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SMALL CLAIMS JURISDICTION

A special legal process for dealing with small claims was established in 1984. Under this process, a Small Claims Tribunal is conferred jurisdiction to hear and determine some disputes. The dispute settlement process adopted is simple and efficient. The tribunal is not bound by the rules of evidence. It is also not bound by the strict technicalities of the law. This article examines the important issue of what cases the tribunal should be allowed to determine.

I. INTRODUCTION

THE establishment of a small claims process by the Small Claims Tribunals Act[1] in 1984 was an important legal development in Singapore. Disputes involving relatively small amounts of money that either would not have been pursued for reasons of cost, or pursued at disproportionate cost, could then be pursued at low-risk, and be resolved at low-cost.[2] Access to legal justice was considerably improved, not just for ordinary wage-earners and small businesses (who generally would not think of litigation), but also large corporations.

This was made possible by the establishment of a dispute settlement system that allowed a claim to be commenced on the payment of a mere $10 in fees,[3] which is followed by relatively informal procedures. Under

1 Act 27/84, now Cap 308, 1985 Ed. The Act came into force on 15 February, 1985. Unless otherwise stated, all future references to legislation herein will be to this Act.

2 The government did not envisage a consumer court as much as a low-cost informal forum. Arguments for barring or restricting access by commercial parties have not been accepted by the government. Restrictions against commercial parties are in place in some jurisdictions, *eg,* in some Australian States: see Eugene Clark, "Small Claims Courts and Tribunals in Australia: Developing and Emerging Issues" (1991) 10 U of Tasmania LR 201. In Singapore, there are no restrictions against commercial parties using the tribunal. It has been observed in Singapore, as in many other jurisdictions, that it has become a cheap and convenient debt collection agency: Ho Peng Kee, "Small Claims Process: The Singapore Experience" (1988) 7 Civil Justice Quarterly 329; and Louis D'Souza "An Experiment in Informal Justice: The Small Claims Tribunal of Singapore" (1991) SAcLJ 264, esp at 274.

3 The current fee applicable to individuals. The fee is $50 for business parties.

the Act, the parties have to appear in person without lawyers,[4] and unsuccessful claimants (who are not guilty of bringing a frivolous or vexatious claim) risk only an order to pay disbursements. Considering the low fees, the bar against legal representation, and a prohibition against the award of costs other than disbursements,[5] the quantum of any order to pay disbursements will be low.

In line with the philosophy of informality and low-cost, the tribunal is not bound to follow the legal rules of evidence,[6] and a claim is decided formally only after a failure to bring the parties to a settlement.[7] Finally, as part of the general thinking behind the tribunal (and possibly a necessary consequence of requiring parties to appear in person), section 12(4) states that "[a] tribunal shall determine the dispute after hearing the parties in private,[8] according to the substantial merits and justice of the case, and in doing so shall have regard to the law but *shall not be bound to give effect to strict legal forms or technicalities.*"[9]

The low-risk and low-cost factors are reinforced by a very limited right to appeal to the mainstream court system. Section 35 allows an appeal to the High Court "(a) on any ground involving a question of law; or (b) on the ground that the claim was outside the jurisdiction of the tribunal." Since the tribunal is not bound to follow the strict technicalities of the law under section 12(4), the right to appeal on the ground of an error of law is very limited in reality. In practice, appeals are not likely to succeed unless the tribunal can be shown to have exceeded its jurisdiction.[10]

4 S 21 requires the parties to appear in person, with limited exceptions, *eg*, for non-natural persons. The list of exceptions has been expanded (first by Act 31/92 and more recently by Act 17/95), but there is an express bar against the appearance of advocates and solicitors in s 21(3). This bar presumably does not apply to a qualified advocate and solicitor who appears in a personal or other capacity.

5 Ss 28 and 29.

6 S 25. S 27 gives the tribunal control over its own procedure, subject to the principles of natural justice.

7 S 12(1). Under s 17, the parties will be invited by the Registrar to a meeting with a view to reaching a settlement. It is only when no settlement is reached that a formal hearing before a Referee will be held.

8 S 22 states that "[a]ll proceedings before a tribunal shall be held in private." However, s 42 allows the publication of particulars relating to proceedings as the Minister may direct. There are also occasional newspaper reports of claims before the tribunal.

9 The tribunal is headed by a Referee. Section 4 requires a Referee to be a legally "qualified person" as defined by the Legal Profession Act (Cap 161, 1985 Rev Ed.)

10 Appeals are uncommon, and there seems to be only one reported case of a successful appeal in *Oxley Travel Service* v *Lee Kok Kian* [1991] 1 MLJ 282. The appeal was successful because of procedural shortcomings (not all the listed claimants had signed the claim form: see s 15), and a breach of natural justice in that a party was not allowed to present its case fully (see s 27).

The evolution of the small claims process in Singapore has been cautiously gradual. Since 1985, the Act has been amended twice; once in 1992 and more recently in 1995.[11] Significant amendments were made in 1995, when the jurisdiction of the tribunal was expanded.[12]

The system has been so efficiently managed that mediation hearings before a Registrar can now be expected within a week of lodging a claim.[13] Urgent cases can be heard within a day.[14] Most of the major legal concerns in establishing, organizing and defining the Singapore small claims process can be said to be largely settled. At this stage, one of the main legal issues that should be periodically examined is that of jurisdiction, *ie,* the types of cases that can be brought before the tribunal.

This article examines the jurisdiction of the tribunal. The issue of jurisdiction is an important one that has a bearing on the claims that can be brought before the tribunal, and is effectively a definition of the role of the tribunal. Potential remedy seekers will naturally prefer such a low-cost and low-risk dispute settlement process, but a line has to be drawn to define claims that should be dealt with as a small claim. The placement of the separator is not likely to satisfy all potential litigants. Too broad a jurisdiction may make it difficult for the tribunal to carry out its function, while too narrow a jurisdiction may severely limit the scope for informal resolution, as well as produce difficult distinctions.

II. Definition of Jurisdiction

A. *Equal Access*

The small claims process is often seen as a process for the assertion of consumer rights. In order to prevent the process from being dominated, undermined or abused by commercial parties, there may sometimes be restrictions to prevent commercial parties from using the small claims system to sue consumers or even other commercial parties.[15] The Singapore small

[11] By Acts 31/92 and 17/95.

[12] The other notable change was the expansion of situations where a representative may appear on behalf of a party. See s 21(2) as amended.

[13] *Straits Times*, 9 April 1996.

[14] A typical example of which would be a short-term visitor like a tourist who is due to leave Singapore.

[15] *Eg,* in New South Wales, where only consumers can bring a claim under s 4 of the Consumers Claims Tribunals Act 1974. Such a restriction will require a definition of "consumer" or "commercial party". A consumer party may of course be wealthier (and able to afford litigation) than a commercial party that is not doing well, and in some cases, a company may be a consumer. In Australia, several jurisdictions restrict access to consumers: see E Clark, "Small Claims Courts & Tribunals in Australia" (1991) 10 U of Tasmania LR 201, at 204.

claims model does not discriminate between consumers and commercial parties: either is free to make a claim before the tribunal. From the legislation and Parliamentary speeches, it is clear that the government does not see the tribunal as a consumer court as much as a low-cost informal forum.

The Singapore Small Claims Tribunal has become, as in many jurisdictions, a low-cost debt collection court for corporations.[16] There is nothing wrong or undesirable in this fact *per se*. An efficient and low-cost means of collecting small debts is in the public interest, as much as it is desirable to enable consumers to have a readily available low-cost forum for resolving disputes with traders. Unnecessary costs would be incurred if a corporation were to be required to commence full and formal legal proceedings in a Magistrate's court[17] to recover, debts in the form of unpaid water, electricity or telephone bills. The issue is whether the obvious legitimate objective of providing an efficient and low-cost dispute settlement process for both individuals and corporations can be achieved together in one single process. There is no obvious reason why this cannot be so in Singapore, unless the presence of one party will prevent the other objective from being achieved. There is no reason to believe that any individual in Singapore will be discouraged from using the tribunal because large corporations have access to the tribunal. It may be argued that individuals may see the tribunal as a forum for large corporations and may therefore shy away from using the tribunal themselves. However, it is no less likely that individuals who have experienced the small claims process (for example, as a result of a claim by a large corporation) will be more aware of the advantages of using the tribunal, and may actually be more likely to use it themselves should they ever find themselves in need of a remedy.

It is difficult to argue that the frequent or dominant use of the tribunal by commercial parties will reduce the usefulness and effectiveness of the tribunal in dealing with claims by individuals. The use of the tribunal by commercial parties is not necessarily at the expense of individuals who wish to use the small claims process. Even if there were to be a large number of claims from commercial parties that put a strain on the resources of the tribunal, administrative arrangements can be made to ensure that individuals have speedy access to the tribunal when necessary, through for example, longer waiting periods for some parties.[18] Justice would be served by ensuring

[16] See *supra,* note 2, and the articles cited therein.

[17] The money limit of the jurisdiction of a Magistrate's Court is $30,000: see s 52 of the Subordinate Courts Act, Cap 321, 1985 Ed, and the definition of "Magistrate's Court limit" in s 2 therein.

[18] See Louis D'Souza "An Experiment in Informal Justice: The Small Claims Tribunal of Singapore" (1991) SAcLJ 264, at 280-81. Administrative arrangements have also been made with frequent users of the tribunals to ensure the smooth and efficient handling of cases.

speedy and convenient access to the Small Claims Tribunal on the basis of need, and not status.[19] It should also be emphasised that commercial parties help to fund the system more than individuals, in that they pay a higher fee, and the large number of claims they bring lead to a significant indirect contribution towards the cost of financing the Small Claims Tribunal.[20] One approach that may balance any perception of inequity may be to further increase the fees for commercial parties towards full-cost recovery.

The conclusion here must be that commercial parties should have the same access to the tribunal as consumers. The experience of the past decade here has confirmed that while there are many claims for debts by large commercial parties, the vast majority of these have proven to be valid claims. There is no evidence that the tribunal has been widely used by disreputable commercial parties.[21] The use of the tribunal by commercial parties to collect debts can hardly be considered to be an abuse of the process, and if the claims are forcibly channelled to the Magistrate or District courts, they would often, in economic terms, be partly financed by other consumers who pay their bills on time.[22]

B. *Money and Cause of Action Limitation*

In practice, there are two major considerations in defining a small claims jurisdiction. The first is a limitation on the monetary size of claims that the tribunal can deal with (money limitation). The second is a limitation on the types of claims that the tribunal can hear (cause of action limitation). By definition, all small claims tribunals will be bound by some form of money limitation as it is the most obvious way to distinguish or identify

Some suggestions have been made by Ho Peng Kee in "Small Claims Process: Some Reflections" (1984) Mal LR 17, at 26-28.

19 To discriminate against commercial parties may also raise a constitutional issue as Article 12 of the Constitution of the Republic of Singapore states that all persons are equal before the law and entitled to the equal protection of the law. It is beyond the scope of this article to deal with this issue.

20 *Supra,* note 3.

21 Studies of some foreign jurisdictions have shown this tendency, *eg,* Yngvesson and Hennessy "Small Claims, Complex Disputes: A Review of the Small Claims Literature" (1975) 10 Law and Society Review 219. Professional debt collection agencies are not allowed to use the tribunal. Parties have to appear in person, and corporations can only send a full-time employee: s 21(2)(b). *Cf* Weller et al, "American Small Claims Courts", at 9-10, Ch 2 of Whelan, *ed*, *Small Claims Courts, A Comparative Study,* 1990.

22 See Louis D'Souza, *supra,* note 2, at 280; and the empirical study of Ho Peng Kee, (1988) 7 Civil Justice Quarterly 329, especially at 336: In the early years, over 90% of claims by commercial parties against individuals were successful.

the type of claim suitable for simplified procedures and rules.[23] In a broad model, there will be a money limitation with no restrictions on the types of claims that can be brought and heard.[24] Such a jurisdiction is simple and easy to understand. It is therefore attractive, but there are administrative problems like the potential for case overload. The lack of any restriction on the type of claims that can be heard means that the tribunal may sometimes hear and decide cases that are not suitable for the small claims process.

Such a broad jurisdiction can result in a large number of claims. While this will not be undesirable in itself, a large support structure will be required, and it may require resources to be diverted away from other courts. From a practical perspective, it will not be easy to prepare the administrative machinery for such a broad jurisdiction, as the demand will be difficult to estimate. There is an often used argument that the small claims process is not suitable for complex issues and problems, and that such cases should therefore be outside the jurisdiction of the tribunal.

Many legal systems have a money limitation coupled with a cause of action limitation. Broadly, there are three ways to do this. The first is an "inclusion system", where the legislature will expressly identify and list the types of action that come within the tribunal's jurisdiction. The second approach is an "exclusion system", where all types of claims within the money limit are allowed, except those in an exclusion list. The inclusion system requires "suitable" types of actions to be positively identified, while the exclusion system requires "unsuitable" types of actions to be identified.

The third approach involves a combination of the first two, where there is an inclusion list and an exclusion list. An example of such a system is Hong Kong, which has a broad inclusion list covering, *inter alia*, "any monetary claim founded in contract, quasi-contract or tort." Then there is an exclusion list that covers *inter alia*, defamation, maintenance agreements, recovery of money lent, and some labour disputes.[25]

The inclusion system is probably the most frequently used method because it allows the precise identification of the types of claims that can be heard. The guiding principle for the legislature here may be pragmatism rather than conceptual purity. The list of included claims will be influenced by knowledge of the frequency of real life problems.

[23] The Small Claims Tribunal of Singapore is constitutionally a subordinate court, like the Magistrate and District Courts. See s 3 Subordinate Courts Act, 1985 Ed.

[24] *Eg,* in England, which does not have a separate tribunal, but which has compulsory arbitration within the County Court system for claims that do not exceed a specified amount. The current sum is £3,000. See County Court (Amendment No 3) Rules 1995, cl 3. However, if there is a claim for personal injuries, the limit is £1,000.

[25] S 5, Small Claims Tribunal Ordinance, Cap 338. See the Schedule for the inclusion and exclusion lists. There is also a money limit.

Under an exclusion system, many types of claims may be heard, and it may not be possible to identify in advance all the types of claims that should be excluded. Much will be depend on exactly what types of claims are included or excluded, but a limited exclusion list will generally be easier to logically justify than a limited inclusion list. This is because with a limited inclusion list, it will be relatively easy to identify unincluded claims that are similar to those that are included.

Credible arguments can be made for different approaches to the issue of jurisdiction, and it is not surprising that caution has been an important guiding factor in defining the jurisdiction of the Small Claims Tribunal in Singapore. Singapore has an inclusion system with a money limitation.

The government left open the possibility of enlarging the jurisdiction of the tribunal after evaluating the experience with a more limited jurisdiction. It has probably been the intention to enlarge the jurisdiction with time and experience. In 1984, during the Parliamentary debate for the Small Claims Tribunals Bill, the Minister for Law said that the jurisdiction may cover other types of actions after the system has been tried out and found to be successful.[26] In 1994, the Chief Justice set up a committee to consider enlarging the tribunal's jurisdiction in terms of quantum and nature of claims. The work of the committee led to a Bill to enlarge the jurisdiction. In 1995, when the Small Claims Tribunals (Amendment) Bill was debated, the Parliamentary Secretary to the Minister for Law,[27] in response to calls for a broader jurisdiction, said: "I would advise an incremental approach. Let us see how the tribunals handle their enlarged jurisdiction first."[28]

III. The Conferred Jurisdiction

A. *The Beginning: 1985 to 1995*

When the Small Claims Tribunal was first established, its jurisdiction was not broadly defined. The government adopted an inclusion system with a money limit of $2,000. The tribunal was conferred jurisdiction "*to hear and determine any claim relating to a dispute arising from any contract for the sale of goods or the provision of services*",[29] provided the claim

[26] *Singapore Parliamentary Debates*, 24 August 1984, Col 2003.

[27] Associate Professor Ho Peng Kee, who had researched and written on the small claims process in Singapore prior to his appointment in the Ministries of Home Affairs and Law.

[28] *Singapore Parliamentary Debates*, 25 May 1995, Col 1137. See also Col 1136: "if it is found that the tribunals are in a position to handle larger claims, the Government will consider increasing the limit."

[29] S 5(1).

does not exceed $2,000 and is brought within one year of the accrual of the cause of action.[30] The jurisdiction did not extend to tort claims and small claims were essentially defined by the $2,000 limitation.[31]

The tribunal does not have exclusive jurisdiction over claims that fall within its jurisdiction. Parties are free to commence legal proceedings in a Magistrate or other court. However, once a claim has been lodged with a tribunal, no action can be brought before any other court.[32] Conversely, once an action has been commenced in another court, no claim can be brought before the tribunal.[33]

The contract jurisdiction is not a general one covering all contracts, but is confined to contracts for the sale of goods or the provision of services. Hire, loan, lease and licensing agreements, and security arrangements do not involve contracts for the sale of goods or the provision of services. The sale of a chose in action would also not be a sale of "goods", and is therefore also not within the jurisdiction of the tribunal.

Although this basic formula remained unchanged for ten years, the jurisdiction was in fact expanded (or arguably clarified in some instances) by legislation that deemed certain sums of money to be money payable under a contract for the provision of services, with the effect of bringing a claim for such sums within the jurisdiction of the Small Claims Tribunal. These sums include fees and levies owned to the Housing and Development Board, Town Councils, and Management Corporations of Strata Titles.[34] These provisions must have increased the debt collection workload of the tribunal significantly. These three bodies would collectively provide "services" to practically the entire population of Singapore. However, it must be true that the availability of an efficient tribunal for such claims has the beneficial effect of greatly reducing the cost of collecting such unpaid sums, to the benefit of non-defaulters.

On all accounts, there is great demand for the services of the tribunal, and it cannot be disputed that the small claims process has been a success in Singapore. Such success naturally led to expectations for a wider jurisdiction.

[30] S 5(2).

[31] S 8 prevents a claim that exceeds the limit from being "split or divided and pursued in separate proceedings before a tribunal for the sole purpose of bringing the sum claimed in each of the proceedings within the jurisdiction of the tribunal."

[32] S 6(1).

[33] S 6(2).

[34] See s 45 of the Town Councils Act, Cap 329A, 1985 Ed; s 65I(b) of the Housing and Development Act, Cap 129, 1985 Ed; and s 42(14) Land (Strata) Titles Act, Cap 158, 1985 Ed.

B. *From 1995*

There were many requests to enlarge the jurisdiction of the tribunal. For ten years, the initial money limit of $2,000 remained unchanged, while the local economy prospered, with a corresponding increase in expenditure. In 1995, the jurisdiction of the tribunal was expanded in two ways.[35]

(i) *Money Limit raised from $2,000 to $5,000*

The $2,000 limit was increased to $5,000, and the limit was redefined as a "prescribed limit" that can be changed by the Minister after consulting the Chief Justice.[36] In addition, the parties can agree to submit a claim of up to $10,000.[37] It is worth noting that new $5,000 limit is the same figure used to define consumer goods that come within the purview of the Hire Purchase Act,[38] which is a major piece of consumer protection legislation in Singapore. The increase from $2,000 to $5,000 was a large increase, and a correspondingly large increase in the workload for the tribunal was expected.

(ii) *Tort claims in respect of damage to property (but not those arising from motor accidents)*

The limited contract jurisdiction was not expanded, but the inclusion list of types of claims was expanded to cover any *claim in tort in respect of damage caused to any property.* However, this is subject to two general limitations: the tribunal cannot hear a claim "in respect of damage caused to any property by an accident arising out of or in connection with the use of a motor vehicle"; and those "which the subordinate courts have no jurisdiction to hear and determine."[39] The latter limitation is basically to prevent the tribunal from having a larger jurisdiction than the other subordinate courts. The former limitation is effectively a bar against road accident related claims.

35 Act 17/95, which generally came into effect on 15 Aug 1995 (S 333/95).

36 S 5(3)(a). "Prescribed limit" is defined in s 2. This basically allows an increase through subsidiary legislation.

37 S 5(4). The claim must be one that, aside from the money limit, can be heard by the tribunal, *ie,* it must relate to a contract or the sale of goods or the provision of services, *etc.* As with the current $5,000 "prescribed limit", this limit can also be increased by the Minister.

38 See the First Schedule of the Hire Purchase Act, Cap 125, 1985 Ed.

39 S 5(2). This will cover cases that only the High Court can hear and determine, as well as cases that no court can hear and determine.

C. *Remedial Jurisdiction*

Before examining the jurisdiction of the tribunal in greater detail, it is necessary to consider its remedial jurisdiction. This is because it is a practical part of its jurisdiction.

The tribunal can basically make two orders in favour of successful claimants. It can (a) order a party to pay money to another party;[40] and (b) order a party to do specified work (and to pay money in default).[41] In addition, it can include such "stipulations and conditions" as it thinks fit, as well make any "ancillary orders as may be necessary to give effect to" the orders of the tribunal.[42] Since 1995, the order to pay money cannot exceed the prescribed limit of $5,000 (or $10,000 if there is an agreement).[43] This is consistent with the jurisdiction of the tribunal to hear claims that do not exceed $5,000.

As the tribunal is a creation of statute, its powers are exhaustively defined by legislation. There is no explicit reference in the Act to concepts like "damages", "debt" or "interest", but the order to pay money can cover all these concepts. There is therefore no gap in terms of the most common money remedies.

Restitution of money can be achieved through an order to pay money, provided the tribunal can hear the claim in the first case. There is no injunctive power (unless it can come in the form of a "stipulation", "condition", or "ancillary" order). There is also no power to order specific performance, unless it can come in the form of an order to pay money, or to perform "work". This is not wide enough to permit an order to perform any contractual obligations under a contract. The idea behind "work" is closer to remedial work than acts that execute the contract. Section 32(1)(c) allows an order to stipulate for the payment of money should there be default in complying with a work order.

There is no reference to any power to order the return of property, although the return of property in the form of money may be achieved through an order to pay money, or as a condition or ancillary order. There is no power to order the return of property alone, as the main or only relief sought. There is also no power to make declarations as to status or rights.

The remedial jurisdiction of the tribunal is therefore not as wide as that

[40] S 32(1)(a).

[41] S 32(1)(b) and (c). Should there be default, a party may be authorised to get substitute performance by a third party: s 32(2)(c).

[42] S 32(1).

[43] S 32(2) as amended by Act 31/92.

of the other courts, which is to give effect to all rights in law and equity.[44] Considering the limited types of claims that it can determine, it cannot be said that the tribunal does not have sufficient powers to function effectively. It may however, be necessary to correspondingly increase the remedial powers of the tribunal if its jurisdiction were to be further expanded.

IV. Analysis of the Jurisdiction

In systems with a small claims process, there will often be requests for a broader jurisdiction than that provided by the law. It is the responsibility of government, working with the courts, to decide not just what is desirable from the point of view of potential claimants, but also what is achievable. What follows is an examination of the present jurisdiction. The purpose of this is to highlight the consequences of the existing jurisdiction, and to identify possible areas for future reform.

The other purpose of the following analysis is to highlight the need to be very specific and unambiguous in the definition of the tribunal's jurisdiction. This is necessary to safeguard the effectiveness of the small claims process. Even though the tribunal is not bound by the strict technicalities of the law in deciding a claim, its jurisdiction is a matter of strict legal definition. Under the present expanded jurisdiction, for example, there must be a contract or tort as recognised in law before a claim can be decided by the tribunal. Corporate parties who are the subject of a claim by an individual party may frustrate the process by technical arguments about jurisdiction, whether before the referee, or in a formal appeal. An appeal (which is to the High Court) can dramatically increase the costs for an individual party, and it may lead to a very different result from a situation where such a tactic cannot be adopted.[45] A high possibility of being subsequently involved in a High Court appeal will deter individuals from bringing claims before the tribunal.

A. *Money Limit*

The raising of the money limit from $2,000 to $5,000 sharply increased the potential workload of the tribunal.[46] In 1985, when the tribunal first started to hear claims, it would have been fair to say that although it was set at a cautious level, the limit was neither obviously low nor generous.

[44] *Eg,* para 14 of the First Schedule of the Supreme Court of Judicature Act, Cap 322, 1993 reprint, which includes the power "to grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance."

[45] *Eg,* the individual may simply settle for less, or even abandon the action.

[46] The tribunal does not have exclusive jurisdiction. See Part IIIA, *supra.*

In 1996, a limit of $5,000 may even be described by some as relatively generous.[47] $5,000 would cover the cost of most consumer contracts that it would be reasonable to bring within the small claims process. The increase brings in many consumer goods[48] and services that were not within the original $2,000 limit. These include personal computers, multi-room air-conditioning systems, simple home renovation works and even foreign holidays outside of Asia.[49] Consumers therefore benefit from the increased limit. The increase however, also means that larger debts can now be pursued through the small claims process.

Some consumer goods that are still not covered by the $5,000 limit include high end hi-fidelity audio systems, musical instruments like pianos, and equipment for "home-theatre" systems. These are, however, not typical consumer goods for the average family.

(i) *Increase by Agreement*

If the parties agree, claims of up to $10,000 can be heard by the tribunal. However, this is only possible for types of claims that fall within the jurisdiction of the tribunal.[50] Section 5(4) states that the tribunal can hear a claim that exceeds "the prescribed limit but does not exceed $10,000 … if the parties to the claim so agree by a memorandum signed by them." The writing requirement reduces the possibility of disputes as to the existence of such agreement. What is not clear is whether such agreement can be made prior to a dispute or claim being contemplated or formally lodged. A literal reading would suggest that the agreement must be made after a dispute has arisen, in a formal memorandum that is signed by both parties.

This issue is important because of the scope for its use in standard form contracts. If prior agreement were possible, many corporations will include such a term in their standard form contracts. Since the agreement must be *signed* by both parties, it is not possible to have such a standard term in a contract that is orally accepted by the other party.

[47] Hong Kong has a limit of HK$8,000; New Zealand has a limit of NZ$3,000 (Disputes Tribunals Act 1988, s 10(3)); the UK has a limit of £1,000 (Order 19, County Courts Rules 1981); in Australia, the limits range from A$2,000 to $6,000 (see Clark, "Small Claims Courts and Tribunals in Australia: Developing and Emerging Issues" (1991) 10 U of Tasmania LR 201, at 205). In England, the limit is £3,000 (County Court Rules Ord 19 r 3(1)).

[48] The cost of motor cars in Singapore is too high to be covered.

[49] This would require a holiday tour to be a contract for a service.

[50] S 5(4) is subject to s 5(1) and (2), which defines the type of action jurisdiction of the tribunal.

This raises the question of whether parties should be able to agree to submit to the jurisdiction of the Small Claims Tribunal in advance. There is an advantage in advance agreement because parties can be less agreeable to compromise on dispute settlement issues when a dispute has arisen.[51] This should be considered in the future reviews of the jurisdiction of the tribunal. A wider scope for prior agreement will help to resolve more of such disputes with the full advantages of the small claims process. This will not infringe upon the right to use a different forum in the Subordinate Courts as it will only enlarge the way in which a legally effective agreement to use the tribunal to resolve a dispute may be made.[52] While oral agreement alone may not be satisfactory, the current requirement of the signatures of both parties may be too strict if a pre-dispute agreement to submit to the jurisdiction of the tribunal is to be recognised. Evidence in writing would be a reasonable alternative.

(ii) *Value of claim and not subject matter*

The money limit of $5,000 is expressed as a limit on a claim. Section 5(1) states that the tribunal shall have jurisdiction to hear and determine any claim relating to a dispute arising from any contract for the sale of goods or the provision of services and any claim in respect of property damage caused to any property. Section 5(3)(a) states that the jurisdiction of the tribunal "shall not extend to a claim which exceeds the prescribed limit". This suggests that the limitation is on the amount claimed, and not the value of the subject matter that it relates to, for example, the value of the contract underlying the claim or the actual damage to property. This fits neatly with the jurisdiction of the tribunal, which is to "hear and determine [a] claim";[53] and to then order the payment of money, or to order work to be done.[54] It is also consistent with the principle that a claimant can abandon any sum in excess of the prescribed limit in order to bring the claim within the tribunal's jurisdiction.[55]

[51] An analogy can be drawn with *ad-hoc* arbitration, which requires the parties to a dispute to agree on certain crucial matters for the resolution of the dispute only after a dispute has arisen.

[52] See s 6 generally. The tribunal does not have exclusive jurisdiction over cases that it has jurisdiction to determine. However, once a claim has been lodged, no claim can be brought before any other court.

[53] S 5.

[54] S 32.

[55] S 9.

This interpretation would mean that the tribunal may hear a claim for $4,000 on a contract whose value is, say $15,000. However, if the actual loss were, say $10,000, it is not possible to make two claims for $5,000 each,[56] but the aggrieved party may elect to abandon the excess over $5,000 and then bring a claim for $5,000 before the tribunal. On a tort that causes property damage, the actual loss could even be say, $10,000, but a claim can be brought (in the absence of mutual agreement) for a maximum of $5,000.

A limitation based on the size of a claim is preferable to one based on the value or size of the underlying transaction. Such a jurisdiction is simple, and easy to explain to lay people. The focus of a small claim tribunal should be the remedy rather than the size of the contract or the actual damage suffered. This may theoretically have the effect of bringing multi-million dollar contracts within the jurisdiction of the tribunal, but even in such a case, the tribunal will not be able to award more than $5,000. The enlargement of the tribunal's jurisdiction to tort claims further reinforces the argument. In a tort action, the value referred to by the legislation cannot relate to anything but the size of the damages claimed, and not the actual damage suffered. To restrict it to the actual damage suffered would make it difficult to interpret section 9, which allows a claimant to abandon the excess over the prescribed limit.

There is however, a High Court decision that seems to suggest that the prescribed limit can sometimes apply to the value of the contract. In that case, a consumer purchased an antique carpet for $10,000. He paid for the carpet with two cheques of $5,000 each, one dated the day of the purchase, and the other postdated a month later. After a dispute regarding flaws in the carpet, the purchaser stopped the postdated cheque, and claimed the return of the $5,000 paid through the first cheque. The Referee awarded the purchaser $5,000, and ordered him to return the carpet.

The seller appealed to the High Court, and argued that as the contract value was $10,000, the tribunal had no jurisdiction to hear the case. This argument was accepted by Justice Warren Khoo, who allowed the appeal.[57] The Referee had ruled that the money limit applied to the amount claimed (*ie,* $5,000) and not the value of the contract (*ie,* $10,000). On appeal, Justice Warren Khoo said "that is no doubt right if the claim does not involve a dispute about the underlying contract. In the instant case, there was such a dispute about the contract. So it is the value of the claim in that dispute which should be taken as the value of the claim for the purpose of considering the question of jurisdiction." This approach adopts a wide definition of

[56] S 8.

[57] *Schneider* v *Mohd Akhtar Carpets*, Straits Times, 20 April 1996, p 33.

"claim". It extends the meaning of "claim" beyond a simple claim for money to a dispute over a contract, or (in this case) a request for the termination of the contract. The claim in the case was therefore seen not just a claim for $5,000, but a claim to have the contract terminated (or the buyer's termination declare lawful) and any money paid under it refunded.

With respect, while this is not an interpretation that is implausible, it is not the most natural use of the English language to label either a dispute over a contract or a request to the tribunal to rule that the contract be terminated as a "claim". Although the tribunal does in one sense determine the dispute, the drafting of the jurisdiction limit is based on the value of the "claim", and not the value of the disputed contract. The same can also be said of a request for the tribunal to acknowledge the buyer's right to terminate the contract. The tribunal does not strictly have any express power to declare a contract terminated. Its main powers are to order the repayment of money and to order work to be done. An order to return the carpet would be an ancillary condition or order. It would follow logically that the jurisdiction under section 5 to hear claims should be consistent with the basic remedial power of the tribunal, which is to order the payment of money and the performance of work. This would be consistent with the idea that tribunal should not be tied strictly to the legal technicalities of the law, which would include the technical rules on termination for breach and the law of restitution.

The drafting technique used to limit the jurisdiction of the other Subordinate Courts show a clear distinction between the value of a claim and the value of the subject matter involved. In the relevant legislation, the value of the underlying subject matter is expressly referred to and distinguished from the value of a claim for money.[58] In contrast, no such distinction is made in the Small Claims Tribunals Act, which only refers to a "claim". As there is no direct reference to the value of the underlying subject matter (as for the tribunal), the value of the claim should mean what it says literally.

A small claims tribunal that is intended for small claims must have been intended to be free from the legal technicalities of the law of contract and restitution. On a technical analysis, there must be a finding on the nature of the breach of contract, and the right in law to terminate the contract. Then the law of restitution would allow an action for the recovery of the

[58] S 20 (1)(b) for the District Court: "… and the remedy or relief sought … is in respect of a subject-matter the value of which does not exceed the District Court limit."; and s 52 (1) for the Magistrate's Court: "… where the amount claimed or the value of the subject matter in dispute does not exceed the Magistrate's Court limit."

money that had been paid.[59] It is a legal requirement that such money can be recovered only if the contract is terminated. In technical law, there must also be total failure of consideration, and there may not have been such failure since he had the use of the carpet.[60] If there is no total failure of consideration, the legal action must be for damages, which will require the use of the carpet to be accounted for on general compensatory principles. From a lay person's point of view, it must simply have been a claim for the return of the money in exchange for the carpet.

The approach of Warren J. can be explained on the fear that the Small Claims Tribunal would otherwise have jurisdiction to adjudicate on contracts that are valued in excess of the prescribed limit. For example, it may then follow that the tribunal can acknowledge the right to terminate a $1 million contract on a claim for $1 in damages. However, even on his honour's interpretation, it will be possible to make a claim in the Small Claims Tribunal on a $1 million contract for the sale of goods if the claim is only for damages of no more than $5,000, with no dispute as to the contract.

Even if the tribunal were to deal with contracts whose value exceed $5,000, it would not have any remedial jurisdiction to give any far-reaching remedies as such. It can also take the view (in appropriate cases) that it is not the most suitable forum for the dispute, and refer it to another court under section 7. As the decision would bind the tribunal, and claimants are not likely to appeal on this point of law, there should be statutory reversal of the position.

(iii) *Future Increase of Money Limit*

It is difficult to criticize the present limit of $5,000 as being inadequate. In fact, it is high enough to make legal practitioners concerned about its future enlargement. This is especially so with regard to the existing ability to submit a claim of up to $10,000 by agreement. While society has no obligation to safeguard the economic interests of lawyers, there is however, some merit in the concern about the money limit. There should be caution against extending an informal process too far, especially when the sum involved is not insubstantial. When the sum involved is equivalent to the wages of a few months for many workers, it may not be fair to discourage

[59] See Goff & Jones, *The Law of Restitution*, 3rd ed 1993, Ch 18. In strict law, there may be problems in the claimant having used the carpet, which may lead to a partial failure of consideration. Money can be recovered in such circumstances only on a total failure of consideration.

[60] *Hunt* v *Silk* (1804) 5 East 449; *Rowland* v *Divall* [1923] 2 KB 500.

legal advice, bar legal representation, and proceed without all the safeguards of a formal trial, including the application of the law rather than a subjective notion of justice. Aside from the long run, on which one can only speculate, there is no pressing reason to increase the present limit.

When the original $2,000 limit was reviewed, one alternative option to its increase was to keep the limit at $2,000, but to increase the types of claims that the tribunal can determine. By maintaining a limit of $2,000, it may have been administratively possible to allow more types of claims to be brought before the tribunal. This would have kept it more literally as a small claims tribunal, with less turning on the type of claim involved.

At present cost levels, any further increase in the limit will literally raise the stakes before the tribunal. This may have the effect of encouraging parties seeking legal advice,[61] and more technical issues being raised before the referees. Referees may also feel pressured to be more legalistic when larger sums are involved.[62] With larger sums, the number of appeals may also increase. Such developments will undermine some of the fundamental thinking behind the small claims process, and possibly affect the effectiveness of the tribunal.

So far, the discussion has considered the money limit in isolation from the types of claims that can be brought before the tribunal. It will be seen later that it is necessary to consider the money limit when examining the types of actions that can be brought before the tribunal. This is because many of the potential problems in including many types of actions will not be significant if the money limit is low. A lower money limit will present less problems in expanding the inclusion list than a higher money limit. A lower money limit will therefore allow more types of claims to be included, while a higher money limit will make it more difficult to increase the list.

B. *Contracts for the Sale of Goods or the Provision of Services*

No one will argue over the jurisdiction to deal with claims relating to contracts for the sale of goods and the provision of services. Typical consumer contracts will fall within this category. With the increased limit of $5,000, there is extremely good consumer contract coverage.

The next logical step from this jurisdiction is to consider the inclusion of other specific types of contracts, or to go even further and cover all contracts generally, subject to the money limit.

[61] Legal representation is barred (see s 21), but there is no bar against seeking legal advice.

[62] This warning has been raised in the New Zealand context. See Spiller, "A Review of the Disputes Tribunals of New Zealand" [1990] NZLJ 109, at 111.

Specific contracts that may be discussed include contracts to buy and sell choses-in-action and shares, hire-purchase contracts, other hire and lease contracts, loan agreements, licensing agreements, and security arrangements. Some of these were considered in 1995 but a decision was made not to include them.

There are valid reasons for excluding these contracts. They may involve more technical legal issues that are likely to arise with contracts for the sale of goods. They may also involve detailed written contracts as well as more technical and regulatory legislation. The small claims process may not provide a suitable mechanism for resolving disputes relating to such contracts.

It is however, arguable that the small claims process can be a very useful means of pursuing remedies for *some* of such contracts. While they may sometimes involve difficult technical issues, the typical claim will more likely be fact based. Many will only involve debt collection. These can often arise with loan agreements, hire contracts and the lease of land.

The money limit and the limited remedial powers of the tribunal have an important bearing on these potential problems. If the money limit were to be only $1,000, it will be quite acceptable to include all contracts within the jurisdiction of the tribunal. It is more difficult to say the same with the current limit of $5,000, but it is certainly not so high as to make such inclusion unacceptable.

The most likely contract that an individual may seek a remedy for will be a contract for the sale of goods or the provision of services. Where other types of contracts are concerned, there is a strong likelihood that a remedy will usually be pursued by a commercial party against an individual. This essentially means that commercial parties will benefit more than individuals from the extension of the jurisdiction to cover all contracts. This is the same issue that has been discussed in the context of equal access to all parties.[63]

On the whole, it is difficult to restrict contract claims to those based on the sale of goods or the provision of services. The long term goal should be to include all contracts. This can be achieved by not increasing the money limit in the next review of the tribunal's jurisdiction, so that more if not all types of contracts can be included. On such an approach, any contract claims that are positively identified as unsuitable can be expressly excluded.

[63] *Supra,* Part IIA.

C. *Tort*

The amendments in 1995 did not bring all tort claims within the jurisdiction of the tribunal, but only those based on damage to property that has not been caused by an accident in connection with the use of a motor vehicle. The result is a limited contract jurisdiction alongside a limited tort jurisdiction.

(i) *What is "Property" and "Damage to Property"*?

"Property" is not defined in the legislation. It will obviously include physical, tangible property. However, there is also property in choses in action and intellectual property rights. The Parliamentary speech referred specifically to disputes between neighbours over property damage. However, no intention to confine the meaning of the word was expressed, and the speech cannot be used as an interpretation aid to exclude intangible property from the meaning of "property" in section 5. There is therefore some scope for dealing with torts that affect economic interests involving choses-in-action, intellectual property rights, goodwill and possibly even commercial reputation.

"Damage caused to any property" will cover destruction and loss of property, as well as repair costs, but it will not cover related consequential losses like loss of use, and the cost of hiring alternative property during repairs. It is difficult to justify the exclusion of consequential losses.

(ii) *Why only Property Damage*?

There are sound reasons for including property damage cases,[64] and it is difficult to argue against its inclusion.

The inclusion of only property damage, and the exclusion of claims based on motor accidents requires close examination. The same tortious acts that result in property damage can cause damage other than property damage. Some form of distinguishing may be explained, for example, in not including damage to reputation.[65] However, the exclusion of claims for personal injuries and damage to economic interests (for example loss of income) are more

[64] There were many requests for such claims to be included. Many of these problems involve adjoining properties and formal litigation would not be good for continuing relations between neighbours. See the Parliamentary speech on the moving of the legislation, *supra*, note 28.

[65] The small claims process is not intended to protect reputation. The money limit makes it meaningless for any reputations of sufficient stature to justify legal redress.

difficult to explain.[66] One result of the current position is that claims for personal injuries or loss of income based on tort principles cannot be brought before the tribunal even if they arise from the same events that result in property damage, for which a claim may be made.

It may be argued that the small claims process is not suitable for personal injury claims, but it is in fact possible to make such a claim before the tribunal, if it is brought in contract.[67] There is a material difference in likely frequency, but not in principle. Personal injury cases are less likely to arise from contracts for the sale of goods or the provision of services. As far as complexity of legal principles is concerned, it is not possible to say that tort law is more difficult and complex than contract law, or *vice versa.*

In theory, property damage cases (which are within the jurisdiction of the tribunal) can involve difficult fact finding, as well as require technical issues to be resolved. These can be more complex than those that are likely to arise with minor personal injury cases, bearing in mind the $5,000 money limit. For example, nuisance based claims for property damage are presently covered, and they could require a tribunal to deal with claims for wall cracks and other property damage resulting from alleged soil movements caused by nearby construction or tunnelling work. It may be argued that difficult cases can be transferred to another court under section 7.[68] However, such an argument can also be used to support a general jurisdiction to hear tort claims,[69] with difficult cases being transferred out in the same way.

The idea of an "accident" would cover cases involving negligence, but not those involving intentional torts as they cannot be said to result from an "accident" on any reasonable definition of the word. So a claim can be made before the tribunal against a driver who intentionally damaged another car with his car. There is also a distinction between accidents relating to the use of motor vehicles and all other types of accidents. This means that a negligent driver of a motor car cannot be brought before the tribunal, but a negligent tower crane operator can be brought before the tribunal if there is resulting property damage.

66 The latter is probably not significant here in view of the money limit of $5,000. As argued earlier, some economic interests can be "property".

67 *Eg*, if personal injury were to be caused by the breach of a contract for the sale of goods or services.

68 S 7 states that "[n]otwithstanding section 5, a tribunal may at any time if it is of the opinion that a claim ought to be dealt with by another court, transfer the proceedings to that court …"

69 With a money limit applying in any case.

(iii) *Motor Accidents*

There can be no claim "in respect of damage caused to any property by an accident arising out of or in connection with the use of a motor vehicle."[70] The exclusion of motor accidents is linked to the insurance element that will be present in many cases. It was expressly stated in Parliament that claims arising from motor vehicle accidents are excluded as "there are other procedures such as insurance policies to deal with such claims."[71]

With respect, this explanation is not entirely satisfactory. Property damage cases may also involve insurers. If this is not a problem, there should not be an assumption that everything can be left to insurers. If insurers were to refuse to pay on demand, legal action will have to be commenced in the courts.[72] Since relatively small claims are involved, this position will result in a remedial gap as the victims of many minor accidents will be left without a remedy unless they are prepared to sue in the Magistrate's Court.

Almost all motor insurance policies have an excess payment clause, which sets a sum that the insured will bear personally. This will be about a few hundred dollars, and the victim will have to bear this amount unless he is prepared to claim it from the other party. In addition, if the loss involved is small, the insured may also not want to claim from his own insurer because his "no claims bonus"[73] will be affected. And even if there were to be an insurance claim, there may then be the loss of the insured's no-claims bonus. It will be useful if it is possible to pursue such loss before the tribunal. At present, the loss of a no-claims bonus is not a loss that is in respect of damage to property, and is outside the jurisdiction of the tribunal.

The number of potential motor accident claims is large and many of such disputes involving relatively small amounts of money are probably not pursued because of reasons of cost. Unless the tribunal can hear such claims, they will not be resolved elsewhere.

On the above arguments, a strong case can be made for the inclusion of motor accident claims within the jurisdiction of the tribunal. There are, however, additional factors to consider.

70 S 5(2)(a).

71 *Singapore Parliamentary Debates*, Col 1136, *supra*, note 28.

72 Depending on the facts, such action may be against the insured party who caused the accident, or be directly against an insurer.

73 The practical effect will be a lower discount on his next insurance premium.

Many motor accident claims will involve disputes as to facts that may not be easy to resolve with the informal procedures of the tribunal. However, they are not inherently any more difficult than those which the tribunal will be resolving under its limited contract and tort jurisdiction.[74]

New Zealand's small claims process actually started with a limited tort jurisdiction that *only* allowed claims for damage to property resulting from negligence in the use, care or control of a motor vehicle.[75] This is the very type of claim which is expressly excluded in Singapore. Such claims accounted (at one stage), for 25% of all claims before the New Zealand tribunals.[76] There is no doubt that there will also be a large number of claims of this nature if the Singapore tribunal were to be allowed to deal with them. In 1988, New Zealand further increased the tort jurisdiction to cover all claims in tort in respect of destruction, loss, damage or injury to property, as well as the recovery of property,[77] with an expected large increase in the number of claims. No distinction is now drawn in New Zealand between motor accidents and other incidents. Such a broad jurisdiction has not proved to be unworkable.

(iv) *Future Directions*

In Singapore, the issue is whether we should expand the tort jurisdiction to allow motor accident claims, or to go even further, and allow all tort claims beyond property damage.

The inclusion of motor accident related cases will require a consideration of some resulting issues. The position of insurers before the tribunals will have to be considered. They may seek to appear as claimants directly on the basis of subrogation; or as an interested party who would be liable if a party insured by themselves is found to be liable. The issues here are not easy to resolve. It was observed that insurers were not entirely comfortable with their treatment in New Zealand.[78]

The Singapore Small Claims Tribunals Act does not deal directly with these issues.[79] It is arguable that an insurer can make a claim before the tribunal in his own right on the basis of subrogation as he steps into the

[74] *Eg,* when a consumer alleges a representation that is denied by the trader. The tribunal may simply have to choose who to believe. The same problem will arise with conflicting accounts of motor accidents.

[75] New Zealand Small Claims Tribunals Act, 1976, s 9(1)(c).

[76] Spiller, *supra,* note 62, at 111.

[77] New Zealand Disputes Tribunals Act 1988, s 10(1) (Act 110/1988).

[78] See C Hawes, "Insurers and Small Claims in New Zealand" 1989 Insurance LJ 131.

[79] The 1988 New Zealand Disputes Tribunals Act, *supra*, note 77 has detailed specific provisions on the position of insurers: see ss 28 to 35.

shoes of the insured party. If this were possible, there is a possibility that the tribunal will be overwhelmed by insurer claims. At present, it may be too costly and inefficient for insurers to recover small losses, but with the small claims process, it will be commercially viable to do so. This is, however, not an outcome that should be criticised. An increase in the number of claims is not undesirable *per se*. Insurance premiums may even decrease if this were to happen. A large case load can of course lead to administrative problems. Administrative considerations cannot be ignored, but they can only be used over the short-term to disallow or discourage such claims.

In theory, this is already an issue for property damage cases where there is insurance coverage over the property. To allow insurers to appear would not introduce something new as an assignee of a debt can appear in person to make a claim because he has the right to enforce the chose in action.[80]

An insurer who is facing a claim against a party insured by him may want a right to take part in the proceedings before the Referee. Under the present Act, this is not possible. It will be difficult to allow this without effectively reviewing the whole scheme against representation before the tribunal.

The ability to bring motor accident claims before the tribunal will benefit accident victims, but there is also the possibility that insurers will raise excess payments as a result, so that their insured can try to recover the payments through the tribunal.[81] If this were to happen, there will be a negative effect on insured parties. A free and competitive market in insurance services may, however, dampen such an effect.[82]

The present limited tort jurisdiction result in many technical distinctions. This is not desirable in a small claims process. Lay claimants will not be able to make such distinctions. This is not to say that the present position is wrong. The administrative considerations are valid, and there is no value in an intellectually satisfying broad expansion of the jurisdiction with no consideration of how well the tribunal will be able to deal with an expected flood of claims. These considerations cannot however be repeatedly raised over an extended period of time. On the whole, the tort jurisdiction should eventually be widened. The problems that may arise do not outweigh the results of better remedial access. The long term goal should be to allow claims in tort for all forms of losses. Specific torts that can positively be identified as being unsuitable for inclusion can be expressly excluded. An obvious example of this would be claims for defamation.

[80] S 4(6) Civil Law Act, Cap 43, 1994 Ed.

[81] See A Fram "Fundamental Elements of the Small Claims Tribunals System in New Zealand" Cap 5, at 73-98, in CJ Whelan ed, *Small Claims Courts* (1990).

[82] There is no anti-competition legislation in Singapore and insurers may all agree not to compete in this regard.

D. *Quasi-Contract or Restitution*

The jurisdiction of the tribunal does not ostensibly extend to quasi-contractual or restitutionary claims.[83] The present jurisdiction is tied to the existence of a valid contract and a tort in respect of damage to property. Section 5 states that "a tribunal shall have jurisdiction to hear and determine any claims relating to a dispute arising from any contract for the sale of goods or the provision of services." If there is no contract (or if the contract is not enforceable),[84] there would not be a dispute that arises from a contract which the tribunal can determine. Restitutionary claims are made on the basis of unjust enrichment and are not claims that are founded on a contract.[85] In some cases, the Law of Restitution is useful precisely because a contract-based remedy would not be satisfactory.

Some of the potential problems with the lack of an express jurisdiction to hear claims for restitution may be overcome with a wide interpretation of the power to order the payment of money, and the ancillary relief power of the tribunal. It will be impossible to do this when the contract does not exist,[86] or if it does, but no action can be founded on it. Examples of such cases include a contract to marry and an oral contract which cannot be enforced unless evidenced by or made in writing.[87] In such cases, the tribunal does not have jurisdiction to hear a claim.

If one were to consider that ordinary contract disputes can be heard by the tribunal, it is difficult to justify the exclusion of claims founded in restitution.[88] Restitution is a fast developing and important area of the law. The law of obligations would not be complete without it.

The Law of Restitution can be very technical, and the academic writings on the subject are in some fields conflicting, and ahead of judicial developments. These may suggest that restitution may be unsuitable for

[83] Hong Kong has an express provision for quasi-contractual claims. See paragraph 1 of the First Schedule to the Hong Kong Small Claims Tribunals Ordinance, Cap 338, 1986 Ed, which refers to "[a]ny monetary claim founded in contract, quasi-contract or tort …"

[84] The tribunal cannot hear a case that the subordinate courts cannot hear: s 5(2)(b). So if a contract is unenforceable, the tribunal will also not have jurisdiction to hear the case.

[85] See *Seagate Technology* v *Goh Han Kim* [1995] 1 SLR 17.

[86] *Eg,* because of uncertainty of terms, lack of agreement *etc.*

[87] *Eg*, see s 6A, Civil Law Act, Cap 43. A contract to marry would not be within the present jurisdiction of the tribunal as it is not a contract for the sale of goods or the provision of services. Without a restitutionary claim, it will not be possible to recover wedding gifts and other valuable items like jewellery before the tribunal.

[88] This is of course subject to the limited contract jurisdiction of the tribunal. The case for a general resitutionary jurisdiction will be much stronger if the contract jurisdiction were to be expanded to a general one.

the small claims process. However, they should be seen in perspective. The informal procedures of the tribunal, and the money limit of $5,000 should be considered. A referee need not, and probably would not try to reconcile the views of influential academics with the local and other Commonwealth case law before making a decision on such a claim to restitution. Restitution is now acknowledged as an important area to consider alongside contract and tort, and it may sometimes produce better results than claims based on contract and tort. Hong Kong and New Zealand both expressly allow claims in quasi-contract.[89]

If restitutionary claims are to be included, it will be necessary to broaden the contract and tort jurisdiction of the tribunal at the same time. A right to claim restitution alongside a limited contract and tort jurisdiction will present problems in consistency with regard to contracts and torts that are not within the jurisdiction of the tribunal. An example in tort will be a waiver of tort claim based on the conversion of property, which will then be possible under the restitution jurisdiction, while a pure claim in tort for conversion will not be possible before the tribunal. An example in contract would be a claim for the return of money paid for a consideration that had wholly failed under an oral contract to buy land.

V. The Next Step

An incremental approach to the jurisdiction of the tribunal is prudent, and the identification of types of actions to include by an examination of actual demand and feedback, is practical. However, the above discussion leads to the conclusion that in the long and possibly medium run, the tribunal should have jurisdiction to hear all claims in contract, tort and restitution, with expressly identified claims being excluded.

If this can be achieved, lay people will basically only have to remember the money limit as the practical definition of the jurisdiction of the tribunal. The current jurisdiction may not be complicated for lawyers, but it can confuse lay people, who may also not understand the reasons for the distinctions drawn.

When the jurisdiction of the tribunal is next reviewed, the possibility of increasing the types of claims should be considered as an alternative to an increase (or a larger increase) of the money limit.

A case can even be made for the jurisdiction to be eventually defined by only a money limit, with all types of claims being allowed, except for

[89] New Zealand: s 10, *supra,* note 77; Hong Kong: The Schedule, *supra,* note 83. England's compulsory arbitration procedure for small claims does not bar claims for restitution.

expressly excluded claims (*ie*, a money limit with an exclusion system). In the present context this would be too broad a leap. It is also difficult to identify claims outside of contract, tort and restitution that are suitable for the small claims process.

In conclusion, the medium or long term goal should be jurisdiction to hear claims in contract, tort and restitution. This can be subject to an exclusion list. Any other claims that are considered useful or suitable can be expressly included. Hong Kong has a model that is close to this.[90]

At present there is a big gap between the cost and consequences of making a small claim and litigation in the Magistrate's court. This gap makes small claims more attractive. There is of course a limit to what can and should be brought within the small claims process. Once the practical limit for the small claims process is reached, the next step should be to examine the issue of costs and procedure in the Magistrate's court rather than further stretch the small claims process.

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[90] See the Hong Kong Small Claims Tribunals Ordinance, Cap 338, 1986 Ed.

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