立法會
Legislative Council

LC Paper No. CB(2)499/05-06
(These minutes have been seen by the Administration)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 24 October 2005 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon LI Kwok-ying, MH (Deputy Chairman) Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon Miriam LAU Kin-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP Hon MA Lik, GBS, JP
Members attending	:	Hon Albert CHAN Wai-yip Hon Ronny TONG Ka-wah, SC Hon CHIM Pui-chung
Public Officers attending	:	Item IV Mr Stephen WONG Deputy Solicitor General (General) Mrs Alice CHEUNG Assistant Director of Administration Mr Paul TSANG Senior Government Counsel (Treaties & Law Unit) Item V Mr Thomas KWONG Acting Assistant Director of Legal Aid (Policy & Development)

Attendance by invitation	:	Item V The Law Reform Commission of Hong Kong Prof Edward K Y CHEN, GBS, CBE, JP Chairman of the Conditional Fees Sub-committee Mr Andrew JEFFRIES Member of the Conditional Fees Sub-committee Mr Stuart M I STOKER Secretary of the Law Reform Commission Ms Cathy WAN Secretary of the Conditional Fees Sub-committee The Hong Kong Bar Association Mr Rimsky YUEN, SC Mr Jeremy CHAN Consumer Council Mrs CHAN WONG Shui Chief Executive Mr Simon CHUI Legal Counsel
Clerk in attendance	:	Mrs Percy MA Chief Council Secretary (2)3
Staff in attendance	:	Mr Arthur CHEUNG Senior Assistant Legal Adviser 2 Miss Lolita SHEK Senior Council Secretary (2)7 Ms Fonny LO Legislative Assistant (2)3

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2) 124/05-06 – Minutes of the meeting on 13 October 2005)

The minutes of the meeting held on 13 October 2005 were confirmed.

II. Information paper issued since last meeting
(LC Paper No. CB(2)94/05-06(01) – Speech made by the Secretary for Justice at the special meeting on 17 October 2005 on the Policy Agenda of the Department of Justice for the year 2005-06)

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

III. Items for discussion at the next meeting
(LC Paper No. CB(2)122/05-06(01) – List of outstanding items for discussion
LC Paper No. CB(2)122/05-06(02) – List of follow-up actions)

3. Members agreed that the following items should be discussed at the next meeting on 28 November 2005 –

(a) Issues relating to legal professional privilege arising from the Police attempts to execute search warrants in the Legal Aid Department (LAD) offices;

(b) Recovery agents; and

(c) Issues relating to the imposition of criminal liabilities on the Government.

4. The Chairman said that Ms Elsie LEUNG had ceased to be the Secretary for Justice (SJ) with effect from 20 October 2005, and Mr WONG Yan-lung had been appointed as the new SJ with effect from the same day. The Chairman commended Ms LEUNG on her readiness to attend a Panel meeting each time she had been invited, and her great support to the work of the Panel. On behalf of the Panel, the Chairman thanked Ms LEUNG for her assistance to the Panel as SJ in the past eight years.

5. The Chairman informed members that pursuant to the decision of the Panel at its meeting on 13 October 2005, she had written to invite Mr WONG Yan-lung to a special Panel meeting to brief members on his work plans. The Chairman added that members would be informed of the details of the special meeting upon receipt of SJ's reply.

(*Post-meeting note*: A special Panel meeting has been scheduled for Monday, 12 December 2005 to receive a briefing by SJ.)

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IV. Reciprocal enforcement of judgments in commercial matters between the Hong Kong Special Administrative Region and the Mainland

(LC Paper No. CB(2)122/05-06(03) – Background brief prepared by the LegCo Secretariat on "Reciprocal enforcement of judgments in commercial matters between the Hong Kong Special Administrative Region and the Mainland"

LC Paper No. CB(2)122/05-06(04) – Paper provided by the Administration on "Reciprocal enforcement of judgments in commercial matters between the Hong Kong Special Administrative Region and the Mainland")

6. Deputy Solicitor General (General) (DSG) and Assistant Director of Administration (AD of Adm) briefed members on the progress of discussion with the Mainland authorities on the establishment between the Hong Kong Special Administrative Region (HKSAR) and the Mainland a mechanism for reciprocal enforcement of judgments (REJ) (the Arrangement). He updated members of developments on the major issues, namely, the level of Mainland courts of which the judgments would be covered by the Arrangement, "trial points" for initial implementation of the Arrangement, and finality of Mainland judgments.

7. The Chairman informed members that although the Hong Kong Bar Association was not represented at the meeting, it had provided a written submission which was tabled at the meeting.

(*Post-meeting note*: The submission from the Hong Kong Bar Association was issued to members vide LC Paper No. CB(2)169/05-06(01) on 25 October 2005.)

Applicability of REJ arrangement

8. The Chairman said that she was given to understand from the information provided for, and discussions at, previous Panel meetings that after the Arrangement was in place, parties to a commercial contract must make it a term of the contract that they agreed that judgments obtained in Hong Kong would be enforceable in the Mainland and vice versa, before the Arrangement was applicable to their contract. She expressed concern that the Arrangement proposed in the Administration's paper for the meeting was different from what the Administration had presented to the Panel previously. The Chairman was of the view that REJ should only be applicable to parties who had expressly indicated their agreement to the Arrangement in their contracts.

9. Sharing similar concern, Ms Audrey EU sought clarification on the how judgments would be enforced in case of parallel trials in the Mainland and the HKSAR.

10. Referring members to paragraph 2 of the Administration's paper, DSG explained that the proposed Arrangement would cover only money judgments given by a designated court of either the Mainland or the HKSAR exercising its jurisdiction

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pursuant to a valid choice of court clause contained in a commercial contract. DSG added that such proposed arrangement was the same as that presented to members at previous Panel meetings.

11. Senior Government Counsel (Treaties & Law Unit) (SGC) added that it was necessary to safeguard the legitimate rights of a judgment-holder, particularly one who had gone through the legal process of obtaining a judgment pursuant to a choice of court agreement in a contract. It was therefore not fair to a judgment creditor if a REJ arrangement was not in place between the Mainland and the HKSAR. However, in view of the differences in the judicial systems of both places, measures had to be included in the Arrangement as safeguards against enforcement. Following a step-by-step approach, the Administration had proposed that as a start, the proposed Arrangement would cover judgements given pursuant to a requisite choice of court agreement.

12. SGC further explained that the proposed Arrangement would in practice be based on a choice of court agreement between parties to a commercial contract. Similar to the enforcement regime provided for in the Hague Convention on Choice of Court Agreements (which was drafted with reference to the 1958 New York Convention), the proposed Arrangement would only be applicable to choice of court agreements concluded after its implementation. It would not be necessary to specify in such agreements the consent of both parties to the enforcement regime under the Arrangement.

13. SGC added that if parties to the contract did not wish to have the judgments enforced in both the Mainland and the HKSAR, they should not choose the HKSAR courts or the Mainland courts as the exclusive forum for the settlement of disputes arising from their contracts. As the Arrangement would only be applicable to cases where an exclusive choice of court agreement had been concluded, the risk of parallel trials would be reduced.

14. Ms Audrey EU remarked that the "exclusive" choice of court clause was not mentioned in paragraph 2 of the Administration's paper for the meeting. She pointed out that notwithstanding the exclusive choice of court clause in the contracts, courts in other places could have jurisdiction to determine the disputes relating to the contracts. As a result, the problem of parallel trials would still exist.

15. Ms EU added that being a new arrangement, REJ should not be applicable to contracts signed before the implementation of the Arrangement, unless all the parties to the contracts had agreed to accept the arrangement. Mr James TO concurred with Ms EU . Mr TO considered that such an arrangement was necessary to protect the interests of those HKSAR businessmen who had signed contracts with the Mainland parties on the understanding that without a REJ arrangement, their properties in the HKSAR would not be subject to the enforcement of Mainland judgments.

16. Mr TO also concurred with the Chairman and Ms EU that the proposed Arrangement should only be applicable to parties who had made express provisions in

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the contracts to indicate their agreement to the Arrangement. Mr TO opined that such an arrangement was necessary because different judicial systems were adopted in the Mainland and the HKSAR, and the judicial system in the Mainland had not been fully developed. He also pointed out that the decisions of the Communist Party prevailed the law in the Mainland. Mainland courts might be affected by the Communist Party and gave judgments in accordance with the decisions of and the public policies set by the Party to the disadvantage of the HKSAR parties. Mr TO added that HKSAR businessmen might not have sought legal advice on their contracts with the Mainland parties and hence might not understand the implication of a choice of court agreement. He therefore considered that the Arrangement should be applicable only to those parties who fully understood and agreed to accept the Arrangement. Mr TO said that he would not support the proposed Arrangement unless the Administration agreed to revise its proposal accordingly.

17. Mr TO suggested that to further protect the interests of the HKSAR parties, a maximum amount should be set for the money judgments covered by the Arrangement. Warnings should be included in the contracts to the effect that once the parties had signified their agreement to the Arrangement in their contracts, their properties in the Mainland and the HKSAR might be subject to the judgments given by the chosen court.

18. The Chairman said that she did not accept the proposed Arrangement if it was enforceable against any party who entered into a commercial contract which contained a valid choice of court agreement after the implementation of the Arrangement. She pointed out that a clause merely specifying Hong Kong as the chosen court did not have the implication that a judgment obtained there was enforceable in the Mainland, or vice versa. The proposed Arrangement therefore changed the meaning of a choice of court agreement. It meant parties could become affected by the Arrangement inadvertently.

19. DSG reiterated that the proposed Arrangement would not have retrospective effect on choice of court agreements concluded before the implementation of the Arrangement. The Administration would consider clarifying this in the proposed Arrangement. DSG further explained that as court judgments could not be executed summarily as in the case of arbitration awards, the Administration had tried to put in place the proposed Arrangement as an alternative for parties which had voluntarily chosen the courts to determine disputes relating to their contracts.

Level of court

20. Referring to the question on the level of court raised in the Hong Kong Bar Association's submission, Ms Audrey EU requested the Administration to provide the additional information –

(a) the list of designated Basic Level People's Courts which had jurisdiction over foreign-related civil and commercial cases involving a single claim of up to or exceeding RMB 1 million, and had been proposed by the Mainland authorities for inclusion in the Arrangement;

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(b) the criteria for drawing up the list of designated Basic Level People's Courts in (a) above; and

(c) the basis for determining the categories of court which could have jurisdiction over a single claim of up to or exceeding RMB 1 million in the Mainland.

21. DSG responded that only about one percent out of the 3 100 odd Basic Level People's Courts in the Mainland had been designated to have jurisdiction over foreign-related civil and commercial cases. According to the Mainland authorities, the total number of foreign-related civil and commercial cases heard by the courts, as well as the past performance and location of the courts would be taken into account in the designation of these Basic Level People's Courts. Further, most of the designated courts were located in economic and technological development zones where there were substantial economic activities involving foreign investments and hence a lot of foreign-related civil and commercial court cases.

"Trial points" for initial implementation of the Arrangement

22. Ms Audrey EU said that given the large number of civil and commercial cases involving parties in the HKSAR in the Mainland, it was necessary to implement the proposed Arrangement. However, many businessmen in Hong Kong had expressed concerns about REJ, and did not support its early implementation. To address these concerns, Ms EU was of the view that the suggestion of identifying cities in the Mainland that had proven trade or economic activities with the HKSAR as "trial points" for the initial implementation of the Arrangement should be adopted. The Arrangement could be extended to other cities only upon the successful implementation of such a trial scheme in due course.

23. Ms Miriam LAU said that to gain people's confidence in the Arrangement, REJ should be implemented in the "trial points" first. Otherwise, people's concerns would overshadow the benefits to be brought by the Arrangement. She suggested that if there were difficulties in making special arrangements for first implementing REJ in some specific cities, the Arrangement could first be implemented in the Guangdong Province or Shenzhen Special Economic Zone where there were frequent economic activities with the HKSAR.

24. AD of Adm assured members that the Administration had tried to persuade the Mainland authorities to accept the suggestion of "trial points". However, the Mainland authorities had explained that insofar as their legal system was concerned, the Arrangement would be implemented through the promulgation of regulations or judicial explanation which must be applied across all provinces in the Mainland. It would not be feasible or practical to exclude certain parts of the Mainland from the uniform applications of the regulations or judicial explanation. Moreover, there was little established or objective basis for discriminating one city against another. There were also difficulties in deciding the criteria for determining the "trial points".

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25. DSG supplemented that the Mainland authorities had reservation to accept the suggestion of "trial points", as a similar arrangement had not been adopted in the Mainland before. As regards Ms Miriam LAU's suggestion of implementing the Arrangement in the Guangdong Province as a "trial point", DSG informed members that the courts in the provinces in the north, northeast and east of China also handled a lot of civil and commercial cases involving parties in the HKSAR. At members' request, the Administration undertook to further discuss with the Mainland authorities members' suggestions on "trial points".

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Finality

26. Ms Miriam LAU noted that under the special procedures to be put in place, after an application had been made to the Hong Kong court to enforce a Mainland judgment under the Arrangement, the case, if subject to trial supervision procedures, could still be brought up for re-trial in the Mainland, although by a People's Court at the next higher level. She said that a judgment must be a final and conclusive judgement before it could be enforced. The proposed procedures would cause confusion and encourage parties to avoid enforcement of judgments by seeking re-trials.

27. DSG referred members to the judgment in *Chiyu Banking Corporation Limited v Chan Tin Kwan* [1966] 2 HKLR 395 in which the House of Lord's decision in Nouvion v Freeman [1889] 15 AC1 on the common law requirement of a final and conclusive judgment was followed. According to the House of Lords, a judgment could not be regarded as final and conclusive if it could be varied by the original trial court. DSG said that the Administration had discussed with the Mainland authorities this requirement as well as the doubts expressed by some members of the local legal profession as to whether a Mainland judgment, which was subject to a possible re-trial by the original trial court, could be considered as final and conclusive under the common law rules applied by the HKSAR courts. DSG further said that to address these concerns, the Mainland authorities had agreed to put in place special procedures to ensure that after an application had been made to the Hong Kong court to enforce a Mainland judgment under the Arrangement, the case, if subject to trial supervision procedures, would be brought up for re-trial by a People's Court at the next higher level in the Mainland and would not be re-tried by the court making the original judgment. In this regard, the special procedures were generally in line with the requirements laid down by the HKSAR court for enforcing Mainland judgments in Hong Kong.

28. The Chairman, however, considered that "enforceability" and "finality" were distinct concepts, and that the proposed special procedures could not solve the legal question of finality. To adopt enforceability instead of finality as the requisite condition was a policy, and not a legal decision. The Chairman stressed that the issue of finality must be addressed before implementation of the Arrangement, particularly if the parties would be regarded as "opting in" for the REJ arrangement on the basis of a valid choice of court clause in a commercial contract, and the initial implementation of the Arrangement would not be limited to certain "trials points".

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29. Ms Miriam LAU asked whether other jurisdictions with judicial systems similar to that of the Mainland had established REJ arrangement with the HKSAR.

30. DSG stressed that in establishing the Arrangement with the Mainland, the HKSAR did not intend to change the judicial system in the two places. The Administration considered the proposed special procedures acceptable in addressing the question of finality of judgments.

31. SGC explained that in order to establish a satisfactory REJ arrangement with the Mainland, the HKSAR should try to understand the background and operation of the trial supervision system in the Mainland. Under the Chinese Constitution, the People's Procuratorates had the function to carry out legal supervision. He then referred members to the last paragraph of the Hong Kong Bar Association's submission concerning finality in which the case *New Link Consultants Ltd v Air China & Others* [2005] 2 HKC 260 was quoted. SGC informed members that the expert evidence given by the defendants' People's Republic of China law expert in the case indicated that the trial supervision procedure in the Mainland had its roots in the Continental Legal System and had equivalents in Germany, Japan and Taiwan. When compared with the available avenues under the common law system, the trial supervision procedures were not so drastically different. The above expert evidence had also revealed that the rates of cases protested and judgment reversed by the Procuracy in the Mainland in 2001, (being 0.3557% and 0.079% respectively) were very low.

32. Referring to the question from Ms Miriam LAU, the Chairman said that the trial supervision system in the Mainland modelled on the Soviet judicial system and was very unique. Because of the trial supervision procedures for re-trials, the Mainland judgments could not be regarded as final and conclusive. She expressed doubt whether there were any other jurisdictions with a similar regime which had already established REJ arrangement with the HKSAR. The Chairman requested the Administration to provide a written response to Ms LAU's question.

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Safeguards

33. Mr Ronny TONG referred to the safeguard mentioned in paragraph 15(e) of the Administration's paper provided for the Panel meeting on 20 March 2002 (LC Paper No. CB(2)1431/01-02(01)) (i.e. the judgment was inconsistent with a prior judgement of the registering court). Mr TONG opined that the proposed safeguard would create problems because while prior judgments were not binding in Mainland courts, this was not the case in Hong Kong. He added that under common law, the proposed safeguard was not a ground for refusal of enforcement of a foreign judgment.

34. Mr TONG considered that a safeguard should be provided to prevent parties from "forum shopping" in order to secure a judgment from a jurisdiction which was advantageous to their cause.

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35. Mr TONG then referred members to the safeguard mentioned in paragraph 15(g) of the Administration's paper provided for the Panel meeting on 20 March 2002 (i.e. in the view of the registering court, the judgment debtor either was 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). He suggested the Administration to improve the wording of the safeguard so as to clarify whether the judgment debtor was entitled to immunity from the jurisdiction of the "registering court" or the "court of origin".

36. DSG thanked Mr TONG for his constructive views. He said that the Administration had considered the conflicts of law in the Mainland and the HKSAR, and made reference to the Foreign Judgment (Reciprocal Enforcement) Ordinance (Cap. 319) in drawing up the proposed safeguards. The Administration would review the proposed safeguards taking into account members' views and the provisions in Cap. 319.

Way forward

Adm 37. The Chairman requested the Administration to consider revising the proposed REJ Arrangement taking into account the concerns and views expressed by members and revert to the Panel in due course. The Chairman also requested the Administration to respond to the Hong Kong Bar Association's submission and provide the additional information requested by members in writing before the Panel revisited the subject at a future meeting.

38. In view of the concerns expressed by members, the Chairman requested the Administration not to enter into any agreement on the Arrangement with the Mainland authorities before reverting to the Panel.

V. Consultation Paper on Conditional fees published by the Conditional Fees Sub-committee of the Law Reform Commission

Consultation Paper on Conditional Fees
(LC Paper No. CB(2)122/05-06(05) – Executive Summary of the Consultation Paper on Conditional Fees)

Presentation of views by various parties

39. Prof Edward CHEN, Chairman of the Conditional Fees Sub-committee, briefed members on the recommendations of the Sub-committee on conditional fees. Prof CHEN said that it seemed that the public and the media had misunderstood several important aspects of the recommendations, he took the opportunity to emphasise that –

(a) the Sub-committee had recommended the introduction of conditional fees, and not the contingency fee system adopted in the United States (US);

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(b) the contingency fee system was not recommended for Hong Kong as the civil justice system in US was different from that in Hong Kong in many ways, e.g. in US, a lawyer's fee was calculated as a percentage of the damages awarded by the court, a party to the proceedings was not required to pay the other party's legal costs, civil cases could be tried by jury with punitive damages awarded, and a legal aid system for civil claims was not available;

(c) the Sub-committee's recommendations would provide consumers with greater choice as regards fees and would not replace the conventional fee arrangements;

(d) the Subcommittee's recommendations were not intended to replace the existing legal aid schemes; and

(e) the Sub-committee had recommended that the proposed conditional fee regime should apply to eight types of civil cases only.

40. Prof CHEN further said that he would like to take the opportunity to respond to two other misconceptions. Firstly, there were claims that the introduction of conditional fees would bring about an increase in frivolous litigation and moral hazard of the legal profession. Prof CHEN elaborated on the Sub-committee's recommendations that there should be a cap on the success fee and that the court should have discretionary power to require security for costs in appropriate cases, and considered that implementation of these recommendations would help reduce nuisance and frivolous claims. Prof CHEN said that although he personally had mentioned a cap of 50-70 % on the success fee, the Subcommittee had not made any recommendation in the Consultation Paper and the issue should be left to be decided after consultation with the relevant parties. Prof CHEN further said that under the conditional fee arrangements, lawyers would have to look more critically at the merits of claims and make an assessment of the likely chances of success before taking up cases. Hence, conditional fees should actually lead to less frivolous litigation. He also believed that the question of moral hazard should not arise as the legal profession was expected to behave in a professional manner.

41. Prof CHEN went on to say that another misconception was that public funds would be required for the implementation of the recommendations of the Sub-committee because of the costs indemnity rule in Hong Kong. Prof CHEN explained that under the recommendations of the Sub-committee, the financial burden would be shared by litigants, legal practitioners and insurance companies. As noted by the Sub-committee, a conditional fee regime could not work effectively without the availability of after-the-event insurance (ATE insurance). The Sub-committee recommended that the Administration should conduct in-depth study of the commercial viability of ATE insurance in Hong Kong. However, to cater for the possibility that conditional fees could not be successfully launched without ATE insurance, the Sub-committee also recommended that the Government should expand

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the Supplementary Legal Aid Scheme (SLAS) by increasing its scope and financial eligibility limits. As it was uncertain whether and to what extent SLAS could be expanded, the Sub-committee further recommended the setting up of a privately-run contingency legal aid fund, similar to the "Contingency Legal Aid Fund" (CLAF) being considered in the United Kingdom (UK). There was a difference, however, because under the recommendations, the solicitor instructed by CLAF would charge conditional fees, whilst CLAF would charge the applicant on a contingency fee basis. The Sub-committee envisaged that CLAF would be run by an independent body, and that applicants would have to satisfy a merits test, but not a means test. The scheme would take a share of any compensation recovered and would be self-financing.

42. Mr Andrew JEFFRIES, a member of the Sub-committee, said that conditional fees in England had been the subject of much criticism, and the Sub-committee had been fortunate to be able to learn from the experience and problems of the English system of conditional fees. In particular, the Sub-committee recommended that any success fee and ATE insurance premium agreed by the claimant with his lawyers and insurers respectively should not be recoverable from the defendant. This recommendation alone should reduce substantially the amount of the satellite litigation. The Sub-committee also recommended that there should be greater guidance on what sort of success fees should be available for what sort of cases in order to further reduce unnecessary litigation. Mr JEFFRIES further said that it would appear that there was not a great deal of support from the insurance companies in Hong Kong to provide ATE insurance for the conditional fee arrangements. However, even without ATE insurance, conditional fees could still be used by liquidators, or clients from the upper-middle income group who were prepared to pay for the other side's costs. Mr JEFFRIES also pointed out that in England, the introduction of conditional fees actually encouraged charitable and pro bono work as lawyers could recover costs from the other party if they won the case.

43. Mr Rimsky YUEN of the Hong Kong Bar Association informed members that the Bar Association had set up a committee to study the Consultation Paper. The committee was still examining the Consultation Paper and would provide a report in due course. The initial views of the Bar Association were as follows –

(a) the Bar Association appreciated that as directed by its terms of reference, the Sub-committee was tasked to consider whether conditional fee arrangements were feasible in the circumstances in Hong Kong. However, if the purpose of the study was to address the unmet legal need in Hong Kong, in particular the middle-income group, the study should examine wider issues such as the pros and cons of other possible options before making recommendation on whether conditional fee arrangements or any other options should be introduced;

(b) the Bar Association was concerned whether the proposed conditional fee regime would be abused. For example, the wealthy claimants or large corporations would litigate more readily than they would have

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been under the conventional fees arrangement. This was because a claimant was not liable to pay his own legal costs, although he would be liable under the costs indemnity rule for the defendant's legal costs if his case was unsuccessful under the conditional fee arrangements; and

(c) the legal profession had expressed concern that the Administration would reduce the scope of legal aid after the introduction of the conditional fee regime, as in the case of Australia. The Panel should seek clarification from the Administration.

44. Mrs CHAN WONG Sui, Chief Executive of the Consumer Council said that the Consumer Council welcomed any measures which would enhance consumers' access to justice. She added that the Council would discuss the Consultation Paper on Conditional fees at a meeting in early November 2005 and would provide a submission to the Sub-committee before the end of the consultation period. Mrs CHAN informed members that the Council would examine the following issues relating to conditional fees –

(a) how to protect the interests of consumers when there were conflicts of interests between the clients and their lawyers;

(b) whether the proposed conditional fee arrangements would increase the consumers' choices;

(c) whether the proposed arrangements would give rise to problems relating to lawyers' unethical conduct; and

(d) whether there were other alternatives, such as expanding SLAS, to achieve the objective of ensuring access to justice for all.

45. In response to the Chairman, Prof Edward CHEN informed members that the Sub-committee had not yet extended the consultation period for the Consultation Paper. However, as some organisations including the two legal professional bodies had so requested, it was likely that the consultation period would be extended. Prof CHEN added that a formal announcement would be made shortly.

46. The Chairman requested the Bar Association and the Consumer Council to provide a copy of their submissions for members' reference in due course.

47. Acting Assistant Director of Legal Aid (Policy & Development) (ADLA (Atg)) said that the high success rate of SLAS was mainly attributable to the fact that SLAS cases were predominantly employees' compensation and personal injuries claims where the prospect of recovery was usually high. ADLA (Atg) added that the policy bureau concerned was studying the recommendations of the Sub-committee, and would provide its views before the end of the consultation period.

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Discussion

48. Ms Audrey EU remarked that the Panel had discussed the suggestion of expanding SLAS for a long time. Ms EU maintained the view that SLAS should be expanded first, irrespective of whether the conditional fee arrangements would be introduced.

49. Ms EU pointed out that although the proposed conditional fee arrangements could solve some problems, it would also create new problems. Under such arrangements, a lawyer and a client had a partnership relationship in a case. As the lawyer had a direct interest in the outcome of the case and in the event of conflict of interests between the two parties, he might try to protect his "investment" by manipulating the client and the development of the case. For that reason, Ms EU was of the view that the proposed conditional fee regime should not apply to matrimonial cases. She also considered that disputes between lawyers and their clients would likely arise in the course of litigation, and hence an increase in satellite litigation.

50. Prof Edward CHEN pointed out that it was unlikely that the amount of satellite litigation would increase in Hong Kong after the introduction of conditional fee as in the case of England. In Hong Kong, legal professional bodies would monitor the discipline of lawyers, and clients could lodge complaints against their lawyers with the professional bodies directly. Prof CHEN added that the Sub-committee would consider how to address the concern about satellite litigation.

51. Ms Audrey EU said that she could not see how the two legal professional bodies could help resolve the disputes between lawyers and clients. Mr Andrew JEFFRIES explained that the legal professional bodies could review their professional conduct rules and devise appropriate provisions and guidelines in relation to conditional fee agreements to safeguard the interests of clients. In further response to Ms EU on the situation of early settlement of a case, Mr JEFFRIES said that rules and guidelines could be drawn up to clearly specify the level of success fees and at which stage of litigation were the fees payable to lawyers.

52. Mr Albert CHAN informed members that there was an overriding clause in some agreements between the lawyers and property buyers to the effect that the lawyers would not represent the buyers in case of disputes between the buyers and the developers. He asked whether there would be provisions in the conditional fee agreements to safeguard the interests of clients from these liability exemption clauses. Mr CHAN also sought clarification whether a conditional fee agreement would apply to any subsequent appeal proceedings.

53. Prof Edward CHEN replied that the problem of the liability exemption clause could occur in any kind of agreement and was not peculiar to the proposed conditional fee arrangements. He suggested that aggrieved parties could lodge complaints with the Consumer Council directly. As regards Mr CHAN's second question, Prof CHEN pointed out that the two legal professional bodies should devise provisions in

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relation to the conditional fee agreements in their professional conduct rules, including the arrangements relating to subsequent appeals. He added that the Sub-committee had discussed the issue raised, and would include its conclusions in the report, taking into account the views received. The Chairman suggested that the Bar Association and the Law Society should provide their views on this issue to the Sub-committee.

54. Mr Martin LEE suggested that the Sub-committee should discuss the problems relating to the proposed conditional fee arrangements with the two legal professional bodies and believed that some of these problems could be resolved ultimately. Referring to the types of cases proposed by the Sub-committee for inclusion under the conditional fee agreements, Mr LEE pointed out that the middle-income group considered it most important to defend their own reputation in libel cases. As many defamation actions involved individuals such as columnists who might not afford to fund legal proceedings by their own resources, Mr LEE considered that both SLAS and the proposed conditional fee regime should cover defamation cases.

55. Prof Edward CHEN referred members to the case of *King v Telegraph Group Ltd* in UK quoted (in pages 88, 89 and 141) of the Consultation Paper. In that case, the Court of Appeal criticised the conditional fee arrangements in UK as bound to have an adverse effect on newspapers' freedom of expression and lead to the danger of self imposed restraints on publication. Prof CHEN explained that the Sub-committee had not recommended that the proposed conditional fee regime should apply to libel and defamation cases as a start, taking into consideration the UK experience and the possible effect on freedom of speech. Nevertheless, the Sub-committee was open to suggestions in this respect.

56. Ms Miriam LAU expressed concern about the emergence of claims intermediaries as mentioned in paragraph 11 of the Executive Summary of the Consultation Paper. Prof Edward CHEN said that the Sub-committee had studied this subject and considered that the introduction of conditional fees would help combat the problem, as conditional fee might appeal to litigants who would have otherwise patronised claims intermediaries.

57. Ms Miriam LAU said that the success of the proposed conditional fee arrangements would hinge on the support of both solicitors and barristers. She expressed concern that the proposed regime would not be successfully implemented if most senior solicitors and barristers were not willing to adopt conditional fee arrangements.

58. Prof Edward CHEN informed members that many members of the legal profession welcomed the introduction of the proposed conditional fee arrangements, which would provide more work opportunities for young and inexperienced lawyers.

59. Referring to Mr Rimsky YUEN's earlier remark, Ms Emily LAU urged the Bar Association to continue its study on other options which would widen access to justice for deserving cases. She also asked whether the Sub-committee could consider

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views and suggestions on options other than the proposal on conditional fees, given the terms of reference of the Sub-committee.

60. Prof Edward CHEN informed the Panel that members of the Sub-committee believed that the introduction of conditional fees was the most feasible option at this stage. Prof CHEN also explained that the Sub-committee had made other recommendations as earlier mentioned by him to cater for the possibility that conditional fees could not be successfully launched (paragraph 41 above). He added that the Sub-committee would set out its final conclusions in its report.

61. Ms Audrey EU opined that expanding SLAS would be a better option than introducing the conditional fee arrangements. As SLAS was operated by LAD, a client could request LAD to appoint another lawyer in case of disputes with his original lawyer. The problem of satellite litigation might be addressed.

62. Ms Emily LAU pointed out that there were concerns that the introduction of the proposed conditional fee arrangements would result in reduction in legal aid funding. She requested the Sub-committee to clarify this issue in its report.

63. The Chairman informed members that at a recent seminar organised by her for some 90 lawyers, the majority of them were solicitors. None of them had expressed interest in adopting the proposed conditional fee arrangements with the success fee capped at 50%, and only five had expressed interest in the proposal if there was no cap on the success fee. The Chairman added that the legal profession had expressed concern whether there would be a substantial cutback in the availability of legal aid after the introduction of conditional fees. They were also worried that once some lawyers had accepted the conditional fee agreements, other lawyers would be compelled to follow suit, even though there might be pitfalls in the proposed system.

64. The Chairman requested the Sub-committee to consider the views expressed by members and other parties attending the meeting.

VI. Any other business

65. The meeting ended at 6:50 pm.

Council Business Division 2
Legislative Council Secretariat
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