立法會
Legislative Council

LC Paper No. CB(2)365/99-00
(These minutes have been seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 15 June 1999 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 Ambrose LAU Hon-chuen, JP Hon Emily LAU Wai-hing, JP
Member Absent	:	Hon Mrs Miriam LAU Kin-yee, JP
Public Officers Attending	:	*Item IV* Judiciary Miss Susie HO Deputy Judiciary Administrator (Development) *Item V* Chief Secretary for Administration's Office Mrs Carrie YAU Director of Administration

Ms Rosanna LAW
Assistant Director of Administration (2)

Judiciary

Miss Susie HO
Deputy Judiciary Administrator (Development)

Department of Justice

Mr R C ALLCOCK
Deputy Law Officer

Item VI

Chief Secretary for Administration's Office

Mrs Carrie YAU
Director of Administration

Ms Rosanna LAW
Assistant Director of Administration (2)

Attendance by Invitation : *Item V*

Hong Kong Bar Association

Mr Clive GROSSMAN

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

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I. Information papers issued since the last meeting

Members noted the following papers which had been issued since the last meeting -

(a) LC Paper No. CB(2)2254/98-99(01) : Administration's comments on the Bar Association's paper entitled 'Exempting the "State" from the application of the Laws of the HKSAR and section 66 of Cap. 1'; and

(b) LC Paper No. CB(2)2254/98-99(02) : Administration's paper on 'Mechanism for the setting up of "State" organs'.

II. Endorsement of draft report of the Panel on Administration of Justice and Legal Services to Legislative Council

(LC Paper No. CB(2)2263/98-99(01))

2. Members endorsed the draft report which gave an account of the work of the Panel for tabling at the meeting of the Legislative Council (LegCo) on 7 July 1999 in accordance with Rule 77(14) of the Rules of Procedure of the LegCo.

III. Items for discussion at the next meeting

(LC Paper Nos. CB(2)2263/98-99(02) and (03))

3. Members discussed what items should be included for discussion at the next meeting to be held on 20 July 1999.

4. Mr Martin LEE said that both the Joint Declaration and the Basic Law specifically provided that the common law should remain in force in Hong Kong after 1 July 1997. However, since the reunification, the way that the Government of the Hong Kong Special Administrative Region (HKSAR Government) had responded to several judgments handed down by the Court of Final Appeal, particularly the recent decision of the Chief Executive to seek interpretation of Articles 22(4) and 24(2)(3) of the Basic Law from the Standing Committee of the National People's Congress, had cast doubt on the HKSAR Government's commitment to preserve the continued application of the common law system as well as the independence of the Judiciary in Hong Kong. He suggested that issues relating to the rule of law in Hong Kong should be discussed by the Panel.

5. After some discussion, members agreed that the following issues should be discussed at the next meeting -

(a) Reciprocal enforcement of arbitral awards between the Mainland and the HKSAR; and

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(b) The rule of law in the HKSAR.

6. In relation to item (b), the Chairman said that she would further discuss with the Legal Adviser after the meeting as to what areas should be covered in the discussion.

(*Post-meeting note :* The Secretary for Justice has been requested to account to the Panel actions she has undertaken to ensure that the HKSAR Government abides by the law and is implementing laws already in force in accordance with Article 64 of the Basic Law. As the meeting originally scheduled for 20 July 1999 has subsequently been cancelled, discussion is deferred to a future meeting.)

IV. Operation of the Court of Final Appeal

(LC Paper Nos. CB(2)1969/98-99(03) and CB(2)2263/98-99(04))

7. At the invitation of the Chairman, Deputy Judiciary Administrator (Development) (DJA(D)) briefly introduced the Administration's papers. She clarified that at present, there were 17 non-permanent judges (NPJ) in the Court of Final Appeal (CFA) (not "14" as stated in paragraph 2(a) of LC Paper No. CB(2)2263/98-99(04)), six of whom were appointed from other common law jurisdictions. There was no intention to increase the number of NPJs on the list in the immediate future, and none of the NPJs had indicated that they were no longer interested to sit on the CFA. Since the establishment of the CFA on 1 July 1997 to replace the Privy Council as Hong Kong's final appellate court, the caseload had built up. To date, there had been a total of 103 applications for leave to appeal and 51 substantive appeals lodged with the CFA. Out of these cases, 84 applications for leave to appeal and 31 substantive appeals had been dealt with. It was anticipated that from September 1999 to April 2000, a total of 15 substantive appeals would be heard by the CFA.

Discussion

8. In response to Ms Emily LAU, DJA(D) said that a full hearing of an appeal before the CFA was heard by five judges, including the Chief Justice of CFA, three permanent judges and one NPJ either from Hong Kong or from another common law jurisdiction. The Hong Kong Court of Final Appeal Ordinance (Cap. 484) (CFA Ordinance) provided that the NPJ was selected by the Chief Justice and invited by the Court. The CFA Ordinance also provided, inter alia, that no judge should sit on the CFA on the hearing of an appeal from a judgment or order made by him. Since the three permanent judges of the CFA were formerly Court of Appeal judges, there might be circumstances in which a permanent judge could not sit on the Appeal Committee or the full Court because he had previously dealt with the case in his capacity as Justice of Appeal. The CFA Ordinance was amended in October 1997 to empower the Chief Justice to nominate a NPJ to sit in place of a permanent judge in such circumstances.

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So far, in hearing full appeals by the CFA, NPJs had been drawn from the overseas panel whose judicial systems were similar to that of Hong Kong, i.e. U.K., Australia and New Zealand.

9. Mr Albert HO pointed out that for final judgments in civil cases involving more than HK$1 million, there was an appeal to the CFA as of right. He asked whether this limit would be reviewed, in view of the upward adjustments to the financial jurisdictional limits of other levels of courts such as the District Court. DJA(D) replied that there was no immediate plan to review the existing ceiling of HK$1 million but the matter could be taken forward in the future.

10. The Chairman asked how the caseload of the CFA compared to that of the Privy Council before the reunification. DJA(D) responded that the Privy Council previously handled an average of about 11 to 12 appeal cases per year. For the CFA, a total of 33 substantive appeals had been lodged in 1998, of which 19 cases had been dealt with. The number of cases was expected to be increasing. Regarding waiting time, she advised that under the Rules of the Court of Final Appeal which called for written cases to be lodged, it took about four months to take a case from date of filing of notice of appeal to a full hearing. So far, the CFA had been able to cope with the workload and exceed its target in respect of waiting time. Yet, the Judiciary would be constantly looking at possibilities to enhance productivity and efficiency of the Court by legislative or other means.

11. In supplementing, DJA(D) provided information on waiting time for civil and criminal cases, for the period from January to September 1998, as follows -

	Number of days (from issue of notice of hearing to actual hearing)	
Application for leave to appeal		
- Civil	27	(35)*
- Criminal	37	(45)
Substantive appeal		
- Civil	100	(120)
- Criminal	76	(100)

* (Figure in bracket denotes target waiting time)

12. Ms Emily LAU enquired about the time spent by CFA judges in court duties. DJA(D) advised that the time varied depending on the different circumstances and degree of complexity of the case. Excluding the work done before and after the full court proceedings, a full hearing of civil appeals took about 16 to 18 hours, and that of

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criminal appeals required about four hours. Concerning the hearing of a civil or criminal application for leave to appeal, the average time required was two hours and 1½ hours respectively.

13. DJA(D) added that the Chief Justice, being the head of the Judiciary, was required to play a leading role in both a judicial and an administrative sense. The permanent judges, apart from performing their normal court duties, were also heavily engaged in other functions such as providing training to judicial officers and participating in the work of various committees and advisory bodies on legal and law reform matters.

14. Mr Albert HO pointed out that there appeared to be a lack of clear delineation between the functions of the Chief Justice of CFA and the Chief Judge of the High Court. He sought the Administration's view on reviewing the duties of the two and setting them out in the law. In response, DJA(D) explained that the confusion referred to by Mr HO arose from post-reunification adaptation of certain provisions in the Legal Practitioners Ordinance containing references to "Chief Justice", such as provisions in relation to disciplinary proceedings applicable to the two branches of the legal profession. She advised that the ambiguity was removed after suitable amendments had been made to the legislation.

Conclusion

15. Members agreed that the Judiciary Administrator should be invited to update the Panel at appropriate times on matters relating to the operation of the CFA.

V. "Leapfrog" appeals to the Court of Final Appeal
(LC Paper Nos. LS183/98-99; CB(2)1969/98-99(04) and (05))

16. The Chairman declared interest as a practising barrister.

17. The Legal Adviser introduced the paper (LC Paper No. LS183/98-99) which set out some background information on the subject. Amongst other things, the paper made reference to the deliberation of the Bills Committee on the Hong Kong Court of Final Appeal Bill in 1995 in relation to the introduction of a "leapfrog" mechanism to enable a civil appeal to go directly from the Court of First Instance to the CFA, without first being heard by the Court of Appeal. The Administration at the time was of the view that it was not appropriate to amend the Bill to provide for such a leapfrog procedure. It preferred to allow the CFA to operate, at least initially, according to the system then prevailed in respect of the Privy Council. Nevertheless, the Administration agreed that the matter could be looked at again after the CFA had been in operation for some time and its reputation had been established.

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The Administration's views

18. At the invitation of the Chairman, Deputy Law Officer (DLO) summarized the points made in LC Paper No. CB(2)1969/98-99(04). He advised that in U.K, there had existed since 1969 a procedure, albeit infrequently used, for leapfrogging the Court of Appeal in England so as to enable an appeal to be taken from the High Court direct to the House of Lords. The conditions which must be satisfied before such a direct appeal could be taken were that -

(a) the trial judge had granted a certificate of satisfaction; and

(b) the House of Lords had given leave to appeal.

19. As to condition (a), a trial judge could only grant a certificate if all the parties consented and the case involved a point of law of general public importance which was either -

(i) concerned wholly or mainly with the construction of a statute or of a statutory instrument, or

(ii) was one where the trial judge was bound by a previous decision of the Court of Appeal or the House of Lords.

The granting of a certificate by the trial judge was discretionary. No appeal was possible against the granting or refusal of a certificate.

20. As to condition (b), the application for leave to appeal was determined by the House of Lords without a hearing. If leave was granted, any appeal to the Court of Appeal from the decision of the trial judge was precluded.

21. DLO further advised that the proposal made by the Hong Kong Bar Association in 1995 was similar to the leapfrogging procedure available in U.K. The procedure would apply only to civil cases and to cases of great general or public importance where it was obvious that an appeal would eventually reach the CFA. Director of Administration (D of A) said that in view of the Panel's wish to revisit the issue, the Administration was prepared to consider either the original proposal as put forward by the Bar Association, or any revised proposal, in consultation with all interested parties concerned.

The Bar Association's views

22. In response to the Chairman, Mr Clive GROSSMAN informed members that the Bar Association's position as set out in the Administration's paper had not changed. The Bar Association was in favour of a leapfrogging appeal procedure to be applicable

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to cases of great public importance, e.g. cases involving the Basic Law and Bill of Rights where it was apparent that an appeal would reach the CFA for a final decision. The availability of such a mechanism would save the parties concerned the expense and trouble of having to go through what might well be an unnecessary step, i.e. the Court of Appeal, before reaching the CFA. He said that the ultimate safety net under a "leapfrog" procedure would be the discretion of the CFA to give or refuse leave to appeal.

Discussion

23. In response to a point made by the Chairman concerning the court cases involving the issue of right of abode, Mr Clive GROSSMAN said that the Bar Association considered that such cases were the paradigm cases for the proposed "leapfrog" process. He said that if a legal procedure for missing out the Court of Appeal in the appeal process was in place, it would help remove more expeditiously the uncertainty and anxiety from those people who were the subject of the Court's judgment, and save the litigants and the public purse a great deal of money.

24. Commenting on the time-saving factor, the Chairman opined that the concern was not so much the time taken to actually hear a case, but the time taken to list the case for hearing. Under the present system, it usually took a long time at each level of appeal, and in most cases several months, for an appeal to be heard by the court.

25. The Chairman added that insofar as a judgment of the Court of First Instance was bound by an existing decision of the Court of Appeal or of a higher authority, an appeal to the Court of Appeal appeared to be an unnecessary step because, at any rate, the Court of Appeal would then be bound by its own decision or that of the higher level court. Mr Martin LEE considered that under the proposed "leapfrog" mechanism, provided that all the built-in safeguards and conditions were strictly adhered to, the chances of abuse could be reduced to a minimum.

26. DLO agreed that from a consumer's point of view, a "leapfrog" appeal process clearly had the benefit of reducing costs in time and money terms. However, there had been counter-arguments as previously raised in the discussion of the subject, such as that legal arguments could be improved as they went through each level of proceedings, and the Court of Appeal's judgments could be of great benefit to the CFA. He said that the Administration had to take all factors into consideration before it could come to a balanced view on the matter.

27. The Chairman sought the Bar Association's views on the argument that leapfrogging appeals would deprive the CFA of the benefit of the Court of Appeal's judgments. In reply, Mr GROSSMAN said that if the CFA felt that it could benefit from an intermediary step of going through the Court of Appeal in a given case, it could always refuse to grant leave to appeal.

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28. In response to the Chairman, DLO said that a major premise for the proposed mechanism was that appeals could only leapfrog if they were destined for the CFA one way or the other. Therefore, whether or not a leapfrog procedure was introduced should not affect the number of cases that would finally be taken to the CFA. He advised that in England, there were four cases in 1990 which went through a similar leapfrogging procedure.

29. Mr TSANG Yok-sing suggested that in considering the matter, the Administration should also conduct a research into the practices in jurisdictions other than the U.K.

30. The Chairman pointed out that for criminal cases, an appeal from a Magistrate's Court went to a single judge sitting in the Court of First Instance (High Court), and a further appeal laid to the CFA by-passing the Court of Appeal. The experience before the reunification was that due to the serious restrictions for an appeal to be brought to the Privy Council, such as because of the difficulty of getting leave for appeal, few cases had actually gone to the Privy Council. Hence, once the single judge sitting as the appellate jurisdiction of the High Court had made his judgment, the decision then bound all Magistrates in the future. However, it was not difficult to see how a single judge could err in a Magistrate's appeal. The Chairman suggested that, as a side-issue of the present discussion of a "leapfrog" process for civil appeals, the Administration should also consider the possibility of a procedure for criminal appeals whereby an appeal from a Magistrate to a single judge in the High Court could be next taken to the Court of Appeal before it might finally end up in the CFA.

Conclusion

31. Members generally shared the view that given the merits of a "leapfrog" mechanism and the fact that the CFA had been in operation for nearly two years, the Administration should seriously consider how the matter should be taken forward. Members agreed that the subject should be further discussed in a few months' time after the Administration had completed its review and submitted recommendations to the Panel.

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VI. Any other business

Reciprocal enforcement of arbitral awards between the Mainland and the HKSAR
(Administration's paper tabled at the meeting and circulated to members vide LC Paper No. CB(2)2322/98-99(01) dated 16 June 1999)

32. At the invitation of the Chairman, D of A briefed members on the Administration's paper which set out the latest position regarding arrangement for the reciprocal enforcement of arbitral awards between the Mainland and the HKSAR. She advised that new progress had taken place since the Administration last updated the Panel on the matter at the meeting on 15 December 1998. As a result of detailed discussion between the two sides, the HKSAR had now reached a consensus with the Mainland authorities on re-establishing a reciprocal arrangement. The new agreed arrangement generally reflected the pre-reunification practice and the principles and spirit of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which, being an international agreement, ceased to be applicable to the enforcement of arbitral awards between the Mainland and the HKSAR. The establishment of the arrangement was in accordance with Article 95 of the Basic Law, which stated that the HKSAR might, through consultation and in accordance with law, maintain juridical relations with the judicial organs of other parts of China, and they might render assistance to each other. The salient features of the new arrangement which followed the principle and spirit of the New York convention were specified in Annex A to the Administration's paper.

33. D of A further informed members that the new arrangement had received the endorsement of the Executive Council on 15 June 1999. To implement the arrangement, the HKSAR Government would sign a Memorandum of Understanding with the Mainland shortly and following that introduce the Arbitration (Amendment) Bill 1999 into the LegCo for the purpose of effecting the necessary changes to the Arbitration Ordinance (Cap.341) as soon as possible.

Discussion

34. In response to the Chairman's enquiry, D of A said that the Administration was aware of the concern of the local arbitration community that any award enforceable in Hong Kong should be made in accordance with the procedural requirements of the New York Convention. The Administration believed that this could be addressed by reflecting in detail the procedural requirements and the grounds for refusal of enforcement of the New York Convention in both the draft arrangement and the implementation legislation. In further response to the Chairman on whether the proposed arrangement conformed to the pre-reunification requirements, D of A made the following points -

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(a) Before 1 July 1997, only awards made by the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC) were recognized for enforcement in Hong Kong. In the course of discussion between Hong Kong and the Mainland, the Mainland authorities had pointed out that although the Arbitration Law of the People's Republic of China (PRC) stipulated that CIETAC and CMAC were set up by the China Chamber of International Commerce as bodies capable of making arbitral awards involving a foreign party, there were other relevant laws in the Mainland which specified that other arbitration centres could also make such awards. The pre-reunification arrangement of recognizing for enforcement only the awards made by CIETAC and CMAC was only an administrative practice, as there was no provision in the Arbitration Ordinance which limited the scope of application of the New York Convention. By way of the new arrangement now agreed upon, awards made in the Mainland in accordance with the Arbitration Law of the PRC by Mainland arbitration centres recognized by the State Council would be enforceable in the HKSAR. A list of these arbitration centres comprising 145 bodies was in Annex B to the Administration's paper; and

(b) To avoid unnecessary delay and expenses, applications to the Mainland Courts for enforcement of arbitral awards made in Hong Kong, together with the relevant documents, would have to be made in Chinese. Arbitral agreements and awards for enforcement in Hong Kong could be either in Chinese or English.

35. The Chairman enquired about the mechanism for determining the recognized arbitral bodies in the Mainland. In reply, D of A said that the Hong Kong and Macau Affairs Office (HKMAO) acted as the co-ordinating agency in liaising and consulting the arbitration community in the Mainland in drawing up the list of recognized arbitral bodies. She advised that despite there were some 200 to 300 arbitration centres in the Mainland, those included in the list were bodies with experience in dealing with arbitral awards involving a party outside of the Mainland. The "list" approach did not apply to awards made by Hong Kong arbitral bodies. All awards made pursuant to the requirements in the Arbitration Ordinance as reflected in the agreed arrangement would be enforced by the Mainland authorities.

36. In response to Mr TSANG Yok-sing's enquiries, Assistant Director of Administration (2) said that arbitral bodies in the HKSAR and the Mainland operated in accordance with the respective arbitration laws in force. The awards made by Mainland arbitral bodies would have to comply fully with the requirements laid down in the agreed arrangement before they were capable of being put to the Hong Kong Courts for enforcement. Same as all other arbitral awards made by parties to the New York Convention, it would be for the High Court of the HKSAR to decide whether the

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awards were enforceable under the arrangement and the Hong Kong's Arbitration Ordinance which was the implementation legislation for this arrangement. The list of Mainland arbitral bodies would be updated from time to time, and the Legislative Affairs Office of the State Council, through the HKMAO, would notify the HKSAR Government of any changes to the list.

37. The Chairman referred to the last paragraph of item 7(e) of Annex A to the Administration's paper, which stated that -

> *"The enforcement of the award may be refused if the court in the Mainland holds that the enforcement of the arbitral award therein would be contrary to the public interests of the Mainland, or the court of HKSAR rules that enforcement of the arbitral award therein would be contrary to the public policy of HKSAR."*

The Chairman asked how one could determine whether or not "public interests" or "public policy" was involved in a given case.

38. In response, the Administration said that the above clause conformed to the requirement in the New York Convention. So far as Hong Kong was concerned, the meaning of "public policy" would be determined on the basis of the common law interpretation of the term. As the common law concept of public policy did not apply in the Mainland, it used the concept of "public interests" which would be determined in accordance with Mainland laws. Each country would enforce the arbitral award in accordance with its own system.

Legislative time-table

39. D of A informed members that the HKSAR Government might be able to sign the Memorandum of Understanding with the Mainland as early as on 21 June 1999. Following that, the Arbitration (Amendment) Bill 1999 would be gazetted on 25 June 1999 and introduced into the LegCo on 7 July 1999.

Conclusion

40. Members considered that despite a Bills Committee was likely to be formed by the House Committee to study the Arbitration (Amendment) Bill 1999 after the Bill was introduced, the Bills Committee might not be able to start its work until after the summer recess of LegCo. Members agreed to discuss this item in greater detail at the next meeting of the Panel on 20 July 1999.

> (*Post-meeting note :* (a) At its meeting on 9 July 1999, the House Committee agreed to form a Bills Committee for the detailed scrutiny of the Arbitration (Amendment) Bill 1999. (b) Due to unforeseen circumstances, the Panel's meeting originally scheduled for 20 July 1999 was cancelled.)

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Study on an independent legal aid authority

41. In response to the Chairman, D of A advised that the Administration had yet to be in a position to update members on the progress of the study. She undertook to propose an appropriate timing for the matter to be discussed by the Panel at the earliest opportunity.

42. The meeting ended at 6:30 pm.

Legislative Council Secretariat
19 October 1999