立法會
Legislative Council

LC Paper No. CB(2)954/01-02
(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of the meeting
held on Monday, 26 November 2001 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members Present	:	Hon Margaret NG (Chairman) Hon Jasper TSANG Yok-sing, JP (Deputy Chairman) Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Hon Mrs Miriam LAU Kin-yee, JP Hon Mr Ambrose LAU Hon-chuen, GBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP
Member Absent	:	Hon James TO Kun-sun
Public Officers Attending	:	Item V Miss Eliza LEE Deputy Director of Administration Mr Michael SCOTT Senior Assistant Solicitor General Ms Rebecca PUN Assistant Judiciary Administrator (D) Mr James CHAN Assistant Director of Administration

Miss Doris LO
Government Counsel

Item VI

Mr Michael SCOTT
Senior Assistant Solicitor General

Mr Patrick CHEUNG
Senior Assistant Director of Public Prosecutions

Item VII

Mr Stephen Kai-yi WONG
Deputy Solicitor General

Mr TSANG Keung
Senior Government Counsel
Legal Policy Division

By Invitation : Item VII

The Hong Kong International Arbitration Centre

Ms Teresa CHENG, SC
Mr Christopher TO
Mr Fred KAN

The Hong Kong Institute of Arbitrators

Mr Huen WONG
President

Mr Michael BYRNE
Vice President

Mr Gary SOO
Hon Secretary

The Hong Kong Bar Association

Mr Francis HADDON-CAVE

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

Action Column

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)438/01-02)

The minutes of the meeting held on 26 April 2001 were confirmed.

II. Information paper issued since last meeting
(LC Paper No. CB(2)219/01-02(01))

2. Members noted that the above paper had been issued.

III. Items for discussion at future meetings
(LC Paper Nos. CB(2)463/01-02(01) and (02))

3. Members agreed that the following items should be discussed at the next meeting on 20 December 2001 -

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

(b) Reciprocal enforcement of judgments between the Mainland and the Hong Kong Special Administrative Region.

Items on the List of issues to be considered by the Panel
(LC Paper No. CB(2)463/01-02(01))

Item 1 - Review of legal education and training in Hong Kong; and
Item 5 - Operation of Legal Aid Services Council

4. Members agreed that pending more substantive developments to be reported back to the Panel, discussion on the above two issues should be deferred after December 2001.

Action Column

Item 2 - Incorporation of solicitors' practices

5. Members agreed that the item should be discussed at an early opportunity.

Item 15 - Common law offence of conspiracy to defraud; and
Item 16 - Definition of "deception" in section 17 of the Theft Ordinance

6. Members noted the Administration's letter of 16 November 2001 advising the Panel on the above items (LC Paper No. CB(2)463/01-02(02)). On item 15, according to the Administration, it was likely to be some years before the English Law Commission could finalise its report on a general review on offences involving dishonesty. Regarding item 16, the Administration had advised that it had no objection to the deletion of "or opinions" from the definition of "deception" in section 17 of the Theft Ordinance. The Administration would introduce an appropriate legislative amendment in the 2002-2003 legislative session.

7. In view of the Administration's advice, members agreed to remove the two items from the list of issues to be considered.

Briefing on Civil Justice Reform : Interim Report and Consultative Paper

8. The Chairman informed members that in February 2000, the Chief Justice had appointed a Working Party to review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed. As advised recently by the Working Party, the review had been completed and an Interim Report and Consultative Paper had been prepared for consultation with interested parties. The Working Party had invited all LegCo Members to attend an embargoed briefing on the subject on 27 November 2001 at 5:30 pm.

9. Members agreed that the subject should be put on the list of issues to be discussed.

Wasted costs arising from conduct of legal representatives; and
Ex-gratia payment for victims of wrongful imprisonment

10. Ms Audrey EU suggested and the Panel agreed that the above two items should be discussed in due course.

Action
Column

IV. Report of the Working Group on Process of Appointment of Judges
(Internal discussion)
(LC Paper No. CB(2)149/01-02(01))

11. The Chairman briefed the Panel on the Report of the Working Group on Review of Process of Appointment of Judges (LC Paper No. CB(2)149/01-02(01)) and the draft Consultation Paper on Process of Appointment of Judges attached to the Report. She sought members' views on the draft Consultation Paper.

12. Ms Miriam LAU suggested and the Chairman agreed that for ease of reference by readers, a brief summary of issues for consultation might be included in the Consultation Paper.

13. Members agreed that the Consultation Paper should be issued for public consultation. Members also agreed that the views of the legal professional bodies, the academics, the Administration and the Judiciary should be sought.

14. Ms Emily LAU suggested and members agreed that a press conference on the Consultation Paper should be held by the Panel on the day of issue of the Consultation Paper.

(*Post-meeting note* - The press conference was held on 12 December 2001 at 2:00 pm.)

V. Review of section 18(3) of the Hong Kong Court of Final Appeal Ordinance
(LC Paper Nos. CB(2)2297/00-01(02); 456/01-02(01) to (07))

15. The Chairman recapped the background to the item. She said that a member of the public had previously made submissions to the Panel requesting that section 18(3) of the Hong Kong Court of Final Appeal Ordinance, which provided that the decision of the Appeal Committee (AC) of the Court of Final Appeal (CFA) should be final and not subject to appeal, should be amended to the effect that there could be a further appeal. The Chairman pointed out that the Panel could not intercede in a decision of the AC. Nevertheless, the matter of whether a further appeal against a decision of the AC should be provided involved policy issues which could be considered by the Panel. The Panel subsequently requested the Administration to comment on the policy aspect of the proposal. The Panel had also invited the Law Society of Hong Kong and the Hong Kong Bar Association to give their views on the matter.

16. The Chairman drew members' attention to the relevant papers circulated before the meeting. She said that the Administration had prepared two papers for the Panel's consideration, one dated September 2001 and the other dated 21

Action Column

November 2001 (LC Paper Nos. CB(2)2297/00-01(02) and 456/01-02(06) respectively). According to the Administration, there was no sound reason for providing an appeal against the decision of the AC. The two legal professional bodies supported the view of the Administration (letters from the Law Society and the Bar Association were circulated vide LC Paper Nos. CB(2)456/01-02(01) and (02) respectively).

17. At the invitation of the Chairman, Deputy Director of Administration explained the stance of the Administration. She said that the Administration had considered the relevant issues and the points raised by the member of the public. With the inputs from the Department of Justice and the Judiciary Administrator, the Administration concluded that there was no justification to amend section 18(3) of the HKCFA Ordinance to provide for another tier of appeal against the decision of the AC. She summarised the major views as set out in the Administration's papers as follows -

(a) Hong Kong allowed a second application for leave to appeal to the CFA. Section 23(1) of the HKCFA Ordinance, which was based on the principles and practices of the Judicial Committee of the Privy Council, provided that no appeal should be admitted unless either (i) leave to appeal had been granted by the Court of Appeal; or (ii) in the absence of such leave, leave had been granted by the CFA. If an applicant could not obtain leave to appeal from the Court of Appeal, he could submit a second application for leave to the Appeal Committee of the Court of Final Appeal.

(b) The threshold for the AC of CFA to grant leave was to establish that the question involved in the appeal was one which by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision. In cases where this threshold could not be passed, there should be no reason for the matter to be heard by the CFA again. It was a general legal policy principle that there should be a limit or a finality of legal proceedings. If an applicant failed to persuade both the Court of Appeal and the AC of CFA, as the case might be, that leave to appeal ought to be granted, to provide a further tier of appeal would be contrary to the principle that there should be finality in litigation. It would also be unfair to the respondent who would be repeatedly vexed in the same matter.

(c) As regards arrangements in other jurisdictions, in the UK, for instance, there were no express provisions in the Practice Directions or the Judicial Committee (General Appellate Jurisdiction) Rules permitting appeal against a decision of the Appeal Committee of the House of Lords or the Judicial Committee of the Privy Council to refuse leave to appeal. In

Action
Column

Australia, there was no automatic right to have an appeal heard by the High Court. Parties who wished to appeal must apply for special leave to appeal to the High Court, and there were no express provisions permitting an appeal against a decision of the High Court to refuse leave to appeal.

18. The Chairman sought members' views on whether the Administration's stance could be accepted, in the light of the reasons given by the Administration and the issues raised in the various submissions made by the member of the public. Members raised no views or queries. The Chairman concluded that the matter had been appropriately dealt with by the Panel.

VI. Jurisdiction to award costs in criminal proceedings

(LC Paper Nos. CB(2)2195/00-01(01); 144/01-02(01) to (02) and LS 17/01-02)

19. The Chairman said that the Panel had earlier sought comments from the Administration and the Bar Association on a proposal made by the Law Society. The Law Society suggested that legislative amendments should be introduced to give a magistrate the power to award costs to defendants when an application for review by the prosecution was dismissed (LC Paper No. CB(2)2195/00-01(01)). Both the Administration and the Bar Association subsequently responded to the Panel and expressed support for amending the Costs in Criminal Cases Ordinance to implement the proposal (LC Paper Nos. CB(2)144/01-02(01) and (02)).

20. The Chairman added that the Legal Service Division of the LegCo Secretariat had also prepared a paper on the legal issues arising from the ruling on the case which gave rise to the Law Society's proposal (the judgment of Secretary for Justice v. Tang Bun [1999] 3HKC647).

21. At the invitation of the Chairman, the Legal Advier (LA) briefed members on the Legal Service Division's paper which set out the key issues as well as the relevant matters discussed during the Bills Committee's deliberations on the Costs in Criminal Cases Bill, which was enacted in 1996 (LC Paper No. LS 17/01-02). In particular, he drew members' attention to paragraph 21 of the paper and invited members to consider whether the existing provisions in sections 3 and 11 of the Costs in Criminal Cases Ordinance had provided for equitable treatment of the prosecution and the defendant in review proceedings. Paragraph 21 of the paper listed three scenarios in review proceedings in respect of which there was no provision for costs to be ordered, namely -

"(a) Upon review of a magistrate's decision of acquittal of the defendant instituted by the prosecution under section 104 of the Magistrates

Action Column

Ordinance, the magistrate does not have power to award costs to the prosecution if it results in a conviction of the defendant.

(b) Upon review of a magistrate's decision of acquittal of the defendant instituted by the prosecution under section 104 of the Magistrates Ordinance, the magistrate does not have power to award costs to the defendant if he confirms his decision to acquit.

(c) Upon review of a magistrate's decision on his own initiative of acquittal of the defendant under section 104 of the Magistrates Ordinance, the magistrate does not have power to award costs to the prosecution if it results in a conviction of the defendant."

LA pointed out that the legislative amendment proposed by the Law Society was intended to deal with the situation described in paragraph 21(b) of the Legal Service Division's paper.

22. Senior Assistant Director of Public Prosecutions (SADPP) explained the Administration's position as set out in the Administration's paper (LC Paper No. CB(2)144/01-02(01)). He said that the Administration concurred with the view that it would be fair to enable defendants who had suffered loss as a result of an unsuccessful application for review by the prosecution to recover their costs. Subject to the views of the Panel, the Administration would be prepared to consider an appropriate amendment to the Costs in Criminal Cases Ordinance to give the magistrate the power to award costs when an application for review by the prosecution was dismissed.

23. Ms Audrey EU said that she supported legislative amendments to provide the magistrate with the power to award costs in the situation described in paragraph 21(b) of the Legal Service Division's paper, but not in the situations described in paragraphs 21(a) and 21(c). Her views were shared by other members.

24. In response to Ms Miriam LAU, SADPP advised that the proposed legislative amendment would carry no retrospective effect.

25. In reply to a question from Mr Albert HO, LA said that the present upper limit of costs awarded to the defendant or to the prosecution in magistracy proceedings was $30,000 for each costs order. The principle of awarding costs was that costs were intended to be compensatory, not punitive.

26. The Panel urged the Administration to proceed with the proposed amendments to the Costs in Criminal Cases Ordinance to empower a magistrate to award costs to the defendant when an application for review by the prosecution was dismissed.

Adm

Action
Column

VII. Promoting Hong Kong as an international arbitration centre
(LC Paper Nos. CB(2)463/01-02(03) and (04); 470/01-02(01))

27. Deputy Solicitor General introduced the Administration's paper (LC Paper No. CB(2)463/01-02(03)) which explained the proposal of the Administration to promote Hong Kong as a legal services centre for the negotiation and documentation of China-related contracts, and as a dispute resolution centre for such contracts. The paper also highlighted the proposed activities to promote Hong Kong's arbitration service and encourage the business sectors in the Mainland and their foreign counterparts to choose the Hong Kong Special Administrative Region (HKSAR) as an international and regional arbitration centre.

28. At the invitation of the Chairman, Ms Teresa CHENG briefed members on the salient points of the paper prepared by the Hong Kong International Arbitration Centre (HKIAC) on promoting Hong Kong as a major Arbitration Centre (LC Paper No. CB(2)463/01-02(04)). The paper provided, among others, an introduction on the functions of and facilities provided by HKIAC in relation to arbitration and alternative dispute resolution, information on the number of arbitration awards made in Hong Kong in past years, problems encountered by the local arbitration industry, measures required for promoting Hong Kong as a major international arbitration centre as well as how best the HKSAR Government could do in assisting in that regard.

29. Referring to the written submission from the Hong Kong Institute of Arbitrators (HKIA), Mr Huen WONG explained the role played by HKIA in promoting the development of legal and arbitration services in Hong Kong. He said that the HKIA fully supported the Government's proposal to develop Hong Kong as the leading centre for legal services and international dispute resolution, which required the concerted efforts of all parties concerned. He called upon the HKSAR Government to make every effort to urge the relevant Mainland authorities, especially the Ministry of Foreign Trade and Economic Cooperation, to advise local and foreign investors in the Mainland to include Hong Kong in their business agreements as a second alternative for resolving disputes. He also suggested that a steering committee comprising representatives from the Administration and all the stakeholder organisations should be set up to coordinate efforts to promote Hong Kong as an international arbitration centre.

30. Mr Francis HADDEN-CAVE said that the Bar Association endorsed the good efforts put together by all parties concerned in developing Hong Kong as a leading centre for resolving disputes. He stressed the need to uphold the rule of law in Hong Kong as one of the most important factors for achieving the objective of developing Hong Kong as a major arbitration centre.

Action
Column

31. Ms Emily LAU noted the appeal of the HKIAC for assistance from the Government to expand the Centre's premises with additional allocation of space. She pointed out that the HKIAC's premises were now situated in a prime office building in Central and asked whether the taxpayers were already heavily subsidising the Centre, and the parties using its facilities, in terms of the expensive rent payable for the premises. She enquired about the size of HKIAC's present premises and the amount of rent paid by HKIAC for the premises. She also asked whether HKIAC had been receiving other forms of subsidy from the Government and whether the Centre had been making a profit for the facilities it provided.

32. Ms Teresa CHENG responded that the size of the current premises was around 6 000 sq ft and a nominal rent was paid by HKIAC for the premises. Mr Christopher TO supplemented that HKICA had been experiencing a loss up to two years when a break-even was attained. In terms of financial support, HKIAC was in receipt of a grant from the Government to cover its overheads in the event of problems arising in the administration of the Centre's day-to-day operation. To date, the grant had been kept in a bank account as reserve and had not been utilized. Mr TO further advised that HKIAC was required to submit reports on its financial position to the Financial Secretary on an annual basis.

33. Ms Teresa CHENG said that HKIAC was a non-profit making organisation with charitable status. The only subsidy provided to it by the Government was the provision of premises for its operation. HKIAC also received financial contributions from a number of professional and business organisations. She said that fees incurred for the arbitrations, apart from the fees charged by the Centre for renting the venue, were paid by the parties concerned to the arbitrators and others such as expert witnesses and legal representatives. The income received by the Centre was in turn used for staff employment and organising various promotional activities etc. She said that the benefits arising from improving the facilities provided by the Centre and enhancing the status of Hong Kong as a leading arbitration centre would ultimately flow to the wider community of Hong Kong.

34. Ms Teresa CHENG further pointed out that the number of arbitral awards made in Hong Kong had been on the rise in recent years, as indicated in the figures quoted in the paper. The number of arbitration cases handled in the year 2000 stood at 298, of which over 40% (120 cases) involved a Hong Kong party and a Mainland party. In terms of a party in a foreign jurisdiction other than the Mainland, such cases accounted for slightly over 53% (160 cases). Five cases were from the Mainland, where both parties were entities/nationals of the Mainland of China in which the arbitration clause specified Hong Kong as the place of arbitration.

Action
Column

35. Ms Audrey EU sought the views of the HKIAC and HKIA on the following issues -

(a) training and qualifications of local arbitrators;

(b) the system of introducing or appointing arbitrators; and

(c) proposals made by HKIAC on providing easy and quick visa access for arbitrators coming from overseas to conduct arbitrations in Hong Kong and foreign arbitrators not being required to obtain work permits and not subject to Hong Kong tax.

36. Mr Huen WONG said that Hong Kong's arbitration services were supported by the HKIA and the Chartered Institute of Arbitrators (East Asia Branch) (CIArb-EAB). The two organisations provided training for arbitrators, and set minimum standards of education and experience for admission of members. Membership was classified into two levels, i.e. at the basic associate and the more senior fellowship levels upon passing the relevant examinations on knowledge of arbitration law and practice. CIArb-EAB had been providing training up to fellowship level for a long time in Hong Kong. HKIA would start organising its own fellowship training and examination by the end of year 2001.

37. Concerning the issue of duty to pay tax by foreign arbitrators, Mr Michael BYRNE said that the matter had to be looked at in the context of the statutory rules in force in different taxation regimes. He pointed out that one of the problems with arbitration was that in some jurisdictions, such as Singapore and Malaysia, the government would automatically deduct a certain percentage of the arbitrators' fees, expert witnesses' fees and legal counsel fees etc in withholding tax. This had the undesirable effect of deterring arbitrations from being referred to those places.

38. Ms Teresa CHENG said that the proposals made by the HKIAC in relation to ease of access of foreign arbitrators etc were intended to address the issue of administrative and bureaucratic problems which proved to be counter productive factors in the choice of an arbitration venue. She said that she had come across complaints, a large part of which from Mainland parties contemplating to choose Hong Kong as an arbitration venue, about the time-consuming process for granting access into Hong Kong. Many potential users of arbitration services were therefore turned away to other venues as a result. The taxation problems also created similar deterrent effect. She said that such hurdles should be removed in order that Hong Kong could be developed into a leading arbitration centre in the region.

39. Ms Miriam LAU said that she had heard about complaints about difficulty in engaging arbitrators and "closed-shop" operation in appointing

Action
Column

arbitrators. In her opinion, the transparency of the appointment system should be improved. Referring to the 298 arbitration cases handled in Hong Kong in the year 2000, she asked how many local arbitrators had participated in those cases. Mr Albert HO asked how many appointments were made by HKIAC and HKIA.

40. Mr Huen WONG replied that while HKIA had been requested by parties to nominate arbitrators in a number of cases, the majority of appointments were not made through HKIA. He pointed out that in fact there were no specific requirements as to professional qualifications, or membership of any professional institutions, for the purpose of performing the work of an arbitrator. As arbitration was built upon the principle of party autonomy, theoretically speaking, any person could act as an arbitrator provided that the parties to the dispute agreed, and the arbitral award so made would be enforceable.

41. Ms Teresa CHENG said that a large part of the 298 cases in year 2000 had not gone through the process of appointment by HKIAC because the arbitrators in those cases were appointed by the parties themselves by mutual agreement. Out of the 298 cases, 54 appointments were made by HKIAC.

42. Ms Audrey EU said that in her opinion, the use of standard form agreement could help promote more extensive use of arbitration as a method for resolving disputes.

43. Ms Miriam LAU opined that junior people with the appropriate qualifications deserved to be given more opportunities to engage in arbitrations to build up their on-the-job experience so that they could eventually handle major dispute cases. The enlargement of the pool of competent local arbitrators would contribute to promoting Hong Kong as an international arbitration centre.

44. Mr Albert HO shared the views of Ms Miriam LAU. He added that to enrich the experience of junior arbitrators, cases involving small amount of claims could be handled by the less experienced arbitrators.

45. Ms Teresa CHENG made the following comments in response to members' views -

(a) Arbitration was not like other professions e.g. the legal profession where the acquiring of the necessary professional qualifications in law automatically entitled a person to practise as a lawyer. Hence, it was difficult to ascertain the number of "qualified" arbitrators as such in Hong Kong. There were about 100 fellow members of the CIArb-EAB and HKIA who were not arbitrators. Moreover, as arbitration was premised upon party autonomy, a person who had

Action Column

knowledge of arbitration law and practice would not necessarily be appointed as arbitrators;

(b) Improving on-the-job experience would no doubt enhance the chance of getting appointment and build up expertise. The HKIAC had been working towards that end by, inter alia, developing new schemes for resolving disputes in the domestic market. A typical example was that HKIAC was currently working with the Water Supplies Department to implement a dispute resolution scheme to deal with minor domestic disputes between neighbours involving water seepage problems in buildings. Under the scheme, people who had knowledge in arbitration law and practice would be enlisted to conduct dispute resolution by acting as arbitrators or mediators, as the case might be;

(c) Although the Council of HKIAC assumed a statutory role under the Arbitration Ordinance in appointing arbitrators, it had no ultimate control over the choice of arbitrators. The choice was finally subject to the agreement of the parties to the dispute. Parties having experience in using arbitration to resolve disputes would tend to choose the same arbitrators they had engaged before. Where parties did not know where to get arbitrators, they could approach HKIAC and HKIA and other learned organisations for assistance. HKIAC maintained a panel of arbitrators which included over 300 arbitrators serving on a roster basis, of whom about 100 were residents in Hong Kong. At the parties' request, HKIAC would recommend a person listed on the panel of arbitrators who was considered to be suitable, having regard to his expertise and experience as well as the nature of the case, to act as the arbitrator. Also, the Council of HKIAC made the appointment only after seeking the advice from the Appointment Advisory Board, which comprised the Chief Justice, representatives from the Bar Association and the Law Society, Chambers of Commerce and Institutes of Engineers etc. All these were done in accordance with set rules and procedures; and

(d) Under the Rules for appointment, the amount of claims involved in a case was a relevant factor to be considered in appointing arbitrators. Minor cases were usually handled by the relatively less experienced arbitrators.

46. Mr Huen WONG informed members that the HKIA would also be introducing a new dispute resolution scheme for settling minor disputes involving real estate agencies.

Action Column

47. Mr Albert HO asked whether overseas advocates coming to Hong Kong acting as arbitrators or legal representatives for the parties in the proceedings would have to seek prior approval of admission from the court. Ms Teresa CHENG said that such approval was not required.

48. In concluding the discussion, the Chairman said that the issues of concern raised by members could be followed up at a future meeting. These included the mechanism and procedures for appointing arbitrators in the absence of a parties agreement, the criteria and factors to be considered in making arbitration appointments, the general picture of local arbitrators being successful in getting appointment vis-à-vis their foreign counterparts, and measures to increase the supply of competent local arbitrators to cope with increasing demand for arbitration service and competition from other foreign arbitral centres.

HKIAC/ HKIA

49. To facilitate future discussion, the Chairman invited HKIAC and HKIA to make further written submissions on the above issues for the consideration of the Panel.

50. The Chairman thanked the representatives from HKIAC and HKIA for attending the meeting and contributing views on the subject.

51. There being no other business, the meeting ended at 6:35 pm.

Council Business Division 2
Legislative Council Secretariat
25 January 2002