SMALL CLAIMS PROCESS: SOME REFLECTIONS

I. INTRODUCTION

CONSUMERS and traders alike are waiting in keen anticipation for the introduction of the Small Claims Tribunal. It has been sometime now since the announcement was made that such a tribunal will be set up in Singapore.[1] It is understood that a Bill achieving this purpose is being finalised and will be presented before Parliament in due course. Whilst we await the tribunal to take on the force of life, it may not be inappropriate to outline some of its expected features and to comment on them.[2] This article will take the following form. Part II discusses small claims procedures in Australia, New Zealand, United Kingdom, United States and Hongkong briefly enumerating some of the more controversial features which this article focusses on. These include the jurisdiction of the small claims tribunal or court,[3] status of claimants, availability of legal representation, nature of hearing (whether private or public) and the related question of publicity given to the proceedings and orders made, and finally, the relationship between the small claims tribunal or court and the existing court system. Part III then describes the expected features of the proposed small claims tribunal in Singapore. Part IV presents more in-depth discussion on some of the features mentioned above. Concluding remarks then follow.

II. BRIEF SURVEY OF SMALL CLAIMS PROCEDURES IN AUSTRALIA, NEW ZEALAND, UNITED KINGDOM, UNITED STATES AND HONG KONG.

This brief survey enumerates the key features of the small claims processes in Australia, New Zealand, United Kingdom, United States and Hong Kong. As a comparative exercise, it seeks to impart to the reader a sense of the possibilities that exist in deriving a framework for the hearing and adjudication of small claims. It underscores the point that there is no one universally accepted way. Rather, any legislature, in enacting a statute on the Small Claims process, should, knowing of

[1] See the Straits Times on 25 February 1983. Suggestions that such a tribunal should be set up in Singapore were made as far back as 1970. See. for example New Nation, 20 March 1976.

[2] I am not dealing in mere guesswork as I outline some of those features. The Consumers' Association of Singapore has been lobbying for the setting up of such a tribunal since 1976. (See 1 March 1976 issue of the "Consumer Bulletin", published by the Consumers' Association of Singapore (CASE)). Since then, there have been many opportunities for CASE officials to put forward its proposals as to how it feels the tribunals should function (see for example, Straits Times on 24 May 1976 and 19 May 1983). It is understood that the legislative draftsman has taken into consideration CASE's proposals, and, in the light of the experience gained by similar tribunals in other countries, has drafted the Bill. It should, however, be realised that when the tribunal finally materialises, it may not bear some of the features discussed in this article.

[3] The terminology used differs from country to country.

the various alternatives and philosophy undergirding each, choose a solution best suited to the country's particular needs. The coverage also acts as a useful springboard into Part III which discusses some of the more controversial features of the proposed small claims tribunal in Singapore. It should, however, be emphasised that this summary is not intended to be comprehensive.

1. *Australia*[4]

In Australia, small claims courts or tribunals have been established in all the States and Territories except Tasmania.[5] The tribunals fall into two distinctly separate types: in four states, separate tribunals handling small claims have been set up,[6] whilst in the fifth[7] and the two territories, special additional jurisdiction with simplified procedures have been conferred on existing courts. In the jurisdictions where separate tribunals exist, the legislation follows a parallel pattern, and the following regime prevails.[8] The tribunal has jurisdiction to hear 'small claims', not exceeding a specified amount.[9] The claims must arise out of a 'contract for the supply of goods or the provision of services' by a 'trader' to a 'consumer'.[10] The tribunal is the exclusive forum for claims which fall within the definition of 'small claims'.[11] Each of the four states provides that a party shall have the conduct of his own proceedings, and that representation by an agent, including a qualified legal practitioner, is possible only with the leave of the tribunal.[12] Corporate bodies may, however, be represented by an

4 A useful text to consult is Goldring and Maher, *Consumer Protection Law in Australia* (1979) 279-298.

5 As Australia has a federal system of government, the legislature of each state and territory enacts its own laws. Under the Constitution, the Parliament of the Commonwealth is empowered to legislate only with respect to specific subject-matter enumerated in various sections of the Constitution, particularly ss. 51 and 52. Except in the highly unlikely event that all States were to refer to the Commonwealth Parliament the power to make laws with respect to the protection of consumers, the Commonwealth has no power to legislate on these matters. There are therefore significant differences between the law relating to consumer protection in the six states and two Territories. The six states are New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. The two territories are the Australian Capital Territory and Northern Territory.

6 Queensland, New South Wales, Victoria and Western Australia.

7 South Australia.

8 The relevant Acts are Queensland's Small Claims Tribunals Act 1973-5, Victoria's Small Claims Tribunals Act 1974-5, Western Australia's Small Claims Tribunals Act 1974-5 and New South Wales' Consumer Claims Tribunal Act 1974. The Queensland Act, which is the earliest, is reviewed in K.E. Lindgren (1973) 1 Aust. Bus. L. Rev. 337; the Victorian Act in J.N. Turner 'The Victorian Small Claims Tribunal's (1975) 2 Monash L. Rev. 125.

9 In New South Wales, the term used is 'consumer claims'. See s. 17 of the Act. As an illustrative comparison, the amount in Queensland is ASIOOO.

10 These terms are defined. See, for example, s. 4(1) of the Queensland Act.

11 In Queensland and Victoria, the definition is such that only 'consumers' may bring claims against 'traders'. The tenor of the section indicates legislature's recognition of the need to protect the ordinary man in the street as the terms 'consumers' and 'traders' are narrowly and widely defined respectively. In Victoria, for example, the term 'consumers' excludes corporations and, in most circumstances, businesses or firms.

12 When the agent is not legally qualified the consent of all the parties concerned it not required. The tribunal exercises discretion in approving such representation. However, before permitting any party to have legal representation, the tribunal must ensure not only the consent of the other parties to the proceedings but it must also be satisfied that these other parties will not be prejudiced thereby. A distinction is therefore made between legal and lay representation.

agent who satisfies the tribunal that he has personal knowledge of the matters giving rise to the claim. The tribunal has no power to make any order as to costs. Its proceedings are held in private; certain particulars may, however, be published by direction of the Minister. Whilst the proceedings in all the tribunals are informal, differences exist amongst the jurisdictions as to the law to be applied. In New South Wales and Queensland, the tribunals may make orders which are 'fair and equitable' in the circumstances. As there is no corresponding provision in Victoria and Western Australia, the courts there accord greater regard to the general law. Subject to the tribunal's power to rehear cases, their decisions are basically final.[13]

As mentioned above, the basic approach taken in South Australia and the two territories, Australian Capital Territory and Northern Territory, differ from the other states in that legislation in these three jurisdictions create special rules and procedures for the handling of small claims within the framework of established court systems.[14] Noteworthy features are as follows. In South Australia, a party may not be represented by a legal practitioner unless either all parties agree and the court is satisfied that the representation of one party will not unfairly disadvantage any other party, or the proceedings have been commenced by the Commissioner for Prices and Consumer Affairs.[15] However, if a court is satisfied that a party to the proceedings cannot properly conduct the proceedings without legal assistance, it may allow assistance by a person who is not legally qualified, and who does not appear for a fee or reward, provided that the other party or parties will not be disadvantaged.[16] There is provision for appeals. In the two territories, proceedings are held in public, unless the court orders otherwise.[17] The court is required to keep a record of the proceedings sufficient to enable preparation of a report to the Supreme Court.[18] Extensive provisions exist for appeal to the Supreme Court,[19] by its leave, but the Court is required to refuse leave unless it is satisfied that the decision of the lower court was wrong in law or was unfair to the applicant.[20] Legal representation is permitted; any other unpaid agent may appear by leave of the court. The usual provision is made for

13 Under the Australian Acts, a rehearing may be granted by the tribunal in two cases: first, where a party has not complied with an order, and secondly, where the tribunal has decided a case in the absence of one of the parties. As regards the limited avenue of appeals, the Australian Acts provide: "No writ of certiorari, prohibition, or other prerogative writ shall issue, and no declaratory judgement shall be given... unless the court before which such writ or judgement is sought is satisfied that the tribunal had or has no jurisdiction conferred by this Act to take proceedings or that there has occurred therein a denial of natural justice. ..." It was held in *R.* v. *Small Claims Tribunal* [1975] V.R. 831 that this section disallows the grant of a certiorari based on a tribunal's error in law.

14 In South Australia the local and District Criminal Courts Act (No. 2) 1974 introduced a Part VIIA dealing with small claims into the principal Act. In the two territorities, the relevant statutes are the Small Claims Ordinance 1974 (ACT) and the Small Claims Ordinance 1974 (NT).

15 S. 152(b) of the relevant Act. *Supra,* note 14.

16 S. 152(b)(2).

17 S. 18(1) of the relevant Ordinances. *Supra,* note 14.

18 S.28.

19 Part III of each Ordinance.

20 ACT s. 33(2); NT s. 32(2).

an agent or employee to represent a corporation.[21] A party may choose whether or not to bring a claim under the Small Claims legislation, as he may also proceed under the normal court processes.

2. *New Zealand*[22]

Small Claims tribunals in New Zealand constitute special divisions of selected Magistrates' Courts.[23] In this respect, the general approach is similar to that taken in the Australian state of South Australia and the two Australian territorities. A magistrate can therefore be appointed to act as referee, and may in fact hold the two positions concurrently.[24] There is no limitation to the status of parties appearing before the court.[25] The court has a relatively wide jurisdiction in that it can hear actions in contract as well as in quasi contract and claims for a declaration that a person is not obliged to pay an amount of money demanded from him.[26] The dispute need not arise out of a contract for the supply of goods or of services.[27] Additionally, the court also has a limited jurisdiction in tort cases.[28] There is, however, an important and far-reaching limitation to the court's jurisdiction; it has no power to hear small claims for a debt or for a liquidated demand, unless the claimant either satisfies the Registrar that "the claim, or part thereof, is in dispute" or establishes that "the claim is in the nature of a counter claim by a respondent against a claimant."[29] Proceedings are heard in private in keeping with their informal nature. The Act provides that "no party shall appear by representative unless it appears to the Tribunal to be proper in all circumstances to so allow, and the Tribunal approves such representative."[30] Unlike the position in Australia, however, legal representation is barred altogether.[31] Limited scope of appeal is provided for.[32]

21 ACT s. 42, NT. s. 41.

22 A useful description of the New Zealand position is found in Professor Peter Ellinger's article "Small Claims Tribunals" (1977) 5 Aust. B.L. Rev. 127, where he compares the Australian and New Zealand positions.

23 S. 4 of the Small Claims Tribunals Act 1976. Minor amendments to the Act were made in the Small Claims Tribunals Amendment Act No. 144 of 1979.

24 S. 5(1).

25 Contrast this with the position in Australia where one party must be a 'trader' and the other a 'consumer'.

26 S. 9.

27 Disputes relating to partnership agreements and landlord-tenant disputes can therefore be heard.

28 This is confined to claims for damage to property resulting from the negligent use, care or control of a motor car. See s. 9(1)(c).

29 S. 10(1)(2). This limitation seeks to prevent traders from misusing the small claims process as a means of collecting outstanding bad debts.

30 S.24(2).

31 S. 24(5) excludes barristers and solicitors, as well as persons regularly engaged in advocacy work before other types of tribunals from appearing in a representative capacity before the tribunals.

32 Small claims may either be heard by a magistrate or by a referee or investigator appointed by the court. In the former case, no provision is made for an appeal. S. 17 renders the magistrate's decision as being final. (A party, however, is likely to be able to seek a prerogative writ of the Supreme Court on grounds of bias or contravention of the principles of natural justice). In the latter case, s. 34 confers a right of appeal to a Magistrate's Court if the referee or investigator has acted in a manner that is unfair to the appellant and which has prejudicial effect on the proceedings.

3. *United Kingdom*[33]

The small claims process in the United Kingdom works within the framework of the County Court. A period of experimentation and gradual introduction of innovative features culminated in a scheme which came into effect on 21 April 1981.[34] Under the new arrangement, any proceedings involving £500 or less is referred automatically to the registrar for arbitration as soon as a defence to the claim is received.[35] No restrictions exist with respect to the status of the parties or causes of action. If one of the parties so applies, the registrar may subsequently rescind the arbitration referral. He can, however, only do this in fairly narrow circumstances.[36] The arbitrator has a reasonably free hand at the hearing which may be held in private, as the hearing is informal and the strict rules of evidence do not apply. There is no prohibition or limitation on the employment of a representative, either legal or lay. However, the rule against the awarding of legal costs acts as a strong deterrent against the widespread resort to counsel.[37] Besides the financial disincentive, the underpinning philosophy is that good sense will prevail and that litigants will be infected by the spirit of the scheme, and hence "do it themselves". For all practical purposes,

33 Reference materials include Brian Harvey, *The Law of Consumer Protection and Fair Trading* (1982) 177-190, Lowe and Woodroffe, *Consumer Law and Practice,* (1980) 144-152, *Simple Justice: A consumer view of small claims procedures in England and Wales* (1979) prepared by United Kingdom's National Consumer Council and the Welsh Consumer Council, Ison, "Small Claims (1972) 35 Mod. L.R. 18, Turner "Small Claims in England" (1974) 48 A.L.J. 345, Thomas, "Small Claims —The New Arrangements [1981] N.L.J. 429 and A Code of Procedure for Small Claims: A response to the demand for do-it-yourself litigation" (1982) C.J.R. 52.

34 The first attempts to deal systematically with small claims were made in 1973 in Manchester with the formation of an Arbitration Scheme for Small Claims, and in Westminster where a Small Claims 'Court' was established. These were voluntary arbitration schemes that were organised and run by local legal institutions. Their introduction provided the necessary momentum for later innovations. However, the prelimary difficulty of securing the consent of both contesting parties, the lack of any easily operated enforcement procedure and, most critical of all, the lack of any public or charitable funding to continue the schemes led to their demise in 1980. Meanwhile, parallel developments were taking place in the County Court. The Administration of Justice Acts 1973 and 1977, amending the County Courts Act 1959, were passed, giving power for County Court Rules to prescribe cases in which proceedings may be referred to arbitration, either automatically or by order of the court, and further providing that the order of the arbitrator shall be as binding and effectual as if given by the judge. New ferment resulted from the publication of *Simple Justice* (note 33) resulting in the new scheme, which came into effect with the enactment of the County Court (Amendment No. 3) Rules 1980 amending Order 19 of the County Court Rules.

35 The registrar may, on a party's application, appoint a judge or an outside arbitrator to hear the dispute instead of himself. See 0.19 r. 1(4).

36 The arbitrator must first be satisfied that:

(a) a difficult question of law or a question of fact of exceptional complexity is involved; or
(b) a charge of fraud is in issue; or
(c) the parties are agreed that the dispute should be tried in court; or
(d) it would be unreasonable for the claim to proceed to arbitration having regard to its subject matter, the circumstances of the parties or the interests of any other person likely to be affected by the award.

Even if the registrar is satisfied on one of these points, he still has a discretion in the matter and is not bound to refer the case to trial.

37 The exceptions to this rule are costs stated on the summons, the costs of enforcing the award and such costs as are certified by the arbitrator to have been incurred through the "unreasonable conduct" of the opposite party.

the arbitrator's decision is final on the facts; the possibility of appeal is very limited.[38]

4. *The United States*[39]

In 1913, Roscoe Pound wrote of the need to revise existing procedures for processing the tremendous volume of small claims in the city of New York.[40] He expressed the need "to make adequate provision for petty litigation in communities where there is a huge volume of such litigation which must be dealt with adequately on pain of grievous denial of justice". He felt that there was no justification for formalised court procedures with retained counsel and all the attendant expenses in small claims cases, where the potential recovery could hardly pay for the process. That year, the Cleveland municipal court established by rule of court a conciliation branch that was, in effect, a specialised court for small claims.[41] The process provided proved very popular and was considered by many to be a success,[42] triggering off similar processes in other jurisdictions.[43] A noteworthy feature of the American system is the movement towards reform that began in the early 70's in recognition of some of the then-existing defects.[44]

The majority of American jurisdictions that have enacted small claims statutes have created small claims divisions within existing civil courts.[45] Other jurisdictions have created separate small claims courts,[46] and still others have attempted to simplify procedures in trials involving amounts under a specified jurisdictional limit in the existing courts.[47] As regards the question whether small claims courts have exclusive jurisdiction over defined small claims, the majority of the jurisdictions grant small claims courts concurrent jurisdiction with the regular civil courts.[48] Generally, American small claims courts have wide jurisdiction over the causes of action it can entertain, being able to hear

38 The County Court judge has power to set aside an award which, however, can only be exercised if there is an error in law on the face of the record or misconduct by the arbitrator.

39 This section's coverage has been taken largely from "Special Project-Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts" (1975) 28 V. L.R. 711 esp. 747-87.

40 "The Administration of Justice in the Modern City" 26 Harv. L.R. 302 (1913).

41 Read Dempsey, "Conciliation in the City of Cleveland" 9 A.B.A.J. 749 (1923).

42 See, for example, Levine, "Conciliation Court of Cleveland" 2 Am. Jud. Society 10 (1918).

43 These early small claims processes were clearly inspired by Pound's article. See note 40. Many of the proposals from which the small claims courts sprang argued the case for the "poor" litigant who could not afford the more expensive litigation process. By 1955, 28 jurisdictions had adopted some type of specialised small claims procedure.

44 For reforms in New York city, see Driscoll, "De Minimus Curat Lex: Small Claims Courts in New York City, 2 Fordham Urban L.J. 479 (1974); Nebraska, see Forbes, "What the Legal Community Needs to know about the small claims court, 6 Leighton L. Rev. 317, 336 (1973): Philadelphia, see Stenumaun & Rosenstein, "Small Claims Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. Pa. L. Rev. 1309 (1973).

45 This is the case, for example, in Idaho (small claims department of magistrate's division) and Michigan (small claims division of each district court).

46 For example, Texas.

47 For example, Alaska, Massachusetts.

48 Examples are New York, Ohio, Texas, and Oregon.

most civil actions.[49] Generally, any party can utilise the small claims facilities. Studies carried out in the United States reveal that businesses are the main users.[50] Although the majority of American jurisdictions do not limit its processes to designated parties, some have, in recent years, begun to do so.[51] Practice is divided on the employment of legal counsel in small claims proceedings. Some states prohibit them altogether;[52] others actively encourage them;[53] whilst some other states passively encourage their employment.[54] On the question of the possibility of appeals, a majority of the jurisdictions provide for an appeal from small claims courts and trial *de novo* in a court of record.[55]

5. Hong Kong[56]

Thus far, we have looked at small claims procedures in four occidental societies. It is useful now to focus on the operation of these procedures in an Asian context where the social structure is more similar to that in Singapore. In this regard, Singapore shares important similarities with Hong Kong: both legal systems are modelled on that of England where the common law from which the law in the two territories spring is a strong link; lawyers in both territories are trained in the art of advocacy in an adversarial setting; both societies are predominantly Chinese in racial composition[57] with English being spoken by a majority of the people;[58] being Asiatic in ethnic origin, both societies tend to be less rights-conscious than their western counterparts, with the people being less prepared to publicly voice their grievances and to prosecute their claims;[59] both are also "city-states" with a high-density population living in a small-land area where com-

[49] In Illinois, the words employed in the statute are "actions in tort or contract for money"; in New Jersey "action in contract and actions for property damages resulting from negligence in a motor vehicle accident and landlord-tenant security deposit cases"; in New York "any cause of action for money only"; in Utah "Cases for the recovery of money only"; in Washington "cases for the recovery of money only".

[50] Robinson in "A Small Claims Division for Chicago's New Circuit Court," 44 Chi. B. Record 421 (1963) revealed that in the small claims branch of the Municipal court of Chicago, 80% of the cases represented commercial collections or assigned claims. In a study of the small claims courts in Oakland-Piedmont-Emeryville, California, 60% of all actions were initiated by businesses and government agencies, while over 80% of all suits were defended by individuals. 52 Calif. L. Rev. 876 (1964). An additional indicator of business domination was revealed in a study of the Pomona, California small claims division. When a private party was a defendant, and a business or government agency was plaintiff, the plaintiff had a favourable judgment in 93% of the cases. When the roles were reversed, an individual plaintiff won in only 65.5% of the cases. I Pepperdine L. Rev. 71 (1973).

[51] Some ways of doing this are discussed below.

[52] Most of the states that place some form of limitation on legal representation employ this approach, for example, Michigan and Kansas.

[53] For example, Conneticut, Indiana and Ohio.

[54] For example, New Jersey, Alaska, Illinois, Oklahoma and Texas.

[55] California, Minnesota, New York.

[56] Reference materials include Faulkner, "The Small Claims Tribunal Ordinance" (1977) 7 HKLJ 242, Allcock "The Small Claims Tribunal" (1978) 8 HKLJ 144 and Hicks "Small Claims Tribunal (Amendment) Ordinance 49 of 1979; July 20 1979" 9 HKLJ 364.

[57] In Singapore, the racial composition is more mixed. Besides Chinese, there are also Malays, Indians, Eurasians and a sprinkling of others.

[58] It should however be noted that in both territories, there is clearly a group of people comprising mainly the elderly folks who do not speak, read or write English.

[59] Generally, Asians tend to be less litigous.

munication is not a problem;[60] both economies also share the striking similarity of rising expenditure by residents on consumer goods; both court systems are also congested with many cases awaiting trial.[61] The list could go on. Hong Kong may therefore provide useful lessons for us in Singapore.[62]

The small claims tribunal in Hong Kong was established in October 1976 under the Small Claims Tribunal Ordinance.[63] The tribunal has jurisdiction over monetary claims founded in contract, quasi-contract or tort up to the amount of HK$3000. Certain claims are specifically excluded from this general jurisdiction.[64] The tribunal has exclusive jurisdiction in that if the claim does fall within its jurisdiction, it shall not be actionable in any other Hong Kong court.[65] The tribunal may, at any stage of the proceedings in the tribunal, either of its own motion or upon the application of any party, transfer the proceedings to the District Court or the High Court.[66] Proceedings are to be informal[67] and, in keeping with this, the tribunal may receive any material it considers relevant.[68] Parties to a claim have a right of audience before the tribunal[69] and may be represented provided firstly, the tribunal gives leave, secondly, the representative is authorised in writing and thirdly, he is not counsel or solicitor.[70] There is in fact a general prohibition against lawyers which extends to public officers whether or not qualified to practise in a court in Hong Kong.[71] The party against whom the award is made may, provided the Court of Appeal grants leave, appeal to that Court on questions of law alone, or on the ground that the claim was outside the tribunal's jurisdiction.[72] A refusal to grant leave is final.[73] It is worthy of note that from its initial "test period" of three years, the small claims tribunal has been made a permanent feature of the judicial system.[74]

60 Both in terms of commuting from one part of the territory to another as well as easy and quick dissemination of information.

61 See for example, Michael Khoo, "Procedural Reform on Court Congestion in Singapore" (1981) 1 M.L.J. cxi.

62 Both as to what to adopt and to avoid.

63 No. 79 of 1975 (Cap. 338, LHK 1975 ed.). It came into effect on 1 October, 1976 (LN 239 of 1976) and was due to expire on 30 September 1979 after an initial three years period. It was however made a permanent part of the judicial system on 20 July 1979 with the enactment of the Small Claims Tribunal (Amendment) Ordinance 49 of 1979.

64 1st Sched., para. 1 excludes: any action in respect of defamation, loss of services of a woman or girl in consequence of her rape or seduction, the inducement of one spouse to leave or remain apart from the other, any action or proceeding in respect of a maintenance agreement within the meaning of s. 14 of the Matrimonial Proceedings and Property Ordinance (Cap. 192, LHK 1972 ed.), any action by a money-lender licensed under the Money-Lenders Ordinance (Cap. 163, LHK 1974 ed.) for the recovery of any money lent, or the enforcement of any agreement or security made or taken in respect of money lent and any action which lies within the jurisdiction of the Labour Tribunal established under the Labour Tribunal Ordinance (Cap. 25, LHK 1974 ed.).

65 S. 5(2).

66 S. 7. For some of the problems which may arise, see Faulkner "The Small Claims Tribunal Ordinance" (1977) 7 HKLJ 242, *supra*, n. 56 at 249.

67 S. 16(1).

68 S.23(1).

69 A party which is a corporation or a partnership may be represented by an officer or servant or its partners respectively.

70 S. 19(1)(d).

71 S. 19(2).

72 S. 28(1)(b).

73 S. 28(3).

74 See n. 63.

III. An Overview of the Expected Features of the Proposed Small Claims Tribunal in Singapore

It is expected that the Small Claims Tribunal will have limited jurisdiction, hearing and determining claims relating only to disputes arising from contracts for the sale of goods or the provision of services, up to the amount of $2000 to $3000. The Tribunal will therefore not decide disputes arising from other causes of action, such as torts or landlord-tenant disputes. Further, it is expected that the Tribunal will have concurrent jurisdiction with the existing court system, where parties will have a choice as to which forum in which to press their claims. No legal representation will be permitted. Individuals will have to appear in person in the proceedings whilst a trader will be represented by one of its employees or partners.

The lodging of claims would probably be a simple process, requiring the claimant to fill in a prescribed form, and to leave it with the Registrar of the tribunal.[75] Tribunal proceedings will be informal, emphasising expediency, speed and economy. A legally qualified Referee will preside over them which, as proposed, would not be bound by strict rules of evidence. Rather, it is envisaged that the tribunal will have control of its own procedures, being bound only by the rules of natural justice. The primary function of the Tribunal is envisaged to be one of bringing the parties to a settlement, failing which, it will have to adjudicate on the matter. In doing this, it will endeavour to reach a fair result, deciding the claim according to the substantial merits and justice of each case with regard to the law, but not be bound strictly by it. In this regard, the parties in dispute would first meet the Registrar of the tribunal who would attempt to mediate between them, and only if this fails, would the parties appear before the Referee.[76]

After hearing both parties' account of the dispute, the Referee would probably either dismiss the claim, or hold in favour of the claimant by making an order. In view of the Tribunal's expected limited jurisdiction extending only over contracts relating to goods and services, this order would probably require the payment of money, or the rectification of any defects in goods, or the making good of any deficiency in the performance of services.

As strict rules of evidence will not be followed, it is not expected that the Referee will be required to keep a record of the evidence. However, for record purposes, one would expect him to at least keep notes of the proceedings. These, together with his order, and the claim lodged by the claimant would probably constitute the case's records in the Registry. It is not expected that these records would be published as a matter of course.

A losing party may appeal to the High Court against the Tribunal's order on any ground involving a question of law or on the ground that the claim was outside the jurisdiction of the Tribunal. Each party would argue his appeal personally without legal representation.

[75] One hopes that the form would not expect too many particulars as the potential claimant might then be deterred from lodging his claim.

[76] It would seem that the process, viewed in its totality, seeks to recreate the Singapore of old when disputes were brought before the kampong or village head or the head of the clan for conciliation, mediation, arbitration or adjudication.

Should the losing party be delinquent in observing the Tribunal's order, the other party can seek the assistance of the court's processes. This is important as, otherwise, the order would have reduced practical significance. It is clear that the full force of all available legal avenues would not be spared to ensure that the vindicated party enjoys the fruits of his labours. In this regard, it is envisaged that judicial processes such as garnishee proceedings, judgment-debtor summons or writ of seizure and sale will be made available to the claimant.

IV. Comments on Some of the Features

1. *Status of Claimants*

As no restrictions exist as to the status of eligible claimants, traders[77] and consumers alike can press their claims before the Tribunal. Four situations are therefore possible: *Consumer* v. *Consumer; Consumer* v. *Trader; Trader* v. *Trader* and *Trader* v. *Consumer.* As such, even though the creation of the Tribunal would be due, to a large extent, to the efforts of the Consumer Association of Singapore (hereafter CASE) traders would also stand to benefit from the new procedures. Indeed, some may argue, and the experience of other jurisdictions bear them out, that traders will be the main beneficiaries,[78] finding the Tribunal's processes an ideal solution to the arduous task of collecting unpaid bills. There is then a possibility that, with the passage of time, the Tribunal would degenerate into a convenient and easily accessible collection agency. Therefore, whilst an individual consumer with a specific genuine grievance may benefit, consumers as a group will be worse off.

Steps to prevent the above scenario from happening include the following:

a. define the status of claimants who may have access to the Tribunal either by expressly excluding actions by traders (corporate or otherwise) or by limiting it to consumers;[79]

b. impose limits on the number of cases which a single claimant may bring before the Tribunal in any one week or month or any other appropriate period;[80]

77 The term 'trader' is used in the wide sense to include corporations, partnerships as well as other legal forms of businesses.

78 Traders with their on-going business activities, in the nature of things, would have greater occasion to seek the tribunal's services. Also, they would be more prepared to press their claims. See for example "Small Claims" (1972) 35 M.L.R. 18, where Professor Ison lists thirteen reasons why buyers do not defend and rarely ever sue. See also Yngvesson and Hennessy "Small Claims, Complex Disputes: A Review of the Small Claims Literature" (1975) 10 Law and Society Review 219 which describes the taking over of small claims courts by business organisation claimants as 'a common theme in all the studies reviewed.' George Adams, "The Small Claims Courts and the Adversary Process: More Problem of Function and Form" (1973) C.B.R. 583 at 608. See also n. 50.

79 This is the case in, for example, (a) the states of Victoria and Queensland in Australia, where claimants are limited to those eligible for legal aid or to consumers. See note 10. (b) New York City, where actions by corporations and partnerships are excluded. See "The Practice of the Small Claims Court of the City of New York" (1934-5) 9 St. John L.R. 247, 248.

80 In Nebraska, legislation provides that "no party shall file more than 2 claims within a calendar week, nor more than 10 claims within any calendar year". The limitation in Ohio is "not more than 6 claims within any 30-day period". In New Hampshire and Maine, legislation now repealed originally limited claimants to 5 claims in any one week, and 20 claims in any one month

c. bar professional debt collection agencies by specifically excluding assignees or by prohibiting a claim for a debt or liquidated demand unless it is in dispute or is in the nature of a counter-claim.[81]

Admittedly, this is not an easy question to resolve. Some would argue that, just as consumers have legitimate complaints against traders over defective goods, traders also have justifiable claims against consumers as regards non-payment of goods. To deny traders access to the more expeditious processes of the Tribunal would restrict them to the more tedious and protracted judicial process. They will cry, "Justice delayed is Justice denied". Moreover, traders will argue that the Tribunal should not be viewed as a cudgel for the expression of consumer rights, but as a relatively expeditious and inexpensive means of providing resolution to problems arising from a specific situation, that is, contracts of sale of goods or provision of services which otherwise might not be resolved or resolved more slowly. Defined as such, the Tribunal is then, simply a process by which a type of *dispute* is aired and resolved, and not a mechanism to further the interest of a specific category of *persons*.[82] Consumers in general may find this proposition difficult to accept, especially as CASE has been instrumental in lobbying for the setting up of the Tribunal. However that may be, making the tribunal's processes available to more people will have the desired effect of making lighter the present caseload of the Subordinate Courts. On the other hand, consumers may argue that they, as a group, are most in need of the Tribunal's services. After all, traders probably have the means and resources to bring their claims before the courts, which process need not necessarily be protracted and expensive in the instances of legitimate claims needing satisfaction against consumers as summary judgment proceedings can be invoked. Consumers will press their case further by pointing to the traditional informal and conciliatory features of the small claims process which have been hallmarks of existing jurisdictions around the world. These, they say, have been designed with them in mind as the beneficiaries so as to further their cause.

To accept either group's point of view and to implement a system totally in accordance with it may be extreme. A suitable compromise may be to allow all parties access to the Tribunal's processes but to limit the number of occasions a particular party may file his claims in the Tribunal's Registry within a given period. This solution does not overtly express preference for either group's interests. It recognises

respectively. See Klein, *Buyer* v. *Seller* in Small Claims Court, 36 Consumer Rep. 628 (Oct., 1971). Also see *Institute of Judicial Administration, Small Claim Court in the United States*, *2*, 7, 10 (supp. 1959). A less direct approach to limiting the number of claims would be to increase the filing fees on a graduated scale for subsequent claims after the first claim in any one period. A plaintiff would therefore have to bear the costs of repeated use of the tribunal's facilities.

81 This is the position in California, see California Code of Civil Procedure s. 117(f) (no assignee may file or prosecute a claim with the exception of a trustee in bankruptcy and a holder of a conditional sales contract who has purchased the contract for investment and not collection purposes). See also the New Zealand position, note 29.

82 This fundamental issue was hotly-debated in the early days of the American Small Claims movement. See, for example, R.H. Smith, *Justice and the Poor* (3rd ed., 1924). Any legislature considering legislation on small claims has to determine what is the basic underlying philosophy behind the provision of this more informal and expeditious dispute-settlement process.

that both groups have legitimate claims. What it does, is to ensure that one group, consumers, as a whole does not stand to suffer too much.[83] It will also prevent the small claims process from becoming a debt-collecting institution for traders, and perhaps also, have the desired effect of persuading traders to consider all possible claims carefully and use legal means only when all else fails.[84]

2. *Non-Availability of Legal Representation*

The availability of legal representation is another difficult question in the jurisprudence of small claims tribunals. Other jurisdictions have dealt with it in different ways. A short summary is in order here. As previously mentioned, in the United States, some states actively encourage their employment.[85] Other states either expressly prohibit them,[86] or employ legislative techniques that discourage or place limitations on their appearance. These include imposing a very low mandatory fee schedule[87] or in some instances even prohibiting the recovery of attorney's fees,[88] permitting legal representation only when the small claims court judge permits it[89] or only for specific purposes.[90] In the United Kingdom, legal representation in the County Court arbitration procedures is permitted, although rules on the awarding of costs have been devised to discourage their employment.[91] As regards the Australian position, an interesting observation is that most state legislation make a distinction between lay and legal representation. Whilst the appearance of counsel is subject to stringent requirements, the tribunals are given greater leeway to permit lay representation.[92] Hong Kong and New Zealand take the more extreme position of prohibiting legal representation altogether whilst permiting lay representation with the tribunal's leave.

The fact that these jurisdictions have adopted different positions highlights the conflicting considerations involved. Proponents for the exclusion of legal representation argue that counsel's presence would add an unwanted aura of formality to the process. The proceedings

83 A variant of this proposal, which will make traders happier, is to apply the restriction in their case to only claims against consumers. In this way, their claims against other traders will not be fettered by this restriction.

84 With the limited number of claims they may file, traders will be more prepared to settle or indeed, drop claims they would otherwise pursue.

85 See note 53.

86 See note 52.

87 As in Wisconsin.

88 As in Nevada.

89 As in Oregon.

90 In Minnesota, legal representation is permitted only for the limited purpose of moving for removal to the regular civil court.

91 See note 37. This approach, however has not had the desired effect of reducing legal representation. In 1975, one or both parties were represented in roughly half of all the cases employing the arbitration procedures. See *Simple Justice — A consumer view of small claims procedures in England and Wales* (1979) (published by the National Consumer Council) 95. More up-to-date figures are not available to the writer. Consequently, the National Consumer Council has advocated for a ban on legal representation, with the following exceptions: first, where the registrar certifies that the claim involves a difficult question of law, or questions of fact of exceptional complexity; secondly, where the registrar certifies that the interests of justice require that legal or lay representation should be permitted; and thirdly, where both parties agree to the use of representation.

92 See notes 11 and 30.

would become more protracted, thus consuming more of the Tribunal's time and increasing costs. As cases that come before the Tribunal are not expected to involve complex issues of law, the presence of counsel would complicate, rather than aid the process. Moreover, they view the small claims process as a good opportunity for lay people to be directly involved in the judicial process, arguing that this involvement would bolster their confidence in it. Confronted with these arguments, the other side counters that legal representation is essential in order to balance any inequality that may arise when an individual faces a corporate party, especially if such individual is uneducated, lacking in confidence and inarticulate. In such a situation, legal counsel would be an invaluable surrogate. To this, the rejoinder is that the presence and role assumed by the Tribunal's Referee would do much to rectify any imbalance arising from the parties' statuses. It is expected that the Referee would play a very active role in the proceedings, asking questions and directing the flow of the proceedings. Such an inquisitorial stance would enable him to assist a hapless, diffident party, and at the same time, keep a more abrasive and dominating party in check. However, advocates of legal representation are not totally happy with this as much would then depend on the personality of the Referee, a factor which is a variant. The check is therefore not built into the system, but is dependent on the actors involved — the Referee as well as the parties appearing before him.

The gravity of the above situation is compounded by the fact that a corporate party will have to be represented by an agent — probably an officer or employee. One would expect that the staff appointed to the role will be involved whenever the corporate party is made a party to the tribunal's processes. With the passage of time, he will become familiar with the procedures involved, as well as the legal issues which most often surface. Moreover, he will become more comfortable with the physical layout where the hearing is conducted, and more importantly, the officials involved. In sum, he invariably begins to feel at home with the entire process and consequently becomes more confident. Additionally, although such an officer or employee cannot be a member of the Bar, he may, nevertheless, have received some form of legal training, either formal or informal. He will therefore be a formidable foe when pitted against the nervous, diffident and inarticulate one-off consumer party. It is improbable that, in such a situation, the Referee, no matter how helpful he may be to the consumer, will be able to rectify the imbalance.

Instead of a total ban on any form of representation, the better approach seems to the writer to be to give the Referee the discretion to permit a party to be represented by his agent when he (the Referee) considers it to be necessary in the interests of justice. Such an agent need not be legal counsel. In fact, different criteria ought to be drawn up to allow for lay as opposed to legal representation.[93] Access to representation would ensure that no claimant will shun away from the tribunal on account of shyness or diffidence. As an additional check

93 An example would be Queensland, Australia where a party may be permitted to be represented by an agent if this seems to the tribunal to be a "matter of necessity" Small Claims Tribunals Act 1973 (Old) s. 32. The section goes on to provide that the tribunal is not to approve of the appearance of an agent who has a legal qualification or who is a professional advocate unless all parties agree, and in addition, the tribunal is satisfied that the parties other than the one applying for approval shall not be unfairly disadvantaged, s. 32(3).

against parties becoming too free in requesting legal representation, limited or no costs should be awarded.

This proposal will give the Registrar some leeway. Some may argue that in his discretion, the Registrar may act in an arbitrary manner. The proper answer to this objection is, of course, that the entire small claims process accords the Registrar a fair amount of discretion. This flexibility is therefore consistent with the overall philosophy and general approach.[94]

The other point arising as regards legal representation is whether it should be permitted when an appeal is lodged. It is difficult to envisage a situation where an untrained layman would be sufficiently competent to ascertain whether he has a good case to base an appeal, let alone frame, file and argue it. The better approach would be to permit legal representation at the appeal stage either as of right or with the tribunal's leave. The non-permissibility of legal representation at this stage further militates against the one-off diffident, inarticulate and nervous individual.

3. *Publicity of the Tribunal's Proceedings and Orders Made*

Adverse publicity is anathema to a trader — a catalyst to plummetting sales charts. Employed wisely, with good sense, and a large dose of discretion, it is a legitimate and potent device against the recalcitrant, belligerent trader. Some attention should therefore be focussed on the question of how the consumer's cause may be advanced by publicising the Tribunal's proceedings and the orders made by it. There are two aspects to be considered: the actual proceedings and the Tribunal's subsequent order. As to the former, it is envisaged that the proceedings of the Tribunal will be held in private, where only the involved parties and the Tribunal's officials will be present. As to the latter, it is not known, at this stage, whether the Tribunal's proceedings and orders made will be made public.[95] These two aspects will be dealt with separately.

As with the other issues discussed so far, there are various arguments that can be pitted against one other. On the one hand, making the proceedings a private affair is consistent with the informal nature of the process. It may encourage more individual parties to pursue and to defend claims. The thought of presenting and arguing his case against another party in public, who will similarly defend his case, may be such a formidable proposition to the self-conscious, diffident consumer that he may be deterred from availing himself of the Tribunal's facilities. Even if this obstacle can be overcome, parties may not be as relaxed and the proceedings may not be as free-flowing as they would probably be if the party were not conscious and apprehensive that what they say in the heat of argument may be quoted in print by the press the next day. The Referee will also be more relaxed in private proceedings, more prepared to assume his role as conciliator and friend between the parties, seeking the truth and persuading the parties to adopt a 'give and take' attitude. In fact, he will probably

[94] Other examples pointing to such flexibility are that the proceedings are expected to be held in private, the tribunal will not be bound by rules of evidence and the Registrar's general overall control of the proceedings.

[95] In arbitration, both the proceedings as well as the award are private matters and are not published.

also be less self-conscious and will more readily shed his formal posture at the appropriate moments.

Public hearings, on the other hand, is more consistent with the maxim that justice should not only be done, but should also be seen to be done. Some jurists will recoil at the idea of closed-door justice. Moreover, they may argue that making the proceedings public will not necessarily result in hordes of people cramming the room where the proceedings are heard. Admittedly, the initial cases may attract the normal crowd of curious onlookers. However, as the institution's novelty wears off, it is unlikely that this crowd will remain. The more realistic expectation then would be, at most, a few interested observers and members of the press — a small number that would not inhibit the proceedings to any great extent.[96] Any inhibition, so the argument runs, will be more than off-set by the immediate adverse publicity that may ensue. More than that, the fear of adverse publicity itself may deter the trader from pressing or defending claims against consumers,[97] and in the longer run, may result in more efficient services and better quality products being made available to consumers.

In the final analysis, it may not matter very much which position is adopted. Public hearings will not inevitably attract large crowds. Large crowds need not necessary be an impediment to the process. However, in planning the scheme of things, this matter of publicity is a relevant one. One possible solution would be to have the proceedings in private, in conformity with the informal approach and conciliation objectives of the process, but to leave some discretion to the Referee to have public hearings when considered necessary in the interests of justice.

On the other question as to whether the Tribunal's orders should be publicised, it is submitted that there is no reason for withholding publication of these orders. The more pertinent question would be what should be the proper content and subject of disclosure: the order only, the reasons for the order or the notes of proceedings as well? Consistent with the possible effect of publication as a form of adverse publicity against recalcitrant traders, and also to build up jurisprudence in the area, the proper extent of disclosure would seem to be the order itself together with reasons for the order.

4. *Brief Comments On Other Features*

a. *Relationship between the Existing Court System and the Tribunal*

Two aspects are involved in this relationship. The first is the question of whether the Tribunal should have exclusive jurisdiction over defined small claims, or whether claimants should have alternative access to the existing court system. Secondly, if there is concurrent jurisdiction and a claim is brought before one forum, whether it is open to either one of the parties or the court/tribunal itself to transfer the case to the other forum.

96 The consumer may, in fact feel more confident in the knowledge that, at the beginning of the proceedings at least, the press is probably on his side.

97 Some may argue that this is not a laudable aim. Whether or not this is so would depend, to a great extent, on one's philosophy and views as to what should be the primary role of the tribunal.

As regards the first question, granting the Tribunal exclusive jurisdiction will have the effect of easing congestion in the existing court system. Additionally, it would prevent forum-shopping by would-be claimants. The ability to choose the forum to sue in would especially benefit the trader, who might decide to press its claim against a consumer in the normal court system in the knowledge that the enhanced costs of defending the claim may dissuade the consumer from defending it even though the consumer may have a good case. On the other hand, should the small claims tribunal have exclusive jurisdiction and the proposal to place a limit on the number of claims a claimant may bring be adopted, once the limit is reached, the claimant would be deprived of a forum to press his claims. This may be argued to be unfair. The other question of transfer of a case from one forum to another forum (assuming there is concurrent jurisdiction), has two dismensions: transfer from the Tribunal to the ordinary court system and vice versa. Both dimensions raise the point as to when such a transfer could be effected.[98] Whilst policy reasons for permitting transfer from the ordinary court system to the small claims Tribunal seem quite compelling,[99] the reverse is not quite true. On the contrary, allowing easy passage of cases from the small claims process to the more expensive and to some, more forbidding litigation process, may encourage respondents to claims of low sums to switch forum in an attempt to "shake off" the claimant. Even if this fails, this tactic may delay the successful prosecution of the claim, constituting therefore a deterrent factor to some claimants.[1]

b. *Appeals*

Most jurisdictions have limited appeal to the existing court system. This access to review of one person's (the Referee) decision inspires greater confidence in the process, and also helps create legal jurisprudence in the area. However, it is important that the avenue of appeal should not be too readily available, as parties who can best afford it and who feel more comfortable to resort to it, (that is, the trader) may wield it too readily. The other point regarding appeal is that the records of each case must contain sufficient information for a party to determine whether he wishes to appeal. Moreover, it must be written in a manner which is comprehensible to the layman. The final point concerns the question of legal representation at the appeal stage which has previously been dealt with.

c. *Role of the Tribunal's Officials, CASE and Availability of Easily-Comprehensible Materials*

The success of any small claims tribunal hinges on whether parties with small claims make use of its facilities. Any possible deterrent to its utilisation should be looked into and steps taken to overcome it. All efforts to rid the process of any features that would discourage the filing of claims such as prohibitive costs, imposing proceedings, the necessity for immaculate preparation, inappropriate physical setting and inconvenient time of hearing, would surely fail if all potential

98 The various possibilities that exist include at the request of one of the parties, or both parties or when the court, at its discretion, decides to transfer the case either with or without the consent of the parties.

99 Since as many claimants as are possible should be encouraged to take advantage of the small claims process.

1 Here again, traders are more likely to employ this tactic.

claimants are not adequately informed as to its availability, how the process works and how they can avail themselves of it. This is especially so for the potential one-off consumer claimant who may not bother to make the extra effort to find out. Relevant information must therefore be widely publicised and brochures made available. In this regard, there must be officials designated to assist wound-be claimants,[2] to explain, assist and generally allay fears and misapprehensions. Additionally, easy to read 'how to do it yourself booklets in the normal four languages should be made readily available.[3] These would explain the entire process, outline the various stages, contain simple expositions of the relevant law, and also have as specimens, the relevant forms.

V. CONCLUSION

This *expose* highlights some of the matters that have to be considered in the setting up of a small claims tribunal. The experience of jurisdictions with such processes are selectively looked into. The features highlighted are some of the more controversial ones, as culled from literature written on these jurisdictions. The road taken by these other jurisdictions may not be the one we in Singapore should take. Whatever model of the small claims process we arrive at, it must be one that suits our particular needs. One of these needs, it is submitted, and which should be borne in mind, is the legitimate complaint of the consumer, especially when he is not well educated, inarticulate and lacking in confidence and funds.

HO PENG KEE*

2 Candidates for these posts would be the Tribunal registry's officials, full-time employees of CASE supplemented by part-time volunteers, or for that matter, even law students from the National University of Singapore.

3 An example of this in the United Kingdom is *Small Claims in the County Court: How to sue and defend actions without a solicitor* by Michael Binks, Registrar of the West London County Court (1978).

* LL.B. (Sing.), LL.M. (Harv.), Lecturer in Law, National University of Singapore.