Legislative Council Panel on Administration of Justice and Legal Services
Meeting on 26 April 2001

Information Paper

Proposed amendment to the Small Claims Tribunal Ordinance (Cap. 338) To limit costs of appeal and transfer of cases from the Small Claims Tribunal

Background

Under the Small Claims Tribunal Ordinance (Cap. 338)(the Ordinance), all proceedings in the Small Claims Tribunal (the Tribunal) are heard and determined by an adjudicator who is qualified to practise as a barrister or solicitor in Hong Kong or any other common law jurisdiction. The adjudicator enjoys the same privileges and immunities as a judge of the Court of First Instance in civil proceedings in that court. The hearing of proceedings in the Tribunal is to be conducted in an informal manner. The Tribunal also inquires into any matter which it may consider relevant to a claim, whether or not it has been raised by a party.

2. When moving the second reading of the Small Claims Tribunal Bill 1975 the Attorney General said (Hong Kong Hansard 75/76, pp. 142-144) -

> "…this Bill seeks to establish a tribunal which will provide an informal forum, with a simple procedure, for the determination of limited monetary claims founded on contract or in tort. The proposed tribunal, which will be known as the Small Claims Tribunal, follows the concept pioneered by the Labour Tribunal.
>
> That concept … embraces three main aspects. The first is that proceedings in the tribunal should be on an inquisitorial rather than an adversarial basis, which means among other things that the tribunal must take a more positive role in the proceedings than is customary in the case of the ordinary courts. Secondly, the procedure and practice is simple, and technical rules, especially the technical rules of evidence, are not to prevail. And the third aspect is that representation by lawyers is not permitted. ….

> The upper limit … of the new tribunal's jurisdiction will be $3000 [now $50,000] – a figure which has been adopted after most careful consideration of the various factors, including the fact that lawyers are to be excluded. Within that limit, the tribunal will have exclusive jurisdiction. … The principle must be that everybody is equal before the law. If the jurisdiction of the tribunal were to be concurrent with that of the District Court, a litigant, whether plaintiff or defendant, might choose the District Court for any one of a number of reasons, some at least of which might give him an unreasonable or socially unjust advantage over his opponent. The aim of the policy is to make simple justice available to everyone equally. … the tribunal will have power to transfer a case to the District Court or the Supreme Court and I am confident that this power will be used whenever a case presents particular difficulties, either of fact or law, which are such that it can best be dealt with in the traditional way by the ordinary courts. …
>
> As in the case of the Labour Tribunal, there will be an appeal to the Full Court on a point of law when leave is given. Careful consideration has been given to the powers which the Full Court should have on an appeal. In particular, it is considered that it should not be entitled to hear further evidence or vary facts found by the tribunal. Unless these normal powers of an appellate court are excluded, there will be difficulties on account of the different rules of procedure applying in the tribunal on the one hand and the Full Court on the other.
>
> If this Bill is enacted I believe that … we shall have moved as far as practicable to provide for the judicial determination of cases without the participation of lawyers … it must be accepted that the services of lawyers are not yet available evenly throughout the community to the extent which is desirable if the demands of social justice are to be met."

3. The Tribunal may award costs and expenses to a party. However, it is implied that no barrister's or solicitor's costs will be awarded as lawyers have no right of audience in the Tribunal. Where a claimant has a claim, which exceeds $50,000, the claimant may abandon the excess, and the Tribunal then has jurisdiction to hear and determine the claim. However, the claimant cannot recover an amount exceeding $50,000.

4. Under section 28(1) of the Ordinance, any party who is aggrieved by a decision of the Tribunal may apply to the Court of First Instance for leave to appeal on any ground involving a question of law or on the ground that the claim was outside the jurisdiction of the Tribunal.

5. On appeal, the Court of First Instance may make such order as to costs and expenses as it thinks fit, but may not reverse or vary any determination made by the Tribunal on questions of fact or receive further evidence (section 29(2)(b)). Leave to appeal to the Court of Appeal may be granted on a question of law of general public importance, and the Court of Appeal may make such order as to costs as it thinks fit.

6. Under section 7 of the Ordinance, the Tribunal may transfer proceedings to the Minor Employment Claims Appeal Board, the Labour Tribunal, the Lands Tribunal, the District Court or the Court of First Instance, and the "practice and procedure" of the transferee court are to apply.

The Problem

7. In So Sai Ming v. The Kowloon Motor Bus Co. (1993) Ltd. (Small Claims Tribunal Appeal No. 1/94 (unreported)) the claimant's van collided with a KMB bus. The repairs to the van and the loss of its use amounted to $26,159.30. The claimant commenced proceedings in the Tribunal in 1993 and in so doing abandoned all claims in excess of $15,000.00, the upper limit of the Tribunal's jurisdiction at that time. Judgment was given for the claimant for $15,000.00 with costs in the sum of $1,500.00.

8. The defendant appealed on the ground that the adjudicator had made procedural errors in the conduct of the hearing. The appeal was allowed and the case was remitted to the Tribunal for a rehearing. In respect of the costs of the appeal, Pang J. ordered that, "The cost of this appeal be to the Appellants if not agreed". The taxed costs, including legal costs, amounted to $122,610.00. The respondent, who had little money, has had to pay the appellant's costs by small instalments.

9. Pang J. held that the words "make such order as to costs and expenses as it thinks fit" appearing in sections 29(2)(b) and 29B of the Ordinance mean that the appellate courts have an unfettered discretion to award costs, including legal costs, in appropriate circumstances. The appellate courts will examine

the circumstances of each case before any costs order is made.

10. Pang J. also considered that the applicant's concern that the amount of costs to be borne by the unsuccessful litigant would be disproportionate to the amounts claimed in the action was more apparent than real. The position is that the court can, as a matter of discretion, refuse to award costs to the successful party in appropriate cases, and the courts will examine the circumstances of each case closely before a costs order is made.

11. It was suggested by a barrister (Mr Michael Bunting SC), in a letter to the Administration (Annex A), that if a party can litigate in the Tribunal without the risk of bearing his opponent's legal costs, he should not lose this protection in proceedings on appeal. It was further suggested that each party should bear his own legal costs in respect of the appeal, and that sections 29(2)(b) and 29B of the Ordinance should be amended accordingly.

12. In a further letter to the Administration (Annex F), Mr Bunting suggested that section 7 of the Ordinance be amended to make it clear that the costs regime of the Tribunal applies in respect of proceedings transferred under the section. This would avoid the danger that small claims litigants whose proceedings are transferred to the Lands Tribunal, the District Court or the Court of First Instance (the Minor Employment Claims Appeal Board and the Labour Tribunal are legal costs-free) would find themselves subject to the same undue costs risk that presently applies on appeal. The object of the Ordinance to minimize the costs of litigating small claims would therefore also be expressly affirmed in respect of transferred cases.

<u>Consultations</u>

13. The Administration undertook to consider whether the Ordinance should be amended as suggested by Mr Bunting. Two consultation papers (Annexes B and G) were issued in early August 2000 and early January 2001 to the Judiciary, the Bar Association, the Law Society, the two law schools and the Secretary for Education and Manpower with requests for comments to be submitted by 30 September 2000 and 31 January 2001 respectively. Mr Bunting and the Director of Legal Aid were also invited to offer comments.

14. The consultation papers sought comments on proposals to amend the Ordinance to –

(a) limit a party's entitlement to costs on appeal to the same kinds of costs as are recoverable in the Tribunal itself, in particular excluding the costs of legal representation;

(b) amend section 7 of the Ordinance so that small claims litigants whose proceedings are transferred to the Lands Tribunal, the District Court or the Court of First Instance may not be subject to the same undue costs risks that presently apply on appeal;

(c) clarify a grey area as to the recoverability of a solicitor's or barrister's advisory or drafting fee under section 24 of the Ordinance; and

(d) amend the Labour Tribunal Ordinance (Cap. 25) and the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) in a similar manner (note: Cap. 453 only provides for the transfer of cases to the Labour Tribunal in which legal representation is also not allowed – therefore the parties are not at risk of incurring disproportionate costs).

Responses to the Consultation Papers to date

15. Responses to the consultation papers have been received from the Judiciary Administrator, the Bar Association and the Law Society. Mr Bunting and the Commissioner for Labour also contributed their comments. Copies of the replies are attached at Annexes C - F and H - J.

A. Costs on appeal and on transfer

16. The Bar Association (Annexes D and H) and the Judiciary Administrator (Annex C) do not support the proposal to cap costs on appeal and on transfer from the Tribunal. The Law Society (Annexes E and I) supports both proposals and suggests that costs on appeal from the Tribunal should be limited to what would be recoverable in the Tribunal except if the court were to determine that the appeal was frivolous, vexatious and without merit.

Arguments against limiting legal costs

17. Arguments against the proposal include –

(1) There is no reason why a successful party to an appeal should be deprived of his right to have his costs indemnified by the losing party. The effect of requiring the parties to an appeal to pay their own legal costs would be that, in some cases, a poor litigant who succeeds on appeal will not be able to recover his legal fees from a wealthy opponent. He would be in an invidious position of having to choose between his rights and his pocket. The right of appeal might be worthless to him. There is even less justification for forcing a successful defendant to bear his own costs of defending the claims (the bringing of which is not of his own choosing).

(2) The appellate courts would take into account factors such as whether the claimant/defendant has a bona fide claim/defence, the merits of the appeal, which party is at "fault" (i.e. was the appeal brought about by errors made by one of the parties or by the Tribunal) and the general principle that costs follow the event. Where an unsuccessful litigant is faced with an order of costs against him, he is protected under the normal rules of taxation (on a party-and-party basis) that only costs necessarily and reasonably incurred would be allowed.

(3) Leave to appeal to the Court of First Instance would only be granted on a point of law or on the jurisdiction of the Tribunal, and further appeal to the Court of Appeal is limited to a point of law of general public importance. The assistance of legal advice is necessary. The appellate procedure should, therefore, not be invoked lightly and, once invoked, the parties should be subject to the same potentially disproportionate risks as to costs as litigants in other appeals.

(4) The concern that the amount of costs to be borne by an unsuccessful litigant on appeal would be disproportionate to the amounts claimed in the action is more apparent than real since the court can, as a matter of discretion, refuse to award costs to the successful party in appropriate cases (So Sai Ming, p.6 L-P).

(5) A further effect of requiring parties to pay their own legal costs

may be that losing parties might be more willing to appeal, since they would not be at risk of an order to pay their opponents' legal costs if they lose the appeal.

(6) Respondents should be protected from frivolous appeals.

(7) Since there are on average only about 40 small claims appeals each year, and cases like So Sai Ming are rare, the problem is minor. There may be no need to change the existing law other than to extend legal aid, subject to means-testing.

(8) The problem of costs on appeal should be addressed by abolishing the right of appeal altogether if the extension of legal aid is politically infeasible. In any event, in appropriate cases, the remedy of judicial review would always be available as a last resort.

(9) The arguments against amending section 7 to make it clear that the costs regime of the Tribunal applies to cases transferred to the Lands Tribunal, the District Court and the Court of First Instance are essentially the same as those noted in subparagraphs (1) to (4) above.

Arguments for limiting legal costs

18. Arguments for the proposal include –

(1) As noted in paragraph 2 above, one of the principal objects of the Ordinance was to minimise the costs of litigating small claims cases. The applicable policies are that costs must be proportionate to the amount in issue and that the less well-off can litigate such cases without the risk of being crushed by costs. While this object is achieved in the Tribunal (subject to the grey area as to the recoverability of lawyers' advisory and drafting fees) it is undermined by treating legal costs on appeal as being recoverable. Since the Tribunal and the appellate court are two components of the one system it is illogical to eliminate the risk of bearing legal costs in the Tribunal, but not the appellate court. In any event, it does not follow that the losing party should be made to pay his opponent's legal costs. The unsuccessful party in the

Tribunal (poor or not) has a choice whether to take a point of law or jurisdiction on appeal. There is nothing illogical or unjust in providing him with a right of appeal without potential for recovery of costs.

(2) The appellate courts are not well-placed to ensure that no injustice is done. The problem is that settled principles govern the award of costs (including the general principle that successful parties get their costs) and the appellate courts are obliged to apply these. Further, as illustrated by So Sai Ming (in which a poor claimant who had succeeded on the merits in the Tribunal had to pay $122,610 in taxed costs on appeal), the rules of taxation also are governed by settled principles and are an insufficient safeguard against injustice.

(3) There is no inevitable requirement to obtain legal advice. Even if unrepresented parties are not able to argue points on appeal themselves, such points can be and frequently are taken by the court itself, even where the parties are represented. Furthermore, it should be borne in mind that the parties will only be in the appellate court if previously the court has given leave to appeal on the basis of identified points of law or jurisdiction. Parties in small claims appeals should not be subject to the same costs risks as litigants in higher monetary value cases where legal costs are payable both at first instance and on appeal. The problem of disproportionate costs is much more acute in smaller cases where the costs of legal representation, for one side alone, frequently far exceed the amount of the claim. In *Access to Justice* (1996), Lord Woolf observed that a system that in many smaller cases pays more to the lawyer who conducts the litigation than it does in compensation to the successful plaintiff is unacceptable.

(4) The discretion of the court is an insufficient safeguard against the danger of a party bearing disproportionate costs on appeal. The facts of So Sai Ming are a paradigm of what can go wrong (see paragraphs 7 and 8 above).

(5) The lesser costs risk of requiring parties to pay their own costs on appeal is consistent with the aim of the Ordinance "to make simple

justice available to everyone equally". The rule that costs follow the event may deter poor litigants from taking meritorious claims while wealthy litigants can afford the costs consequences of losing a given case. A wealthy litigant may be able to drive a poor opponent into the ground by successfully appealing on a point of law or jurisdiction, which may make no difference to the merits, and then being awarded disproportionate costs. So Sai Ming is an example of this since, on the facts, the Tribunal's order was inevitable regardless of the alleged procedural irregularity. It is also relevant that, under section 29(2)(b), the appellate court cannot reverse or vary any determination made by the Tribunal on questions of fact. The present appellate costs regime gives the wealthy litigant "an unreasonable or socially unjust advantage over his opponent" such as might occur if "a litigant … chose the District Court" (see the object of the Ordinance as described in paragraph 2 above).

(6) Respondents are already protected against frivolous appeals, since leave to appeal under sections 28 or 29A can only be given in cases where some reasonably arguable point of law or jurisdiction arises. However, this does not necessarily avoid the unfairness of disproportionate costs. For example, in Diamond Property Management Ltd v. First Class Fashion Co Ltd & Others (Small Claims Tribunal Appeal No. 61 of 1993 (unreported), Chan J (pp. 8S-9B) observed that it was most unfortunate that the respondents should be held liable to pay for the mistake of the adjudicator when none of them had contributed in any way to the mistake. Furthermore, an appellant who has an arguable case may lose on appeal. Under the current law, he might have to pay the respondent's costs after being encouraged by the leave procedure to proceed with his appeal.

(7) The relatively small number of appeals from the Tribunal each year does not establish that the problem of costs on appeal should be ignored. The problem is not minor for those who have been crushed by costs or put off from using the Tribunal for fear of being crushed by costs. The extension of legal aid specific to small claims appeals may not be consistent with the policy and object of the Ordinance to establish a simple procedure that was as

non-litigious and non-adversarial as possible because of the small sums at stake. Even assuming that legal aid were to be extended, that would not solve the problem of the severely disproportionate costs risk for parties who failed the means test.

(8) There seems to be no good reason to deprive the losing party of the option of taking a point of law or jurisdiction on appeal. The losing party may have good reasons to have the point established in his favour even though he has to bear his own legal costs. The availablility of judicial review would not provide a solution since the problem of disproportionate costs would be as applicable to that procedure as it is to an appeal.

(9) The arguments for amending section 7 to make it clear that the costs regime of the Tribunal applies to cases transferred to the Lands Tribunal, the District Court or the Court of First Instance are essentially the same as those noted in subparagraphs (1) to (5) above. Without such amendment, small claims litigants whose proceedings are transferred to the latter fora could, contrary to the object of the Ordinance, find themselves subject to the same disproportionate costs risk which presently applies on appeal. Further –

(a) the object of the transfer procedure is to ensure that difficult cases are dealt with by a higher court and the object of the Ordinance to minimise the costs of litigating small claims is not displaced in transferred cases; and

(b) the amendment would be consistent with the main principle underlying section 44A(6) of the District Court Ordinance (Cap.336) that the costs regime of the transferor court should apply, and with the argument noted in subparagraph (4) above.

Views of the Administration

19. There are precedents in other jurisdictions which show that, even where legal representation is allowed, there is a trend to cap legal costs in small claims cases by reference to the amount of the claim or not to allow legal costs at all.

20. In England and Wales, for example, when assessing costs, the courts dealing with claims allocated to the small claims track must have regard, among other matters, to the amount or value of the property involved. Quebec does not permit judgments of the Small Claims Division to be appealed. No costs of legal representation may be awarded in New Brunswick, although a judge may award costs against a party who has brought or defended an action unreasonably. In Nova Scotia, barrister's costs on an appeal are capped at $50 (Canadian).

21. In the Administration's view, there are good grounds for limiting the costs of appeals and transferred proceedings in small claims cases for the reasons noted in paragraph 18 above.

22. It is apparent from the nature of the jurisdiction and the second reading speech of the Attorney General (see paragraph 2 above) that the object of the Ordinance was to strike a fair balance between, on the one hand, the interest of the winning party to recover his legal costs (to the extent that they were reasonably incurred), and, on the other hand, the interest and expectation of both parties (rich or poor) from the outset that their expenses will be reasonably proportionate to the amount at stake. Further there is the interest of the poor litigant not to be at risk of a costs order against him which he cannot afford to meet.

23. That balance was struck by creating a tribunal in which legal representation is prohibited but whose jurisdiction is limited to small claims. The fault in the system lies in treating the appellate procedure (and also the transfer procedure) as if it justified different treatment from the tribunal procedure, whereas the reality is that the three levels of first instance, appeal and final appeal are components of the same package and the balance struck at tribunal level needs to be maintained at the higher levels if the object of the Ordinance is not to be defeated.

24. Accordingly, the Administration is of the view that it would be both just and consistent with the object of the Ordinance to exclude the costs of legal representation on an appeal or transfer from the costs that may be awarded to a party. A party who considered that a point of law or jurisdiction was of such importance that it should be challenged or defended on appeal would have the option of participating in the appeal with legal representation or not, but with the costs limited to the same kinds of costs as are recoverable in the Tribunal.

There is inherent fairness in this approach: if the parties bore their own legal costs they would then be able to quantify the costs of the appeal and to avoid the problem of disproportionate costs if they considered it would be a problem for them.

B. Barrister's/Solicitor's advisory or drafting fee

25. Section 24(1) of the Ordinance provides that the Tribunal may award to a party costs and expenses which may include, inter alia, any reasonable expenses necessarily incurred. Section 24(1) appears to give the Tribunal a general discretion as to costs as well as making specific provision for certain kinds of costs. Since lawyers have no right of audience before the Tribunal, it is unlikely that a barrister's or a solicitor's fee for representing a claimant or a defendant would be "reasonable expenses necessarily incurred" under section 24(1). Nevertheless, the Tribunal might possibly award costs in respect of an advisory or drafting fee charged by a barrister or solicitor, although the award is unlikely to be very great.

26. Both the Judiciary Administrator (Annex C) and the Law Society (Annex E) consider that lawyers' advisory and drafting fees should not be allowed. The Bar Association (Annex D) considers that a litigant should be allowed to recover his advisory fee if he goes to a solicitor for simple advice.

Views of the Administration

27. While it is within the power of the Tribunal to interpret section 24(1), the Administration considers that "reasonable expenses necessarily incurred" should not include a lawyer's advisory or drafting fee. If the advisory or drafting fee is allowed, proceedings in the Tribunal would appear to be conducted on an adversarial basis. This would be inconsistent with the purpose of setting up the Tribunal which is that claimants should represent themselves in person. It is the statutory duty of the adjudicator to take a more positive role in the proceedings than is customary in the case of the ordinary courts. It is therefore recommended that section 24 be amended accordingly.

C. Other Ordinances

28. The proposed amendment of the Ordinance may have implications for the Labour Tribunal Ordinance and the Minor Employment Claims

Adjudication Board Ordinance. The latter Ordinance establishes the Minor Employment Claims Adjudication Board (the Board) to adjudicate minor employment claims. The Labour Tribunal Ordinance establishes the Labour Tribunal with limited civil jurisdiction to determine labour disputes.

29. The Ordinances provide that the hearing of claims in the Board and the Labour Tribunal are to be conducted in an informal manner. The Board and the Labour Tribunal are required to investigate any matter which they consider relevant to the claims, whether or not they have been raised by the parties. A barrister or a solicitor has no right of audience before the Board or the Tribunal. An appeal from a decision of the Board or from a determination of the Labour Tribunal to the Court of First Instance is allowed with leave on a question of law or on the ground of the jurisdiction of the Board or the Labour Tribunal. The Court of First Instance may make such order as to costs and expenses as it may think fit. An appeal from a decision of the Court of First Instance may also be brought with leave on a point of law of general public importance, and the Court of Appeal may make such order as to costs as it may think fit.

30. The Bar Association (Annex D) and the Judiciary Administrator (Annex C) do not support the proposal to amend the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance to limit costs in the same way as in respect of small claims cases based on similar arguments to those against amendment of the Small Claims Tribunal Ordinance (see paragraph 17 above). The Judiciary Administrator expressed the view that in cases where workers appeal from decisions of the Labour Tribunal to the High Court, the respondent companies might not be able to be represented by their officers, but might have to engage lawyers to represent them. Small companies may suffer if they are unable to recover legal costs. The Law Society (Annex E) supports the proposal to amend these two Ordinances.

31. The Commissioner for Labour (Annex J) considers that the Small Claims Tribunal, the Labour Tribunal and the Minor Employment Claims Adjudication Board are set up specifically to provide a speedy and an inexpensive way to resolve disputes involving a small amount of money. The Commissioner notes that it has never been the intention of the Executive Council, the legislature or the Administration to expose low paid workers to the risk of unlimited costs upon appeal by an employer on the ground of an error of law made by a presiding officer. It is a serious anomaly to expose workers to such risk of unlimited costs on appeal. The Administration and the Judiciary

owe the public a moral obligation to rectify as soon as possible any unintended anomaly. To do otherwise would be a serious neglect of one's public duty.

Views of the Administration

32. Like the Small Claims Tribunal (which was modelled on the Labour Tribunal – see paragraph 2 above) the Board and the Labour Tribunal were also established to provide informal fora to settle disputes in their specific areas to make simple and inexpensive justice available to everybody equally. Since it is recommended that the Small Claims Tribunal Ordinance should be amended to limit costs on appeal and to exclude costs for advisory and drafting fees, the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance should be amended in an equivalent way in order to observe the general legal policy principle that the law should be coherent and consistent.

33. As noted in the case of the Small Claims Tribunal in paragraph 18(1), litigants (including small companies) would have the choice whether to appeal or not and there is nothing illogical or unjust about providing a right of appeal without potential for recovery of costs. Furthermore, in Australian Telephone Distributors Property Ltd. v. Golden Always Ltd & Another [1996] 3 HKC 401, Nazareth VP held that 0.62 r.28A of the Rules of the High Court does not permit a company appearing by its director to recover its costs. He also observed that, in Hong Kong, companies are not infrequently represented by lay directors due to inability to afford high legal costs. In this context, therefore, excluding the recovery of legal costs on appeal from the Labour Tribunal would benefit employers (small companies in particular) as well as employees.

The Administration's recommendations summarised

34. The Administration recommends that the Small Claims Tribunal Ordinance, the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance be amended in the following manner –

(a) sections 29(2)(b) and 29B of the Small Claims Tribunal Ordinance be amended so that each party should bear his own legal costs on appeal;

(b) section 7 of the Small Claims Tribunal Ordinance be amended to make it clear that the costs regime of the Small Claims Tribunal Ordinance applies in respect of proceedings transferred under the section;

(c) section 24(1) of the Small Claims Tribunal Ordinance be amended to make it clear that "any reasonable expenses necessarily incurred" do not include a lawyer's advisory or drafting fee;

(d) sections 35(2)(b) and 35B of the Labour Tribunal Ordinance be amended so that each party should bear his own legal costs on appeal;

(e) section 10 of the Labour Tribunal Ordinance be amended to make it clear that the costs regime of the Labour Tribunal Ordinance applies in respect of proceedings transferred under the section;

(f) section 28(1) of the Labour Tribunal Ordinance be amended to make it clear that "any reasonable expenses necessarily incurred" do not include a lawyer's advisory or drafting fee;

(g) sections 32(2)(b) and 34 of the Minor Employment Claims Adjudication Board Ordinance be amended so that each party should bear his own costs on appeal; and

(h) section 27(1) of the Minor Employment Claims Adjudication Board Ordinance be amended to make it clear that "any reasonable expenses necessarily incurred" do not include a lawyer's advisory or drafting fee.

Legal Policy Division
Department of Justice
April 2001

Table of Annexes

Annex A

TEMPLE CHAMBERS
16TH FLOOR, 1 PACIFIC PLACE
88 QUEENSWAY, HONG KONG
Tel: 2523 2003, 2840 1131
Fax: 2840 0711, 2810 0302

16 June 1998

Miss E.O.S. Leung, JP
The Secretary for Justice
Department of Justice
4th floor, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Miss Leung,

Proposed amendments to the Small Claims Tribunal Ordinance

I write to you to propose that Government should initiate amendments to section 29(2) and 29B of the Small Claims Tribunal Ordinance (Cap 338) which would have the effect of limiting a party's entitlement to costs on appeal to the same kinds of costs as are recoverable in the Tribunal itself, notably excluding the costs of legal representation.

The position as to legal costs in the Tribunal itself is largely straightforward and follows from section 19(2), which provides that neither barristers nor solicitors have a right of audience in the Tribunal. Clearly, in no circumstances could any order for costs include a barrister's or solicitor's attendance fee. There is a grey area as to the recoverability of a solicitor's or barrister's advisory or drafting fee, since the provision as to costs, section 24, appears to give the Tribunal a general discretion as to costs as well as making specific provision for certain kinds of costs. Therefore, whereas it seems unlikely that the Tribunal would hold such a fee to have been "necessarily incurred" for the purposes of section 24(1)(a) (see the So Sai Ming case referred to below), it might possibly allow such an advisory or drafting fee under its general discretion under the section, though such a fee is unlikely to be very great.

The position on appeal from the Tribunal is, however, very different.

Under section 28 an appeal to the Court of First Instance lies, with leave, on a point of law or jurisdiction. If leave is refused, the Court is not given power to make an order for the costs of the application for leave. If leave is granted, section 29(2) provides that on the appeal itself the Court may "make such order for costs and expenses as it thinks fit". Under section 29A a further

appeal to the Court of Appeal lies, with leave, on a point of law of general public importance. Again, if leave is refused, the Court of Appeal is not empowered to make an order for the costs of the application for leave, but section 29B provides that on the appeal itself the Court of Appeal may "make such order as to costs as it thinks fit". (Nothing appears to turn on the fact that sections 24 and 29(2) refer to "costs and expenses" whereas section 29B refers to "costs".)

In appeals from the Tribunal to the Court of First Instance and the Court of Appeal, members of the Bar do have a right of audience (though it appears that solicitors do not), since section 19(2) only applies to proceedings in the Tribunal. It was held in So Sai Ming v The Kowloon Motor Bus Co (1933) Ltd, unreported, Pang J, 24 June 1997 (copy enclosed) that the costs recoverable under sections 29(2) and 29B include counsel's attendance fees and solicitors' instructing fees.

The question that arises is this: In view of the fact that in the Tribunal itself a party can litigate without the risk of bearing his opponent's legal costs (except, possibly, to the very limited extent debatable in the grey area mentioned above) is it right that he should lose this protection in proceedings on appeal? If not, the Ordinance requires amendment. For the reasons given below I would suggest that on appeal a party should have the same protection from orders for legal costs as he has in the Tribunal and the Ordinance should be amended accordingly.

The Tribunal was established in 1976 to provide an informal and cheap method of determining small claims (the jurisdiction limit was then $3,000 and is now $15,000). On the second reading of the 1975 Bill which led to the enactment of the Small Claims Tribunal Ordinance, the Attorney-General said "... this bill seeks to establish a tribunal which will provide an informal forum, with a simple procedure, for the determination of limited monetary claims founded on contract or in tort ... The upper limit ... of the new jurisdiction will be $3,000 - a figure which has been adopted after most careful consideration of the various factors, including the fact that lawyers are to be excluded ... Within that limit the tribunal will have exclusive jurisdiction ... If the jurisdiction of the tribunal were to be concurrent with that of the District Court, a litigant, whether plaintiff or defendant, might chose the District Court for any one of a number of reasons, some at least of which might give him an unreasonable or socially unjust advantage over his opponent. The aim of policy in this context is to make simple justice available to everyone equally ... there is a clear demand in the community for such a tribunal as this to determine small claims" (Hong Kong Hansard 75/76 pp.142-3).

There is perhaps no more common complaint about the administration of civil justice in Hong Kong than that it frequently results in a disproportionate amount of legal costs being paid by comparison with the amount in issue. It is not uncommon to find that the parties' legal costs exceed the amount in issue. It was obviously considerations of this kind which led to Government taking the view, which with Legco agreed, that lawyers should be excluded from the Tribunal. Those considerations are as important today as they were when the Ordinance was enacted in 1976. Indeed, given a jurisdiction limit of only $15,000, if lawyers were allowed in the Tribunal, each represented party's legal costs would inevitably exceed the amount in issue.

Moreover, among the "unreasonable or socially unjust" advantages of proceeding in the District Court to which the Attorney-General referred in Legco is that the winning side who has legal representation has a legitimate expectation (even if, strictly, not a right) that an order for costs

covering his legal costs will be made in his favour. This obviously acts as a severe deterrent to the average litigant who has a bona fide claim or defence which is not certain to succeed (and there are relatively few cases where success can be guaranteed) - especially if he does not have much money, and the typical litigant in the Tribunal will not have much. This was clearly one of the compelling reasons for excluding lawyers from the Tribunal so as to achieve the policy aim of "making simple justice available to everyone equally".

On the basis that Pang J was correct to find in the So Sai Ming case that, on a true and proper construction of the Ordinance, a party's costs of legal representation on an appeal to the Court of First Instance are recoverable under section 29(2), something has clearly gone wrong in the drafting of that section (and, a fortiori, section 29B in respect of appeals to the Court of Appeal).

As Pang J pointed out in the So Sai Ming case, it is understandable that legal representation is allowed on appeal from the Tribunal since the right of appeal to the Court of First Instance is limited to points of law or jurisdiction and the right of further appeal to the Court of Appeal is limited to points of law of general public importance. As Pang J said, "In the appeal hearing it would be inconceivable that the parties, being lay persons, could be expected to understand and argue on the legal issues involved".

It is, however, quite another matter whether a party able and willing to spend on legal representation an amount which will in all cases inevitably greatly exceed the amount in issue should recover those costs from his opponent should he win on the point of law involved.

It is submitted that in these small claims cases there are the clearest policy reasons against subjecting the losing party to a liability to pay his opponent's costs on appeal. Whereas it is no doubt right to allow legal representation on appeal, it is submitted that it would be entirely consistent with policy for a represented party to bear his own costs of the appeal. Since the clear policy of the legislation is to provide for the Tribunal's determination of small claims without the incidence of legal costs, it is a anomalous and absurd that on appeal the parties are at risk as to such costs. There would have been no sense in Legco creating a special tribunal to determine small claims in which the parties are at *no* risk as to costs *and* providing for appeals from that tribunal in which the parties *are* at risk as to costs.

In the present state of the law, the potential litigant in the Small Claims Tribunal should be advised, before he makes his claim or puts in his defence, to consider what are the prospects of his opponent bringing a successful appeal on a point of law, since he would have be very brave or quite mad to litigate a sum not exceeding $15,000 at the risk of bearing the costs of legal representation on appeal, or even appeals. But of course the typical litigant is in no position to make such an assessment. Only, for example a large corporation with an in-house legal adviser, or a party with the resources to obtain legal advice, would be in a position to make such an evaluation. This is precisely the kind of "unreasonable or socially unjust advantage" which Government in promoting the Bill was anxious to avoid.

We thus have a system which is well able to make "simple justice available to everyone equally" at the Tribunal level but which breaks down in a vital respect at the appeal stage in a way that very few litigants in the Tribunal can be aware of.

The facts of the So Sai Ming case illustrate what can go wrong. The claimant sought to recover $15,000 as expenses incurred in repairs to his vehicle damaged by the defendant's negligence. He won. The defendant appealed on the ground that the Adjudicator had made procedural errors in the conduct of the hearing. The appeal succeeded and a retrial was ordered. After a contested hearing as to costs, the claimant was ordered to pay the defendant's costs which were taxed at over $120,000. Having little money, he is now paying this off by small instalments.

It is submitted that it is self-evident that neither Government nor Legco could have contemplated a result such as this.

There are two arguments, both deriving from the judgment in the So Sai Ming case, which might be made in favour of the law as it now stands. The first is that under section 7 of the Ordinance the Tribunal may transfer a case to the District Court or the Court of First Instance, and once a case is so transferred the parties are at risk as to costs in the same way as if the case had started in the court of transfer (see pp.4r-5o). However, it was precisely to avoid the disadvantages of those courts in small claims cases that the Tribunal was established, and section 7 was enacted to deal with those seldom encountered cases which for some reason could not be adequately dealt with by the Tribunal and which therefore had to be dealt with by a higher court, notwithstanding the disadvantages of proceeding in a higher court. Section 7, therefore, offers no guidance as to how the question of costs should be approached in cases which remain in the small claims jurisdiction. The second possible argument against changing the law is that the appellate courts have a discretion in the matter of costs in small claims cases and are therefore in a position to ensure that no injustice is done (c.f. the judgment at pp.6m-7e). However, this overlooks the fact that settled principles govern awards of costs (including the general principle that the successful party gets his costs) and it was to avoid the application of these principles to small claims cases that, inter alia, the Tribunal was established. The facts of the So Sai Ming case well illustrate this.

I would therefore submit that sections 29(2) and 29B should be amended in the manner suggested above. I would also suggest that consideration should be given to clarifying, by an additional amendment, the grey area mentioned above.

Yours sincerely,

Michael Bunting

c.c. Miss Audrey Eu, Chairman of the Hong Kong Bar Association.

Encl.

Annex B

CONSULTATION PAPER

Small Claims Tribunal Ordinance (Cap. 338) - Costs

Introduction

This consultation paper seeks comments on proposals to amend the Small Claims Tribunal Ordinance (Cap. 338)(the Ordinance) -

(a) to limit a party's entitlement to costs on appeal to the same kinds of costs as are recoverable in the Small Claims Tribunal (the Tribunal) itself, in particular excluding the costs of legal representation;

(b) to clarify a grey area as to the recoverability of a solicitor's or barrister's advisory or drafting fee under section 24 of the Ordinance; and

(c) to amend the Labour Tribunal Ordinance (Cap. 25) and the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) in a similar manner.

A. Costs on Appeal

Background

2. The purpose of the Ordinance is to establish a Tribunal which will provide an inexpensive and informal forum in which the parties have the opportunity to present their cases personally, with a simple procedure, for the determination of limited monetary claims founded on contract or in tort.

3. All proceedings in the Tribunal are heard and determined by an adjudicator (section 3(3)) who is qualified to practise as a barrister or solicitor in Hong Kong or any other common law jurisdiction (section 4(2)). The adjudicator enjoys the same privileges and immunities as a judge of the Court of First Instance in civil proceedings in that court (section 39). The hearing of proceedings in the Tribunal is to be conducted in an informal manner (section

16(1)). The Tribunal also inquires into any matter which it may consider relevant to a claim, whether or not it has been raised by a party (section 16(3)). Except for certain proceedings prescribed under the Ordinance, no barrister or solicitor has a right of audience before the Tribunal unless he is acting on his own behalf as a claimant or defendant (section 19(2)). The Tribunal may award costs and expenses to a party (section 24(1)). However, it is implied that no barrister's or solicitor's costs will be awarded as lawyers have no right of audience in the Tribunal.

4. The Tribunal has jurisdiction to hear and determine claims where the amount claimed is not more than $50,000 (section 5(1)). Where a claimant has a claim, which exceeds $50,000, the claimant may abandon the excess, and the Tribunal then has jurisdiction to hear and determine the claim. However, the claimant cannot recover an amount exceeding $50,000 (section 9(1)).

5. Any party who is aggrieved by a decision of the Tribunal may apply to the Court of First Instance for leave to appeal on any ground involving a question of law or on the ground that the claim was outside the jurisdiction of the Tribunal (section 28(1)).

6. On appeal, the Court of First Instance may make such order as to costs and expenses as it thinks fit, but may not reverse or vary any determination made by the Tribunal on questions of fact or receive further evidence (section 29(2)(b)). It has been stated that, unless the normal powers of an appellate court to hear further evidence or to vary facts found by the ordinary court are excluded, there will be difficulties on account of the different rules of procedure and evidence applying in the Tribunal on the one hand and the full court on the other (Hong Kong Hansard 75/87, p.144).

7. Leave to appeal to the Court of Appeal may be granted on a question of law of general public importance (section 29A(1)), and the Court of Appeal may make such order as to costs as it thinks fit (section 29B).

The Issue

8. In So Wai Ming v. The Kowloon Motor Bus Co. (1993) Ltd. (Small claims Tribunal Appeal No. 1/94 (unreported)) the claimant's van collided with a KMB bus. The repairs to the van and the loss of its use amounted to $26,159.30.

The claimant commenced proceedings in the Small Claims Tribunal in 1993 and in so doing abandoned all claims in excess of $15,000.00, the upper limit of the Tribunal's jurisdiction at that time. Judgment was given to the claimant for $15,000.00 with costs in the sum of $1,500.00.

9. The defendant appealed on the ground that the adjudicator had made procedural errors in the conduct of the hearing. The appeal was allowed and the case was remitted to the Small Claims Tribunal for a re-hearing. In respect of the costs of the appeal, Pang, J. ordered that the "cost of the appeal be to the Appellants if not agreed". The taxed costs, including legal costs, amounted to $122,610.00. The respondent, who had little money, has had to pay the appellant's costs by small instalments.

10. Pang, J. held the words "make such order as to costs and expenses as it thinks fit" appearing in sections 29(2)(b) and 29B of the Ordinance to mean that the appellate courts have an unfettered discretion to award costs, including legal costs, in appropriate circumstances. The appellate courts will examine the circumstances of each case before any costs order is made (p. 6H-K of Pang, J's judgment).

11. Pang, J. also considered that the applicant's concern that the amount of costs to be borne by the unsuccessful litigant would be disproportionate to the amounts claimed in the action was more apparent than real. The position is that the court can, as a matter of discretion, refuse to award costs to the successful party in appropriate cases, and the courts will examine the circumstances of each case closely before a costs order is made (p. 6M-P of Pang, J's judgment).

12. It was suggested by a barrister who wrote to the Administration that if a party can litigate in the Tribunal without the risk of bearing his opponent's legal costs, he should not lose this protection in proceedings on appeal. It was further suggested that each party should bear his own legal costs of the appeal, and that sections 29(2)(b) and 29B of the Ordinance should be amended accordingly.

Arguments for limiting legal costs

13. An appeal from the decision of the Tribunal can only be pursued on a point of law or on the jurisdiction of the Tribunal. At the appeal hearing it would

be inconceivable that the parties, being lay persons, could be expected to understand and argue the legal issues involved (per Pang, J. in So Sai Ming, p. 5I-J).

14. The charging of legal fees by reference to the time spent inevitably leads to higher costs. The rising legal costs will deter the average litigant who has a bona fide claim or defence which is not certain to succeed.

15. The Tribunal is staffed by professional adjudicators (per Huggins VP in Chung Lai Yung Anna v. Attorney General [1985] 1 HKC 559 (CA) at p. 560). Proceedings in the Tribunal should be on an inquisitorial rather than an adversarial basis. The Tribunal must take a more positive role in the proceedings than is customary in the case of the ordinary courts (Hansard 75/76 at p. 142). Upon appeal, it is most unfortunate that the respondent should be held liable to pay for the mistake of the learned adjudicator when neither the appellant nor the respondent has contributed in any way to the mistake (per Chan, J in Diamond Property Management Ltd. v. First Class Fashion Co. Ltd. & Others (Small Claims Tribunal Appeal No. 61 of 1993 (unreported) at p. 8S).

16. Although unarguable cases on appeal are filtered out by the application for leave procedure under sections 28(1) and 29A of the Ordinance (see Pang, J.'s judgment at p. 5H), there is no guarantee that the appellate court will allow the arguable appeal cases. The arguable cases may be dismissed upon appeal. It is equally unfortunate that the appellant, being encouraged by the court via the leave procedure to proceed with his appeal, has to pay for the respondent's costs if he fails in his appeal.

17. The Tribunal may, under section 7 of the Ordinance, transfer a case to the District Court or the Court of First Instance, and it is arguable that once a case is so transferred the parties are at risk as to costs in the same way as if the case had started in the court of transfer (see Pang, J's judgment at pp. 4R - 5D). However, it is envisaged that the power to transfer is only used if a case presents particular difficulties, either of fact or law, which are such that it can best be dealt with in the traditional way by the ordinary courts (Hansard 75/76 at p. 143).

18. If the upper limit of the Tribunal's jurisdiction is to be equivalent to or higher than the lower limit of the District Court's jurisdiction, a litigant, whether plaintiff or defendant, might choose the District Court for any one of a number of

reasons. The policy of establishing the Tribunal is to make simple justice available to everyone equally (Hansard 75/76 at p. 143).

19. The purpose of the proposed increase in the jurisdiction of the Tribunal to $50,000.00 recently is to further lower litigation costs for members of the public. It is envisaged that a number of cases each year will flow from the District Court to the Tribunal.

Arguments against limiting legal costs

20. As noted by Pang, J. in So Sai Ming (p. 6 H - K) the court can, as a matter of discretion, refuse to award costs to the successful party in appropriate cases. In deciding which cases are "appropriate", the appellate courts would take into account factors such as whether the claimant/defendant has a bona fide claim/defence, the merits of the appeal, the question of which party is at "fault" (that is, was the appeal brought about by errors made by one of the parties or by the Tribunal) and the general principle that costs follow the event.

21. Leave to appeal to the Court of First Instance would only be granted on a point of law or on the jurisdiction of the Tribunal, and further appeal to the Court of Appeal is limited to points of law of general public importance. Accordingly, the appellate procedure should not be invoked lightly and, once invoked, the parties should be subject to the same potentially disproportionate risks as to costs as litigants in other appeals.

22. The effect of requiring the parties to an appeal to pay their own legal costs would be that, in some cases, a poor litigant who succeeds on appeal will not be able to recover his legal fees from a wealthy opponent. A further effect of such a requirement may be that losing parties might be more willing to appeal, since they would not be at risk of an order to pay their opponents' legal costs if they lose the appeal.

Practice in other jurisdictions to limit costs in small claims cases where legal representation is allowed

England and Wales

23. The court which deals with claims which have been allocated to the small

claims track may order costs assessed by the summary procedure in relation to an appeal under Part 27.14(2)(c) of the Civil Procedure Rules 1998. When assessing costs, the court must have regard to, amongst other things, the amount or value of any money or property involved (Part 44.5(3)(b)). In fact the overriding objective of the 1998 Rules is to deal with a case justly, which includes dealing with the case in ways which are proportionate to the amount of money involved and the financial position of each party (Part 1.1).

Canada

24. The Report of the Manitoba Law Reform Commission in 1998 on the "Review of the Small Claims Court" (the Report) explains the court practice in various provinces of Canada.

Manitoba

25. The Court of Queen's Bench Small Claims Practices Act does not specify to what extent claimants may or may not be represented by counsel or agents. The hearing officer may award costs against an unsuccessful party, which are not to exceed $100 (Canadian) plus reasonable disbursements except in "exceptional circumstances". However, what constitutes such circumstances has been left very much up to the individual hearing officer (pp. 8 and 9 of the Report).

26. Costs on an appeal may be awarded in such amount as the judge may allow; such costs are generally "modest", but on occasion can be quite significant relative to the amount of the claim (see e.g. Birchwood Pontiac Buick Ltd. v. Hasid (7 April 1997), No. CI96-01-9811 (Man. Q.B.), where Hanssen, J. awarded costs of $1,000 plus disbursements, although the actual damages award was only $2,700, as a result of the defendant's fraudulent conduct).

British Columbia

27. A party is entitled to be represented by a lawyer or an articled student. Lawyers' fees are not recoverable in small claims courts, but certain disbursements are payable unless the judge or registrar orders otherwise. The judge may also order an unsuccessful party to pay up to 10% of the successful party's claim if the party proceeded through trial with no reasonable basis for success (pp. 12 and 13 of the Report).

Saskatchewan

28. A party may be represented at trial by a lawyer or by an agent. The court is authorized to award the following by way of costs: fees paid for issuing a summons or counterclaim; the costs of service or substituted service; fees paid to a witness and telephone charges incurred to enable a witness to testify by telephone (p. 15 of the Report).

Ontario

29. A party may be represented by a lawyer or an agent. Where a party is represented by counsel and the amount in issue exceeds $500, the court may award costs of up to $300. A successful party is also entitled to his or her disbursements, as assessed by the clerk. Costs awarded may not exceed 15% of the amount claimed or the value of the property in issue, unless the court considers it necessary to penalize a party, counsel, or agent for unreasonable behaviour in the proceeding (p. 17 of the Report).

Quebec

30. Lawyers are prohibited from appearing in the Small Claims Division in a representative capacity, with one of the exceptions being where a case raises a complex question on a point of law. In such a case the judge may allow the parties to be represented by legal counsel, whose fees are borne by the provincial Crown on the legal aid tariff. Judgments of the Small Claims Division may not be appealed (pp. 20 and 21 of the Report).

New Brunswick

31. Parties can be represented by a lawyer, an articling student, or, with leave of the court, an unpaid agent. An appeal as of right, on the record, lies to the Court of Appeal on a question of law alone. Parties may submit written arguments to the court. No costs are to be awarded, except that a successful party is entitled to his filing fees, attendance money, and the costs of ordering a transcript if an appeal was involved. A judge may also award costs against a party who has brought or defended an action unreasonably, and the Court of Appeal may award costs against a party who has brought or defended an appeal unreasonably (pp. 20 and 21 of the Report).

Nova Scotia

32. Parties may be represented by counsel or by agent. The adjudicator has only limited authority to award costs, primarily disbursements. Counsel or agent fees are expressly prohibited. On appeal, barrister's fees of up to $50 may be awarded as costs (pp. 21 and 22 of the Report).

Prince Edward Island

33. Parties may be represented by a lawyer, an articled student, an unpaid agent (with leave of the court), an officer, partner or employee. The unsuccessful party must pay costs to the successful party unless the court orders otherwise, including: filing fees, reasonable amounts for service, other reasonable charges and party and party or solicitor and client costs at 50% of the normal taxed amount (pp. 22 and 23 of the Report).

Newfoundland and Labrador

34. Parties may be represented by a solicitor, an articled clerk or an agent. Costs awarded to a party cannot exceed 10% of the amount of the claim or $300, whichever is less, and are limited to amounts set out in a schedule to the rules of the small claims court (pp. 23 and 24 of the Report).

Yukon Territory

35. A party may be represented by a lawyer or an agent. A successful party may be awarded costs of up to $100 for preparation and filing of pleadings, plus, if the claim exceeds $1,500, up to $150 if represented by counsel, or up to $75 if represented by an articling student (pp. 26 and 27 of the Report).

Provisional views of the Administration

36. The above precedents show that, even where legal representation is allowed, there is a trend in other jurisdictions to cap legal costs in small claims cases by reference to the amount of the claim or not to allow legal costs at all.

37. In England and Wales, for example, when assessing costs, the courts dealing with claims allocated to the small claims track must have regard, inter alia,

to the amount or value of the property involved. Quebec does not permit judgments of the Small Claims Division to be appealed. No costs of legal representation may be awarded in New Brunswick, although a judge may award costs against a party who has brought or defended an action unreasonably, and the Court of Appeal may award costs against a party who has brought or defended an appeal unreasonably. In Nova Scotia, barrister's costs on an appeal are capped at $50 (Canadian).

38. In the Administration's view, there are good grounds for limiting the costs of appeals in small claims cases for the reasons noted in paragraphs 13 to 19 above. Unlike litigants in the courts, the parties in small claims cases are not permitted legal representation in accordance with the object of the Ordinance to provide a simple, inexpensive and accessible means of determining disputes involving limited monetary amounts. The present appellate procedure is contrary to that object since, as shown in So Sai Ming, an appeal can raise costs unexpectedly, unnecessarily and disproportionately to the advantage of wealthier parties, particularly given the rule that costs follow the event.

39. Therefore the Administration is of the view that it would be both just and consistent with the object of the Ordinance to exclude the costs of legal representation on an appeal from the costs that may be awarded to a party. A party who considered that a point of law was of such importance that it should be challenged or defended on appeal would have the option of taking part in the appeal with legal representation or not, but with the costs of the appeal limited to the same kinds of costs as are recoverable in the Small Claims Tribunal. Parties who chose to have legal representation on appeal would bear their own legal costs.

B. Barrister's/Solicitor's advisory or drafting fee

40. Section 24(1) of the Ordinance provides that the Tribunal may award to a party costs and expenses which may include, inter alia, any reasonable expenses necessarily incurred. Section 24(1) appears to give the Tribunal a general discretion as to costs as well as making specific provision for certain kinds of costs. Since lawyers have no right of audience before the Tribunal, it is unlikely that a barrister's or a solicitor's fee for representing a claimant or a defendant would be "reasonable expenses necessarily incurred" under section 24(1)(a). Nevertheless, the Tribunal might possibly award costs in respect of an advisory or

drafting fee charged by a barrister or solicitor, although the award is unlikely to be very great.

41. However, while it is within the power of the Tribunal to interpret section 24(1), it is submitted that "reasonable expenses necessarily incurred" should not include a lawyer's advisory or drafting fee. If the advisory or drafting fee is allowed, proceedings in the Tribunal would appear to be conducted on an adversarial basis. This would be inconsistent with the purpose of setting up the Small Claims Tribunal which is that claimants should represent themselves in person. It is the statutory duty of the adjudicator to take a more positive role in the proceedings than is customary in the case of the ordinary courts. It is therefore provisionally recommended that section 24 be amended accordingly.

Other Ordinances

42. The proposed amendment of the Small Claims Tribunal Ordinance may have implications for the Labour Tribunal Ordinance (Cap. 25) and the Minor Employment Claims Adjudication Board Ordinance (Cap. 453). The latter Ordinance establishes the Minor Employment Claims Adjudication Board (the Board) to adjudicate minor employment claims; and the Labour Tribunal Ordinance establishes the Labour Tribunal with limited civil jurisdiction to determine labour disputes.

43. The Ordinances provide that the hearing of claims in the Board and the Labour Tribunal are to be conducted in an informal manner. The Board and the Labour Tribunal shall investigate any matter which they consider relevant to the claims, whether or not they have been raised by the parties. A barrister or a solicitor has no right of audience before the Board or the Tribunal. An appeal from a decision of the Board or from a determination of the Labour Tribunal to the Court of First Instance is allowed with leave on a question of law or on the ground of the jurisdiction of the Board or the Labour Tribunal. The Court of First Instance may make such order as to costs and expenses as it may think fit. An appeal from a decision of the Court of First Instance may also be brought with leave on a point of law of general public importance, and the Court of Appeal may make such order as to costs as it may think fit.

44. Like the Small Claims Tribunal, the Board and the Labour Tribunal were also established to provide informal fora to settle disputes in their specific areas to

make simple and inexpensive justice available to everybody equally. If it is considered that the Small Claims Tribunal Ordinance should be amended to limit costs on appeal and to exclude costs for advisory and drafting fees, the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance should be amended in an equivalent way in order to observe the general legal policy principle that the law should be coherent and consistent.

Comments Sought

45. Comments on the proposals set out in paragraphs 1, 39, 41 and 44 above by 30 September 2000 would be greatly appreciated.

General Advisory Unit
Legal Policy Division
Department of Justice
August 2000

Annex C

Consultation Paper
Small Claims Tribunal Ordinance (Cap. 338) - Costs

Thank you for your memo.

2. Having consulted within the Judiciary, our views on the captioned consultation paper are set out below.

Costs on Appeal

3. It is a well-established principle, as stipulated in Order 62, rule 3(2) of The Rules of the High Court, that costs shall follow the event. It is reasonable and logical that the successful party shall be allowed costs incidental to the enforcement of his civil rights. The proceedings in the Small Claims Tribunal and any consequential appeals are civil in nature. It is appropriate to adopt a similar practice. Unless there are strong compelling reasons, it is undesirable to depart from the established principle.

4. We have considered the arguments put forward in favour of limiting the legal costs as set out in paragraphs 13 to 19 of the consultation paper. We have the following observations:

(a) The appeals from the Small Claims Tribunal are limited to points of law. The assistance of legal adviser is necessary, if not inevitable, in most of the cases. To limit or exclude legal costs will hamper the desire to enforce or defend their legal rights by way of appeal.

(b) Legal issues of the Small Claims Tribunal can be quite complicated and is often not commensurate with its modest jurisdictional limit. While most of the cases are argument of facts, those few cases that survive the leave application stage often involve difficult points of law.

(c) Any appeal against the decision of a single judge/adjudicator necessarily arises from some 'error' by the judge/adjudicator. This is a universal fact inherent in any court proceedings. If we limit the scope of costs in Appeals from the Small Claims Tribunal on this ground, what justification do we have in not treating other proceedings similarly? We fail to see why this is a basis to depart from the established practice.

(d) The inexpensive and informal procedures of the Small Claims Tribunal are limited to the proceedings in the Tribunal. It is not the intention of the law to extend this to any consequential proceedings. If there is any misunderstanding by the public in this respect, it is better to correct this misconception as soon as possible.

(e) The appeal procedures are valuable channels to correct the 'error' of the lower courts and to attain justice. The proposal to exclude legal costs is equivalent to giving this right only to those who can afford the legal fees. It is most undesirable.

(f) The Small Claims Tribunal has an exclusive jurisdiction on tort, quasi-contract and contract where the amount claimed is below $50,000. There cannot be any overlap with that of the District Court.

5. The Court of First Instance has wide discretion in awarding costs to successful parties. Judges are entitled to look at the conduct of the parties in the whole course of the proceedings when deciding the amount of costs and the basis of taxation. In **Choy Yee Chun (The representative of the estate of Chan Pui Yiu) v Bond Star Development Ltd [1997] HKLRD 1327**, Stock J. commented,

> "In determining whether the conduct of proceedings or the motive behind that conduct is or is not of a particular colour, the court cannot put on blinkers and shut out earlier behaviour by a litigant which might well explain conduct within the litigation itself. In any event, in the course of normal litigation, whilst the grounds upon which costs are awarded must be

connected with the case, this may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further."

6. Moreover, in **So Wai Ming v The Kowloon Motor Bus (1993) Limited** (the case cited in the consultation paper), Pang J. commented,

"In my view the applicant's concern that the amount of costs to be borne by unsuccessful litigant would be disproportionate to the amounts claimed in the action is more apparent than real. The position is that the court can, as a matter of discretion, refuse to award costs to the successful party in appropriate cases. It would be suffice for me to say that the courts will examine the circumstances of each case closely before a cost order is made."

7. That is exactly what the Court of Appeal did in awarding costs of $500 to a successful appellant in **Kamshan Holdings Ltd v Chan Tung Mun [CACV 141A of 1999]**. Godfrey JA, as he then was, commented,

"In my view, the justice of the case does require a minor variation in our proposed order as to costs. The landlord, whose initial claims were all rejected by the tenant, including the landlord's claim for $2,500 upon which we have given judgment in the landlord's favour, has achieved that minor success, and ought to have an order for costs which reflects what he would have had to expend in order to recover the $2,500 in the Small Claims Tribunal. That cannot be a sum greater, I think, than some $500."

8. Experience shows that there are only a small number of appeals from the Small Claims Tribunal each year. Case like **So Wai Ming** mentioned above is rare. In any event, parties may apply for legal aid in these proceedings.

Barrister's/Solicitor's Advisory or Drafting Fee

9. It has always been the view of the Small Claims Tribunal that section 24 of the Small Claims Tribunal Ordinance does not include costs for advisory or drafting fee charged by a barrister or solicitor. As far as we know, the Tribunal has not awarded costs in respect of this item. However, with the increase in jurisdictional limit, it becomes an increasing trend in the Tribunal that a lot of pleadings and documents are apparently prepared by

lawyers. We support an amendment to section 24 to expressly disallow this item of costs so that parties can no longer expect or argue fruitlessly to recover these costs.

Similar amendments to the Labour Tribunal Ordinance and Minor Employment Claims Adjudication Board Ordinance

10. For the reasons set out in paras. 3 to 7, we do not support any similar limit on legal costs in appeals arising from the Labour Tribunal and the Minor Employment Claims Adjudication Board.

11. While the Minor Employment Claims Adjudication Board is outside the jurisdiction of the Judiciary, our further comments on the proposal to cap entitlement to legal costs on appeal from the decision of the Labour Tribunal are as follows.

12. As you know, there is no maximum amount of claim in the Labour Tribunal. There were 11,594 cases filed in 1999, of which 5,047 cases were with claim amount of $40,000 or above, representing 44% of the total number of cases. This is not a small percentage. In fact, the Labour Tribunal often comes across cases with claim amount that is within the jurisdiction of the District Court or even of the High Court. Therefore, as far as costs on appeal are concerned, it would not be fair to treat these cases differently from the cases in the District Court or the High Court.

13. In the Labour Tribunal, the defendants are very often limited companies. They can send their officers to attend the hearings at the Tribunal (re. section 23(1)(d) of the Labour Tribunal Ordinance). When the cases come up for appeal in the High Court, they can no longer send their officers to attend the appeal and must be represented by counsel or solicitors (re. Order 5, rule 6(2) of the Rules of the High Court). If a director wants to represent the company, he has to obtain leave from the High Court and must show grounds for the application, such as lack of resources or other good reasons (re. Order 5, rule 6(3)(a) of the Rules of the High Court). Thus, in normal circumstances, defendant companies have to engage counsel and solicitors to represent them at the appeal hearings. If they were to be deprived of their costs even when they win the appeal, we do not think that the system is doing justice to these defendant companies, and in fact it may also cause hardship to the small companies.

14. On the other hand, the claimants in the Labour Tribunal are mainly workers who can obtain legal aid to assist them in the appeals. It would not make any difference to these claimants whether the costs are limited or not. It would however cause losses to the taxpayers when the Legal Aid Department cannot recover costs from the losing defendants.

15. Appeals from the Labour Tribunal are limited to points of law. The legal issues involving the Employment Ordinance and employment contracts can be very complicated. It is very difficult to expect the parties to argue these legal issues without the assistance of legal representatives. By limiting costs, it is in effect discouraging parties to engage legal representatives. This will in turn limit the parties' right to present proper legal arguments to the courts. The parties have already not been legally represented in the Labour Tribunal. We do not think that they should be further restricted in having legal representation in the High Court. Justice will not be served in this manner.

16. We should leave the matter entirely to the High Court judge hearing the appeal who shall have unfettered discretion in awarding or refusing costs. The High Court judge can take into account all the circumstances of each individual case in exercising the discretion. This will be a better safeguard for the parties' interests than limiting costs.

(Ms Rebecca Pun)
for Judiciary Administrator

Letterhead of HONG KONG BAR ASSOCIATION

Annex D

Your Ref: LP 426/00/1

25 September 2000

Department of Justice
4/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

Attn: Miss Dora Lo
Government Counsel
Legal Policy Division

Dear Sirs,

Re: Consultation Paper
Small Claims Tribunal Ordinance (Cap. 338) - Costs

Thank you for your letter dated 4 August 2000 inviting the Bar Association for their comments on the Consultation Paper relating to the captioned subject.

Enclosed please find the same thereon for your consideration.

Yours sincerely,

Ronny Tong, SC
Chairman

Encl.

MY/rc

HONG KONG BAR ASSOCIATION

Re: Consultation paper on Small Claims Tribunal Ord. (Cap. 338) - Costs

Overview of the Consultation Paper

1.1 The Consultation Paper contains 3 legislative proposals put forward by the Administration:

(i) to limit a party's entitlement to costs on appeal to the Court of First Instance from a decision of the Small Claims Tribunal;

(ii) to clarify a grey area as to the recoverability of a solicitor's or barrister's advisory or drafting fee under section 24 of the Ordinance; and

(iii) to amend the Labour Tribunal Ordinance (Cap. 25) and the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) in a similar manner.

1.2 The first of the above proposals has been put forward by the Administration as a response to the decision in **So Sai Ming v. The Kowloon Motor Bus Co. (1933) Ltd. [1997] HKLRD 909** wherein the successful party to an appeal to the Court of First Instance from the Small Claims Tribunal was awarded costs of the appeal including the costs of legal representation. The result in **So Sai Ming** is perceived as contrary to the policy behind establishing the Small Claims Tribunal which was to protect litigants with small claims against potentially disproportionate legal costs.

1.3 The Administration has proposed that a party's entitlement to costs on appeal should be limited to the same kind of costs as are recoverable in the Small Claims Tribunal itself, in particular excluding the costs of legal representation.

1.4 The Administration's proposal of expressly excluding lawyers' advisory fees or drafting fees from costs recoverable under section 24 of the Ordinance is based on similar policy considerations. Currently, section 24 of the Ordinance does not expressly prohibit the award of such costs. Whilst there is no empirical evidence whether and if so, under what circumstances and how often lawyers' advisory or drafting fees are awarded to a successful party in the Small Claims Tribunal, the Administration nevertheless argues that there is a risk that the Small Claims Tribunal might make an award of costs which includes lawyers' advisory or drafting fees; and that such an award would be contrary to the policy of the Small Claims Tribunal which is intended to provide an informal (and not over legalistic) setting for the resolution of disputes.

1.5 The proposal to amend the Labour Tribunal Ordinance (Cap. 25) and the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) is intended to ensure that similar regimes on costs apply to the various statutory tribunals.

Costs on Appeal

2.1 A number of arguments for and against limiting costs on appeal have been exhaustively set out in the Consultation Paper and we shall not repeat them here.

2.2 Whilst we have no doubt that **So Sai Ming** was correctly decided under the existing law, we note the Administration's concern that a party who invokes the jurisdiction of the Small Claims Tribunal should not be exposed to potentially disproportionate costs when the matter goes on appeal.

2.3 However, we see no reason why, as a matter of principle, a successful party to an appeal should be deprived of his right to have his costs indemnified by the losing party.

2.4 Further, we do not believe that the *mischief* can be eliminated merely by limiting the recoverable costs on appeal to the same kind of costs recoverable in the Small Claims Tribunal.

2.5 Appeals from the Small Claims Tribunal lie to the Court of First Instance only on points of law or jurisdiction of the Tribunal. As it was pointed out by Pang, J. in **So Sai Ming** (at p. 911I), it is inconceivable that at the appeal hearing, the parties, being lay persons, could be expected to understand and argue on the legal issues involved. This

being the case, costs of legal representation would necessarily have to be incurred by both parties whenever an appeal is brought.

2.6 The costs of one of the parties alone can easily exceed the amount of the claim (max. $50,000). In most cases, if the successful appellant were not allowed to recover the costs of bringing the appeal, the right of appeal would be worthless to him. (There are exceptions. One notable exception would be where a party regularly contracts on a standard form and for whom the decision of the Tribunal in a particular case might have wider ramifications). Equally, there is little justification for forcing a successful respondent to bear his own costs of defending the appeal (the bringing of which is not of his own choosing). The effect would be to put respondents to appeals in an invidious position of having to choose between his rights and his pocket.

3.1 We agree with the observation of Pang, J. in **So Sai Ming** (at p. 912F) that "the applicant's concern that the amount of costs to be borne by an unsuccessful litigant would be disproportionate to the amounts claimed in the action is more apparent than real. The position is that the court can, as a matter of discretion, refuse to award costs to the successful party in appropriate cases. It would suffice for me to say that the courts will examine the circumstances of each case closely before a cost order is made."

3.2 We would add that even where an unsuccessful litigant is faced with an order of costs against him, he is always protected under the normal rules of taxation. On the party-and-party basis, only costs necessarily and reasonably incurred would be allowed. A successful party who unjustifiably incurs legal costs on a relatively straightforward appeal would not be able to recover all or any of his costs from the losing party.

3.3 Although we do not have the relevant statistics before us, our own experiences suggest that the number of appeals from the Small Claims Tribunal in an average year is no more than 40.

3.4 In light of the above, it may be argued that there is no need to change the existing law. As a general rule the award of costs is a matter for judicial discretion. It would be unnecessary and undesirable to fetter the judicial discretion to award costs in the case of appeals from the Small Claims Tribunal because the judge, who has heard the appeal and is most familiar with the facts of the case and all the surrounding circumstances, is in the best position to make an appropriate costs order to do justice in the case before him.

4.1 If changes have to be made, one possibility would be to extend legal aid to cover appeals from the Small Claims Tribunal, subject to means-testing.

4.2 If the extension of legal aid as suggested above were politically not feasible, another, more radical, alternative would be to consider abolishing the right of appeal from the Small Claims Tribunal (perhaps coupled with a more liberal use of the existing mechanism for transferring complex cases to the District Court).

4.3 The cost of bringing an appeal in small claims cases is invariably disproportionate to the amount at stake. Further, the small numbers of appeals brought suggest that in practice, the right of appeal is rarely resorted to. In any event, in appropriate cases, the remedy of judicial review would always be available as a last resort. In the circumstances, it may be argued that the existence of a right of appeal is both unnecessary and inconsistent with the policy of Small Claims Tribunal Ordinance.

Barrister's/Solicitor's Advisory or Drafting Fee

5.1 The Administration does not draw any distinction between the various situations in which a litigant might be claiming for advisory / drafting fees.

5.2 In our experience, advisory / drafting fees come in many guises. At one extreme is the case where a litigant pays a lawyer to prepare an "advice" which is then submitted to the adjudicator as if it were a written submission. The practices of individual adjudicators vary, but as far as

we are aware, such written submissions are not encouraged by the Small Claims Tribunal and a claim for the drafting fees of preparing such written submissions would almost certainly be disallowed. At the other extreme would be the litigant who goes to a solicitor for a simple advice on his legal rights. The question then is whether the amount incurred is reasonable.

5.3 We do not agree with the Administration's view that allowing a litigant to claim lawyers' advisory / drafting fees would necessarily be inconsistent with the purpose of setting up the Small Claims Tribunal. There is no reason why, in suitable cases, a litigant would not be allowed to claim the reasonable costs of obtaining legal advice. The matter can be safely left to the discretion of the Tribunal. In the absence of clear empirical data showing widespread abuse, we do not believe that the case for change is made out.

Other Ordinances

6.1 We recognise the force of the argument that costs provisions in the various statutory tribunals should be the same.

6.2 However, the argument is not one-sided. In particular, the principle that costs should not be disproportionate to the amount of the claim does not apply with equal force in the case of the Labour Tribunal, where there is no monetary limit to jurisdiction.

6.3 Whether the other ordinances should be amended in a similar fashion would depend on the changes to the Small Claims Tribunal Ordinance eventually adopted. In view of our comments above, we feel we are unable to comment further at this stage.

Dated the 25th day of September, 2000.

Letterhead of Johnson Stokes & Master

Annex E

Miss Doris Lo,
Legal Policy Division,
Department of Justice,
4th Floor, High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong

Our Ref: NDH
Your Ref: LP 426/00/1
Direct Tel: 2843 4417
Direct Fax: 2845 9121
Date: 25th September 2000

BY FAX (2869 0720) AND BY POST

Dear Miss Lo,

Re: Consultation Paper
Small Claims Tribunal Ordinance (Cap.338) - Costs

I am the chairman of the Law Society Civil Litigation Committee. My Committee recently considered the consultation paper which you sent to the Law Society's President under cover of your letter of 4th August 2000.

I am familiar with the problem because coincidentally I acted as the solicitor for Mr. So Sai Ming in the application to Pang J. to reconsider the order for costs he had made against Mr. So.

My Committee had a long discussion about your consultation paper. We all agreed there is an absurdity in a claimant in Small Claims Tribunal proceedings being faced with a potential legal bill several times the amount of his claim in the event of a successful appeal by the respondent. It is particularly harsh when, as in the So Sai Ming case, the error was that of the adjudicator, not the claimant.

However, concern was expressed that your recommendation to limit costs on appeals might lead to another form of injustice. If either party to a Small Claims Tribunal proceeding knows that he can appeal to the Court of First Instance without being at risk as to paying costs if the appeals is unsuccessful, this may encourage the bringing of more appeals. The appeal is in front of a Court of First Instance Judge. It is likely the parties will engage legal representation. That being so, the respondent is faced with having to spend money on legal representation with no possibility of recovery from the appellant, even if the appeal is dismissed and is without merit.

We wondered whether a possible solution might be to provide that the presumption should be that costs on an appeal from the Small Claims Tribunal should be limited to what would be recoverable in the Small Claims Tribunal except if the court were to determine that the appeal was frivolous, vexatious and without merit. That would at least create some form of sanction against frivolous appeals.

We agreed with the provision that legal drafting fees should not be recoverable costs. It is clearly contrary to logic to exclude legal representation in the Small Claims Tribunal but to allow people to recover the cost of employing lawyers to advise them on their claim.

I trust the above is of assistance.

Yours sincerely,

N. Hunsworth

Annex F

TEMPLE CHAMBERS
16TH FLOOR, 1 PACIFIC PLACE
88 QUEENSWAY, HONG KONG
Tel: 2523 2003, 2840 1131
Fax: 2840 0711, 2810 0302
E-mail: mbunting@netvigator.com

15th November 2000

Mr Michael Scott,
Senior Assistant Solicitor General
Department of Justice
Legal Policy Division
4/F, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Mr Scott,

Proposed amendments to the
Small Claims Tribunal Ordinance

Thank you for your letter of 18th October.

I entirely agree with paragraphs 38 and 39 of the Consultation Paper. One of the principal objects of the Ordinance (reaffirmed when the jurisdiction limit was raised) was to minimise the costs of litigating small claims. There are 2 policies here: (a) the costs must be proportionate to the amount in issue and (b) the less well-off can litigate without risk of being crushed by costs. This object *is* achieved in proceedings in the Tribunal (subject only to removing the possibility of lawyers' advisory and drafting fees being recoverable). But this object is subverted by treating costs on appeal as being recoverable. There is no logic in eliminating the risk of bearing legal costs in the Tribunal, but not the appellate court. The 2 courts are components of one system.

I am glad to see that the Law Society agrees. As to their point that respondents should be given protection against frivolous appeals, respondents are already protected, since leave to appeal can only be given in cases where some reasonably arguable point of law or jurisdiction arises. Therefore frivolous appeals cannot arise.

The arguments against the Administration's provisional views appear to be these:-

(1) *The danger of a party bearing disproportionate costs is more apparent than real because the court has a discretion as to costs.* However,
   (a) The judge exercised his discretion in *So Sai Ming's* case which is a paradigm of what can go wrong.
   (b) The principles governing the Court of First Instance's and Court of Appeal's discretion as to costs are inherently likely to expose the

unsuccessful litigant to the burden of disproportionate costs, in particular the general rule that costs follow the event.

(2) *Since legal representation is indispensably necessary to deal with points of law or jurisdiction, if the successful appellant were not allowed to recover his legal costs, his right of appeal would be rendered nugatory.* However,

(a) The premise is incorrect. Even if unrepresented parties are not able to argue such points themselves, such points can be and frequently are taken by the court itself, even where the parties are represented and, very commonly, where they are not. And one needs to bear in mind that the parties will only be in the appellate court if previously the court has given leave to appeal on the basis of identified points of law or jurisdiction.

(b) In any event, it does not follow that the losing party should be made to pay his opponent's legal costs. The unsuccessful party in the Tribunal has a choice whether to take a point of law or jurisdiction on appeal. There is nothing illogical or unjust in providing him with a right of appeal without potential for recovery of costs.

(3) *Since there are only about 40 appeals a year, the problem is minor.* However, the problem is not minor for those who have been crushed by costs or put off from using the Tribunal for fear of being crushed by costs.

(4) *The problem should be addressed by abolishing the right of appeal altogether.* However, there seems to be no good reason for depriving the losing party of the option of taking a point of law or jurisdiction on appeal. It is worth noting that he may have good reasons to have the point established in his favour even though he has to bear his own legal costs.

A quite different problem from the one under discussion arises from para 17 of the Consultation Paper. Under s.7 a case can be transferred from the Tribunal to the District Court, the Court of First Instance, the Labour Tribunal or the Lands Tribunal, and in such cases the "practice and procedure" of the transferee court are to apply. In cases of transfer to the Labour or Lands Tribunal, the litigants remain in a legal costs-free environment. But does the same apply where the transfer is to the District Court or the Court of First Instance? The words in s.7 quoted above suggest it does not. But there are very good reasons why it should:

(1) The object of the transfer procedure is to ensure that difficult cases are dealt with by a higher court. There appears to be nothing, aside possibly from s.7, to suggest that the object of the Ordinance to minimise the costs of litigating small claims is displaced in transferred cases.

(2) While s.7 could perhaps be read as indicating that the costs regime of the transferee court should apply to transferred cases, that would not be consistent with the policy behind s.43(2) of the District Court Ordinance that the costs regime of the transferor court should apply.

It may be that if the Small Claims Tribunal Ordinance is amended in the manner proposed by the Administration, the courts may satisfactorily resolve the problem of transferred cases without the need for more amending legislation, though ideally s.7 should also be amended.

Yours sincerely,

Michael Bunting SC

Letterhead of DEPARTMENT OF JUSTICE Legal Policy Division

Annex G

Our Ref.: LP 426/00/1
Your Ref.:
Tel. No.: 2867 2847

8 January 2001

Letters sent to:

Chairman, HK Bar Association
Chairman of the Law Society Civil Litigation Committee
Dean, Faculty of Law, University of Hong Kong
Dean, Faculty of Law, City University of Hong Kong
Judiciary Administrator
Secretary for Education and Manpower

Dear

Consultation Paper
Small Claims Tribunal Ordinance (Cap. 338) - Costs

In August 2000, the Administration issued a Consultation Paper which sought comments on proposals to cap costs on appeal from the Small Claims Tribunal, the Labour Tribunal and the Minor Employment Claims Appeal Board. This letter seeks your comments on an associated proposal to amend section 7 of the Small Claims Tribunal Ordinance ("the Ordinance") to cap the costs of small claims cases transferred to the District Court or the Court of First Instance.

2. One of the principal objects of the Ordinance is to minimise the costs of litigating small claims. This object was reaffirmed when the jurisdiction of the Small Claims Tribunal was raised from a monetary amount of $15,000 to $50,000. The policy objective of minimising costs is twofold-

(a) the costs of litigating small claims must be proportionate to the amount in issue; and

(b) the less well-off in particular should be able to litigate small claims without running the risk of having to pay disproportionate costs.

The objective of minimising costs is achieved in proceedings in the Tribunal. However, this objective is subverted by treating costs on appeal as being recoverable to potentially a far greater extent than in proceedings before the Tribunal. There is no good ground to eliminate the risk of the parties bearing disproportionate legal costs in the Tribunal but not in the appellate court. The two courts are components of the same system.

3. Under section 7 of the Ordinance, the Small Claims Tribunal may transfer proceedings to the Minor Employment Claims Appeal Board, the Labour Tribunal, the Lands Tribunal, the District Court or the Court of First Instance, and the "practice and procedure" of the transferee court are to apply. While litigants who are transferred to the Board, the Labour Tribunal and the Lands Tribunal would remain in a legal costs-free environment, arguably they would be subject to the costs regime of the transferee court in respect of transfer to the District Court or the Court of First Instance. This carries the danger that small claims litigants whose proceedings are transferred to the District Court or the Court of First Instance could, contrary to the object of the Ordinance, find themselves subject to the same undue costs risk that presently applies on appeal.

4. It is proposed that section 7 of the Ordinance be amended to make it clear that the costs regime of the Ordinance applies in respect of proceedings transferred under the section. The object of the Ordinance to minimise the costs of litigating small claims would therefore be expressly affirmed in respect of transferred cases.

5. I would be grateful for any comments you may wish to make on the proposal set out in paragraph 4 above by 31 January 2001.

Yours sincerely,

LETTERHEAD OF HONG KONG BAR ASSOCIATION

Annex H

By fax and by post
(fax: 2180 9928)

12 February 2001

Miss Doris Lo
Government Counsel
Legal Policy Division
Department of Justice
1/F, High Block
Queensway Government Office
66 Queensway
Hong Kong

Dear Miss Lo,

Consultation Paper on
Small Claims Tribunal Ordinance (Cap. 338) - Costs

Thank you for your letter dated 8 January 2001 inviting the comments of the Bar Association on the captioned Consultation paper.

Enclosed please find the Bar's comments thereon for your consideration.

Yours sincerely,

Alan Leong, SC
Chairman

Encl.

/rc

HONG KONG BAR ASSOCIATION'S COMMENTS ON

Costs of Proceedings Transferred from Small Claims Tribunal

1. Further to our paper of 15th September, 2000, we have been asked to comment on the additional proposal put forward by the Administration to limit a party's entitlement to costs in the District Court or the Court of First Instance where the proceedings have been transferred from the Small Claim Tribunal pursuant to section 7 of the Small Claims Tribunal Ordinance.

2. The proposal has been put forward by the Administration on the ground that to allow costs in the District Court or the Court of First Instance where the claim is within the small claims jurisdiction (i.e., less than $50,000) would be contrary to the policy behind the Small Claims Tribunal Ordinance which is to protect litigants with small claims against potentially disproportionate legal costs.

3. The Administration has proposed that a party's entitlement to costs in cases transferred from the Small Claims Tribunal to the District Court or the Court of First Instance should be limited to the same kind of costs as are recoverable in the Small Claims Tribunal itself.

4. Whilst we note the Administration's desire to protect litigants in small claims against potentially disproportionate costs, we are concerned that_in preventing the successful party from recovering his costs where the proceedings have been transferred to the District Court or the Court of First Instance merely on the

ground that the monetary value of his claim is small may give rise to serious injustice.

5. The starting position is that litigants have the right to have their disputes resolved in a court. Procedural limitations can only be justified insofar as they do not unduly impede access to justice. Under the existing framework of the Small Claims Tribunal Ordinance, the Small Claims Tribunal offers a relatively informal and inexpensive forum for the adjudication of small claims. Costs are kept low because legal representation is excluded and litigants are expected to appear in person. The no-costs rule is a natural corollary of the exclusion of legal representation.

6. However, it is recognised that the Small Claims Tribunal is ill-suited to dealing with complex cases involving difficult issues of law and that is why section 7 of the Ordinance provides for transfers to the District Court of the Court of First Instance. By their very nature, such cases are likely to require legal representation; the costs of which for one of the parties alone can easily exceed the amount of the claim (max. $50,000). Given that it is unrealistic to expect litigants to be able properly to prosecute or defend these cases in person, if the successful plaintiff were not allowed to recover his costs, his right of action would be worthless to him. There is even less justification for forcing a successful defendant to bear his own costs of defending the claim (the bringing of which is not of his own choosing).

7. Whilst it may be argued that parties should be discouraged from litigating small claims at disproportionately large costs, we do not believe that procedural impediments should be placed in the path of potential litigants. As a matter of principle, litigants (however small may be the monetary value of their claims) should not be pressured into abandoning their claims (or defences) simply because complex legal issues are involved.

8. In the light of the above, we believe that the award of costs in small claims proceedings transferred to the District Court or the Court of First Instance, like the award of costs on appeal, is *necessary* for the proper administration of justice. In this regard, we also believe that the policy behind the Small Claims Tribunal Ordinance is only to cut down on unnecessary costs and it does not require an extension of the no-costs rule of the Small Claims Tribunal to proceedings transferred to the District Court or the Court of First Instance.

9. If changes have to be made, we would recommend extending legal aid to cover small claims proceedings in the District Court or the Court of First Instance, subject to means-testing.

Dated 7 February 2001

Letterhead of Johnson Stokes & Master

Annex I

Miss Doris Lo,
Legal Policy Division,
Department of Justice,
4th Floor, High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong

Our Ref: NDH
Your Ref: LP 426/00/1
Direct Tel: 2843 4417
Direct Fax: 2845 9121
Date: 30th January 2001

BY FAX (2869 0720) AND BY POST

Dear Miss Lo,

Re: Consultation Paper
Small Claims Tribunal Ordinance (Cap.338) - Costs

I thank you for your letter of 8th January 2001.

As I said in my letter of 25th September 2000, the Law Society's Civil Litigation Committee accepts in principle the proposition that the costs of proceedings in the Small Claims Tribunal should be minimized as far as possible.

Consistent with that position, we agree that parties in the Small Claims Tribunal should not be exposed to the cost regimes of the District and High Courts if matters are transferred to those Courts from the Small claims Tribunal. If the parties decide in those higher courts they wish to obtain legal representation, then they are entitled so to do but we accept it would be unfair to expose the other party to potential orders for costs which may be significantly greater than the amount in dispute.

We therefore support the proposed amendments to section 7 of the Ordinance.

Yours sincerely,

N. Hunsworth

Annex J

MEMO

From Commissioner for Labour	*To* Secretary for Education and Manpower
Ref. 8 *in* 10/706 Pt3	*(Attn* Miss Erica Ng *)*
Tel. No. 2852 4102	*Your Ref.* _____ *In* _____
Fax. No. 2544 3271 2543 3194 (CR)	*dated* _____ *Fax No.* 28017825
Date _____	*Total Pages* _____

Consultation Paper
Small Claims Tribunal Ordinance (Cap.338) - Costs

The Judiciary Administrator has not elaborated on her reasons for objecting to the proposed capping of costs on appeal from the three tribunals set up specifically to provide a speedy and inexpensive way of resolving disputes involving a small amount of money.

2. The intention to provide an inexpensive way of resolving these minor monetary claims could easily be traced from the relevant ExCo papers and from Legco hansards debating on this subject when the relevant bills were passed in the legislature. It has never been the intention of either the ExCo nor the legislature nor the Administration to expose low paid workers to the risks of unlimited costs when an employer appeal a case against a legal error made by the presiding officer. To expose workers to uncontrolled and unlimited liabilities in court costs upon appeal is a serious anomaly, which must be rectified as soon as possible.

3. The Administration, and the Judiciary, owes the public a moral obligation to rectify as soon as possible any unintended anomaly in our statute, whether it occurs by way of commission or omission. To do otherwise would be a serious negligence in the discharge of one's public duty.

CHOW Tung Shan
(for Commissioner for Labour)

c.c Department of Justice (Attn: Miss Doris Lo 21809928
Judiciary Administrator (Attn: Ms Rebecca Pun) 25014636