立法會
Legislative Council

LC Paper No. CB(2)2780/01-02
(These minutes have been
seen by the Administration)

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Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 27 May 2002 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 James TO Kun-sun Hon Miriam LAU Kin-yee, JP Hon Mr Ambrose LAU Hon-chuen, GBS, JP Hon Emily LAU Wai-hing, JP
Member Absent	:	Hon Audrey EU Yuet-mee, SC, JP
Non-Member Attending	:	Hon James TIEN Pei-chun, JP
Public Officers Attending	:	Item IV Miss Eliza LEE Deputy Director of Administration Mr Frank POON Deputy Principal Government Counsel (International Law) Mr W C SUEN Senior Assistant Solicitor General (China Law)

Mr CHAN Yum-min, James
Assistant Director of Administration

Mr Paul TSANG
Senior Government Counsel

Item V

Mr Michael SCOTT
Senior Assistant Solicitor General

Ms Kitty FUNG
Senior Government Counsel
Legal Policy Division

By Invitation : Item IV

Mr P Y LO
The Hong Kong Bar Association

Item V

Law Society of Hong Kong

Mr Paul C Y TAN
Vice President

Mr Herbert TSOI
Council Member

Mr Patrick MOSS
Secretary General

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

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Miss Mary SO
Senior Assistant Secretary (2)8

Action
Column

I. Confirmation of minutes of previous meeting
(LC Paper No. CB(2)2058/01-02)

The minutes of the meeting held on 20 March 2002 were confirmed.

II. Information papers issued since last meeting
(LC Paper Nos. CB(2)1714/01-02(01);1722/01-02(01);1781/01-02(01); 1908/01-02(01);1920/01-02(01); and 2019/01-02(01))

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

III. Items for discussion at future meetings
(LC Paper Nos. CB(2) 2056/01-02(01); 1749/01-02(01); and 1909/01-02(01), (02), (03), (04) and (05))

3. Members agreed that the following items should be discussed at the next regular meeting on 24 June 2002 -

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

(b) Consultation paper on conveyancing documents executed by corporations; and

(c) Draft Rules made by the Bar Council under the Legal Practitioners Ordinance (Cap. 159).

4. Members further agreed to hold a meeting at 4:30 pm on 12 July 2002 to discuss the following items -

(a) Research report on "Mechanism for handling complaints against judges in some overseas places";

(b) Review of process of appointment of judges; and

(c) Review on provision of legal aid services.

(*Post-meeting note* : The meeting was subsequently rescheduled to be held at 10:45 am on 22 July 2002)

IV. Reciprocal enforcement of judgments in commercial matters between the Hong Kong Special Administrative Region (HKSAR) and the Mainland
(LC Paper Nos. CB(2) 1431/01-02(01) and 2020/01-02(01))

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

6. At the invitation of the Chairman, Deputy Director of Administration (DD of Adm) briefed members on the following -

(a) proposed framework for reciprocal enforcement of judgements (REJ) in commercial matters between the HKSAR and the Mainland (the Arrangement) (Annex to the Administration's letter dated 20 March 2002 to the Chairman - LC Paper No. CB(2) 1431/01-02(01); and

(b) outcome of the Administration's consultation exercise with the legal profession, chambers of commerce and trade associations on the broad framework of the Arrangement conducted during the period 20 March 2002 to 30 April 2002 (the Administration's paper on "Result of the Consultation Exercise" - LC Paper No. CB(2) 2020/01-02(01)).

7. At the invitation of the Chairman, Mr P Y LO took members through the Bar Association's position paper on the Arrangement (Annex 2 to LC Paper No. CB(2) 2020/01-02(01)). In gist, Mr LO said that although the Bar Association recognised that there were likely benefits to be derived from REJ between the HKSAR and the Mainland, it nevertheless had reservations about the Arrangement due to the following reasons -

(a) judgments in civil and commercial matters rendered by a People's court in the Mainland had been held not to be final and conclusive under the common law rules applied by the HKSAR courts;

(b) the quality of justice and propriety of the judicial officers in the Mainland were matters of legitimate concern;

(c) the execution process in the Mainland under the Law on Civil Procedure was fraught with difficulties; and

(d) the fundamental principles of the Mainland legal system differed from those of the HKSAR legal system.

8. Mr LO said that the Bar Association suggested the HKSAR Government to adopt an approach which was more limited than what it had proposed in the consultation exercise. Two alternative approaches were proposed by the Bar Association -

(a) to negotiate with the Mainland authorities for the adoption by the Supreme People's Court of regulations similar to those issued by the Supreme People's Court on Recognition of Civil Judgments of Courts of the Taiwan Region (1998), and to confine the Arrangement to judgments in civil and commercial matters where the contracting parties had agreed that the HKSAR courts to be the exclusive or one of the fora for the resolution of disputes. The issue of reciprocity (i.e. the enforcement of Mainland judgments in the HKSAR) should be resolved at a later date, when the current improvements to the Mainland judicial system would have borne fruit; or

(b) the HKSAR Government should conclude REJ arrangements only with those regions of the Mainland where there were substantial economic activities involving foreign direct investment and where the current improvements to be introduced to the Mainland judicial system were at a more advanced stage.

9. Mr James TIEN requested the Administration to provide copies of the written submissions received from the respondents during the consultation exercise, instead of merely providing a summary of their respective positions (Annex I to LC Paper No. CB(2)2020/01-02(01)). Mr TIEN said that the business sector was concerned about the implications of the proposed arrangement given the differences in legal systems and quality of justice of the two places. He asked whether a defendant could appeal against a Mainland judgment in the HKSAR court under the Arrangement.

10. DD of Adm agreed to provide the Panel with the written submissions received during the consultation exercise, subject to the respondents' consent to disclose their identities and comments. The Chairman said that the Administration might also consider providing members with a summary of the comments received from the respondents.

11. DD of Adm explained that the development of the HKSAR into a centre for resolution of commercial disputes was a natural progression from the establishment of a mechanism for mutual enforcement of arbitral awards between the HKSAR and the Mainland in 1999. Following China's accession to the World Trade Organization, and with the growing volume of trade in goods and services between the HKSAR and the Mainland, it was in Hong Kong's interests to develop an arrangement with the Mainland which would ensure that the HKSAR judgments could be effectively enforced in the

Mainland. Such an arrangement would benefit not only Hong Kong businesses, but also members of the legal profession. However, as the HKSAR had never had an arrangement with the Mainland for REJ the Administration intended to start with a focussed approach. On these premises, the Administration considered that the arrangement should cover only money judgments given by a court of either the Mainland (at the Intermediate People's Court level or higher) or the HKSAR (at the District Court level or higher) exercising its jurisdiction pursuant to a valid choice of forum clause contained in a commercial contract.

12. DD of Adm added that the proposal was built on the principle that the autonomy of parties to commercial contracts would be respected. The proposed arrangement would therefore only apply to judgments where the parties to a commercial contract had agreed that the court of either place or the courts of both places would have jurisdiction.

13. Deputy Principal Government Counsel (DPGC) confirmed that there would be no legal redress in the form of appeal for a defendant under the Arrangement against a Mainland judgment in the HKSAR courts. However, safeguards would be built into the Arrangement to allow the court of either jurisdiction to refuse to enforce a judgment given in the other jurisdiction. The grounds under which registration of a judgment under the Arrangement might be refused or set aside were set out in paragraph 15(a)-(g) of the Annex to LC Paper No. CB(2)1431/01-02(01).

14. Mr P Y LO said that the Bar Association had a number of concerns about the suggested safeguards -

(a) while safeguards (b) and (c) (i.e. that the judgment was obtained by fraud and that the judgment was obtained in breach of natural justice) were necessary, it was difficult to prove fraud or lack of natural justice (including bias) before the HKSAR courts in order to set aside a Mainland judgment;

(b) as regards safeguard (d) (i.e. that the enforcement of the judgment would be contrary to public policy (or ordre public) in the place of the registering court), the Bar Association considered that a specific or limited definition should be provided for the term "ordre public" as the meaning of such a term under the Mainland law appeared to be wide and uncertain;

(c) the need for including safeguard (e) (i.e. that the judgment is inconsistent with a prior judgment of the registering court) was questionable, in view of the absence of a system of precedents in the Mainland and the limitation of the Arrangement to cases where there had been a choice of court; and

(d) on safeguard (g) (i.e. that in view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the court of origin and did not submit to its jurisdiction), the Bar Association doubted whether this was a true safeguard or a ground for immunity. While the categories of persons entitled to immunity under the HKSAR law were quite clear, it was by no means the case under the Mainland law. For instance, it was unclear whether a state-owned enterprise or a member of the armed forces was entitled to immunity under the Mainland law.

15. In reply to Mr TIEN's further enquiry on the timing for implementing the Arrangement, DD of Adm said that there was no definite timetable for concluding the discussion with the Mainland on REJ. The Administration was nonetheless conscious of the need to handle the matter with priority. The Administration intended to discuss with the Mainland authorities on the proposed framework of the Arrangement in the coming months. Once a mutually satisfactory arrangement with the Mainland authorities had been reached, the Administration would seek to introduce legislation to give it the requisite legislative backing.

16. Mr Albert HO and Mr Martin LEE were of the view that the Arrangement might not necessarily be beneficial to Hong Kong companies if a Mainland judgment was to be enforced in Hong Kong. Mr HO asked whether consideration would be given to implementing REJ arrangement by phases, e.g. by first limiting REJ arrangement to those regions of the Mainland where there were substantial economic activities involving foreign direct investment such as Beijing and Shanghai. Mr LEE and Mr HO also suggested that the suggested safeguards should be improved to include grounds such as judgement obtained under duress or by corrupt practices, or obtained under circumstances which were unfair to the defendant.

17. DD of Adm said that as a starting point, the intention of the Administration was to focus only on commercial contracts and to exclude other civil matters. As regards the suggestion of first limiting REJ arrangements to certain regions of the Mainland, DD of Adm pointed out that most of the foreign-related civil and commercial cases were presently handled by the Intermediate People's Courts or above in major provinces, special economics zones and municipalities in the Mainland. On the issue of safeguards, DD of Adm said that they were drawn up by making reference to the cases of enforcement of foreign judgments under common law rules, the Foreign Judgment (Reciprocal Enforcement) Ordinance (Cap. 319), and the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the Hague Convention). Nevertheless, the Administration would take into account members' views in its discussions with the Mainland on the Arrangement.

18. At the request of members, DPGC agreed to provide a comparison between the scope of the proposed REJ arrangement and the scope of the arrangement for reciprocal enforcement of arbitral awards between the HKSAR and the Mainland.

19. Ms Miriam LAU asked the following questions -

(a) in the absence of the REJ arrangement, whether judgments made by HKSAR courts could be enforced in the Mainland if the parties to a commercial contract had agreed that the HKSAR courts would have jurisdiction;

(b) in view of some members' concerns, whether the contracting parties under the Arrangement could be required to choose the HKSAR courts as the place of jurisdiction. This would avoid the situation where a Hong Kong company which was eager to do business with a Mainland company would have less say in the choice of forum clause in the commercial contract; and

(c) whether similar problems had been encountered in the implementation of mutual enforcement of arbitral awards between the HKSAR and the Mainland.

20. DD of Adm replied in the negative to Ms LAU's first question. She said that the Mainland, 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 at present, judgments made in HKSAR could not be enforced in the Mainland.

21. Regarding Ms LAU's second question, DD of Adm said that under the proposed REJ arrangement between the HKSAR and the Mainland, both sides would have the freedom to choose whether they wished to have their commercial disputes settled by the courts in the HKSAR or in the Mainland or both, for enforcement in either the HKSAR or in the Mainland as the case might be. The REJ arrangement would not alter the bargaining power between the contracting parties. DD of Adm further said that the Administration was aware of the concerns expressed by members. That was why the Arrangement was proposed to cover, inter alia, disputes between companies, and not between companies and such individuals as consumers and employees. This approach was also in line with the spirit of the relevant provisions in the draft Hague Convention.

22. As to Ms LAU's last question, DD of Adm said that the Judiciary did not receive any complaints about problems in enforcement. Senior Government Counsel referred members to a survey conducted by a Mainland research body concerning enforcement of foreign-related China International Economic and

Trade Arbitration Commission (CIETAC) arbitral awards and foreign awards by the Intermediate People's Courts and the Maritime Courts between 1990 and 1996. According to the survey result, 127 of the 164 foreign-related awards made by the CIETAC were enforced, and 11 of the 14 awards made by other jurisdictions were also enforced.

23. The Chairman said that the greatest obstacle in implementing REJ arrangements between the HKSAR and the Mainland was whether Mainland judgments were final and conclusive judgments under the common law, in view of the civil procedures in the Mainland. Although it would be desirable if the contracting parties under the Arrangement could choose the HKSAR courts as the forum to hear any commercial disputes, the Chairman nevertheless expressed concern about the difficulties in transmitting money obtained from enforcement of judgment out of the Mainland. The Chairman further asked whether the Administration had made any projection on the number of cases which would be heard by the HKSAR and the Mainland courts respectively if the Arrangement was implemented, and how the Arrangement would impact on the principle of "one country, two systems".

24. DD of Adm responded that the issue of how and when a judgment should be treated as final and conclusive would be discussed with the Mainland authorities to ensure that an arrangement that was mutually acceptable would be reached. On REJ arrangements in commercial matters between the HKSAR and the Mainland, the Administration's initial thinking was to follow the arrangements adopted under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). On the estimated number of cases following implementation of the REJ arrangement, DD of Adm said that it was difficult to give a realistic forecast at this stage.

25. The Chairman wondered how REJ could be implemented if parties to a commercial contract under the Arrangement filed charges against one another in courts of different places. DPGC responded that chances of such a situation occurring should be remote. Nevertheless, the Administration would discuss with the Mainland authorities on ways to address such a situation.

26. Mr P Y LO hoped that the Administration could negotiate with the Mainland authorities that a common law approach should be maintained in addressing the issue of final and conclusive judgments. Mr LO also hoped that the Administration could raise with the Mainland authorities on the adoption by the Supreme People's Court of regulations similar to those issued by the Supreme People's Court on Recognition of Civil Judgments of Courts of Taiwan Region (1998). The adoption of such regulations would have the beneficial effects of promoting Hong Kong as a centre for resolution of commercial disputes involving a Mainland party to the litigation, while at the same time set aside the issue of reciprocity (i.e. enforcement of Mainland judgments in Hong Kong) to be resolved in due course.

27. DD of Adm reiterated that the Administration would strive to come up with a mutually satisfactory arrangement with the Mainland authorities. Regarding the suggestion to implement an interim arrangement whereby HKSAR judgments could be enforced in the Mainland, but not vice versa, DD of Adm said that this would not be feasible as all bilateral agreements were reached on the basis of mutual trust and interests.

28. On closing, the Chairman requested the Administration to report to the Panel the progress of its discussions with the Mainland authorities on REJ arrangements between the HKSAR and the Mainland.

(*Post-meeting note* : The information provided by the Administration on paragraphs 10 and 18 was circulated to the Panel vide LC Paper No. CB(2)2642/01-02 on 24 July 2002)

V. Incorporation of solicitors' practices
(LC Paper No. CB(2) 2056/01-02(02))

29. The Chairman said that according to the Administration's paper, the issue remained to be resolved was whether solicitor corporations should be required to take out top-up insurance. The Administration's view regarding the issue of insurance was that, in the interests of consumers, adequate insurance coverage should be taken out by solicitor corporations.

30. The Chairman invited representatives of the Law Society of Hong Kong to give their views on the matter.

31. Mr Patrick MOSS said that the Law Society considered the cover provided by the existing Hong Kong Solicitors Professional Indemnity Scheme (PIS) was sufficient protection for the public. Under the current arrangement, the Hong Kong Solicitors Indemnity Funds Limited (SIF) provided coverage of $10 million in each and every claim to its membership. Of this amount, SIF retained the first $1.5 million of every claim and reinsured the remaining $8.5 million. In addition to the mandatory $10 million insurance coverage, it was not uncommon for some larger solicitor firms to take out additional indemnity insurance. Mr MOSS pointed out that whilst there might also be a claim against the solicitor corporation in contract, it would be subsumed in any action in tort brought against the solicitor or members of his staff in the solicitor corporation who would be covered under the PIS in respect of such action. The Law Society therefore was of the view that it was difficult to conceive of any situation where the solicitor corporation might be liable but not the solicitor directors/members other than in actions in contract to which the usual commercial rules would apply. Moreover, even if additional coverage was required of solicitor corporations, the amount of compensation which a

claimant would receive would not be more than that under the existing arrangement. Furthermore, amendments would be made to include solicitor corporation in the definition of "indemnified" under the Solicitors (Professional Indemnity) Rules.

32. Mr MOSS said that the reason why the English law required a solicitor's firm to take out top-up insurance to cover civil claims made by clients was because members of a solicitor's firm in England and Wales were not necessarily solicitors of England and Wales, and could include foreign lawyers and members of other professions from the European community. Such a situation was different from that of Hong Kong. Mr MOSS further said that if solicitors in Hong Kong were required to take out additional insurance for the corporation, it would become unattractive for them to incorporate their practices, bearing in mind that the only benefit that one could really get from a solicitor corporation was that innocent directors might escape liability in tort.

33. Ms Miriam LAU asked the Administration to advise whether it was mandatory for a firm to take out top-up insurance before it could become a solicitor corporation, or whether it was a matter for the Law Society to decide. Representatives of the Administration responded that the Administration considered that the Law Society should consider whether the existing insurance coverage was sufficient from the public interest angle and recommended the Law Society to consider whether mandatory, instead of optional, top-up insurance was required. The concern identified in England in respect of the "gap" in compensation that might be obtainable in respect of a negligent solicitor in a solicitor corporation, as opposed to a negligent solicitor in a firm, appeared to apply equally in Hong Kong. In determining whether solicitor corporations ought to take out top-up insurance, the Administration had asked the Law Society for information on other common law jurisdictions where solicitor corporations existed, i.e. whether or not they required top-up insurance, and if so, according to what formula. The Law Society had replied that it was contacting other jurisdictions where solicitor corporations were permitted and would revert to the Administration as soon as possible.

34. Mr MOSS said that the risk of a "gap" mentioned by the Administration existed irrespective of whether a solicitor practised as a sole proprietor or a solicitor corporation because there was always a possibility for a solicitor to face a claim which was larger than the $10 million mandatory insurance cover, or the mandatory insurance cover plus top-up insurance.

35. The Chairman said that requiring a solicitor to take out top-up insurance would defeat the legislative intent of incorporation of solicitor firms. The reason why incorporation of solicitor firms was contemplated was that the present system was considered to be too onerous on solicitor firms as solicitors had to pay from their own private means, if necessary, for the faults of their partners even though they had nothing to do with the case.

Adm
Law Society

36. In order to help members to consider more carefully the proposal of top-up insurance, the Chairman requested the Administration to provide more information on the proposal, including the proposed amount of top-up coverage, how it was calculated, and the justification for the extent of the proposed top-up amount. The Chairman also requested the Law Society to provide information on the practice in other jurisdictions for the consideration of the Panel.

37. In response to the Chairman's enquiry about the legislative timetable for the Solicitor Corporations Rules, Mr MOSS said that the approval of the Chief Justice had to be obtained first. It was envisaged that the rules could be introduced into LegCo by the beginning of the next legislative session.

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

Council Business Division 2
Legislative Council Secretariat
16 September 2002