立法會
Legislative Council

LC Paper No. CB(2)2584/99-00
(These minutes have been seen by the Administration and cleared with the Chairman)

Ref : CB2/BC/2/99

Legislative Council
Bills Committee on District Court (Amendment) Bill 1999

Minutes of 9th meeting
held on Monday, 27 March 2000 at 8:30 am
in Conference Room A of the Legislative Council Building

Members Present	:	Hon Margaret NG (Chairman) Hon Albert HO Chun-yan Hon Mrs Miriam LAU Kin-yee, JP Hon Ronald ARCULLI, JP Hon Ambrose LAU Hon-chuen, JP
Member Absent	:	Hon Jasper TSANG Yok-sing, JP
Public Officers Attending	:	Ms Emma LAU Deputy Judiciary Administrator Ms Miranda CHIU Deputy Director of Administration Mr David LEUNG Assistant Judiciary Administrator Ms Rosanna LAW Assistant Director of Administration

Mr J D SCOTT
Senior Assistant Law Draftsman

Miss Carmen CHU
Senior Government Counsel

Miss Vivian FUNG
Senior Government Counsel

Mr Louie WONG
Government Counsel

Mr Ryan CHIU
Assistant Secretary (Administration)

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

Staff in Attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Mrs Eleanor CHOW
Senior Assistant Secretary (2)7

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2) 1386/99-00)

The minutes of the meeting on 21 January 2000 were confirmed.

II. Matters arising

Interim assessment and payment of costs
(LC Paper No. CB(2) 1460/99-00(03))

2. At the invitation of the Chairman, Deputy Judiciary Administrator (DJA) briefed members on the proposal to introduce into the District Court (DC) interim

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assessment and payment of costs as set out in the paper.

3. In response to Mrs Miriam LAU on paragraph 4(c) of the paper, DJA explained that under the proposal, interim payment was on account of the costs pending taxation and the receiving party had to give credit for the sum so paid upon taxation. As regards the procedure for handling the difference between interim payment made and the amount payable after taxation, there were three possible scenarios -

(a) If the taxed amount was equal to the interim payment, no action would be required;

(b) If the taxed amount was greater than the interim payment, the court would order the paying party to pay the difference upon taxation; and

(c) In the unlikely event that the taxed amount was less than the interim payment, the difference would be settled by way of set-off or refund.

4. DJA said that at the end of the day, there would not be any excess payment or short fall in payment. Mrs Miriam LAU held the view that the payment should be more appropriately referred to as "provisional payment", instead of "interim payment", as it was subject to taxation. DJA responded that the merit of the proposal was that costs had to be paid forthwith, although the amount to be paid was not final.

5. The Chairman asked about the basis for the procedure described in paragraph 3 above. She said that the court only had the power to order payment of costs and could not give instruction as to how payment upon taxation should be handled. She was aware that taxing masters had their own set of rules and would apply different rules depending on the circumstances. It was not easy to predict the rules to be adopted by the taxing masters for individual cases.

6. DJA responded that the Civil Court User Committee had yet to work out the detailed arrangements. The law draftsman had been asked to revise the draft rules to incorporate procedures for the different scenarios. In further response to the Chairman, DJA said that the procedure described in paragraph 3 above was for illustrative purpose. The taxation process under the new rules would be the same as the existing one. In addition, taxing masters would continue to be guided by their own set of rules.

7. In response to Mr Albert HO, DJA said that under Order 62 rule 4(1)of the

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Rules of the High Court (RHC) as applicable to the DC, both the High Court (HC) and the DC might order costs to be paid forthwith notwithstanding the proceedings had not been concluded. The major difference between the proposal and the existing rule was that since the payment would be on an interim basis, it was unnecessary to require the services of a law costs draftsman so as to avoid delay and reduce litigation costs.

8. The Chairman asked members to indicate their position on the issue. Mr Albert HO said that it would appear that the proposal would simplify the procedure for interim payment of costs without broadening the power of the DC. He would like to reserve his position as he needed to consult his party friends in the Democratic Party. The Chairman said that she had reservations about the proposal. She said that while the proposal could achieve the purpose of reducing interlocutory applications, she was not sure whether it would be at the cost of justice.

9. In response to Mr Albert HO, DJA confirmed that it was intended to introduce the proposed rules into the DC after the introduction of the relevant rules into the HC. New rule 9A would be added to Order 62 of the RHC which would be introduced shortly into LegCo for negative vetting. As regards the legislative timetable for the Bill and DC rules, it was expected that after the enactment of the Bill in May 2000, a new set of the DC rules would be introduced into LegCo for negative vetting in the same month.

10. DJA said that a set of draft DC rules would be forwarded to members for perusal within this week. Given that the new set of DC rules was rather lengthy, the Administration would provide a table comparing the RHC and the draft rules of the DC for members' easy reference.

(*Post-meeting note* : A set of draft Rules of the DC and related papers were issued to members vide LC Paper No. CB(2) 1542/99-00 on 31 March 2000.)

Clause 22 (section 39): Agreements as to jurisdiction
(LC Paper No. CB(2) 1460/99-00(04))

11. DJA said that having regard to members' comments, the Administration would introduce Committee Stage amendments (CSAs) to repeal proposed sections 39 and 44A(3).

12. Mrs Miriam LAU asked whether repealing proposed section 44A(3) would have the effect of empowering the Court of First Instance (CFI) to disallow the

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transfer of cases that were within DC jurisdiction to the DC, even with the parties' consent.

13. DJA clarified that for cases that were within the jurisdiction of the DC, the CFI might, if the parties consent, order the transfer to the DC in accordance with proposed section 44. If proposed section 44A(3) was not repealed, the CFI would have to transfer cases that were outside the jurisdiction of the DC to the DC, if the parties agreed to the transfer. The arrangement contravened the principle that the DC was a court with limited jurisdiction.

14. The Chairman said that the principle of agreements as to jurisdiction in this section was very clear. There was no self-conferring jurisdiction. Proposed section 44A(3) was jurisdiction by consent and therefore should be repealed.

15. Members expressed support to the proposed CSAs.

Appeals from DC: Application for leave to appeal
(LC Paper No. CB(2) 1496/99-00(01))

16. DJA said that different mechanisms of appeals were currently in place at different levels of courts to cater for different needs and circumstances of the courts/tribunal concerned. She stressed that any change to the existing mechanism would be a serious matter and required careful consideration and consultation with the legal profession. As the existing mechanism had been working well, the Administration was of the view that drastic changes should not be made to the mechanism of appeals at this stage. DJA further advised that a working group chaired by Mr Justice P CHAN, Chief Judge of the HC, was currently conducting a review on civil litigation. Subject to the working group's recommendations, changes would be introduced to the mechanism of appeals if necessary.

17. As regards the statistical data on the number of applications for leave to appeal against decisions of DC judges, DJA advised that the statistical data in 1999 was as follows -

(a)	Applications for leave to appeal against decision of DC judges	41
(b)	Leave to appeal granted by DC judges	9
(c)	Leave to appeal refused by DC judges	21

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(d)	Applications withdrawn	11
(e)	Applications for leave to appeal to the Court of Appeal (CA) after refusal by DC judges	6

18. DJA said that the statistics showed that if the requirement of applying for leave to appeal from the DC judge was dispensed with, the workload of the CA in this regard in 1999 could have increased by about seven times.

19. Mrs Miriam LAU said that the workload that could have been handled by the CA was exaggerated. She pointed out that the total number of applications for leave to appeal to the CA should be 15 (paragraph 17(b)+17(e)), given that the leave to appeal granted by DC judges would eventually be handled by the CA. In addition, after discounting the number of applications withdrawn, the actual number of applications for leave to appeal was 30 (paragraph 17(b)+17(c)). In this regard, the workload of the CA in 1999 could have doubled only, if the requirement of applying for leave to appeal from the DC judge was dispensed with.

20. DJA stressed that the crux of the matter was not on the workload of the CA. The issue was that the existing mechanism had its merits and should be retained. The Chairman responded that the paper did not mention anything about the merits of the existing appeal mechanism. On the other hand, it placed emphasis on how the workload of the CA could have increased.

Time for application for leave to appeal
(LC Paper No. CB(2) 1496/99-00(01))

21. Members unanimously considered that the proposed period of 7 days within which a person could appeal against a DC judge's refusal to grant leave to appeal to the CA was too short. They pointed out that 7 days were not enough for a litigant acting in person who might instruct a legal representative to make an application for leave to the CA, or seek legal aid after his application for leave of appeal was refused by the DC; and for litigants who wished to change lawyers after their applications for leave to appeal were refused by the DC. The Chairman asked the Administration to provide information on how many of the 41 applications made in 1999 were legally represented.

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22. DJA said that the Administration would provide such information if available. She explained that the objectives of the proposal were to avoid delay as far as

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possible, and to bring the leave period in line with that under Order 59 rule 14(3) of the RHC. The relevant Rule provided that "where an ex parte application has been refused by the court below, an application for a similar purpose may be made to the CA ex parte within 7 days after the date of refusal".

23. The Chairman said that given that the paper did not give an account of the different types of ex parte cases, she was not sure whether the leave period for ex-parte applications should apply to an appeal against the refusal of a DC judge to the CA. Mr Ronald ARCUULI pointed out that given that the majority of HC cases was legally represented, it might not be appropriate for the leave period in question to be modelled on the RHC.

Adm

24. The Chairman said that since the Administration had indicated that it did not wish to make drastic changes to the existing appeal mechanism, the Administration should consider refraining from changing the leave period in question. DJA undertook to reconsider the proposal.

25. As regards appeals from an interlocutory order by a DC judge, members agreed that the application for leave should be made to the DC judge within 14 days to be in line with the RHC. For appeals against decisions other than interlocutory orders by the DC judge, members also agreed that the leave period should be 28 days.

Responses to outstanding issues raised by the Bills Committee during clause-by-clause examination of the Bill
(LC Paper No. CB(2) 1496/99-00(02))

Item 1- Officers illegally demanding fees

26. Members noted that the Administration was seeking legal advice as to whether clause 14 (section 26) should be covered by the Prevention of Bribery Ordinance.

Item 2 - Rescuing foods/ assaulting officers/ revocation of committal orders

27. Assistant Judiciary Administrator (AJA) briefed members on the effect of the proposed amendments to sections 29 - 31. In gist, the existing power of the judge to commit an offender to prison under these sections would be replaced by the procedure of conviction on indictment to imprisonment.

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28. Mrs Miriam LAU pointed out that since the bailiff's power to take an offender into custody and bring him before a judge was proposed to be abolished, the intended deterrent effect would diminish.

29. Mr Ronald ARCULLI asked why a person was only liable to imprisonment but not a fine on conviction of indictment under proposed section 29(b).

30. AJA said that under proposed section 29, an offender might be subject to prosecution either on summary conviction or conviction on indictment, depending on the seriousness of the offence. Mr Ronald ARCULLI and the Chairman pointed out that while the seriousness of an offence was a matter for the prosecutor, the court had the power to decide whether an offender should be imprisoned or fined.

31. The Chairman opined that the proposed change was a change of policy. She pointed out that under the existing procedure, the court had the power to commit an offender to prison, whereas the Bill proposed that such judicial power should be passed to the executive. She had reservations about the new arrangement.

32. Mr Ronald ARCULLI said that he would consider the proposed change to be a technical one on the condition that the bailiff's power under the existing sections was rarely exercised, as advised in the paper. If the situation was otherwise, he would agree with the view of the Chairman. He added that from an offender's viewpoint, the proposed change might also have the effect of changing a civil offence to a criminal offence.

Item 3 - "likely" in proposed section 44(1)

33. AJA briefed members on the item and members did not raise any queries.

Item 4 - General ancillary jurisdiction

34. AJA advised that other than replacing the word "hitherto" with "as in the past", proposed section 48(3)-(5) was exactly the same as section 16(2) and 16(3) of the High Court Ordinance (HCO). The phrase "as in the past" was construed as having the same meaning as “hitherto".

35. Mr Albert HO asked why proposed section 48(2) only made reference to the rules of equity and the rules of the common law, whereas proposed section 48(3)(b) only made reference to common law and customary law. He considered that common law, equity, customary law as well as statutory law should all be included in

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the relevant provisions.

36. ALA explained that proposed section 48(2) was to give effect to the Judicature Acts of 1875. The purpose of the section was to provide that where there was a conflict or variance between the rules of equity and the rules of the common law, the rules of equity should prevail. Proposed section 48(3)(b) simply repeated the principle stated in the proposed section 48(2) but in greater detail.

Items 5 – 7

37. AJA briefed members on the items and members did not raise any queries.

Proposed CSAs
(LC Paper No. CB(2) 1496/99-00(03))

Items 1 – 7

38. AJA briefed members on the proposed amendments and members did not raise any queries.

Item 8

39. The Chairman advised that proposed amendments to section 42(3) (clause 22) was in response to concerns expressed by members at previous meetings.

40. Members noted that a new subsection (3)(c) was proposed to be added to provide that if a defendant in an action or proceedings within the jurisdiction of the DC made a counterclaim which was not within the jurisdiction of the DC but within the jurisdiction of the CFI, the DC might, either of its own motion or on the application of any party, order, where the DC considered that the whole proceedings should be heard and determined in the DC, that the matter be reported to the CFI or a judge thereof.

41. Mr Albert HO asked how would the case be handled in the absence of a report to the CFI. AJA responded that the existing practice in section 38 of the District Court Ordinance (DCO) concerning jurisdiction as to counterclaims would apply, i.e. the DC should have jurisdiction to hear and determine the whole proceedings. He advised that as indicated in item 8(d) of the paper, a new section along the line of section 38(4) of the DCO with appropriate modifications would be added to the relevant section.

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42. Pointing out that the CFI was a court with unlimited jurisdiction, the Chairman raised queries on the wording "within the jurisdiction of the CFI" in proposed section 42(3). Citing the example of the Small Claims Tribunal, AJA explained that certain courts had exclusive jurisdiction that was outside the jurisdiction of the CFI.

Items 9 -13

43. AJA briefed members on the proposed amendments and members did not raise any queries.

III. Clause by clause examination of the Bill

(LC Paper Nos. CB(2) 420/99-00(02), 672/99-00(03), 1196/99-00 and 1242/99-00(04))

44. The meeting commenced clause by clause examination of the Bill at clause 66A. Discussion of the Bills Committee was highlighted below.

Clause 34 (section 66B) - Witness expenses

45. Mr Ronald ARCULLI asked whether the power of ordering the reimbursement of a witness for any expenses reasonably and properly incurred by the witness was only in a judge and registrar and not in deputy registrar and assistant registrar. AJA advised that section 14(2) of the DCO provided that the deputy registrar and assistant registrar might exercise the power of the registrar. AJA further advised that the Administration would propose CSAs to put beyond doubt that temporary deputy registrar and temporary assistant registrar had the same powers as the deputy registrar and assistant registrar respectively.

Clause 37 (section 69C) - Interpretation and application of this section and sections 69, 69A and 69B

46. ALA advised that proposed section 69C basically followed section 69(4) of the DCO. However, the definition of "trial" and a saving provision for the Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap. 126) were added to the section.

47. In response to the Chairman, DJA explained that the two new provisions

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were modelled on section 21H of the HCO. SALD supplemented that proposed section 69C(2) of the Bill and section 21H(2) of the HCO would have the same effect. The only difference was that the former was written in plain language while the latter was in traditional legal language.

Clause 39 (section 71A) - Registrar may apply for an order

48. ALA advised that the new section was adapted from section 40 of the HCO which stated that "The Registrar may, in case of doubt or difficulty, apply summarily to the CFI for an order for the direction and guidance of a bailiff, and the CFI may make such order in the matter as may seem just and reasonable". Proposed section 71A stated that "The Registrar may apply summarily to the Court for an order for the direction of a bailiff in a difficult or doubtful case".

49. Mr Ronald ARCULLI said that while the language in section 40 of the HCO was very clear, he had difficulty in understanding the language in proposed section 71A.

50. DJA advised that the wording used in the Kempster Report was the same as the one in the HCO. SALD believed that the draftsman who had drafted the Bill considered that the expression of "direction and guidance" would be covered by "an order for the direction".

51. Mrs Miriam LAU pointed out that the phrase "a difficult and doubtful case" was subject to different interpretations. She said that the original drafting which referred to a person having difficulty or doubt was a better version. In response to members, the Administration undertook to reconsider the drafting of the proposed section.

Adm

Clause 39 (section 71B) - Protection of the Registrar

52. AJA advised that proposed section 71B was modelled on section 39 of the HCO but different wording was used.

53. Noting that the section sought to provide protection to the registrar, Mr Albert HO asked whether an action might be brought against a bailiff if he had wrongfully executed an order. Mr Ronald ARCULLI said that in the discharge of statutory duties, government officials very often had no liability unless they were acting in bad faith.

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54. Referring to the HCO version which stated that "No action shall be brought against the Registrar", and proposed section 71B which stated that "a person cannot bring an action against the Registrar", Mr ARCULLI pointed out that the use of the word "cannot" implied that if one could not bring an action, one could not have any remedy. He opined that that was not necessarily the case.

55. SALD said that the reason behind the use of different language for proposed section 71B was that the law draftsman sought to avoid the use of the words "shall not". On the query raised by Mr Albert HO, he said that the point made by Mr ARCULLI was a restatement of the ordinary law that public officials discharging a duty in good faith was not liable. It was arguable whether this clause would only protect the registrar but not other officers.

Adm

56. At the request of the Chairman, the Administration undertook to reconsider the drafting of proposed section 71B.

IV. Date of next meeting

57. Members agreed that the next meeting would be held on 5 April 2000 at 8:30 am.

58. The meeting ended at 10:37 am.

Legislative Council Secretariat
20 September 2000