as an interim measure it will be necessary for the regulating body, and the consumer associations, to focus on these standard form contracts.

(iii) Absence of appropriate redress mechanisms.

If the substantive rights of the consumer pertaining to banking services does not seem to be clearly defined, then their procedural rights are equally as obscure.

The volume of business transacted by banks and other financial institutions inevitably generates customer grievances. Disputes arise over issues of fact (for example, 'What has happened to an allegedly missing credit transfer?'), of law ('Has the bank's duty of care been broken?'), and of banking practice ('Has there been an unacceptable delay in dealing with this matter?'). How are these

banker/customer disputes - whether of fact, of law, or of banking standards - resolved? How, in practice, can the customer enforce his rights and obtain redress?

The consumer currently has three main options. They can take their complaint to the bank concerned and have it resolved there, and/or, they can forward their complaint to the regulating body, failing which, they can have their grievances redressed in a court of law.

The great majority of banker/customer disputes are resolved at an early stage. There are occasions however, where those disputes are not resolved, or where the customer feels that they have not been resolved satisfactorily.

In Malaysia, the Bank Regulation Department of Bank Negara (the regulating authority) has come out with a standard complaint form in which the public can file complaints on fraud, unfair treatment or deception in any business transaction, and discourteous service from banks, or financial institutions. These forms can be used for commercial banks, merchant banks, discount houses, and finance or insurance companies. Bank Negara claims that it acknowledges and investigates public complaints lodged against any bank or financial institution within seven days and that every complaint is investigated both by the central bank and the financial institution concerned. The complaint forms are available from Bank Negara and all financial institutions.

There are two points to note here. First, what mechanism has the regulating authority employed to carry out the investigations? Is the mechanism adopted regulated by custom and usage of the industry, the common law, the Guidelines issued by the regulating authority, or merely by the terms of any written contract between the customer and the relevant financial institutions? Or is there any other standard of "good practice" that will be the basis for the resolution of the dispute? Second, does the annual report issued by the regulating authority contain any information on complaints against banks? In Malaysia, the regulating authority's annual report does not contain such data. This is unlike the situation in the insurance industry where the annual reports of the Director General of Insurance¹² contain such data, analysis, tabulations and other relevant information.

Many disputes between customers and banks could in principle be brought before a court. This will be so where issues of law are in dispute and in most - but not all - cases of disputed fact. In general however, there are a number of obstacles in the way of customers seeking redress before the court, resulting in very few individuals ever taking a dispute with a bank to court.

The two most obvious obstacles are those of costs and self-generating imbalances. A priori, the cost of litigation, in the absence of a comprehensive legal aid scheme, effectively excludes the poor and even the moderate income earner from the courts. The rule common to courts in the English mould that costs follow

¹² Bank Negara Malaysia, *31 st Annual Report of the Director General of Insurance*, Public Affairs Unit, Kuala Lumpur, 1994.

the event is something of a palliative, since it offers successful litigants the opportunity to recoup at least part of the expenses. However, the rule also requires the litigant, if unsuccessful, to pay the opponent's costs. In any event, the costs recouped by the successful litigant under the rule are party-party costs, which are often substantially lower than the actual solicitor-client costs. Hence, even the successful litigant will nearly always be out of pocket.

In addition to the direct expenses of litigation, the intending litigant also faces indirect costs. The proceedings are frequently slow; a case may take a long time to be heard; it may be adjourned and require several court attendances by the customer during working hours. All such indirect costs must be added to the calculus. The costs factor therefore builds into the judicial system a discrimination in favour of large claims where the chances of winning are high, and this is normally not the case with banker/customer disputes.

The second obvious obstacle is that faced by any individual who tries to bring a case against a large organisation in the ordinary courts. Whereas the banks are very well versed with the legal system and are capable of employing lawyers specialising in the required area of law, the individual customer lacks the access to information, advice, and legal services, and also lacks familiarity with the law and the legal system. Further, mass processing of claims and the relative insignificance of each claim gives the banks greater leverage in the bargaining process and permit them to effect pre-trial settlement where the odds are unfavourable to them. The

reverse is generally true of customer litigants as only cases which the banks are confident of winning go to trial. The system favours the "repeat player" as distinct from the "first timer".

In general therefore, the individual customer in dispute with a bank will almost always fare badly in terms of money, time and competence.

Methods have been employed to overcome the problems experienced by consumers in dealing with the legal system, and these may be classified into two categories. The first involves measures directed at facilitating access to the ordinary courts, and the second, measures which seek to by-pass these through the creation of court alternatives.

Measures adopted or proposed to ensure access to the courts take a variety of forms. Reforms have been in such matters as the nature of the proceedings, the structure of the court, the feasibility of limiting new procedures to small cases only, the rules governing limitation periods, the conduct of cases and the rules governing evidence, the form of the proceedings, the role of the judge, the representation of the parties and, the right to appeal. In many countries, the changes were provided for in smaller claims through what came to be known as small claims procedure (or courts).

13

¹³ Whelan, C.J. (ed.) (1990) *Small Claims Courts - A Comparative Study*, Oxford, OUP.

The overall objective of small claims reform is to create an equitable system of whose existence and purpose citizens are aware, in which such mechanisms are easily available in all communities, and in which these mechanisms provide an inexpensive, convenient and effective forum for citizens.

Hence, a number of crucial features distinguish the mechanism for small claims from the usual courts. The small claims mechanisms have:

- a) simplified procedure;
- b) the prohibition of legal representation;
- c) the prohibition of appeals except on points of law; and
- d) an effective and cheap mechanism for the enforcement of the court's judgements.

In Malaysia, a small claims procedure was implemented in the Second Class Magistrates Courts in 1987. It is important to note that what was created was not a Small Claims Court, but instead, a small claims procedure to be observed in instances provided by the Rules, which is, that all claims for the recovery of a debt or liquidated demand on money with or without interest which at the date of filing does not exceed RM 5000.¹⁴ No new court or structure was established.

¹⁴ Order 54 of the Subordinate Court Rules 1980.

Since its introduction, the small claims procedure has been modified twice. The first amendment was by way of Practice Direction No. 14 of 1987. This Practice Direction sought to address the problem posed by Order 54 rule 7 of the Subordinate Court Rules 1980, pertaining to the prohibition of legal representation by all parties to a small claim. The Practice Direction resulted in a degree of confusion in the courts with some Magistrates permitting legal representation and others not.

The second amendment was by way of Subordinate Courts (Amendment)(No.3) Rules 1990. Whilst many of the features introduced by these amendments are progressive in nature the new Rules validated and institutionalised the practice adopted by some magistrates - an individual consumer was denied legal representation but any defendant company is required to obtain legal representation. This is a travesty since the small claims procedure is intended essentially to remedy the inequities of ordinary courts in which the individual has to do battle with the body corporate represented by lawyers and backed by its relatively huge financial resources. What has now been introduced in the Malaysian Courts is the reverse. The individual consumer is prevented from securing the services of a lawyer but the defendant company is required to be represented by a lawyer.

This injustice of the present system can be overcome by an amendment to Section 38 of the Legal Profession Act 1976 by providing that a company need not be represented by a lawyer but instead by any full-time employee of a company, as

provided by the appropriate Rules of court. Section 38 now provides the legal profession the exclusive right of representation of companies.

Further, we must also recognise the need for the entire process of civil litigation to be reviewed with the view of making it simple, relatively informal, cheap to use and to operate, quick, effective and fair. Reform of the court system to ensure access must continue, for there is no point in giving people rights, if they cannot enforce them.

The foregoing discussion indicates that new extra-judicial procedures are required for the resolution of disputes between banks and their customers.

II. Procedures for Redress of Consumer Grievances

i) A Code of Good Banking Practice.

It must be recognised that, no matter how good the legal framework, something more is required, especially when, as between a bank and its personal customer, there is the inevitable inequality of economic power in their dealings.

In the United Kingdom the need for such a Code of Practice was considered and stated in the Jack Report,¹⁵ published in 1989. The report concluded that there was a need to improve standards of banking practice, and the way to do so was by adopting a code of best practice. The result was the First Edition of the Code of

¹⁵ Review Committee on Banking Services Law, Banking Services: Law & Practice, Report by the Review Committee, HMSO publications, London, 1989.

Good Banking Practice, which was adopted voluntarily in March 1992. On 28 March 1994, following the review carried out by a Code Review Committee, a Second Edition of the Code was adopted. From the outset it was a governing principle of the Code that Banks should "act fairly and reasonably in all their dealings with their customers". What that entailed was indicated in other more specific guidelines. A Code of Banking Practice is also operational in Australia.

The purposes of such codes of good practice are succinctly stated in the preamble to the Australian Code of Banking Practice,¹⁶ which reads:

"The Code seeks to foster good relations between Banks and their Customers and to promote good banking practice by formalising standards of disclosure and conduct which Banks that adopt the Code agree to observe when dealing with their Customers."

The objectives of the Australian Code are stated to be:

- i) describe standards of good practice and service;
- ii) promote disclosure of information relevant and useful to Customers;
- iii) promote informed and effective relationships between Banks and Customers; and
- iv) require Banks to have procedures for resolution of disputes between Banks and Customers.

Codes of good practice are a necessary supplement to legal provisions. Though not legislative, the Courts do take cognisance of them to guide them as to what amounts to "good practice". They therefore influence the law and are commonly known as "soft law". They can also be a cost effective alternative to imposed government regulation. The Association of Banks in Malaysia, and the

Association of Finance Companies of Malaysia have introduced similar Codes of practice. Though this is laudable, it is to be borne in mind that these codes of practice were drawn up by the industry itself and without the participation of other interested parties. As such they must be viewed merely as a public relations exercise on the part of the banks. These codes do not state clearly and unequivocally what the banks and finance companies are prepared, and not prepared to do.

In determining the elements of an industry code of conduct, a tripartite meeting of all stakeholders must be held - not only at the initial phase of drawing up the Code, but on an ongoing basis. These stakeholders are:

- i) members of the banking industry;
- ii) the regulating authority and the appropriate government agencies; and
- iii) consumer associations.

Involving all interested groups removes any perception that the self-regulatory scheme is operating solely in the interests of member banks.

The form and nature of the Code should also contain the following features:

- i) some form of monitoring for code compliance;

¹⁶ Australian Bankers Association, Code of Banking Practice, 3 November 1993.

- ii) a mechanism for regular reviews. This is important as the Code must not be static, but instead a dynamic document and should be reviewed from time to time to deal with the problems that arise;
- iii) a complaints handling process;
- iv) a mechanism for addressing common problems; and
- v) significant sanctions for breaches of the code.

It is further proposed that the Codes make it a requirement that banks should not only act fairly and reasonably, and express their written terms and conditions in plain and fair language, **but also that those terms and conditions be fair in substance**. It would defeat the purpose of having good procedural rights, if the substantive rights relied on are flawed by unfair standard form contracts.

Any redress mechanism is dependent upon substantive rights. Redress mechanisms cannot provide, except as charity, what is not a substantive right. There should therefore not be any trade-off between the granting of substantive rights and the creation of redress mechanisms. Redress mechanisms must complement, not substitute the development of substantive rights.

(ii) Internal complaints handling procedure in each bank.

The Code of Banking Practice should require banks to have available to their customers an internal complaints handling procedure (see (1)(iii) above).

There should also be a requirement that bank staff should be aware of their own

bank's internal complaints procedure and that banks should deal fairly and expeditiously with complaints.

(iii) An alternative dispute resolution mechanism for the entire banking industry.

Court alternatives, or more commonly referred to as Alternative Dispute Resolution mechanisms (ADR), involve a whole range of permutations with only one factor in common - they each do not involve court-based litigation. Each scheme has its own peculiarities, strengths and weaknesses, and consequently generalisation is difficult. ADR mechanisms avoid the real and imagined psychological obstacles that surround the courts, and provide additional choice to consumers.

ADR mechanisms also offer a wide scope for innovation and are more likely than the courts to adopt 'active' styles of fact-finding and informal, simple and flexible means of decision making. They can adopt a 'specialists' approach - a scheme which deals with just one industry will know far more about that industry than the courts. Privately organised ADR schemes can be empowered to deal with more than the strict issues of law and fact, to which the courts are confined. They can be authorised to deal with complaints that there has been maladministration or a failure to observe the proper standard of professional behaviour. Finally, such

schemes can observe and comment on (for example in an annual report) the wider trends and practices revealed by individual disputes.¹⁷

An example of a privately organised scheme is the Voluntary Ombudsman Scheme, which is not governed by statute but set up as an incorporated body with the participating companies as members. The Ombudsman in such schemes is governed by the Articles of Incorporation of the Scheme and is frequently answerable to a council which may or may not include consumer representatives. The members of the scheme are usually required to accept the decisions of the Ombudsman but consumers are not similarly bound.

An example of such a scheme is the Banking Ombudsman Scheme of Britain and the Australian Banking Industry Ombudsman Scheme. Malaysia has its very own model in the The Insurance Mediation Bureau (IMB) and The Banking Mediation Bureau (BMB).

The BMB is established as a company limited by guarantee under section 24 of the Companies Act 1965. The expenses of the BMB are met from annual levies raised from the member banks and financial companies.

The objects of the BMB in relation to redress mechanisms are:

- (a) To receive references in relation to complaints, disputes and claims involving monetary loss made in connection with the provision of

¹⁷ *Banking Services and the Consumer*, a report by the National Consumer Council, Methuen & Co. Ltd., 1983, London, p. 107.

banking services and, specifically, the charging of excessive fees, interest and penalty, misleading advertisements, unauthorised Automated Teller Machine withdrawals, unauthorised use of credit cards and unfair practice of pursuing actions against guarantors, by any Member of the Bureau and to facilitate the satisfactory settlement or withdrawal of such complaints, disputes or claims whether by the making of decisions or by such other means as shall seem expedient including (without limitation) the provision or instruction of counsellors, conciliators, professional advisers or every kind, experts, adjudicators and arbitrators.¹⁸

- (b) To collaborate with the Government or authorities (whether supreme, municipal, local or otherwise) or statutory bodies or any corporations, companies or persons on all matters relating to and affecting the settlement of complaints as referred to in paragraph (a) above.¹⁹

Structurally, the BMB has two bodies, the Board of Directors and the Council. The Board, comprising representatives of the member companies, is responsible for the management and administration of the business and the affairs of the Bureau. The Council consists of not less than five persons, at least two of whom are Board members, one representative from "any registered consumer association specifically approved by the Board (and at present from the Federation of Malaysian Consumer Associations (FOMCA)), one representative from a university in Malaysia and at least one other person nominated by the Board who does not fall into any of the categories mentioned above.²⁰ The main function of the Council is to appoint a Mediator, define the Mediators powers, duties and terms of reference. The Mediator reports to the Council on matters relating to the Mediator's functions and obtains advice from the Council from time to time.

¹⁸ Clause 3(a), Memorandum of Association, Banking Mediation Bureau (MA, BMB).

¹⁹ Clause 3(b) MA, BMB.

The role of the Mediator is to act as an independent counsellor, conciliator, adjudicator or arbitrator in cases referred to him by consumers relating to the matters specified in clause 3(a) of the MA, BMB (cited above). The Mediator is empowered to make awards of up to RM 25000 which are binding on the bank but not the policy holder.

One of the principal weaknesses of such schemes however, is that membership is not compulsory. The BMB for example, was established to investigate and resolve complaints, disputes and claims made against its member companies and hence only banks and other financial institutions which are members of the BMB are under the control and discipline of the Bureau. Not all banks and finance companies are, presently compulsorily required to become members or to remain as members. However, this can be overcome if the regulating authority can bring "pressure" to bear to effect membership by all eligible companies. In the BMB example, all banks, finance companies and merchant banks are members of the Banking Mediation Bureau. Bank Negara ensured the full participation and support of the banking industry for an alternative dispute resolution mechanism, by employing the traditional central bank technique of "moral suasion" whereby it informally induces a voluntary response from the financial system to its policy initiatives.

²⁰ Clause 55(a) MA, BMB.

Alternatively, Bank Negara could have made it a condition of the banks license that they become members. The imposing of conditions for the granting of a new license or, the imposing of new conditions for existing license holders are provided for under BAFIA 1989.²¹

A point to note, is that the BMB currently only provides a resolution of the disputes of individual consumers. It does not address systemic problems. The Memorandum of Association of the BMB gives it sufficient powers to research into any area of disputes relating to the banking industry and to make such recommendations as it deems fit.²² However, these are powers that have yet to be exercised by the BMB. Such powers should be borne in mind when formulating the terms of reference of a possible banking ombudsman.

It may be argued that systemic problems are for the regulating authority to deal with. However, an independent ombudsman or mediator will have sufficient moral authority for his/her recommendations to be seriously taken into consideration by member banks. Where member banks fail without just cause to give effect to the recommendations of the ombudsman, the recommendations can be implemented by the regulating authority.²³

²¹ Sections 6(4) and 9, BAFIA 1989.

²² Clause 3(d) MA, BMB.

²³ In Malaysia the regulating authority, Bank Negara can exercise wide powers under section 126 of BAFIA 1989 which empowers the Bank, or the Minister, to issue guidelines, circulars, or notes, as the Bank or the Minister may consider desirable.

Section 126 of BAFIA 1989 is an extremely important provision and can be a fertile source of consumer protection. If Bank Negara so decides, this provision can be relied upon to extend protection to consumers for all their transactions with the licensed institutions. Unfortunately, the full potential of section 126 is yet to be realised.

III. Evaluating Alternative Dispute Resolution Mechanisms

ADRs though very much touted, must be critically appraised. Often, these mechanisms hand out second-class justice, operate in favour of industry either intentionally or because consumers are unable to identify their statutory or contractual rights and the factors relevant to their position, present their case in a cogent and coherent manner and determine whether they have obtained a reasonable settlement. Especially when justice is privatised through industry ombudsman schemes, systemic problems may be swept under the carpet and corporate compliance minimised.

It is necessary therefore to evolve a set of criteria or requirements for an ideal dispute resolution mechanism, whatever mechanism is eventually adopted.²⁴

Access

The consumer must be able to easily bring a complaint, and this requires:

- Cost: The scheme must be cheap, or ideally, free to the consumer.

²⁴ See Griffin, P. (1990) 'Access to Redress' in National Consumer Affairs Directory (Australia) (1990) *New Directions in Consumer Financial Services*, pp 105-109; Mitchell, J. Ombudsman Schemes for Financial Services in the U.K.: A Consumer View, *Journal of Consumer Studies and Home Economics* (1991) pp 299-306; and Lowe J. and Vass, J. (1991) Dealing with Consumer Complaints, *Consumer Policy Review*, Vol. I No. 1, January 1991. Birds J. and Graham C. (1992) *Complaints Against Insurance Companies* outline independence, openness, accessibility, fairness and effectiveness as key features. Also see National Consumer Council (1993) *Ombudsman Services, Consumers' Views of the Building Societies Ombudsman and the Insurance Ombudsman Bureau*, London: NCC.

- Procedure: The procedure adopted must be simple and in any case, procedural error should not serve to prejudice a claim.
- Evidence: The stringent requirements of court-based rules of evidence must be tempered with realism and the primary focus must be justice.
- comprehensive: It must be possible for the complainant to resolve all aspects of his claim at one forum. For instance, in arbitration, both interest and grievance must be addressed. The scheme adopted must apply to all eligible banks and not be confined to only some members of the banking industry (comprehensive);
- Directly Accessible: The consumer must be able to have direct access and not be required to go through unreasonable delay before being referred to such a scheme. For example, the requirement that a complaint first reach "deadlock" with the senior management of a company before being referred to the scheme, serves to delay access to justice and deny access to those not persistent enough to pursue their claim. Therefore, it is proposed that a specific period of time be introduced for the banks to deal with the complaint after which the dispute be deemed to have reached "deadlock".
- Well-advertised and understood by consumers: There must be sufficient publicity for the scheme, and guidelines for the use of the scheme in simple language must be made readily available.
- Availability: Be available to all consumers and not only to those in the larger urban centres.

Fairness

The consumer must not be shortchanged and the quality of justice meted out must not be second-class.

- Public Accountability: The scheme must be open and a reasoned explanation of the decision must be made public. The decisions need to be published and practice notes must record non-binding precedents.
- Independent: The scheme must be truly independent and not be subverted by industry. Even in a voluntary scheme funded by industry, the officials must be appointed by an independent body and the terms of their appointment and remuneration should not be at the pleasure of the industry. Any governing body must have a majority of independents and consumer representatives.
- Natural Justice: The rules of natural justice must apply and the consumer must have the right to expert opinion and advice before submitting the complaint.

Effectiveness

The scheme must provide redress and to this end:

- Scope: The range of remedies provided must be comprehensive and the financial jurisdiction of the awarding body must be adequate to satisfy the claims submitted to it.

- Speed: The scheme must provide for the speedy resolution of the dispute.

- Address systemic problems: The scheme must not only provide a resolution of the disputes of individual consumers but must also address systemic problems. For this the scheme must be given investigative powers.

- Decisions binding on industry: The decisions handed down must be binding on industry. However, where these schemes are voluntary schemes managed by industry, the consumer's right to reject the award and have recourse to the court must be ensured.

Some ADR schemes have attempted to incorporate consumer representation in their governing councils. This has been rightly welcomed by consumerists. Yet, this consumer representation is not always a positive factor for it may merely be nominal. Unless consumer representation is significant, unless consumer representatives are well-informed and diligent, unless they resist the charm of the corporate purse and do not become seduced by apparent power and influence of their appointments, consumer representation will become a mere window dressing and a detriment to consumer interest.

Conclusion

In most countries the law governing banker-customer relations is not all codified. The relationship is still largely governed by 'custom and usage'. These are frequently inequitable to consumers. Some of these have been clarified by the

courts which have sought to fairly protect the customers interests. However, since the basic relationship between banker and customer is contractual, banks have relied on their superior bargaining power to impose unfair terms and conditions by way of standard form contracts.

Though disputes between customers and banks could in principle be brought before a court, the high costs, delay and other obstacles impede customers from seeking redress in the courts.

Procedures for the resolution of consumer grievances with regards banking services need to be established. A Code of Good Banking Practice, an internal complaints handling procedure in each bank, and an alternative dispute resolution mechanism (by way of a banking ombudsman or mediator) need to be implemented.

We must however remain concerned with improving the official court system. Apart from the dangers of ADRs mentioned earlier, there is also the greater danger that the establishment of alternative or supplementary systems may deflect attention away from the deficiencies of the court system. We must remember that although the primary function of judicial power is to resolve disputes between the immediate litigants, the Courts do have a secondary rule-making function. This the courts achieve, inter alia, by the doctrine of precedent and the power to award injunctive and declaratory relief. If certain classes of individuals, in this instance,

consumers and banking customers in particular, and especially the poorer amongst them, do not have realistic access to the courts, then the body of judge-made rules will not reflect their interest. Judge-made rules will become increasingly distorted, to the detriment of consumers. The judicial system must remain sensitive to the consumer interest and judge-made rules must be consonant with this. The tax-funded legal system must not be monopolised by large corporations and the wealthy. It is also imperative that any additional redress mechanisms that are sought, must neither be mere public relation exercises nor luxurious alternatives for those who already have access to justice, but rather serve as a means of addressing the grievances of those who are currently denied access to justice.