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CONSUMER PROTECTION  
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THE ASIAN EXPERIENCE WITH
CONSUMER PROTECTION LAW
AND REDRESS MECHANISMS

by

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6th International Conference
on Consumer Law
Kuala Lumpur
Malaysia
5 - 7 May 1997

organised by

The Faculty of Law
University of Malaya
Malaysia

and

The Ministry of Domestic Trade
and Consumer Affairs
Malaysia

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A. *Introduction*

Asia comprises a great variety of political and legal systems. These have been going about the business of consumer protection at different speeds, with different degrees of rigour, using a variety of techniques. In many of these countries consumer protection law and redress mechanisms are still very rudimentary, some have made significant progress, and in a few spectacular and novel approaches have been adopted. To attempt generalisations for such a diverse group of countries is a difficult task.

This paper first highlights some salient features of consumer law reform in Asia (Part B). It then focusses on the status of consumer law in Malaysia, where though specific measures for consumer protection have been adopted there exists no comprehensive statute titled Consumer Protection Act (Part C). This is followed by a cursory survey of the statutes titled Consumer Protection Act/Code that have been introduced in several Asian countries (Part D). The paper then deals with the types of consumer redress mechanisms that have been attempted in Asian countries (Part E). The conclusion to the paper emphasises the need for clearly established legal rights as the basis for providing redress to consumers, and the need to ensure that the legal rights and redress mechanisms that are introduced serve the interests of those currently denied access to justice.

I wish to thank Consumers International - Regional Office for Asia and the Pacific (CI-ROAP) for having obtained for me the English translation of the consumer protection statutes of many of the countries covered in this survey.

B. *Some Salient Features of Consumer Protection Law Reform in Asia*

Consumer law, here defined to mean the legal manifestation of the desire to protect the consumer interest, is of relatively new origin in Asia. The consumer is a recently recognised subject in law. In fact, thirty years ago, no statute in any Asian country defined the term "consumer" or included it in any laws. However, though consumer protection law is often regarded as a modern phenomenon, many of what we regard as laws with an emphasis on consumer protection have their origin in much earlier laws. In fact, most countries already had laws on weights and measures, contracts, sale of goods, food and sanitation and such financial services as moneylending, pawnbroking, hire-purchase, banking and insurance. These laws were motivated by three principal considerations:

1. Protect honest traders from their dishonest competitors, the emphasis being on fair trading;
2. Facilitate the development of financial institutions often to the advantage of the colonial powers that ruled these countries; and
3. Provide for a minimum of health and sanitation of the general population.

With increased demand for consumer protection, efforts were made to obtain greater enforcement of these laws and where they were seen to be not particularly helpful to consumers, amendments were sought.

A feature of these earlier laws is that they did not distinguish between different categories of buyers - consumers were treated in the same manner as commercial buyers. A major step was made when provisions were inserted into existing laws to distinguish consumer purchases from those of commercial buyers and to extend greater protection and rights to the former. An example of this is the Sale of Goods Acts of various countries. The Malaysian Sale of Goods Act for instance provides for implied terms as regards quality,

fitness for purpose, and conditions applicable to sale by description or by sample. However, these may be excluded by way of express provisions in the contract of sale and purchase. This was also the case in Hong Kong, until the Sale of Goods Ordinance was amended in July, 1977. The Hong Kong Sale of Goods Ordinance now provides that the implied terms relating to quality, fitness for purpose and the conditions implied in a sale by description or by sample cannot be excluded in the case of a consumer sale.

The focus in the early phases of law reform was still very much the buyer and seller of goods and services. No responsibility to the consumer was imposed on the manufacturer and importer of goods, and, no protection was extended to the user of the goods and services and other affected persons if they were not the buyers or purchasers of the goods and services concerned. It was a considerable period of time before the statutes would begin to remedy the seller-buyer focus and instead deal with the producer-consumer relationship. In Malaysia, for instance, the term consumer first entered the statute books only in 1991 and that by way of an amendment to the Hire-Purchase Act 1967.

In time, the campaign shifted towards obtaining new statutes that focused on specific problems such as trade descriptions, advertising in specific trades (pharmaceuticals, food, financial services, housing etc.) door-to-door sales, distance selling, and safety of particular products (electrical goods, children's products, household goods etc.) Consumers were given added protection in these statutes.

Piecemeal legislation, however, has severe limitations. New problems keep coming to the fore and the law focusing on specific areas is inadequate to deal with the new problems. For instance, legislation specifically crafted to deal with door-to-door sales can not curb malpractices in mail order sales or electronic media sales. In the area of consumer credit for instance, the piecemeal approach focussing on such areas as moneylending, pawnbroking, hire-purchase, etc, has resulted in separate statutes that lack any functional basis, and

distinctions between one type of transaction and another are drawn on the basis of legal abstraction rather than on the basis of commercial reality. More significantly, such piecemeal legislation fail to extend consumer protection to many forms of credit transactions, for example credit and charge cards, instalment payments, and revolving credit and confusion arises as to what law applies to many consumer transactions. Consumer protection in many Asian countries, including Malaysia, Singapore, and Hong Kong is still very much in this phase.

One area of consumer protection in which progress has been particularly slow in coming is the area of product liability. In many countries, it was possible on the basis of contract law to make the seller strictly liable for damage caused by defective products. Liability was for personal injury and death of the buyer, damage to her property and such consequential loss as she may have suffered. However, there was no contractual relationship between the manufacturer and the buyer, and other users of the product. It was therefore not possible for the buyer or other users of the product to sue the manufacturer for breach of contract. Similarly, there was no contractual relationship between the seller and users of the product who were not the buyers. Again, it was not possible for the other users to sue the seller on the basis of contract law.

In some countries, especially those which have inherited the English tort law pertaining to negligence, it is possible for an end-user and a buyer to bring an action against the manufacturer, or indeed any party whose negligence causes personal injury or death or consequential loss. But the law of negligence requires the "fault" of the negligent party to be established and this the injured consumer finds particularly difficult. It was to overcome these particular difficulties that a new product liability law was enacted in the European Community and many other OECD countries.

The novelty of the new product liability laws is essentially two fold. The first is that they extend the protection afforded by the concept of strict liability, already a feature of contract law which governed the buyer-seller relationship, to all users of the goods, i.e. to all consumers. The second is that the liability is not confined to the seller of the goods and services, but is extended also to all those involved in the production and sale of the product. No longer is it necessary for the consumer to rely on the fault based law of negligence to impose liability on the producer. The new product liability laws have not been introduced in the vast majority of Asian countries because of objections from producer interests, though its introduction in Japan in 1994 has served to increase demands for such laws in other countries.

Since 1968 several Asian countries have enacted statutes specifically titled as Consumer Protection Acts. Though the statutes of each of these countries has the same name they each are vastly different in content. Part D of this paper describes some salient features of these statutes and the difference in the approach and content of the law of each of these countries will become apparent. The new genre of statutes have introduced a number of very progressive features. Some of these features may be noted at this juncture:

- (a) Some of these statutes state the rights of consumers as rights that are protected in law - rights such as that for safety, choice, information, fair price, representation and redress.
- (b) They frequently cover the delivery of both consumer goods and services, and some even include the provision of professional services (doctors, dentists, engineers, architects, engineers etc.).
- (c) The statutes vest existing or newly created agencies with rule-making power to enable a swift response to evolving malpractice. In some instances, the rule-making power is vested in the executive branch of the government, but advisory committees comprising both consumer and industry representatives are permitted to formulate recommendations of the regulations to be promulgated.

- (d) Special tribunals with simplified rules of procedure and evidence are created to hear consumer complaints.
- (e) The statutes permit individual consumers to seek redress. Importantly, they confer upon a public officer (such as the Director of Trade Practices, etc. and in some instances social action groups such as consumer organisations, the right to commence litigation on behalf of a consumer or a group of consumers.
- (f) A range of remedies, including rescission, the right to damages, and, injunctive and declaratory relief are provided for. This is in recognition of the fact that the absence of a full, balanced and flexible range of remedies has the effect of emasculating the rights that such statutes seek to confer upon the consumer.
- (g) They provide for the appointment of an official of Government (a Commissioner, Director, etc.) to exercise a range of administrative functions. In at least one instance, i.e. in Sri Lanka, the efficacy of the Commissioners' operations are enhanced by conferring her with powers to enforce directions to and undertakings by manufacturers and traders. Such directions and undertakings may be to and by trade associations (in which case it would be to all traders of that particular class) or individual rogue traders. Breach of a direction or undertaking is an offence under the Act.
- (h) The statutes establish Consumer Protection Funds into which specified fines, allocations by government and donations by private individuals and corporations are to be paid. The funds so established are meant to support consumer education programmes and the activities of consumer organisations.

C. *Consumer Protection Law in Malaysia*

As noted in Part B of this paper, several Asian states have enacted statutes to provide for specific problem areas but are yet to attempt "comprehensive statutes" titled as "Consumer Protection Acts/Codes." Countries in this category include Malaysia, Singapore, Brunei, Pakistan, Bangladesh, Indonesia and Papua-New Guinea. It is not here proposed to describe the situation in each of these countries. This part of the paper focusses only on Malaysia. It highlights the problems that piecemeal legislation pose to the consumer interest.

Like most ex-colonial territories, Malaysia emerged from colonial rule with laws identical in most aspects to that of the colonising country. This was so especially in relation to mercantile law. Sections 3 and 5 of the Civil Law Act 1956 (Revised 1972) provide for the reception of English common law and statutes in areas of mercantile law where there is no Malaysian statute. However, the law to be imported is the law "as would be administered in England in the like case on 7 April 1956 [the date the Act first came into force] if such issue had arisen in England". Unless the Malaysian Parliament enacts new laws or amends those inherited at the time of independence, the English law as at 7 April 1956 will apply.

Two statutes of great significance in consumer purchases are the Contracts Act 1950 (Revised 1974) and the Sale of Goods Act 1957 (Revised 1989); both are part of private law. The roots of both these statutes can be traced to the English 19th century ideal of equal bargaining power between contracting parties and the maxim of freedom of contract. The Contracts Act 1950 (Revised 1974) codified the English common law pertaining to contracts and applies to all contracts including those between producers and consumers. The Malaysian Sale of Goods Act is based on the English Sale of Goods Act 1893. The English Sale of Goods Act 1893 has been superseded by the Sale of Goods Act 1979. The latter Act has itself been amended on several occasions and added protection thereby given to consumers. However, the enhanced rights conferred by the UK Sale of Goods Act 1979 and subsequent amendments to it have not yet been adopted in Malaysia. Hence, for instance, as noted earlier, in

the Malaysian context, the implied terms that the goods match the description, be of merchantable quality, and be fit for their purpose can be excluded by an express term of the contract (section 62).

Malaysian law does not regulate unfair contracts. Exclusion clauses are a feature of almost all consumer contracts. Statutes have now been introduced to govern the contracts of sale of houses developed by private housing developers, to regulate direct selling (door to door sales, multi-level marketing and mail order firms) and hire-purchase. Each of these, to a different degree, regulates the contract of sale involved and in some instances provide significant protection. However, the approach is essentially piecemeal and the protection not uniform.

The principal Act governing trade descriptions and advertising is the Trade Descriptions Act 1972 (Amended 1980). The Act does not apply to immovable property (including houses) and is limited in its application to statements made in the course of a trade or business and does not include statements made by professionals (section 15). It is a penal statute seeking to discourage false and misleading descriptions of goods and services by imposing criminal sanctions. It does not impose a specific duty to provide adequate description of the goods and services provided. Furthermore, it does not provide for the victims of the misdescription to be compensated by the wrongdoer. The critical matter in regulating advertising is to prevent unacceptable material from appearing in the first place, but if it appears regulators must be able to remove it swiftly from the media and consumers and other producers disadvantaged by the breach must be compensated. The Trade Descriptions Act 1972 fails in each of these areas.

However, in the areas of banking and financial services and insurance, the regulating agencies are awarded wide regulatory powers which may be used to regulate advertising, but in practice these powers have not been exercised. Wide powers are also available to administrators in the field of drugs

and pharmaceuticals and housing by private developers. In fact in the case of housing by private developers each advertisement has to be approved by the regulating agency. Wide powers are also accorded the Ministry of Broadcasting and the Ministry of Home Affairs to regulate, by means of the terms of licensing, the operations of media owners. Such administrative and bureaucratic controls, however, tend to be used to deter the publication of politically sensitive matters and obscene matter. Advertisements against the economic interest of consumers fail to obtain the same degree of attention from regulators.

The situation in relation to consumer credit is similar. Consumer credit is governed by the Moneylenders Act 1951 (Revised 1989), the Hire Purchase Act 1967 (Revised 1978), and the Pawnbrokers Act 1972. The existing law lacks any functional basis, and distinctions between one type of transaction and another are drawn on the basis of legal abstraction rather than on the basis of commercial reality.

The law fails to extend consumer protection legislation to many forms of credit including leasing (except under the general provisions regarding bailment in the Contracts Act 1950 (Revised 1974)), credit and charge cards, instalment payments, revolving credit, etc. Moreover, there is uncertainty as to what law applies to many consumer credit transactions. The three statutes contain inconsistent provisions, amongst others, in relation to

- Licensing
- Control of advertising
- Provision of information to consumers, in particular, information pertaining to interest and other charges
- Regulation of exorbitant interest and other charges
- Reopening of contracts considered unfair
- Warning about legal action and the steps to be taken prior to, at the time of, and subsequent to, the issue of warning; and

- Use of the credit-leverage for tie-in sales such as insurance.

The statutes also reveal a lack of consistent policy in relation to sanctions for infringement - in some instances the law provides criminal sanctions and in others offers only civil remedies. Where it does provide criminal sanctions the penalties provided for are inconsistent. The interest of third parties is inadequately provided for and guarantors are not equitably treated. The statutes are not all enforced by the same agency and this has resulted in inconsistent application of the laws.

The law on product safety in Malaysia can be found in several piecemeal legislation dealing with specific products, for example:

- Sale of Drugs Act 1952 and the Control of Drugs and Cosmetics Regulations 1984.
- Electrical Inspectorate Act 1983 and the Electrical Inspectorate Regulations 1984
- Pesticides Act 1974
- Poisons Act 1952 (Revised 1989)
- Radioactive Substances Act 1968.

These laws provide safeguards over the sale and distribution of these products; the appropriate authorities have to approve or register these products after satisfying themselves that they meet certain established standards, while the use of some products may be restricted. However, there exists no general law on products safety providing for the general safety and quality of consumer products.

Malaysia has an effective national body, the Standards and Industrial Research Institute of Malaysia (SIRIM), to do product testing and certification and develop product standards. SIRIM's role is geared more to assisting the manufacturing sector to produce products that meet Malaysian and

international standards. It has no powers to enforce standards. It tests products voluntarily submitted by manufacturers for a fee and sells them its standard marks if they meet the required standards under its Certification Marketing Scheme. It is considered that with these labels, the manufacturers may have an edge over other competitors in Malaysia. SIRIM does not collect accident statistics related to consumer products, or develop mandatory standards for all manufacturers and importers to comply with, or test products before they go on sale.

Malaysia does not have a comprehensive and general statute on product liability. The law on product liability is expressed in the law of contracts, the common law principles of the tort of negligence, and several statutes, the most important of which is the Sale of Goods Act 1957 (Revised 1989). Both common law and statute provide different rights of compensation for loss or damage caused by goods to different classes of people. For a claim based on contractual or statutory liability, only the immediate party to the contract can claim compensation and other affected persons such as the innocent bystander, a friend, or family member who uses or receives the product as a gift has no right to claim. These persons are required to base their claims under the tort of negligence but claims based on tort face almost unsurmountable complexities.

Malaysia does not have any redress mechanism specifically for consumer disputes. However, in common with Hong Kong and Singapore, it has a small claims procedure in the magistrates courts. The insurance industry also maintains a mediation scheme. Both these are dealt with in Part E of this paper.

D. CONSUMER PROTECTION ACTS IN ASIA

1. The Consumer Protection Fundamental Act 1968 of Japan

Since the late 1960s, several Asian countries have enacted statutes titled Consumer Protection Act/Code. Perhaps, the earliest such effort was the Consumer Protection Fundamental Act of Japan which was enacted in 1968.

That Act is merely a directory law clarifying consumer protection policy and specifying the administrative framework necessary to implement that policy. It sets out the need for and the measures to be adopted by government, business and consumers for consumer protection with particular regard to the prevention of risk, weights and measures, standardization, labelling, securing of fair trade and competition, consumer education, consumer representation, testing and inspection and complaints redressal. The Act itself is not empowered with any legal force or penal sanctions. However, about 70 individual laws and a host of local government regulations specifying sanctions and remedies now function under the Act.

Not all of these individual laws were however enacted after the Fundamental Law; many in fact predate the Fundamental Law. Examples of such are:

- Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Anti-Monopoly Law) 1947 (amended 1953),
- Agricultural Chemicals Control Act 1948,
- Consumers Livelihood Cooperative Association Law 1948,
- Industrial Standardization Act 1949,
- Law Concerning the Standardization and Proper Labelling of Agricultural and Forest Products 1950,
- Weights and Measures Law 1951,
- Loans Trust Act 1952,
- Travel Agency Law 1952,
- Nutrition Improvement Act 1952,
- Gas Utility Industry Law 1952,
- Water Pollution and Industrial Waste Water Control Act 1958,
- Pharmaceutical Affairs Law 1960,
- Law Concerning Installment Sales 1961,
- Electrical Appliances Control Law 1961,

- Household Goods Labelling Law 1962,
- Act Against Unjustifiable Premiums and Misleading Representations 1962, and
- Law for the Welfare of the Aged 1963.

However, since the Fundamental Law, there have been several new statutes dealing with a number of important areas of consumer protection:

- Product Safety - Consumer Product Safety Law 1973.
- Credit - Law Concerning Installment Sales 1984.
- Deposit Taking - Law Concerning Contracts for the Deposit of Specific Commodities and the Control of Specific Rights 1986.
- Securities Investment - Law Regulating Securities Investment Adversary Business 1986.
- Food Safety - Special Measures Act Concerning Prevention of Poisonous Substances in Food 1987.
- Mortgage Securities - Law Concerning the Regulation of Mortgage Securities Business 1987.
- Door-to-Door Sales - Law Concerning Door-to-Door Sales, etc. 1988.
- Pyramid Sales - Law Prohibiting Pyramiding 1988.
- Building Lots - Building Lots and Building Transactions Business Law 1988.
- Product Liability - Product Liability Law 1994.

An important feature of the Act is the establishment of a high level Consumer Protection Council chaired by the Prime Minister. The Council which meets yearly specifies the planning and measures necessary for consumer protection on which related Ministries and agencies are to act. It is when the respective Ministries have acted that concrete measures eventuate.

The Consumer Protection Fundamental Law of Japan did not confer justiciable rights to consumers and consumer groups have had to mount a protected campaign for each new law. Consumer law remains piecemeal and uneven in its application.

2. The Consumer Protection Act 1979 of Sri Lanka

The Consumer Protection Act of Sri Lanka came into effect on 1 January 1979. The stated objectives of the Act are not only consumer protection but also the regulation of internal trade, the establishment of fair trade practices, the amendment of the National Prices Commission Law, the repeal of the Licensing of Traders Act and matters connected with or incidental thereto (Long title of the Act).

An important focus of the Act is articles of food, drink or merchandise determined by the Commissioner as "essential to the life of the community" (section 37). In relation to such articles, the Commissioner may determine "schemes of distribution" specifying the places, times, standard, quantity, packaging, labelling, price marking and "any other conditions" as to the manufacture, marketing or sale.

A novel feature of the Act is a general provision as regards misleading or deceptive conduct - "No trader shall, in the course of a trade or business engage in conduct that is misleading or deceptive" (section 18). Another section specifies the particular types of false representation and misleading statements section 19. Contravention of these provisions is an offence, conviction for which attracts a fine and or custodial sentence (section 19).

Though titled as a Consumer Protection Act it also deals with such supply side related matters as:

- Refusal to sell articles (section 11).

- Denial of possession of any article for purposes of trade or the sale of such article subject to any condition (section 12).
- Hoarding (section 13).
- Exclusive dealing except with the written approval of the National Prices Commission (section 20).
- Price discrimination (section 21).
- Monopolisation (section 23).

The Act, however, relies essentially on administrative and bureaucratic controls for achieving its objectives. It creates the Office of Commissioner of Internal Trade and assigns wide powers to the Commissioner. The Commissioner is vested with wide powers to call for documents and any other information from any manufacturer or trader (section 26). The Commissioner is also empowered to authorise any public officer to enter, inspect and search premises; break open any place of storage; seize articles and inspect and take copies of any records required to be kept (section 27). The Act also gives the Minister responsible for Internal Trade special powers to order the forfeiture of all or any of the assets, whether connected to the trade or not, of any person who has contravened any of the provisions of the Act (section 25).

Amongst the novel provisions of the Act is one that confers the Commissioner with powers to issue general directions to manufacturers or traders or special directions to any particular manufacturer or trader in respect of price marking, labelling and packaging of articles or "any other conditions as to the manufacture, marketing, labelling or sale of that article" (section 6(1)). Any manufacturer or trader who fails to comply with any such direction is guilty of an offence under the Act. The Commissioner is in addition given specific powers to enter into binding written agreements as he may deem necessary with any manufacturer, trader or association of manufacturers or traders to provide for price, standards, quantity of production, times and places of sale, and "any other conditions as to the manufacture, marketing, labelling or sale of any article"

(section 10(1)(e)). Failure to comply with such an agreement is also an offence under the Act.

The Commissioner is also specifically empowered to hold an inquiry where a manufacture or sale has been made of an article not conforming to the standards or specifications "determined or deemed to be determined by the Commissioner" and order the manufacturer or trader to pay compensation to the aggrieved party or to replace the article or to refund the amount paid for the article (section 8(4)). Failure to comply is an offence under the Act.

The Commissioner is thus armed with a flexible range of powers which permit for creative, effective and expeditious intervention in the market place to ensure consumer protection and fair trading.

The Act has since 1979 been amended on three occasions - 1980, 1992 and 1995.

The 1980 Amendment to the Act introduced another novel feature - the Consumer Protection Fund. All fines imposed by a court for any offence under the Act, 50% of the proceeds of the sale of any articles forfeited under the Act, grants or donations to the fund by any person or body of persons whether corporate or unincorporate, and any sums of money voted from time to time by Parliament for the purpose of consumer education are paid into the Fund. The Commissioner may pay out of the Fund such sums of money as he considers necessary:

- "(a) for the promotion, assistance and encouragement of consumer organizations and the administration and development of such organizations, and
 - (b) for consumer education and the dissemination of information relating thereto, and for any purpose connected with or incidental to the furtherance of such education."
- (Section 33A(1)-(4) as inserted by section 2 of the Consumer Protection (Amendment) Act, No. 37 of 1980).

The 1992 Amendment increased the penalties provided for in the 1979 Act. The provisions of the 1979 Act applied in the main to articles of "food, drink or merchandise as is, in the opinion of the Commissioner, essential to the life of the community and is so specified by the Commissioner by notification in the Gazette" (section 37). This position remains unchanged despite an amendment to the section by the Amendment Act of 1995 (section 2 of the Consumer Protection (Amendment) Act 1995.).

Despite the three sets of amendments described above, the principal weaknesses of the Act remain. The Act neither creates any private rights which consumers may exercise, nor establishes any new redress mechanism for the resolution of consumer disputes. Consumers have to rely on the Office of the Commissioner for relief. Consumer groups complain that there are not sufficient prosecutions; the few traders who are prosecuted allege selective prosecution.

Furthermore, though the Act addresses both the supply of goods and services, the implied warranty that "the services will be rendered with due care and skill" are confined to a very limited range of services. For the purposes of the aforementioned implied warranty, services includes only those relating to the construction, maintenance, repair, treatment, processing, cleaning, alteration, distribution or transportation of goods. The implied warranty does not extended to other services including professional services.

3. *The Consumer Protection Act 1979 of Thailand*

The Act of Thailand, which came into effect on 4th May 1979, though also entitled Consumer Protection Act, adopts a completely different approach. The Act envisages the creation of a Consumer Protection Board consisting of the Prime Minister as Chairman, the Under-Secretaries of State of Industry, Commerce, Agriculture and Co-operative, the Secretary-General of the Food and Drug Board, and, not more than six qualified members appointed by the Council of Ministers as members (section 9). There was also established the

Office of the Consumer Protection Board, the Director of which is to serve as a member of the Consumer Protection Board (section 9).

The Consumer Protection Board is entrusted with a wide range of functions which include providing the general public with information and education pertaining to consumer related issues, and advising the Council of Ministers on the necessary policies and measures for the protection of consumers (section 10).

The Consumer Protection Board is required to establish two ad hoc committees, to be known as the Committee on Advertisement, and, the Committee on Labels. Each of these Committees is to comprise between seven to thirteen members appointed by the Board. The Board and the ad hoc committees are empowered to hear complaints on all matters considered to be infringing the rights of consumers and in particular about advertisements and labelling.

The Act details the powers of each of the Committees. The Committee on Advertising is given powers to order any advertiser to rectify a statement contained in an advertisement, or change the method of advertisement. The Board is empowered, where necessary, to prohibit the use of certain statements as appeared in the advertisement; to prohibit the advertisement or the use of such method of advertisement; to correct by advertisement the possible misunderstanding of the consumers; and require substantiation of the claims made.

The Committee on Labels has the power to declare goods label-controlled and to regulate the form and content of the labels used on such goods.

The Board also has powers to have goods harmful to consumers to be tested and where necessary to prohibit their sale. The Board is also empowered to prescribe certain businesses as "controlled business" and regulate the form of the receipts of payment issued by traders involved in such a business.

The Consumer Protection Act of Thailand, like that of Sri Lanka, also neither confers any enforceable private rights nor establishes any new redress mechanism. The control that it empowers is essentially administrative and bureaucratic in nature. One progressive feature of the Act, however, is sections 40 and 41 of the Act and these pertain to the role of "any association which has as its object the protection of consumers or opposition against unfair trade competition and whose regulations with respect to the board, members and methods of operation of the association are in accordance with the conditions prescribed in the Ministerial Regulations...". Such an association may file an application to the Board for recognition and, on such recognition being granted, may institute civil and criminal proceedings for the protection of consumers. It can also sue for recovery of damages on behalf of any of its members if it has obtained from that member a power of attorney to do so. The Act protects the right of the member who has entrusted his or her case to the association by providing that the association may not withdraw such an action for damages without the approval of the court.

4. *The Consumer Protection Act 1980 (Revised 1986) of Korea*

The Consumer Protection Act 1980 (Revised 1986) of Korea enumerates broadly cast rights - safety, information, choice, representation, compensation and, consumer education, organisation and participation. State and local governments are required to enact related laws and regulations, establish administrative agencies, formulate and execute requisite policy and support consumer organisations. A National Consumer Protection Board (NCPB) was created with a wide range of functions. A Consumer Dispute Settlement Committee with quasi-judicial powers was established within the NCPB to

resolve consumer disputes; the Committee is mandated to settle cases within 30 days of their submission.

5. *The Consumer Protection Act 1986 of India*

Perhaps the most novel and far reaching Consumer Protection Act in Asia is that enacted in India in 1986. The Act imposes the duty to trade fairly by stipulating five grounds on each of which a complaint may be lodged. The five grounds are:

- (1) An unfair trade practice or a restrictive trade practice has been adopted by any trader;
- (2) The goods are defective;
- (3) The services are deficient;
- (4) The price charged for goods is in excess of that fixed by law or displayed; and
- (5) The goods offered are hazardous to life and safety when used and are in contravention of any existing law (section 2(c)).

The term restrictive trade practice is utilised not in relation to the law on monopolies and restraint of trade, but specifically to mean a trade practice which requires a consumer to obtain goods or services as a condition precedent to obtaining other goods or services (section 2(nn)).

The term "unfair trade practice" is given a general definition:

"... a trade practice which, for the purposes of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice..." (section 2(r)).

This general definition is followed by a detailed list of unfair trade practices but the list is not an exhaustive list and merely serves to indicate the type of trade practices that would be held to be unfair:

- False representation that goods are of a particular standard, quality, quantity, grade, composition, style or model;
- False representation that services are of a particular standard, quality or grade;
- False representation that goods are new;
- False representation that goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits;
- False representation that the seller or supplier has a sponsorship, approval or affiliation;
- False or misleading representation as to the need or usefulness of any goods or services;
- False representation as to warranty or guarantee of performance, or life span of a product without adequate or proper test thereof;
- False representation as to warranty or guarantee of a product and after sales service;
- Misleading price indications;
- False or misleading comparative advertising;
- Bait advertising;
- Offering goods for sale which do not meet stipulated standards; and
- Hoarding, destruction or refusal to sell with the intent of raising the price of those or similar goods or services (section 2(r)).

The Act creates Consumer Protection Councils at the national level and that of each state to promote and protect the rights of the consumer in such matters as safety, quality, choice, representation, education and redress. The Consumer Protection Councils are at each level to comprise the Minister in charge of consumer affairs and such other government and non-government members as may be prescribed (chapter 2, sections 4-8).

In themselves the characteristics of the Act described above are not unique and would not have had the far reaching impact they have wrought had it not been for the unique and highly effective redress mechanism that the Act also provides. This is described in detail in Part E of the paper.

6. *Consumer Protection Law of Mongolia 1991*

The statute of Mongolia restricts the term consumer to mean "an individual buyer or customer who acquires products, work or services with the purpose of providing for his needs" (Note to Article 1). It appears that users other than buyers are not protected. The law deals with aspects of product quality, safety and information, the protection of the economic interest of consumers, and complaints handling about faulty products. It also specifies the penal sanctions that shall apply; the penal sanctions being fines and forfeiture of the products by the state. Though enacted in 1991, the statute provides very rudimentary rights to consumers, and what rights there are provided will depend very much on the willingness of particular agencies of government to grant at their absolute discretion.

The statute is remarkable for its simplicity containing in all only 12 Articles. However, a creative reading of the statute would allow immense power to the organs of state to provide substantial consumer protection, when they decide so to provide. The following provisions which apply to unsafe and harmful products will suffice to establish the point being made.

- Producers and sellers shall identify products that may be harmful to the life and health of humans and the environment by printing warning labels on the containers or packages of those products according to the international standards. (Article 4.2)
- A producer shall set out the requirements for storage, transportation, use and consumption of perishable products or products that may be harmful to the life and health of

humans and/or the environment in the operating instructions or other documents. (Article 4.3)

- It is prohibited to sell or trade in products that may be harmful to the life and health of humans and/or the environment after their expiry date. (Article 4.4)

- If an appropriate specialized agency finds that a product is harmful to the life and health of humans and/or the environment, the authorized central and control organizations shall make a decision to terminate production of the product, to remove it from circulation and to prevent the performance of works and services. (Article 11.3)

In relation to consumer complaints redressal, Article 9 of the Law provides that consumers or their lawful representatives have the right to complain on products (work or services are not mentioned). The seller shall first be asked to remedy the damage, and if unwilling to act without good reason, a claim shall be made with the relevant state control organization. If not accepting the decision of the state control organization the consumer may appeal to a court.

7. *The Consumer Act of the Philippines 1991*

At about the same time that the statutes of Sri Lanka and Thailand were enacted, moves were also underway in the Philippines for its own Consumer Protection Act. The effort was spearheaded by Attorney Zenaida C. Reyes who was both the President of the Consumer Federated Groups of the Philippines (CFGP), and, a member of the Faculty of Law of University of Philippines. Her draft code was presented to government agencies, consumer organizations and business and industry groups. The amended draft code was sponsored in the Philippines Congress in 1984. The dissolution of the Congress in 1986 served to delay its adoption. The Code, then renamed the Consumer Act of the Philippines, was in 1990, responsored in the newly constituted Congress, adopted and obtained Presidential approval and came into effect on 15 July 1992.

The general objective of the Act is to protect the interests of the consumer, promote the consumer's general welfare and to establish standards of conduct for business and industry. More specific objectives enumerated in the Act include:

- Protection of consumers against hazards to health and safety;
- Protection of consumers against deceptive unfair and unconscionable sales acts and practices;
- Provision of information and education to facilitate sound choice and the proper exercise of rights by the consumer;
- Provision of adequate rights and means of redress; and
- Involvement of consumer representatives in the formulation of social and economic policies (Article 2).

The Act covers a very wide range of areas:

- Consumer product quality and safety
- Food, drugs, cosmetics and devices
- Hazardous substances
- Deceptive, unfair and unconscionable sales acts and promises
- Weights and measures
- Consumer product service and warranties
- Price tagging
- Labelling and packaging
- Liability for products and services
- Consumer credit transactions
- Advertising and sales promotions
- Repair and service firms
- Consumer complaints handling.

The approach adopted in the Act is not to create a new agency but rather to strengthen existing agencies to exercise enhanced powers. The Act therefore envisages four main implementing agencies:

(a) *Department of Trade and Industry (DTI)*

The jurisdiction of this department encompasses consumer product quality and safety; deceptive, unfair and unconscionable sales acts or practices; weights and measures (metrication); consumer products and service warranties; price tagging; labelling and packaging; liability for deceptive products and services; service and repair shops; and advertising and sales promotions. New implementing rules and regulations to govern these areas were published in July 1993.

(b) *Department of Agriculture (DA)*

This department plays the same role as the DTI but with reference to agricultural products only. Again new implementing rules and regulations were published in June 1993.

(c) *Department of Health (DOH)*

The manufacture, import and trade in food, drugs, cosmetics and devices, and hazardous substances were already covered by existing rules and regulations. These were brought under the Act.

(d) *Department of Education, Culture and Sports (DECS)*

Consumer education, already integrated in the school curriculum, administered by the DECS was also brought under the Act.

The Act also envisages a significant role for the Central Bank, and the Securities and Exchange Commission which regulate the provision of credit - the former regulates consumer credit transactions involving banks and financial intermediaries, and the latter those involving finance companies.

The six agencies (i.e. the DTI, DA, DOH, DECS, the Central Bank, and the Securities and Exchange Commission) have been enjoined to exercise a range of functions:

- Exercise the powers and duties provided to them under existing laws or as modified by new rules and regulations;
- Formulate and implement consumer programmes consonant with their own respective charters and which embody standards set by the Act;
- Establish procedures for meaningful participation of consumers in the development and review of department rules, policies and programmes; and
- Render advisory services and make available to consumer organizations and to the general public, technical and legal assistance.

Clearly, an Act that envisages six agencies to undertake a range of activities will have to provide for a co-ordinating and monitoring body. This the Act does by creating a National Consumer Affairs Council (NCAC). The NCAC has a representative from each of the four principal government agencies (DTI, DA, DOH and DECS), four consumer representatives, and two representatives from business organizations. The NCAC's functions include monitoring, evaluating, rationalising and co-ordinating the efforts of the implementing agencies; recommending new policies and legislation, and undertaking a continuing education and information campaign. To facilitate the NCAC's functions, the implementing agencies are each required to furnish to the NCAC copies of their respective programmes and activities.

The Act creates a host of enforceable private rights. It also establishes a system of mediation and arbitration for the redress of disputes between individual consumers and traders. This is dealt with in Part E of this paper.

8. *The Consumer Protection Act 1991 of Mauritius*

The Mauritian Consumer Protection Act 1991, on the other hand, did not aim to be a comprehensive statute for consumer protection but merely to complement existing laws. Its focus is on product safety and quality. The main provision is that no person shall supply any goods which suffer from any fault with regard to any prescribed quality, potency, purity or standard, or in the case of any machinery or motor vehicle, with regard to the quality, nature or manner of its performance. No special agency or redress mechanism was established. Moreover, grocery, crops, water, food, animal feed, chemical fertilizer, aircraft, drugs or medicine, tobacco and goods manufactured in the Export Processing Zone are excluded from the ambit of the Act.

9. *The Law on the Protection of Consumer Rights and Interests 1993 of the People's Republic of China*

In 1993 the People's Republic of China adopted a Law on the Protection of Consumer Rights and Interests. That Law, inter alia, enumerates in general terms consumer rights and the obligations of business dealers and enjoins state organs to punish the criminal offences of business dealers who violate legal consumer rights and interests. It declares that consumer disputes with business dealers over consumer rights and interests can be settled through the following approaches:

- (1) Consultation and conciliation with the business dealers;
- (2) Appeal to consumers' associations for mediation;
- (3) Complaint to the administrative departments concerned;

- (4) Arbitration in arbitration organs in accordance with any agreement with business dealers; and
- (5) Legal proceedings before people's courts (Article 34).

No new agency or redress mechanism was provided for but the People's Courts are required to adopt measures to make it convenient for consumers to take legal proceedings and accept, hear and try cases of dispute over consumer rights and interest in conformity with the "Civil Procedural Law of the People's Republic of China" (Article 30). The Act has not been sufficiently long in operation to meaningfully evaluate its efficacy.

10. *The Consumer Protection Act 1994 of Taiwan*

The Consumer Protection Act 1994 of Taiwan contains a statement of consumers' rights and benefits under four headings - protection for health and safety, model contract, special sale, and full and correct information. It provides two mechanisms for the resolution of consumer disputes - one through Committees for Mediation of Consumer Disputes established by local government, and another via proceedings in the courts but through modified rules to the Code of Civil Procedure. Consumer organisations are permitted to initiate class actions but only with the consent of a government appointed consumer protection officer. No criminal sanctions are provided for violations of the Act.

E. Redress Mechanisms

The creation of new legal rights is a meaningless gesture unless the recipients are realistically in a position to enforce them when necessary. Substantive rights depend on procedural rights. The legal systems in most Asian countries have not been able to cope adequately with the task of enforcement.

Obstacles to Redress in the Courts

The obstacles in the way of consumers seeking redress before Asian courts are in general similar to that in most countries of the world. For convenience, these may be summarised under three headings - costs, self-generating imbalances, and personal barriers to access.

The most visible obstacle confronting the individual's access to the judicial system is the high cost of litigation. No Asian country maintains a comprehensive legal aid scheme and this effectively excludes the poor and even the moderate income earner from the courts. The rule common to courts in the English mould (Pakistan, India, Bangladesh, Sri Lanka, Malaysia, Singapore, Brunei and Hong Kong) that costs follow 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-to-party costs, which are often substantially lower than the actual solicitor-client costs. Hence, even the successful litigant is nearly always out of pocket.

In addition to the direct expenses of litigation, the intending litigant also faces indirect costs. The proceedings are frequently slow and in the countries of South Asia (India, Pakistan, Bangladesh and Sri Lanka) notoriously so. A case often takes a very long time to be heard; and requires several court attendances by the consumer during working hours. All such indirect costs add to the calculus. The cost factor, therefore, builds into the judicial systems a discrimination in favour of large claims where the chances of winning are high.

Most consumer disputes involve a corporation or other institutional adversary well-versed with the legal system and capable of employing lawyers specialising in the required area of law. Mass processing of claims, and the relative insignificance of each claim, gives institutional litigants 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 consumer litigants as only cases which the institutions are confident of winning go to trial. The system favours the "repeat player", as distinct from the first-timer. The unfortunate fact is that the more "developed" the legal and judicial system the more marked is this inequitable situation.

Many consumers allow their legitimate claims to be defeated by default because they are unaware of their rights. It is generally assumed that the crucial factor for this is ignorance. However, also relevant are the psychological barriers to be overcome. Consumers are frequently awed by the court room atmosphere, by the formality of legal proceedings, arcane legal language and by overbearing legal personnel. For the uninitiated, even the judges' and advocates' robes can be intimidating. Personal barriers are more likely to be a disincentive to the poor, but are shared to varying degrees by all people in infrequent contact with the legal system.

Facilitating Consumer Redress

The methods employed in Asian countries to overcome the problems experienced by consumers in dealing with the legal system 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 substitutes.

Access to the Court

Measures adopted or proposed to ensure access to the courts have taken a variety of forms. Many of these reforms are not designed to cater for consumer cases only. They are part of the general concern to make the courts more efficient and accessible to all citizens, and consumers are also beneficiaries of the changes. 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 proceedings;

- The role of the judge;
- The representation of the parties; and
- The right to appeal.

In Malaysia, Singapore and Hong Kong, these changes were provided for in smaller claims through what came to be known as small claims procedures (or courts).

A variety of ways have also been employed in different countries to handle the cost factor - legal aid for the needy, and a contingent fee system. The contingent fee system is prohibited by law in some jurisdictions (notably Malaysia, Singapore, Brunei and Hong Kong) but the practice is not uncommon. The cost has been further lowered in some instances by many routine functions performed by lawyers being performed by para-legal professionals at substantially reduced costs to the consumer.

In some countries, public interest litigation has been provided for. These are private proceedings brought in the public interest and, in the case of consumer claims, for relief by way of an injunction to restrain the defendant from engaging in certain activity, or for a declaration that the defendant's conduct is illegal, or even a writ of mandamus ordering a public official to discharge a duty or perform a function according to law. The plaintiff will no doubt gain from the proceedings, but the aim is that all those affected will benefit.

This paper will now focus on a few developments of special reference to consumer access to justice.

In many countries, including Malaysia and Singapore, a major obstacle to public interest litigation is the requirement that the plaintiff must have standing to sue. It is required that the plaintiff have a direct and personal interest in the matter to be litigated. In an increasing number of countries, however, the

law on standing has been substantially modified by legislation. Consumer associations have been given the required standing and are permitted to bring public interest litigation, or even attempt substituted actions on behalf of a consumer. The Thai and Indian Consumer Protection Acts may be cited as examples.

The Consumer Protection Act 1979 of Thailand, provides that any association which has as its object, the protection of consumers, or opposition against unfair trade competition, and whose regulations with respect to the board, members and methods of operation are in accordance with the conditions prescribed in Ministerial Regulations, may file application for its recognition, so that the association has the right and power to institute legal proceedings (section 41). In the legal proceedings for the infringement of the consumer's rights, the association, which has been recognised by the Board (under section 40), has the right to institute civil and criminal proceedings or bring any legal proceedings for the protection of consumers and shall have the power to sue for the recovery of damages on behalf of its member if it has obtained the power of attorney to claim damages from its member (section 41).

The Consumer Protection Act 1986 of India, provides that a complaint regarding any goods sold or delivered, or any service provided, may be filed with the relevant consumer redressal agencies amongst others by "any recognised consumer association, whether the consumer to whom the goods sold or delivered or service provided is a member of such association or not" (section 12(b)). The Explanatory Note to this section stipulates that for the purpose of the section, "recognised consumer association means any voluntary consumer association registered with the Companies 1956, or any other law for the time being in force".

In some Asian countries a system of class actions has been provided for. A class action is a legal procedure to enable many persons to combine to recover damages or other compensation in the one action. An example of such is India which in its Consumer Protection Act 1986 provides that a complaint, in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum, by " ...[amongst others]... one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested;..." (section 12).

Class actions can serve many functions. In the context of consumer redress, they permit the resolution of disputes where each member's stake is so small that there is no incentive for each member to litigate separately. By consolidating the individual claims, class actions raise the amount at stake to a level which outweighs the risks involved in the court action. It also eases the psychological barriers to litigation. Importantly, class actions bring to the courts cases that the courts would otherwise not have an opportunity to rule on, and thus serve as a deterrent to those producers who make substantial gains by defrauding large numbers of consumers, each by a little, but in total, by a substantial sum.

Court Substitutes

Court substitutes, or to use the term now very much in vogue, Alternative Dispute Resolution (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. For convenience, they are here considered under four categories: statute-based tribunals, arbitration, statutory ombudsman scheme and voluntary ombudsman scheme.

Statute-based Tribunal

The distinguishing feature is that such tribunals are governed by statute and in most cases, the matters dealt with by these tribunals are required by statute to be referred to it. There is usually no recourse to the court in such schemes and the decisions are binding on both parties. Frequently, no appeal against the decisions is possible except by way of prerogative writ. This, in itself, has been considered a weakness. Consequently, variations of these schemes provide for a hierarchy of tribunals to which appeals lie. Commonly, disputes are heard and determined by a mixture of experts and lay representatives; the lay representatives may be required to be "capable of representing the consumer interest".

The advantages of such schemes are that they address the cost factor, provide for simplified procedures and generally involve less formal proceedings. They have been held to be more speedy avenues for redress but where appeals are provided for, this has not always been the case.

Perhaps the most revolutionary of such schemes is the consumer disputes redressal bodies established under the Consumer Protection Act 1986 of India (Chapter III, Sections 9-27). The Act established a consumer disputes redressal agency at the district, state and national levels parallel to but separate from the hierarchy of the courts that already existed. The composition of these agencies (known as the District Forum, State Commission and the National Commission), the evidentiary and procedural rules that govern them and the remedies that they can provide ensure the efficacy of these agencies.

The redressal agencies comprise three persons at the district and state level and five persons at the national level. The President at each level is to be a judge or person who has been a judge (or in the case of the District Forum a person qualified to be a judge). The President is intended to ensure that the decisions arrived at are judicious. The other members of the redressal agencies, two each at the district and state level but four at the national level, are

to be persons of ability, integrity and standing, and have adequate knowledge or experience of, or shown capacity in dealing with, problems, relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman. A member of the redressal agency is permitted to hold office for a term of five years or up to 65 years of age in the case of the District Forum and State Commission, and 70 years in the case of the National Commission, whichever is earlier, and is not eligible for reappointment. The remuneration, terms and conditions of the members of the district forum and state commission are determined by the State Governments and those of the National Commission by the Central Government.

Criticism that the redressal agencies were stacked with political appointees and inappropriate persons led to an amendment of the Act. The members are now chosen at each level by a selection committee. For the District Forum and State Commissions the selection committee comprises the Secretaries of the Department of Law and the Department responsible for consumer affairs and the President of the State Commission. In the case of the National Commission a Judge of the Supreme Court of India nominated by the Chief Justice of India substitutes for the President of the State Commission.

The District Forum can entertain complaints where the value of the goods or services and the compensation claimed does not exceed Rupees 500,000. The State Commissions can entertain complaints the value of which exceed Rupees 500,000 but are less than Rupees 2,000,000. Claims in excess of Rupees 2,000,000 have to be referred to the National Commission. The State Commission also serves as a supervisory agency and has the power to call for the records and pass appropriate orders in any dispute pending or decided by the District Forum. The State Commission also serves as an appeal agency for decisions at the District Forum but the appeal has to be ordinarily lodged within thirty days of a decision being made by the District Forum. The National Commission similarly acts as an appeal agency for decisions of the State Commission.

An important feature of the redress established by the Indian Consumer Protection Act 1986 is the very liberal rules as to standing. An aggrieved consumer may herself bring an action or may seek the assistance of any recognised consumer association. The rules also permit representative and class actions, and actions by state and central governments.

The Act does not specify the manner in which a complaint needs to be lodged with the redressal agency and in practice any manner of complaint (be it a letter or even verbal complaint) is acted on by the District Forum.

The complaint is then referred by the District Forum to the opposite party directing that other party to give his version of the case within a period of thirty days. If the complaint is denied or refuted or there is no response from the other party, the court will proceed to deal with the complaint. The District Forum is entitled to require where necessary tests to be conducted on goods complained of at approved laboratories at the expense of the complainant. The parties are then given an opportunity to be heard. Every proceeding before the District Forum is deemed to be a judicial proceeding.

The District Forum has the same powers as are vested in a Civil Court and these include the power to summon and enforce attendance and examine any defendant or witness, the discovery and production of evidence, and, the reception of affidavit evidence. The District Forum is also empowered to award a wide range of remedies:

- Repair, replacement or return of the price paid for the goods;
- Compensation for any loss or injury suffered by negligence of the party complained of;
- Removal of the defect or deficiencies of the service provided;

- Injunctions to discontinue the unfair or restrictive trade practice, to withdraw and not offer hazardous goods for sale;
- Adequate costs to the parties.

The State and National Commissions exercise the same powers as that of the District Forum for complaints within their jurisdiction.

These newly created bodies, however, remain under the ultimate supervision of the courts, since any person aggrieved by an order made by the National Commission may appeal against such an order to the Supreme Court (section 22).

Arbitration

This involves the reference of a dispute to an impartial third party, usually an expert in the field, chosen by the parties to the dispute, who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard. Arbitration can be by mutual consent and the parties can choose and agree on the procedure to be observed in arbitration. Arbitration in consumer disputes often arises as a result of an arbitration clause in contracts (eg. insurance contracts) providing for compulsory arbitration in case of a dispute as to rights or liabilities under such a contract. Arbitration can also be provided for by way of statute. Unless there is a statute that requires arbitration in any particular circumstance, the parties cannot be forced to agree that disputes will be referred to arbitration, but once arbitration is agreed upon, a relevant dispute can be arbitrated even if one of the parties refuses to co-operate.

In consumer contracts, the arbitration process is often presented as a condition precedent to litigation in the courts. Compulsory arbitration clauses come in various forms, the more odious ones even attempt to oust the jurisdiction of the courts. An important aspect is the scope of the arbitration

provided for, and it is necessary to distinguish between *interest* and *grievance* arbitration. Interest arbitration involves settlement of terms of a contract as contrasted with grievance arbitration, which concerns the violation or interpretation of an existing contract. Consumer complaints usually involve grievance arbitration.

Arbitration procedures are meant to be less formal than those of the courts. A case may be determined on the basis of written evidence alone or might involve a hearing. Most arbitration schemes for consumer disputes are free to the consumer and exclude legal representation. The determination of the arbitrator is binding on both parties and only a very limited right of appeal is available, by way of prerogative writ.

In many countries, private organisations or even an association of arbitrators exist. In Malaysia, there is a national organisation of arbitrators known as the Malaysian Institute of Arbitrators. Such associations of arbitrators often produce Codes of Ethics and Procedural Standards for use and guidance of arbitrators. Such codes will be enriched by a meaningful participation of consumer representatives.

Statutory Ombudsman

The Statutory Ombudsman does not act in a judicial capacity and usually has wide powers not only to weigh the merits of each party's case but also to investigate the matter. The decision arrived at is not purely on legal points but also on "good industry practice" and the need for change. Proceedings are usually informal and can include oral as well as written submissions. Legal representation is not usual and the service is often free to consumers. The consumer is not required to refer the case to the Ombudsman and awards are not binding on the consumer, though they often are on the other party.

The 1991 Consumer Act of the Philippines introduces a permutation of Statutory Ombudsman incorporating aspects of arbitration. The government departments concerned i.e. the Department of Trade and Industry, Department of Health, and the Department of Agriculture may each, within their own area of competence, commence an investigation upon petition or upon letter-complaint from any consumer and upon finding of a "*prima facie* violation of any rule or regulation promulgated under its authority, it may *motu proprio* or upon verified complaint, commence formal action against any person who appears responsible therefor" (Article 159). The same Article enjoins the department to "establish procedures for systematically logging in, investigating and responding to consumer complaints ... assuring as far as practicable simple and easy access on the part of the consumer to seek redress for his grievances". The concerned Department Secretaries are required to appoint consumer arbitration officers (Article 110), each college-trained and with a minimum of three years experience in the field of consumer protection (Article 161), to mediate, conciliate, hear and adjudicate all consumer complaints (Article 162). The Consumer Arbitration Officers are required to "first and foremost ensure that the contending parties come to a settlement of the case" and "in the event that a settlement has not been effected the officer may proceed to formally investigate and decide the case" (Article 163). A wide range of penalties may be imposed even if not requested for in the complaint. These include cease and desist orders, assurance to recall, replace repair or refund the money value, restitution or rescission of the contract, and the imposition of fines between Pesos 500 to 300,000 depending on the gravity of the offence (Article 164). Any order, not interlocutory, becomes final and executory unless appealed to the relevant Department Secretary within 30 days. The decision of the Department Secretary becomes final after 15 days from receipt of it unless a petition for *certiorari* is filed with the Court of Appeal (Articles 165 and 166).

Voluntary Ombudsman Scheme

Voluntary Ombudsman Schemes are not governed by statute but are usually voluntary schemes set up as incorporated bodies 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 Insurance Ombudsman Bureau of Britain, which has been emulated in several other countries, including Malaysia.

The Malaysian scheme, known as the The Insurance Mediation Bureau (IMB) is established as a company limited by a guarantee under section 24 of the Companies Act 1965. The expenses of the IMB are met from annual levies raised from the member insurance companies. Structurally, the IMB 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 Bureau. The Council consists of not more than five persons, two of whom are Board members, one representative from the Federation of Malaysian Consumers Associations (FOMCA), one representative from a university in Malaysia and one other person nominated by the Board who does not fall into any of the categories mentioned above. The main function of the Council is to appoint a Mediator, define the Mediator's 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.

The role of the Mediator is to act as an independent counsellor, conciliator, adjudicator or arbitrator in cases referred to him by insurance policy holders. The mediator is empowered to make awards of up to RM100,000 which are binding on the insurance company but not the policy holder.

One weakness of such schemes is that membership is not compulsory but this can be overcome if the regulating authority can bring "pressure" to bear to effect membership by all eligible companies. In the Malaysian case, all insurance companies, both general and life, are members of the Insurance Mediation Bureau. A similar scheme has in 1997 been introduced for the banking and financial institutions sector.

F. Conclusion

As noted in the introduction, consumer protection law in much of Asia is still very rudimentary. Some countries have however made significant progress and a few have adopted spectacular and novel approaches.

Consumer protection is a necessary component of free market economies if the benefits of economic growth are to be shared by the bulk of the population. An essential feature of consumer protection is the creation of legal rights and appropriate redress mechanisms for the enforcement of these rights.

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

Reform of the court system to ensure access must continue. 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, amongst other ways by the doctrine of precedent and the power to award injunctive and declaratory relief. If certain classes of individuals, in this instance, consumers and especially the poorest amongst them, do not have realistic access to the Courts, then the body of 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.

Though ADR mechanisms are very much touted, they 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 ombudsman schemes, systemic problems may be swept under the carpet and corporate compliance minimised.

Some of the privatised schemes have attempted to incorporate consumer representation in their governing councils. This has been rightly welcomed by consumerists. Yet, even 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 the apparent power and influence of their appointments, consumer representation will become mere window dressing and a detriment to consumer interest.

Finally, and most importantly, efforts to obtain substantive and procedural rights must be directed to obtaining it for those who do not have, or are unable to exercise, these rights. These efforts must not be hijacked by those who already enjoy a disproportionate share of rights and the state's resources. Additional redress mechanisms must be sought not only as a luxurious alternative for those who already have access to justice but for those who are currently denied access to justice.