

# **HOUSING TRIBUNALS: COMPARATIVE ANALYSIS OF THE PRACTICES IN PENINSULAR MALAYSIA, SABAH AND SARAWAK**

**Azlinor Sufian\***

*International Islamic University Malaysia*

## **ABSTRACT**

As a developing country, Malaysia can be proud of its structured mechanism in relation to land, housing and property. The mechanism will support the growth of these areas. This is also related to the confidence the public has in property developers. In Malaysia there are three housing tribunals that are applicable in three different jurisdictions, namely, the Tribunal for Homebuyers' Claim in Peninsular Malaysia and the Tribunal for Housing Purchasers' Claim in Sabah and Sarawak that came into force in 2002, 2007 and 2010, respectively. The purpose of the Tribunal is to minimise the burden that purchasers have to face in order to claim remedies from developers. It is the objective of this article to provide a comparative analysis of the provisions, rules and procedures of the Tribunal for Homebuyers' Claim in Peninsular Malaysia and the Tribunals for Housing Purchasers' Claim in Sabah and Sarawak. It is hoped that this comparison will yield improvements in the laws and regulations governing all three tribunals in Malaysia.

**Keywords:** Malaysia, Housing Tribunal, developers, Courts

## **1. INTRODUCTION**

Prior to the establishment of housing tribunals, purchasers in Malaysia had to bring their action against housing developers before the ordinary courts. The case was brought before the Small Claims Court, the Magistrates' Court, the Sessions Court or the High Court depending on the sum of the claim or the type of remedy sought by the purchaser. In practice, the conventional process of litigation in the ordinary courts would normally subject purchasers to great expenditures of time and money.<sup>1</sup> The first housing tribunal created in Malaysia was the Tribunal for Homebuyers' Claim, applicable only in Peninsular Malaysia. It was established

---

\* Corresponding author: Azlinor Sufian, Ahmad Ibrahim Kulliyah of Laws (AIKOL), International Islamic University Malaysia, P.O. Box 10, 50728 Kuala Lumpur, Malaysia. E-mail: [sazlinor@iiu.edu.my](mailto:sazlinor@iiu.edu.my)

<sup>1</sup> Prior to the establishment of Tribunal, a problem of backlog of cases in Malaysian courts was considered as very common. This is one of the reasons why there was an urgent need to establish a tribunal specifically to cater the claims from house purchasers against developers. Until 28<sup>th</sup> February 2011, there are 4849 pending cases at High Court (Civil), 127 at High Court (Criminal), 2201 at Sessions Court (Civil), 808 at Sessions Court (Criminal), 192 in Magistrates' Court (Civil) and 1590 at Magistrates Court (Criminal). See further in Joint Press Release by the Chief Justice of Malaysia and the President of the Malaysian Bar in Jurisk! (2011). Special Edition (March & June) Vol 7 Issue 1. Kuala Lumpur: Risk Management Quarterly, A Publication of Professional Indemnity Insurance Committee, Bar Council, pp. 6-7.

under the Housing Development (Control and Licensing) Act of 1966 (hereinafter referred to as “the HDA”). As for the Borneo States of Sabah and Sarawak, the housing tribunals known as the “Tribunals for Housing Purchasers’ Claim” were established at later dates through the enforcement of amendments that had been made to the Sabah Housing Development (Control and Licensing) Enactment, 1978 (hereafter referred to as the “Sabah Enactment”) and to the Sarawak Housing Developers (Control and Licensing) Ordinance of 1993 (hereafter referred to as the “Sarawak Ordinance”), respectively. The aim of this article is to analyse the overall operational process of the first housing tribunal under the HDA in order to examine its efficiency in assisting purchasers to obtain redress against developers. In this article, when necessary, comparisons will be made between the tribunals that are currently enforced in these three jurisdictions, based on the recent amendments to the HDA in 2007, the amendment to the Sabah Enactment in 2005 and the amendment to the Sarawak Ordinance in 2009.

The first housing tribunal in Malaysia, the Tribunal for Homebuyers’ Claim, was established under section 16B in 2002 via the amendments to the HDA<sup>2</sup> that came into effect on 1 December 2002. The tribunal has been in operation for more than eight years, and throughout the period, a few amendments to the HDA and its regulations have been made in order to improve the tribunal. Experiences of other countries in regard to protection of home buyers have been taken into account in the establishment of the tribunal. This is demonstrated by the Hansard which states that the Tribunal for Homebuyers’ Claim is established for the purpose of minimising the burden that purchasers have to face in order to claim remedies from developers. The tribunal is meant to provide an avenue for purchasers to claim against developers with minimum expense.<sup>3</sup> Based on the same premise, the Sabah Enactment and Sarawak Ordinance have been amended to provide for the formation of their own housing tribunal known as the “Tribunal for Housing Purchasers’ Claim”. There are, however, few provisions under these three different statutes (HDA, Sabah Enactment and Sarawak Ordinance) which are different from one another.

The provisions of the HDA relating to the Tribunal for Homebuyers’ Claim shall be taken as basis for analysing the operation of all three housing tribunals in Malaysia. Furthermore, the HDA provides specific regulations for the housing tribunal that is the Housing Development (Tribunal for Homebuyers’ Claims (Regulations) 2002. The Minister through his power in section 16A1 of HDA 2002 (Amendments) has come out with regulations that provide details on the working of the tribunal, organisation of the tribunal, the responsibilities of members of the tribunal, procedures of the tribunal, forms or instruments to be used in proceedings of the tribunal, the fees and the manner for collecting and disbursing such fees and other relevant procedures. In contrast, both the Sabah Enactment and Sarawak Ordinance do not have the same regulations as the HDA. Nevertheless section 19K of the Sabah Enactment provides for procedure of the Tribunal for Housing Purchasers’ Claim.

---

<sup>2</sup> (Act 118) Amendment A1142).

<sup>3</sup> Hansard, Second and Third Reading, Malaysian House of Senate, 28th. November, 2001.

## 2. PRACTICES OF THE HOUSING TRIBUNALS

Practices of the housing tribunals involve various aspects including the jurisdiction to hear the claim, pecuniary jurisdiction, out of court's settlement, parties in the action, types of remedy, counter-claim action, sittings of tribunal, criminal penalty and enforcement of award. There were many loopholes of the provisions of the HDA and regulations when it was first introduced. The deficiencies were non-clarity of the date of commencement of the operation of the tribunal, limited pecuniary jurisdiction, limited period for purchasers to file complaints, non ability on purchaser to claim against other persons involved in the construction other than the developer, limited remedy for purchasers, availability of counter claim procedure for developers, limited provision for representative action, limited sittings of the tribunal, purchasers' risk of criminal penalty and problems to enforce the award (Azlinor Sufian, 2007).

### 2.1. *Jurisdiction to Hear the Claim*

Section 16N(2) of the HDA in 2002 (Amendment) does not clearly provide that the operation of tribunal would have a retrospective effect. Section 16N(2) of the HDA 2002 Amendment provides that:

*“The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months (12) months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.”*

Consequently, one of the issues arose as regard to the jurisdiction of the tribunal to hear the claim was whether the tribunal has a jurisdiction or not to hear the claim based on the sale and purchase agreement executed prior to the establishment of the tribunal.

The jurisdiction of the Tribunal was challenged in the case of *Puncakdana Sdn. Bhd. v Tribunal for Housebuyers' Claims and Another Application* [2003] 4 MLJ 9. This is the application for judicial review<sup>4</sup> filed by the developer, Puncak Dana Sdn. Bhd. The court had pronounced awards in favour of purchasers upon failures of the defendant-developers in making payment of late assessment damages. The developers argued that the Tribunal had no jurisdiction to hear the claims that were based on the sale and purchase agreements which were executed prior to 1 December 2002 that is the date of the coming into force of the Tribunal. The Tribunal pronounced that the developers were held liable to pay late assesment damages to the buyers due to the late delivery of vacant possessions. Upon pronouncement of the said award, the developers made the present application for an order of *certiorari* to quash

<sup>4</sup> Section 16 AC of the HDA 2002 Amendment states that decision of the Tribunal to be final. Hence the parties who dissatisfied with the award given by the Tribunal may refer to the High Court for review of the case. *Malaysian Land Properties Sdn. Bhd v Chan Cicilia & Tribunal for Homebuyers' Claim* ([http://202.75.7.131/kl/attachments/198\\_R1-25-330-2010.pdf](http://202.75.7.131/kl/attachments/198_R1-25-330-2010.pdf)) (Retrived on 14 November 2011) Example of case from Sabah that was brought for judicial review is *CL Pertama Development SB v The Tribunal For Home Buyer/Housing Purchaser Claims at Kota Kinabalu & 2 ORS* [JRK.25-17-2010-1].

the awards of the tribunal. The court ruled that section 16N(2) could not be read to confer retrospective jurisdiction. The Court said: if the Parliament intended it to have a retrospective effect, it must have said so in clear words in section 16N(2). The court also was of the view that the section could not be interpreted to operate retrospectively because of the existence of section 16AD which provides non-compliance with the award of the tribunal as a criminal offence. This means that to allow the tribunal to act retrospectively, will affect the substantive rights of the parties as this would be against the principle under criminal law where it shall not have a retrospective effect. Similarly this right is also guaranteed by Article 7 of the Federal Constitution. The court has refused to apply the rule of statutory interpretation including the purposive approach to interpret the meaning of section 16N(2). The decision in this case has created uneasiness among the house purchasers as well as the consumer associations.

The jurisdiction of the tribunal has been questioned again in *Westcourt Corporation Sdn. Bhd. v Tan Geok Moi and Anor* (No. R1-25-58 Year 2003) when a purchaser, Tan Geok Moi sued the developer, Westcourt Corporation Sdn Bhd for liquidated damages for late delivery of vacant possession. The tribunal ordered the developer to pay RM13,926.74 to the purchaser. Subsequently, the developer referred the case to the High Court for review seeking an order *certiori* to quash the awards of the tribunal and also a declaration that the awards given were invalid, *ultra vires*, null and void and of no consequence, that the tribunal had no jurisdiction to hear and determine the claims lodged by the claimants/homebuyers thereof and an order prohibiting the tribunal from hearing such claims. The High Court held that the tribunal had no jurisdiction to hear such claims because the sale and purchase agreement was entered into before 1 December 2002 and gave such orders as prayed for by the developer. The high court judge in this case shared the same view with the high court judge in the case of Puncakdana above.

However, the Court of Appeal in *Tribunal for Homebuyers Claim v Westcourt Corporation Sdn. Bhd.* [2004] 3 MLJ 17 held that the HDA being a piece of social legislation, its provisions must be interpreted using a liberal and purposive approach. Thus, reference must be made to the intention of the Parliament when interpreting such provisions, that is to provide for a speedy mechanism for purchasers to lodge their grievances against developers. The court also held that section 16AD does not penalise a licensed housing developer for a breach *simpliciter* of a sale and purchase agreement. The penalty comes into play only when there is a failure to comply with or satisfy an award handed down by the tribunal after adjudicating a claim based on a breach of a sale and purchase agreement irrespective of its date. And since the tribunal only began to function from the appointed date the question of an award handed down before that date and the application of section 16AD for failure to comply does not arise. In otherwords, the retrospective effect of the tribunal to cover the claims based on the sale and purchase agreement executed prior to 1 December 2002 could not be regarded as effecting retrospective effect on criminal offence. The developer lodged a final appeal to the Federal Court where the Federal Court concurred with the decision of the Court of Appeal. In order to avoid further dispute on the jurisdiction of tribunal to hear the claim, amendments to section 16N(2) to the HDA has been made in 2007 in which it provides a clear period within which a claim against a developer maybe filed before the Tribunal.

If compared with the provision in the Sabah Enactment, section 16N(2) of the HDA provides a better and wider right to a purchaser. Section 19M(8) of Sabah Enactment clearly mentions that the Tribunal shall have jurisdiction to hear a claim which arose prior to the setting up of the Tribunal and confined to the claim related to any loss suffered or any matter related to interests derived from the sale and purchase agreement (as provided in section 19N of the same Enactment). Apart from that, section 19N(3) of the Enactment also provides that a purchaser may file a claim against a developer even before the issuance of the certificate of fitness, irrespective whether a sale and purchase agreement is terminated or not. On the other hand, the HDA only provides that a claim may only be filed after the issuance of the certificate of fitness. If it is to be done before the issuance of the certificate of fitness, it can be made only after termination of the sale and purchase agreement. This means that under the HDA, in cases of abandoned housing projects, a purchaser may be able to file a suit against a developer (where there would be clear situation certificate of fitness is not to be issued) only after the application to terminate the sale and purchase agreement is made. Thus, it will cause delay to a purchaser to enforce his right to file the case before the Tribunal. On the other hand, the time limit to file the claim, under section 17I(3) the Sarawak Ordinance, is very limited which can only be filed at any time not later than twelve months from the date of the issuance of the occupation permit or before the expiry date of the defect liability period as set out in the sale and purchase agreement (whichever is later). Thus, it is proposed that Peninsular Malaysia and Sarawak may consider to have the same provisions as Sabah on this point.

## ***2.2. Pecuniary Jurisdiction***

Initially a pecuniary jurisdiction of the Tribunal as stated in section 16M(1) of the HDA 2002 (Amendment) was Ringgit Malaysia twenty five thousand. (RM25,000/about 5,815 Euro) only. This limited jurisdiction has created many problems to purchasers because there could be many claims exceeding Ringgit Malaysia twenty five thousands (RM25,000). Purchaser could still have to file their claims before the ordinary court (for instance, claims for late assessment damages). Thus, in section 16M of the recent amendment, a pecuniary jurisdiction of the Tribunal was extended to Ringgit Malaysia fifty thousand (RM50,000/about 11,632 Euro). This means that the pecuniary jurisdiction of the Tribunal is higher than the magistrate's court or Consumer Tribunal established under the Consumer Protection Act 1999 which is only Ringgit Malaysia twenty five thousand (RM25,000/about 5,816 Euro). (Section 90 of Subordinate Courts Act 1948 and Section 98(1) of Consumer Protection Act 1999). The increase of this monetary limit is to empower purchasers to fight for their rights through the Tribunal. Nevertheless, the pecuniary limit of the Tribunal may not commensurate with the present market value of houses in Malaysia. In general, probably only purchasers of houses under the categories of low, low-medium and medium costs are suitable to claim against developers to the Tribunal. Purchasers of high cost houses may not be able to make a claim for liquidated damages for late delivery or for defective materials as the amount of claims exceed the pecuniary limit of the Tribunal.

In contrast with section 19N(1) of the Sabah Enactment, the Tribunal in Sabah has jurisdiction to hear a claim where the amount in dispute or value of the subject matter does not exceed the amount to be determined by the Minister, pending which, the amount shall be Ringgit Malaysia forty thousand (RM40,000/about 9,306 Euro). It is argued that the pecuniary jurisdiction of the

Housing Tribunal in Sabah is not limited to Ringgit Malaysia of forty thousand (RM40,000) only because under section 19N(1) the minister has a power to determine any amount of claim which may be filed before the tribunal. This wide power given to the Minister enables him to enlarge the jurisdiction of the tribunal, when necessary. If the developer has a counter claim against the purchaser, the same principle will apply, as provided in section 19N(2).

In the case of Sarawak, the Sarawak Ordinance (under the proviso of section 171(1)) provides that the tribunal can make an award to house purchasers up to the amount of Ringgit Malaysia forty thousand (RM40,000) only, and further under the proviso of section 17J(4) of the same Ordinance, to a maximum of Ringgit Malaysia eighty thousand only (RM80,000/about 18,548 Euro), subject to mutual agreement and ministerial approval. This means that the tribunal may have pecuniary jurisdiction of up to RM80,000 but subject to the consent of the Minister and mutual agreement. The power of the Minister to extend the pecuniary jurisdiction of the tribunal is subjected to two conditions, namely, (i) the extension of pecuniary jurisdiction shall not exceed Ringgit Malaysia eighty thousand (RM80,000) and (ii) such an extension may be made when there is a mutual agreement. However, the meaning of 'mutual agreement' in the provision is not clear. Does it mean that the agreement is between the Minister and house purchasers or between the parties to the claim i.e. the house purchaser and developer? (It is argued that the plausible meaning of 'mutual agreement' should be between 'the developer and the purchaser'). To overcome such ambiguity, it is proposed that the provision in the Sabah Enactment is to be adopted. Under the Sabah Enactment, the Minister is given wide power as regards to the tribunal's pecuniary jurisdiction. As opposed to section 16O(1) of the HDA in Peninsular, even though the Tribunal has a pecuniary jurisdiction beyond Ringgit Malaysia fifty thousands (RM50,000), the tribunal can only exercise its jurisdiction to hear a case of a claim of more than RM50,000 after the parties have agreed to such amount of claim. Consequently, the purchaser will not be able to claim for more than RM50,000 if the developer disagrees, because a Minister is not given any discretion under the HDA to extend the pecuniary jurisdiction of the tribunal, unlike in the Sabah Enactment's provision.

### **2.3. Out of Court's Settlement**

For cases of out of court's settlement, the HDA provides that, if appropriate, the Tribunal will assist the parties to negotiate an agreed settlement in relation to a claim. If parties reach an agreement, the Tribunal shall approve and record the settlement. Consequently, the settlement shall then take effect as if it were an award of the Tribunal (section 16T). A written report must be made by the Tribunal when the agreed settlement is reached and the agreed settlement shall be final and binding on all parties to the proceedings (section 16AB). The award of the Tribunal shall be deemed an order of a Magistrate's Court or Sessions Court (as the case may be) and be enforced accordingly by any party to the proceedings (section 16AC).

The process of negotiation between the disputing parties may be attended by an expert appointed by the Tribunal or attended by officer of the Tribunal itself. It depends on the subject matter of dispute. If for instance the claim made by a purchaser against a developer is related to defective materials of the house, the negotiation process may be attended by an architect or engineer. However, a representative from the Tribunal only assists the parties to the dispute to reach the settlement. If the negotiation fails, the case will be heard before the Tribunal.

Comparatively, the alternate dispute resolution used in the Tribunal for Housing Purchasers Claim in Sabah is mediation (section 190 of Sabah Enactment). This is similar to the position under Sarawak Ordinance (section 17L). Nevertheless, the provision on mediation in Sabah Enactment is more detail if compared with the Sarawak Ordinance.

It is therefore observed that even though the HDA uses negotiation, and Sabah Enactment and Sarawak Ordinance employ mediation as out of court's settlement, the negotiator or mediator (as the case may be), is the member of the tribunal. These provisions are quite confusing because negotiation and mediation is different. Negotiation creates a structure to encourage and facilitate direct negotiation between parties to a dispute without the intervention of a third party (Brown et al., 1998) whereas mediation requires the existence of a mediator. Thus, the provisions of the Sabah Enactment and Sarawak Ordinance on mediation are consistent with the principle and practice of mediation as compared to the HDA which provides for negotiation but yet require the presence of a member of the Tribunal to assist the dispute resolution between the parties.

#### **2.4. Parties in the Action**

The Tribunal's jurisdiction is only to hear a claim against a developer and does not extend to other parties in the construction industry, for instance, an architect, engineer or a contractor. Section 16N(2) of the HDA 2002 Amendment states that the jurisdiction of the Tribunal shall be limited to a claim based on a cause of action arising from a sale and purchase agreement entered into between the homebuyer and the licensed housing developer. It means that the Tribunal only provides a mechanism for a purchaser to file a claim against a developer whereby in certain circumstances a purchaser may need to file a claim against other parties other than a developer. For instance, in a claim for defective workmanship and materials of houses, consumers may have a cause of actions not only against the developer but also against the design and construction team. Thus, if purchasers want to take civil action against other parties mentioned above, they have to file the claim in the ordinary court. The corresponding provision is available in Sabah Enactment and Sarawak Ordinance in sections 19N(3) and 17J(2) respectively.

Besides, no representative action is allowed to be filed before the Tribunals as the HDA provides that only a homebuyer (which includes a person who has subsequently purchased a housing accommodation from the first purchaser of the housing accommodation) is allowed to lodge a claim before the Tribunal. The HDA does allow any consumer association or any non-governmental organisation, for instance Housebuyers Association, Consumer Association of Penang (commonly known as CAP) and Federation of Malaya Consumer Association (commonly known as FOMCA) to represent a purchaser. Therefore, regardless of any type of claim, it is only the purchaser who has the *locus standi* to file a claim before the Tribunal.<sup>5</sup>

---

<sup>5</sup> Issue of *locus standi* has also been raised before the Tribunal by respondents-developers. They argued that since purchasers have assigned their rights on the property to the financier through the execution of the deed of absolute assignment, purchasers would have no right to initiate the action against them before the Tribunal. The Federal Court's decision in *Philleoallied Bank (M) Bhd. v Bupinder Singh all Avtar Singh & Anor* [2002] 2 MLJ 513 has made it difficult for purchasers to initiate their own action because sometimes financiers refuse to cooperate and do not want to lend their names to the suits against the developer. See this comment



Whilst this position is consistent with the Rules of High Court 1980 which do not provide an avenue for a representative action in any civil suit in the Malaysian courts, the HDA being a “social legislation” should be interpreted liberally and thus a representative action on behalf of the purchaser be allowed in a claim before the tribunal.

### 2.5. *Types of Remedy*

A specific remedy is provided under the HDA for a purchaser who files his case before the Tribunal. Under section 16M of the HDA 2002 (Amendment), the remedy awarded by the Tribunal is confined to pecuniary loss or damage of a consequential nature. According to section 16Y (3), the remedy does not extend to damages for non-pecuniary loss or a claim arising from personal injury or death (section 16N (4)). The remedies under the HDA are considered limited compared to civil suits in the civil courts where a purchaser (plaintiff) is entitled to claim for both liquidated and un-liquidated damages as available under the law of contract. The corresponding provision (as in the HDA) is provided in Sabah Enactment and Sarawak Ordinance under sections 19P(4) and 17J(4) respectively. The author is of the view that as a statute enacted for consumer protection, the Tribunal should be given a wider power to award the types of remedy as given by the civil courts.

### 2.6. *Counter-claim Action*

Section 16M (2) and (3) of the HDA 2002 (Amendment) does not allow a housing developer to lodge a claim with the Tribunal, except as a counter claim to the claim lodged by the homebuyer. This means that even if a developer is not allowed to initiate claim/s against a purchaser before the Tribunal, a developer is still able to file a counter claim against the claim/s initiated by a purchaser. Similar provisions are available in section 19K(h) and 19N(2) of Sabah Enactment and section 17I(2) of Sarawak Ordinance. Consequently, it may happen that through the counter claims procedure, a developer may succeed in his action against a purchaser. Undoubtedly, the provision which allows a developer to file a counter claim against a purchaser will put the purchaser at risk. This provision arguably will defeat the purpose of establishment of the Tribunal that is to protect the house buyers.

### 2.7. *Sittings of the Tribunal*

Before the amendment to the HDA in 2002, the Tribunal was only sitting in Kuala Lumpur. Purchasers from other states would have to file their case and have their proceedings in Kuala Lumpur. This caused difficulty to purchasers residing outside Kuala Lumpur attending the

---

in Theivanai Amarthalingham, The Housing Development (Control and Licensing)(Amendment) Act, 2002: A Consumers' Perspective. A Conference on the Housing Development (Control and Licensing)(Amendment) 2002, Lexis-Nexis Butterworth, Hyatt Regency, Subang, Selangor, 25<sup>th</sup> July. Nevertheless this grey area is settled by the inclusion of the new section 22C to the HDA 2002 (Amendment) and the insertion of clause 7 of both Schedules G and H of the HD Regulations which states that the purchaser shall be entitled on his own volition to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against the vendor or any other person in respect of any matter arising out of the sale and purchase agreement. However even though this clause would be the answer to the developers' argument on the question of *locus standi*, the phrase “unless a contrary intention” is considered as a loophole to the Regulations. This is because if there is any express agreement, assignment or charge between the Purchaser and the Financier that expressly required their written consent, this requirement must be complied with. Thus, purchasers would have to resort to their financiers before proceeding with any action including a claim before the Tribunal.



proceedings. Some purchasers might have spent more money in attending matters before the Tribunal in Kuala Lumpur compared to the amount of their claim against developers. The situation is much easier now. At present the sittings of the Tribunal are conducted at various states in Peninsular Malaysia covering three zones: northern, southern and eastern. The Chairman is given full discretion to exercise his power in the Act to determine the proper time and place for a proceeding to be held. The Sabah Enactment and Sarawak Ordinance also have the same provision. The provision is considered very suitable for Sabah and Sarawak since the two states lack physical infrastructure compared to Peninsular Malaysia. The purchasers in Sabah or Sarawak will have easy access to the Tribunal for Housing Purchasers' Claim if the sittings are carried out at many places in the state respectively. This will indirectly encourage them to claim for their rights.

### **2.8. Criminal Penalty**

All the three housing statutes provide that a purchaser may be subjected to criminal penalty. The Secretary to the Tribunal shall send a copy of the award made by the Tribunal to the Magistrate's Court having jurisdiction in the place to which the award relates or in the place where the award was made and the Court shall cause the copy to be recorded (section 16AC(2) of the HDA). This award shall be deemed to be an order of a Magistrate's Court. Criminal penalty shall be imposed on any person who fails to comply with an award made by the Tribunal within the specified period. Section 16AD of the HDA 2002 Amendment provides that any person who fails to comply with an award made by the Tribunal within the period specified commits an offence and shall on conviction be liable to a fine not exceeding Ringgit Malaysia five thousands ringgit (RM5,000/1,160 Euro) or to an imprisonment for a term not exceeding two (2) years or to both. As for a continuing offence, the offender shall in addition to the above penalties, be liable to a fine not exceeding one thousand ringgit (RM1,000) for each day or part of a day during which the offence continues after conviction. Corresponding provisions can be found in the statutes of Sabah and Sarawak. In practice, the Tribunal will give fourteen (14) days for the party to comply with the award. If at the expiry of fourteen (14) days, a party against whom any order has been passed respectively still fails to comply with the order contained in the award, the other party may report this non-compliance to the Tribunal. Consequently, the Tribunal may proceed with an order providing for a criminal penalty. This means that in a case where a developer files a counter claim a purchaser and his claim is allowed, the purchaser may also be subject to a criminal penalty. Being a consumer oriented statute, section 16AD seems to be quite inappropriate. As far as criminal penalty in the form of imprisonment is concerned, and since the commencement of the Tribunals under the HDA, Sabah Enactment and Sarawak Ordinance respectively, no cases of imprisonment on either the developer or purchaser were reported.

### **2.9. Enforcement of Award**

All the three housing statutes provide that the decision or award pronounced by the Tribunal is final. The provisions of the award must be complied with by the party against whom an award has been given. The award of the tribunal shall be deemed an order of a Magistrate's Court or Session's Court and be enforced by any party to the proceeding. Non-compliance with the award within the prescribed period will enable the party on whom award has been

given in his favour, to make a report before the tribunal for the purpose of initiating an action for prosecution or a committal proceeding before a court. However for the enforcement of an award of the Tribunal, all the three statutes have no provision allowing the Tribunal to enforce the award. The enforcement of award therefore has to be initiated by the party on whom the decision is given in his favour. This is because the Tribunal has no power to enforce its own award. If an award has been given in favour of a homebuyer, the buyer himself would have to go to the ordinary court for execution of the order through a writ of seizure and sale<sup>6</sup> or specific performance<sup>7</sup> or garnishee proceeding<sup>8</sup> depending on the forms of order awarded by the Tribunal. The execution of award before the ordinary courts will usually entail with complexity of procedures, delay and cost. Up to 30 June 2011, 278 developers have failed to comply with the award handed down by the Tribunal. As a consequence, the developers are put in the “List of Blacklisted Developer for Non-Compliance with the Award Pronounced by the Tribunal” in the website of Ministry of Housing and Local Government (Peninsular Malaysia) (Ministry of Housing and Local Government, 2011) However, similar information is not available for Sabah and Sarawak.

### 3. NUMBERS AND TYPES OF CLAIM

The records of the Ministry (only for Peninsular Malaysia) shows that there are 30,618 cases filed before the tribunal from 2003 until May 2011 (Table 1). The cases involve claims on non-issuance of strata title, maintenance and management of the strata building, late delivery of vacant possession, payment of late assesment damages, non-issuance or delay in issuance

**Table 1:** Claims at Tribunal for Homebuyers

| Year | No. Of Cases                      |
|------|-----------------------------------|
| 2003 | 3554                              |
| 2004 | 6524                              |
| 2005 | 5624                              |
| 2006 | 3821                              |
| 2007 | 3299                              |
| 2008 | 2465                              |
| 2009 | 1990                              |
| 2010 | 1747                              |
| 2011 | 1594 (Until 31 <sup>st</sup> May) |

<sup>6</sup> This mode of execution is possible if the order is related to the payment of money. This may include awards mentioned in section 16Y(2)(a)(b)(d)(f) and (g) of the HDA 2002 (Amendment). The procedure for this execution method is prescribed in Order 32 of the Subordinate Court Rules, 1980.

<sup>7</sup> The application for specific performance is possible for the award under 16Y(2) (c) and (e) of the HDA 2002 (Amendment). An application must be made to the High Court because according to section 69(b) of the Subordinate Courts Act 1948, the lower court has no jurisdiction to issue the order. The application is made through originating summons. The law on specific performance is provided in Chapter II of Specific Relief Act 1950.

<sup>8</sup> The procedure for garnishee proceedings is available in Order 33 of the Subordinate Court Rules 1980.

of certificate of fitness for occupation, abandoned housing projects, shoddy workmanship and defective houses, non adherence to building plan and incomplete infrastructure within the housing projects. As for Sarawak, the biggest complaints brought before the Tribunal are on late delivery of vacant possession. (Sarawak Government, 2011)

#### 4. CONCLUSIONS AND RECOMMENDATIONS

There are some improvements that can be made to the HDA in Peninsular Malaysia. The above discussions show that there are certain provisions in the Sabah Enactment or Sarawak Ordinance that are better than the HDA. For example, the time limit for filing a case. The time limit under the Sabah Enactment is much longer. This is to give a better protection for house buyers by extending the period within which they may file a claim before the Tribunal. Another provision of Sabah Enactment and Sarawak Ordinance that may be taken as an example for the HDA is on the alternate dispute resolution. The Sabah Enactment and Sarawak Ordinance provide a better provision on 'mediation' in housing dispute.

As for the pecuniary jurisdiction of Tribunal, the provision in the Sarawak Ordinance is preferred because it has higher monetary jurisdiction that is Ringgit Malaysia forty thousands (RM40,000), and by the order of Minister, it can be raised to Ringgit Malaysia eighty thousands (RM80,000). Thus, the provision in the HDA may be considered for amendment on this point. This is because if the Tribunal for House Purchasers' Claim has a higher pecuniary jurisdiction, it will encourage more purchasers to make a claim and indirectly cause developers to be more responsible. However Sabah Enactment and Sarawak Ordinance has its own weaknesses: there are no rules to specifically regulate the practices and procedures for the Tribunal for Housing Purchasers' Claim, as available under the HDA.

Finally, it is without doubt that the Tribunal of Homebuyers' Claim enforced in Peninsular Malaysia and the Tribunal for Housing Purchasers' Claim of Sabah and Sarawak have given avenue for purchasers to make claims against developers easily, faster and more cost effective. However in order to further strengthen the consumers' right and protection, the enforcement of award of the tribunal need to be improved. This is because there are many cases where awards given in favour of the purchaser has not been complied with. Peninsular Malaysia, Sabah and Sarawak should learn from one another in improving its housing law, in particular relating to the protection of house purchasers. Recently, Parliament has tabled a Bill to amend the HDA which provides important provisions connected to the problem of abandoned housing project, among others. The Bill also include requiring a deposit of three per cent of the cost of the project by the developer, completion of the house before selling them to the buyer, and the prosecution on the developer under the Penal Code for failing to complete a project. It is still premature to state whether similar amendments will be made to the Sabah Enactment and Sarawak Ordinance. However it would be better for Sabah and Sarawak to follow the provisions of the Bill tabled before the Parliament in order to give better legal protections to house purchasers in the states.

## REFERENCES

- Azlinor Sufian (2007) *Tribunal Tuntutan Pembeli Rumah: Satu Mekanisma Penyelesaian Pertikaian. Siri Perkembangan Undang-Undang di Malaysia, Pentadbiran Keadilan Atikel Terpilih*, 2007. Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Brown, Scott, Christine Cervenak, and David Fairman. (1998). *Alternative Dispute Resolution. Practitioner's Guide*. Washington DC: Centre for Democracy and Governance, Bureau for Global Programs, Field Support, and Research, U.S. Agency for International Development.
- Consumer Protection Act 1999 of Malaysia.
- Hansard (2001) Second and Third Reading. 28<sup>th</sup> November. Malaysian House of Senate.
- Housing Developer (Control and Licensing) Ordinance 1993 of Sarawak.
- Housing Development (Control and Licensing) Act, 1966 of Peninsular Malaysia.
- Housing Development (Control and Licensing) Enactment 1978 of Sabah.
- <http://www.mysarawak.org/2011/05/14/late-delivery-of-houses-tops-complaints-%E2%80%93-tribunal/> (retrieved on 24<sup>th</sup> April 2012)
- Jurisk! (2011). Special Edition (March & June) Vol 7 Issue 1. Kuala Lumpur: Risk Management Quarterly, A Publication of Professional Indemnity Insurance Committee, Bar Council.
- Ministry of Housing and Local Government, 2011
- Puncakdana Sdn. Bhd. v Tribunal for Housebuyers' Claims and Another Application [2003] 4 MLJ 9
- Sarawak Government, 2011
- Subordinates Court Act 1948 of Malaysia (Revised 1972)
- Tribunal for Homebuyers Claim v Westcourt Corporation Sdn. Bhd. [2004] 3 MLJ 17
- Westcourt Corporation Sdn. Bhd. v Tan Geok Moi and Anor (No. R1-25-58 Year 2003)