

立法會
Legislative Council

LC Paper No. CB(2)955/01-02
(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Thursday, 20 December 2001 at 8:30 am
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon Albert HO Chun-yan
Hon Mr Ambrose LAU Hon-chuen, GBS, JP

Public Officers Attending : Item III

Mr Michael SCOTT
Senior Assistant Solicitor General

Ms Kitty FUNG
Senior Government Counsel
Legal Policy Division

Item IV

Mr Andrew H Y WONG, JP
Director of Administration

Miss Eliza LEE
Deputy Director of Administration

Mr Robert ALLCOCK, BBS
Solicitor General

Mr Stephen Kai-yi WONG
Deputy Solicitor General

Mr Frank POON
Deputy Principal Government Counsel

Mr Paul TSANG
Senior Government Counsel

By Invitation : Item III

The Hong Kong Society of Notaries

Mr Lester G HUANG
Vice President

Mr Robin BRIDGE

Mr CHAN Bing-woon

Mr Timothy HANCOCK

Mr KWOK Hong-yee, Jesse

Ms Christine W S CHU

Item IV

The Hong Kong Bar Association

Mr P Y LO

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

I. Confirmation of minutes of meetings
(LC Paper Nos. CB(2)716, 717 and 723/01-02)

The minutes of the meetings held on 18, 29 September and 29 October 2001 were confirmed.

II. Items for discussion at future meetings
(LC Paper Nos. CB(2)722/01-02(01) and 629/01-02(01) to (03))

2. Members agreed that the following items should be discussed at the next meeting on 28 January 2002 -

(a) Review of legal education and training in Hong Kong; and

(b) Civil Justice Reform : Interim Report and Consultative Paper.

3. On item (b), the Panel agreed that the two legal professional bodies and academics should be invited to give preliminary views on the matter at the next meeting, pending further discussions by the Panel on specific proposals for reform at a later stage.

Items on the list of issues to be considered by the Panel
(LC Paper No. CB(2)722/01-02(01))

Item 16 - Wasted costs

4. Members noted that the judgment of the Court of Appeal in Criminal Appeal No. 269 of 2000 and extracts from the reports of the Bills Committee on Costs in Criminal Cases Bill had been circulated to the Panel for reference (LC Paper Nos. CB(2)629/01-02(01) to (03) dated 7 December 2001). Members agreed that preliminary discussion on the item, in the context of the Civil Justice Reform, could be held at the meeting on 28 January 2002. If necessary, the item could be discussed in further detail at another meeting.

Item 17 - Ex-gratia payment to victims of wrongful imprisonment

5. Members agreed that the Administration should be requested to prepare a paper to explain its policy on the above issue, and provide relevant background information on previous public discussions on related policy issues, complaints and applications for compensation from victims as well as the practices adopted in other jurisdictions so as to facilitate the Panel's consideration of the matter.

Bilingual proceedings

6. Mr Martin LEE proposed that the issue of bilingual proceedings should be discussed by the Panel. The Chairman suggested and members agreed that the matter could also be discussed in the context of the Civil Justice Reform.

Policy on legislation and making of executive orders under Article 48(4) of the Basic Law

7. The Chairman informed members that as the Chief Secretary for Administration (CS) was unable to attend this meeting for discussion of the item due to some prior engagements, the item had been postponed and arrangements were being made for CS to attend another meeting.

III. Admission of notaries public in Hong Kong

(LC Paper Nos. CB(2)722/01-02(02) and (03); 755/01-02(01))

8. The Senior Assistant Solicitor General drew members' attention to the Administration's letter to the Panel dated 13 December 2001 (LC Paper No. CB(2)722/01-02(03)), which listed the eight sets of draft rules on notarial practice to be made under the Legal Practitioners (Amendment) Ordinance 1998. He advised that the draft rules had been prepared and finalized. Subject to further fine-tuning of the drafting, the draft rules would be submitted to the Chief Justice for approval.

9. At the invitation of the Chairman, Mr Lester HUANG briefed members on the paper prepared by the Society of Notaries (the Society) (tabled at the meeting and circulated after the meeting vide LC Paper No. CB(2)755/01-02(01)). In particular, he explained the present position concerning two outstanding issues which had yet to be resolved, namely, notarial examination and professional indemnity for notarial practice.

Examination for admission as notaries public

10. Mr Lester HUANG said that instead of drawing on the assistance from the universities, the Society had secured the consent in principle of The Scriveners Company in England, which had unique experience of running notarial examinations in Hong Kong and some other commonwealth jurisdictions, to assist with drawing up the examination syllabus and providing examiners to set and mark the papers. As for the development of literature for potential candidates to prepare for the examination, the Society had approached Mr Nigel Ready, the author of the authoritative textbook "Brooke's Notary", who had agreed to compile a Hong Kong supplement to his work. It was expected that the new text would be ready by February 2002, and the Society could conduct the new examination within one year.

11. Ms Emily LAU asked whether it was the Society's plan to only rely on The Scriveners Company to continue to run the examination in the future. Mr Lester HUANG responded that in view of its present resources position and the relatively small membership of about 400, the Society was of the view that it would in practice be more desirable to seek the services of the said institution in running the examination at this particular stage. Meanwhile, the Society would start developing local literature for the examination and assess the impact of the implementation of the first set of the examination rules. It was the intention of the Society to run the examination itself in time.

Professional indemnity

12. Mr Lester HUANG advised that another issue that remained outstanding was whether it was necessary to make professional indemnity rules for notaries public in Hong Kong. He said that at present, most of the notaries public in Hong Kong were also practising as solicitors and hence they were covered by the Solicitors' Indemnity Scheme (SIF). There was however a practical difficulty in making appropriate insurance indemnity arrangements for six members of the Society who were not covered under the SIF. The Society's contacts with insurers had revealed that viable indemnity cover could not be made available to this minority of notaries public. This was particularly the situation after the September 11 incident.

13. Mr Lester HUANG further advised that the Society had assessed the potential risks to the public of not being able to provide for indemnity coverage for the minority of its members. It had come to the conclusion that there was no real urgency for introducing any indemnity rule, having considered the following factors -

- (a) it would not lead to any worse-off situation because there was no statutory requirement for notaries public to maintain professional insurance, and indeed no notaries public had taken out such indemnity coverage at present;
- (b) the majority of members were already covered under the SIF. Many of those not covered did not reside in Hong Kong and were not entitled to practise as notaries public in Hong Kong. Many had retired from the practice and just wished to retain their status as notaries public. Also, those engaged in active practice would not normally engage in high-risk work and were sufficiently senior to practise competently; and
- (c) notaries public would not handle clients' monies in the course of their practice, and the local notarial practice so far had a no-claim record.

14. Mr Lester HUANG said that in the views of the Society, it would not be necessary to introduce a statutory requirement of professional indemnity cover for the purpose of notarial practice. The Society would like to seek the Panel's views on the matter.

15. Mr Martin LEE asked whether there were precedent cases of notaries public in the United Kingdom or other commonwealth jurisdictions being sued for professional negligence. Mr Lester HUANG responded that he had not heard of any such cases.

16. In reply to Ms Emily LAU's questions, Mr Lester HUANG said that there was an enabling provision in the principal Ordinance for the Society to introduce rules regarding mandatory indemnity. However, the situation was that to date the Society had yet to make any such rules to actually implement the requirement. He further advised that it had been the original intention of the Society to put in place rules on mandatory indemnity in the present exercise. However, the Society now had second thoughts about the necessity to do so because of the reasons explained earlier.

17. In further response to Ms Emily LAU, Mr Lester HUANG advised that there were currently about 28 notaries public who were not covered under the SIF, of whom many were not residing in Hong Kong or had retired from practice but wished to retain their status as a notary public. As to the remainder, there were only about six who were currently in Hong Kong and able to practise.

18. Ms Audrey EU asked what were the major differences between the work of notaries public in the traditional sense and that of the China appointed attesting officers. She opined that measures should be taken to promote public awareness of the differences.

19. Mr Lester HUANG replied that members of the Society could only practise within Hong Kong. The documents attested by members of the Society who were not concurrently China appointed attesting officers were not recognized in the People's Republic of China. However, there was a significant number of members of the Society who were concurrently China appointed attesting officers. He added that China appointed attesting officers were generally expected to take on duties that went beyond the mere attestation of documents in that they should also verify the accuracy of the contents of the documents. Notaries public in Hong Kong, however, verified the accuracy of the identity and the signature of the persons appearing before them, but not the accuracy of the contents of the documents. He said that in time, the issue of achieving some form of harmonization of the work performed by the two might be looked into.

20. In response to a further question from Ms Audrey EU on admission of notaries public, Mr Lester HUANG said that admission was restricted to practising solicitors. The Legal Practitioners Ordinance required that the person had to be on the roll of solicitors continuously for a period of seven years immediately preceding application for admission. The person must also have passed the notarial examination within one year of applying for admission.

21. Ms Audrey EU pointed out that as notaries public engaged in active practice were normally solicitors of sufficient seniority, from the consumer protection point of view, the question of whether the fees charged were reasonable or good value for money should be looked into. This issue was particularly pertinent to ordinary members of the public who did not have a standing relationship with a solicitors' firm willing to charge the services at a cheaper rate.

22. In reply, Mr Lester HUANG said that the Council of the Society in fact maintained a Scale of Fees ranging from \$400 to \$750 per transaction. The existing scale fees were in place since the 1980s. The actual fees charged, however, were sometimes less than that prescribed under the scale. Moreover, notaries public very often provided additional services for free to their clients. He added that no complaints had been received in the past about high fees charged by notaries public in Hong Kong. The Chairman requested the Society to provide a copy of the scale fees for members' information.

(Post-meeting note - The Society's Circular on "Notarial Fees" dated 17 October 1994 was circulated to the Panel vide LC Paper No. CB(2)806/01-02(01) on 4 January 2002. The Society clarified that the scale of notarial fees attached to the Circular came into force since 1 November 1994.)

23. Mr Lester HUANG supplemented that the work of notaries public involved not just the mere attestation of documents. It also included research on the different attestation requirements for the documents and the preparation of a notarial certificate to go with the documents to meet the specific requirements of the particular jurisdictions in which the documents were to be used etc.

24. The Chairman sought members' views on the Society's intention to leave the issue of mandatory professional indemnity aside at the moment and to proceed with the implementation of the other necessary rules so that the Society could start to admit new notaries public as soon as possible.

25. Members raised no opposing views. Mr Martin LEE and Ms Audrey EU considered that there was unlikely to be a serious risk arising from lack of indemnity cover for notarial practice. Ms Miriam LAU said that it did not

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seem to be necessary to introduce any mandatory indemnity scheme in view of the no claim situation in Hong Kong. She opined that the issue of compensation for professional negligence should better be left to the individual notaries public concerned.

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26. In response to Ms Emily LAU, Mr Lester HUANG said that the Society would consult its members on the draft rules. At the Chairman's request, he agreed to revert to the Panel on the contents of the rules and the result of consultation in due course.

IV. Reciprocal enforcement of judgments in commercial disputes
(LC Paper Nos. CB(2)722/01-02(04) and (05); LS25/01-02)

27. The Chairman declared interest as she was at present handling a case involving enforcement of a Mainland judgment in Hong Kong.

28. The Legal Adviser drew members' attention to the paper prepared by the Legal Services Division (LC Paper No. LS25/01-02) which provided a factual account of the legal framework for enforcement of foreign judgments in Hong Kong, under both common law and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319).

29. At the invitation of the Chairman, Solicitor General (SG) briefed members on the Administration's paper (LC Paper No. CB(2)722/01-02(04)). The paper explained –

- (a) the enforcement of Mainland judgments in the Hong Kong Special Administrative Region (HKSAR) and the benefits of an arrangement for reciprocal enforcement of judgments (REJ) between the HKSAR and the Mainland; and
- (b) the choice of forum provisions and their implications on REJ under the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

30. SG said that to develop HKSAR's legal services and to promote HKSAR as an international centre for dispute resolution would benefit Hong Kong businesses as well as international businessmen doing business with the Mainland consequent to China's accession to the World Trade Organization. He said that at present, there were no REJ arrangements between the HKSAR and the Mainland. A Mainland judgment might be recognized in Hong Kong under the common law if it was given by a competent court. For the judgment to be enforceable in Hong Kong, it must be for a fixed sum of money and a final and conclusive judgment upon the merits of the claim. China, however, being a civil law jurisdiction, did not have a rule similar to the common law

rule. Hence, whereas a Mainland judgment could be enforced in the HKSAR, judgments made in the HKSAR could not be enforced in the Mainland. To eliminate this anomalous situation, it was considered desirable to develop a working arrangement on REJ between the Mainland and the HKSAR.

31. SG added that the intention at this stage was to introduce a limited form of reciprocal arrangements for the settlement of civil and commercial disputes arising from contracts entered into between a foreign party and either a Mainland party or a Hong Kong party. It was contemplated that under the future arrangements, if the parties to a contract agreed that the courts of the Mainland should have jurisdiction, then the judgment of the court should be enforceable in the HKSAR, and vice versa.

32. Director of Administration (D of A) clarified that contrary to recent media reports, negotiations on REJ arrangements between the HKSAR and the Mainland had yet to start, and the discussion was not expected to be concluded in six months' time.

33. The Chairman asked whether it was a confirmed position that a Mainland judgment was enforceable in the HKSAR under the common law. She pointed out that there had been controversial views on this issue. SG replied that at common law, Mainland judgments were enforceable in the HKSAR if the judgments were final and conclusive, depending on the merits of the case.

34. The Chairman tabled copy of excerpts from "Dicey and Morris on the Conflicts of Laws" and a High Court judgment (Action No. A11186 of 1995) (circulated vide LC Paper Nos. CB(2)755/01-02(04) and (05) respectively on 21 December 2001) for members' information. The former set out the relevant factors and requirements under the conflicts of laws rules in relation to final and conclusive judgments. The latter was an interlocutory judgment which raised the question of whether, given the Chinese law and the Chinese legal system, a Mainland judgment fulfilled the criteria for finality and conclusiveness.

35. The Chairman invited the representative from the Hong Kong Bar Association to give his views.

36. Mr P Y LO said that the Bar Association had yet to have a firm position on REJ between the HKSAR and the Mainland, though it recognized that there were likely to be benefits derived from such arrangements.

37. Mr LO tabled a copy of a Judicial Interpretation by the Supreme People's Court for Recognition of Civil Judgments of Courts of Taiwan in 1998 (circulated vide LC Paper No. CB(2)755/01-02(02) on 21 December 2001) for members' information. He said that the judicial interpretation provided an

example of the Mainland giving recognition to judgments of a part of China which was under a different administration. It might also assist in substantiating a case to be made out for a similar judicial interpretation to be rendered by the Judicial Committee of the Supreme People's Court with regard to the recognition and enforcement in the Mainland of judgments made in the HKSAR in the absence of REJ.

38. Concerning the question of final and conclusive judgment, Mr P Y LO also tabled a judgment of the Court of Appeal in CACV354/2001 (circulated vide LC Paper No. CB(2)755/01-02(03) on 21 December 2001) for members' reference. In the case, the Court held that the defendant who wished to rely on a Mainland judgment was required to prove that the judgment was final and conclusive. Mr LO said that the issue of final and conclusive judgments made by Mainland courts might involve, firstly, an examination of the mechanism under the Mainland civil justice system for the Mainland procuratorate to supervise the proper functioning of the courts, and secondly, whether the parties to the proceedings actually wanted to take the point of finality and conclusiveness of a Mainland judgement as an issue and if so to have it resolved by the courts of Hong Kong. He further opined that these matters might be of great and general importance justifying the Secretary for Justice intervene in the legal proceedings.

39. Ms Audrey EU said that she saw a dilemma situation in the consideration of the desirability of REJ between the HKSAR and the Mainland. She pointed out that while there were obvious arguments for putting in place the arrangements, there were concerns expressed by many about widespread corruption, bias, personal influences and absence of fair hearing etc in the Mainland which were extremely difficult to prove. Furthermore, many judges in the Mainland were not legally qualified, and the laws and legal systems in operation in the two jurisdictions were different. Concerns had also been expressed that there were difficulties in enforcing Mainland court judgments effectively in the Mainland, let alone in Hong Kong. All these indicated that some of the advantages of REJ might be illusory and hence there was a need to proceed with the matter with extreme caution. She suggested that it might be desirable to consider implementing a limited form of REJ to apply to, for example, judgments made by certain status of courts in the Mainland which had been approved by the highest court in the Mainland.

40. Mr James TO expressed similar views. He said that he had encountered people, many of whom were in the business sectors, expressing grave concerns about the possible adverse impact on their interests of the implementation of REJ between the HKSAR and the Mainland.

41. Ms Miriam LAU said that she supported in principle the new initiative to introduce REJ arrangements which she believed was an inevitable move forward in the area of mutual legal assistance and co-operation between the

HKSAR and the Mainland. She said that an essential element of the new arrangements was the autonomy of the contracting parties to mutually consent to submit to the jurisdiction of particular courts for the purpose of resolving disputes. She further said that more researches and studies should be conducted so as to put in place the necessary rules and safeguards to ensure that the system could operate satisfactorily.

42. Ms Emily LAU asked whether the Administration itself saw any difficulties and problems in implementing the new arrangements.

43. SG said that the Administration had taken on board views and concerns similar to those expressed by members before putting forward the preliminary proposals. As had been explained by the Secretary for Justice on various occasions, including at the meeting of the Panel on 29 October 2001, the proposals constituted only a limited form of REJ as they would apply not to all judgments but only foreign-related judgments on commercial agreements, where the parties had consented to have any disputes decided by either the Mainland courts or the Hong Kong courts. Also, given the international nature of the disputes, only the Intermediate People's Courts of the Mainland of China, which were of a relatively senior status, would have jurisdiction to determine cases.

44. Referring to the issue of safeguard mechanisms, Mr P Y LO said that he noted that some of the defences available to a defendant in a common law action brought on a judgment from another jurisdiction as set out in paragraph 6 of the Administration's paper, namely regarding judgments obtained by fraud or in breach of natural justice' were not defences available in the concluded arrangements for mutual enforcement of arbitral awards between the HKSAR and the Mainland. The two defences were also absent in paragraph 9 of the Judicial Interpretation by the Supreme People's Court for Recognition of Civil Judgments of Courts of Taiwan in 1998, which specified the grounds for non-recognition of Taiwanese civil judgments in the Mainland.

45. Mr TSANG Yok-sing enquired whether any judgments made by Mainland courts had previously been enforced in Hong Kong. In reply, SG said that the matter of how Mainland judgments could in practice be enforced in Hong Kong based on common law rules was still a matter to be resolved by the Hong Kong courts. He said that the Administration was not aware of any Mainland judgments having been enforced in Hong Kong.

46. The Chairman said that she had done some initial research in this regard and found that no Mainland judgments had been enforced in Hong Kong, in other commonwealth jurisdictions or in the United States.

47. The Chairman enquired about the implications of the Draft Hague Convention (the Convention).

48. The Administration replied that negotiations on the Convention were still under way and not expected to be concluded before the end of 2002. Briefly, the essential elements embodied in the Convention included the rules of jurisdiction and the principle of reciprocity in enforcing judgments by Contracting Parties to the Convention. As reflected in the relevant Article in the Convention, there was a general consensus among Contracting Parties that if the parties in a particular legal relationship agreed that the courts of a Contracting Party to the Convention should have jurisdiction to settle any dispute arising with the legal relationship, then those courts should have exclusive jurisdiction, and the resulting judgment based on this particular ground of jurisdiction should be enforceable by all other Contracting Parties. The Contracting Parties to the Convention might include the People's Republic of China. The above "choice of forum" provision in the Convention, however, would not assist in the relationship between the HKSAR and the Mainland with regard to REJ. This was because the Convention, as an international agreement, would not apply as between two places in the same country. Yet, the underlying principle governing the obligation to enforce a judgment resulting from the exercise of jurisdiction based on a choice of forum agreement might serve as a useful guide and model in any future arrangements to be made between the HKSAR and the Mainland on REJ in civil and commercial matters.

49. In response to members, D of A said that the Administration had no definite timeframe in when negotiations with the Mainland on REJ could be finalized. However, the Administration was conscious of the need to conclude the negotiations as a priority. He added that the Administration would conduct appropriate consultations on the matter.

50. The Chairman said that the general public were not clear about the proposals regarding REJ between the HKSAR and the Mainland. They were also confused about the difference between mutual enforcement of arbitral awards and judgments. To facilitate further discussion by the Panel, members requested the Administration to provide another paper in due course setting out the contents of the proposed REJ arrangements, the progress of negotiations with the Mainland, how consultations would be conducted and the relevant issues for consultation, as well as the anticipated timetable for implementing the arrangements etc. The Administration agreed.

Adm

51. There being no other business, the meeting ended at 10:35 am.