

Speech by Secretary for Justice in Sydney (English only)

Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, titled “Law and Legal Services: Hong Kong’s Strength as an International City and Bridge to Mainland China” at a function organised by the Sydney Law School and Mallesons Stephen Jaques in Sydney today (November 26):

Distinguished guests, ladies and gentlemen,

Introduction

It is truly a pleasure to be here in Sydney. I am always impressed by the vitality of your city, beautiful harbour and your warm hospitality. May I thank the Sydney Law School and Mallesons Stephen Jaques and Mr Cobban (now the regional director of the Sydney Law School, the former Australian Consul General in Hong Kong) for organising this event.

Australia and Hong Kong share many important qualities and enjoy long-standing partnership on various fronts. We share the common law heritage and the commitment to promote a fair and just community, as well as open and transparent markets. Last few days in Melbourne, Canberra and Sydney further confirm that on the legal front, we share very similar values and struggle over similar issues. On the development of ADR in particular mediation, we do have a lot to learn from you.

Hong Kong has been benefiting tremendously from the wise counsel of top legal talent from Australia. With the appointment of Mr Gleeson last month, there are now altogether three former Chief Justices of the High Court of Australia serving as Non-Permanent Judges on our Court of Final Appeal. The former Chief Parliamentary Counsel of the State of Victoria, and currently President of the Commonwealth Association of Legislative Counsel, Mr Eamonn Moran QC, is now leading the Law Drafting Division of my department in Hong Kong. We are grateful for Australia’s help and links.

Apart from our unique links, we are becoming more closely intertwined by the forces of globalisation, for better or worse, richer or poorer, in sickness and in health. The recent financial tsunami has hit all shores and brought about a seismic shift to the international financial landscape. It shows the extent to which we share each other’s problems – as well as each other’s opportunities. Being a hub of global economic endeavour, we like to see Hong Kong playing a positive role as a facilitator of trade and investment flows, and a loyal follower of international best practice.

The current crisis also highlights the importance of Mainland China as one of the key engines of global economic growth and a stabilising force in turbulent times. The International Monetary Fund has said that the huge RMB 4 trillion economic stimulus package announced by the Mainland will not only influence its own economy, but will also influence the global economy by supporting demand.

The change in the international economic landscape had in fact started earlier with China maximising on reforms, globalisation and foreign investment. Hong Kong is admittedly benefiting from the tremendous economic growth of Mainland China. In addition, China's rise as an international economic power is also raising the tide of the Asian Pacific region.

Against that backdrop, I would like to share with you tonight some thoughts as to how, in the legal field, we can make the most of what we have and where we are in Hong Kong, under the unprecedented "One Country, Two Systems" order to enhance our strength as an international city and to serve as a bridge to Mainland China.

Keep enhancing our advantage

As you know, the establishment of the HKSAR in 1997, a new constitutional order enshrined in the Basic Law was put in place. Under the principle of "One Country, Two Systems", Hong Kong is part of the People's Republic of China and yet we practise an entirely different system of law from the Mainland, and enjoy a high degree of autonomy.

In the past 11 years, although we have encountered controversies in the implementation of the new constitutional order, litigations over the application of specific provisions of the Basic Law, as well as economic turmoil like the one we are facing now, the rule of law is working well in Hong Kong and the rights and freedoms guaranteed are being respected, as is confirmed by the reports prepared by independent outside observers including international rating agencies as well as the US and UK Governments.

Enriching the common law and judicial independence

Common law is not only preserved but is actually enriched by the Basic Law. Since 1997, we have further moved on from the predominantly English basis to attain a more international jurisprudential repertoire, with Australia being a major contributor. As guaranteed by the Basic Law, precedents from other common law jurisdictions can be referred to in our courts (which, by the way, makes life very difficult for lawyers), and means demand of expertise on a wider scale. Apart from the eminent former Chief Justices of the High Court of Australia, we have retired judges from New Zealand and serving Law Lords from the UK on the Court of Final Appeal. Many of the judgments delivered by our Court of Final Appeal are of the highest jurisprudential value not just in Hong Kong, but also in other common law jurisdictions. They have been cited in the House of Lords in the UK, Federal Court of Australia, Supreme Court of Canada and many leading law books.

The Court of Final Appeal is indeed Hong Kong's pride. One of the pillars of Hong Kong's success is judicial independence. In the most recent survey by the Political and Economic Risk Consultancy, who asked 1,537 corporate executives working in Asia to rate the judicial systems in the countries where they reside, Hong Kong's judicial system topped the vote with a score of 1.45 on a scale that has zero

representing the best and 10 the worst. If I remember correctly, we are no.2 worldwide, with Australia being no.1.

The rule of law entails core values and commitments which must not be subject to any compromise. Furthermore, after 1997, protection of fundamental human rights and freedoms is guaranteed on a constitutional level. Development of constitutional and human rights jurisprudence in Hong Kong has been exponential, with a lot of virgin territories up for exploration by virtue of the unique “One Country, Two Systems” principle and also because of our courts’ power to strike down unconstitutional legislative provisions. It is unlike the UK’s situation that the unconstitutional legislation is referred back to the Parliament. I understand that it is also the provision in Victoria.

As the record shows, our courts have fiercely upheld the rule of law. Since the Reunification, our courts particularly the Court of Final Appeal have made important adjudications in a wide spectrum of cases, including those defining fundamental rights and freedoms. The judgments in those cases, some in favour of the Government and some against, are clear demonstrations of the independence of our judiciary. These cases also demonstrate clearly that the Basic Law is not a piece of window-dressing but a powerful and enforceable constitutional instrument.

Extending the international horizon

Hong Kong’s success lies in our being the most international city in China run on a separate legal system. This is the design of the Basic Law. It is important for Hong Kong to continue to strengthen our international status, including that in the legal field, in order to secure our leading position as a global financial centre.

Despite rapid changes in the economic landscape including the rise of leading cities in the Mainland, and the on-going keen competition from other Asian countries, Hong Kong is still the preferred magnet in Asia in attracting international investment and business. The number of overseas and Mainland owned regional operations in our city is now approaching 4000, which is 50% over and above that in 1997.

The city needs top-class support from the legal profession, who is able to provide a variety of private and corporate clients with a wide spectrum of expertise. In terms of our lawyer’s population and profile, you may like to know that in addition to about 6,100 solicitors and about 1,000 barristers, we also have about 1,200 registered foreign lawyers from 27 jurisdictions working in Hong Kong, with the largest number of foreign lawyers coming from the United States, England, Australia and the Mainland, which is a different jurisdiction.

In this day of globalisation, it is important that in appropriate areas, we should not merely be a follower but should seriously explore whether there is a more active role to play riding on the strengths and advantages we already possess.

In this connection, one of the most important directions we are working on is to develop Hong Kong into a leading international dispute resolution centre, in particular, the hub of international arbitrations.

Promoting international arbitration

In promoting international arbitrations, we enjoy a clear advantage over others again, by virtue of the “One Country, Two Systems” principle.

For anyone who is engaged in international arbitration practice, he will agree that large international arbitration cases involving Chinese parties are clearly on the rise. As a result, some international arbitration bodies are already considering moving east into the Asia Pacific region.

For example, the International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC), which is based in Paris, will shortly be opening its first ever branch of Secretariat in Hong Kong. The Secretariat will be serving the Asia Pacific Region and responsible for supervising ICC arbitrations in Hong Kong. This is a significant move by an international arbitration institution of high repute and a show of confidence in Hong Kong’s position as a centre of dispute resolution.

You may ask how did we manage to persuade them to come? Technically, apart from the first class legal and business structure, Hong Kong has long-standing expertise and experience in international arbitration. The Hong Kong International Arbitration Centre, our own home-grown arbitration body, ranked 4th in the world and 2nd in Asia in terms of number of cases handled in 2007 and is rapidly expanding into a forum for the resolution of new areas of international disputes such as those over domain names.

We are also actively reforming our arbitration law. My department is busy preparing an amendment bill which seeks to streamline the domestic arbitration regime with that governing international arbitration under the UNCITRAL Model Law. Under that Law, the court should only intervene in an arbitration to support, but not to interfere with, the arbitration. We are confident that with these changes, we will help better the environment for conducting international arbitration in Hong Kong.

Strategically, Hong Kong's proximity to the Mainland and the economic integration of the two economies make it an ideal venue for arbitration of commercial disputes between Mainland enterprises and international businesses.

Before 1997, Hong Kong has already been a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1999, a separate arrangement was entered into between Mainland China and Hong Kong in order to facilitate reciprocal enforcement of arbitral awards.

International treaties

Speaking of international treaties and relationship, under the Basic Law, Hong Kong is intended to remain international. You may find it strange as to why Hong Kong’s Chief Executive should be appearing alongside President Hu Jin-tao in APEC in Peru, in those rather interesting brown ponchos. That’s the deliberate design under the new unprecedented constitutional order we have. Since 1997, Hong Kong has

negotiated and concluded some 160 bilateral agreements with foreign governments. Over 220 multilateral treaties continue to apply to Hong Kong and almost 80 of these agreements do not apply to Mainland China. These bilateral and multilateral agreements cover a vast spectrum of subjects such as air services, merchant shipping, investment promotion and protection, mutual legal assistance in criminal matters, and many more. Subjects like human rights protection, intellectual property rights and private international law are also covered.

Promoting international legal co-operation

And speaking of private international law, we are further developing Hong Kong's status as a major player in promoting global co-operation in this area. In September this year, my department jointly organised with the Hague Conference on Private International Law the Third Asia Pacific Regional Conference in Hong Kong. I understand that the second one was in fact held in Sydney some time ago.

Australia is one of the active members of the Hague Conference on Private International Law. As you know, the Hague Conference is the world's leading organisation who promotes and oversees the operation of numerous important international conventions on private international law. These conventions include service of judicial documents abroad, taking of evidence abroad, and those relating to child support and family maintenance.

Hong Kong's participation in the Hague Conference is perhaps one of the best illustrations of the success of the "One Country, Two Systems" principle.

First of all, nine Hague Conventions are applicable in Hong Kong. And some of them are only applicable in Hong Kong but not Mainland China or Macau SAR. This is made possible by the relevant provisions in the Basic Law of Hong Kong and the design of most of the Hague Conventions, which allow a State party to apply a Convention to all or only some of the territorial units of a State where a different system of law is practised.

Secondly, at the same time on the "One Country" level, Hong Kong has been participating in meetings of the Hague Conference since 1998 as a member of the Chinese delegation. Lawyers from my department and more recently, those from the Department of Justice in the Macau Special Administrative Region, have participated in the negotiations of new Hague Conventions and in the review of the operation of existing ones.

Thirdly, the Hague Conventions enable Hong Kong to become a member of the global network of jurisdictions that benefit from mutual legal co-operation. To the courts and individual parties caught up in cross-border civil and commercial disputes, the application of Hague conventions have provided effective ways and means of overcoming hurdles inherent in the nature of such litigation and helped the parties to avoid unnecessary and unwanted duplication of procedure.

Fourthly, the Hague Conventions also provide us with role models. A striking example is that the provisions and principles underlying the 2005 Hague Convention on Choice of Court Agreements have been used by us extensively in devising an Arrangement on reciprocal recognition and enforcement of civil and commercial

judgments between Hong Kong and Mainland China (which I shall come back to later). The private international law framework is significant as Hong Kong remains a common law jurisdiction while Mainland China is still a civil law jurisdiction.

These enhanced legal and judicial co-operations between Hong Kong and Mainland China underline the unique position of Hong Kong, not just as a premier banking and financial centre of the world but also our status as a regional centre for professional legal services.

In addition, in recent years particularly in the post 9-11 era, Hong Kong has been active in international collaboration with other countries against terrorism, money laundering, corruption and trans-national crimes. In particular, Hong Kong has been an active member in the Financial Action Task Force (“FATF”), which is the leading international organisation specialising in anti-money laundering efforts.

Legal Co-operation with Mainland

Agreements in different fields

And on the subject of legal co-operation, given the increasingly close economic and social ties between Hong Kong and the Mainland, it is imperative to promote and strengthen co-operation between the legal communities of Hong Kong and the Mainland. Other than the arrangement on mutual recognition and enforcement of arbitral awards that I have just mentioned, we have also concluded two other arrangements with the Mainland authorities relating to the service of judicial documents and reciprocal enforcement of court judgments.

With regard to the latter, we have landmark arrangement in this respect concluded between my department and the Supreme Peoples’ Court in July 2006 based on the principles of the Hague Convention. It has become law in August this year.

This particular Arrangement applies to money judgments given by designated courts of Hong Kong or the Mainland when exercising their jurisdiction pursuant to an exclusive choice of court clause, contained in a business-to-business agreement. Prior to the coming into effect of this Arrangement, a party who wished to enforce a Mainland judgment in Hong Kong could only do so by way of the common law which was fraught with difficulty relating to the finality of Mainland civil judgments. With the establishment of a convenient registration mechanism under the implementation legislation for this Arrangement, a judgment creditor will no longer have to spend substantial amount of time and money to re-litigate a case in the place where the assets of the debtor are located.

With more practical experience on the operation of this Arrangement, it is open to both sides to review the scope of the Arrangement in order to meet the needs and expectations of the community at large. We hope this will only be the prototype of many others to come, and will provide further incentive for international investors to make use of Hong Kong’s legal services and judicial process.

CEPA

On the subject of legal co-operation with Mainland, I must mention CEPA, i.e. the Closer Economic Partnership Arrangement between Hong Kong and the Mainland. CEPA is special in that it is not only a free trade agreement (“FTA”) entered into between two regions within a country, it is also an arrangement concluded by two separate members of the WTO. This gives the CEPA an international dimension, which again is made possible by virtue of the “One Country, Two Systems” principle.

Within the first 3 years of the implementation, CEPA has induced HK\$9.2 billion of Hong Kong capital investment into the Mainland services market and has created 16,000 jobs for Mainland citizens. Similarly, CEPA has induced HK\$5.1 billion of capital investment into the Hong Kong market and has created 36,000 jobs for Hong Kong residents.

In the case of the Hong Kong legal profession, CEPA offers an important platform through which the legal practitioners from both Mainland and Hong Kong can co-operate and share experience. Since the implementation of the CEPA on January 1, 2004, Hong Kong lawyers have enjoyed easier access to the legal services market in the Mainland. If I may just outline a few of these concessions:-

- * Representative offices of Hong Kong law firms in the Mainland are allowed to operate in association with Mainland law firms.
- * Hong Kong barristers are allowed to act as agents in civil litigation cases in the Mainland in the capacity of citizens.
- * Hong Kong residents who have acquired Mainland legal professional qualification and hold a Mainland lawyer practice certificate are allowed to practise in non-litigation work and Hong Kong related matrimonial and succession cases.
- * Hong Kong permanent residents with Chinese citizenship are allowed to sit the National Judicial Examination. Indeed, with the co-operation of the Ministry of Justice, Hong Kong has set up an examination centre for holding the National Judicial Examination in Hong Kong since 2005.

As at June 2008, 77 representative offices have been established by Hong Kong law firms in 13 Mainland cities. In fact, some law firms in Hong Kong that originally began life as foreign law firms have, after their members qualified as Hong Kong solicitors, switched to become Hong Kong law firms. As a result, they can not only offer advice on Hong Kong law, but their representative offices on the Mainland can also enjoy the benefits of CEPA. Mr Zipfinger, you will be in a better position to advise us with first-hand experience.

Training of Mainland Officials

The effectiveness of legal co-operation between Hong Kong and the Mainland, to a large extent, hinges on the mutual understanding of each other’s legal system. In this connection, my Department seeks to make contribution by providing Mainland officials with opportunities to study the common law in Hong Kong and to familiarise themselves with the legal system in Hong Kong. In the past nine years, over 120

Mainland officials have participated in the Common Law Training Scheme run by my department.

Participants in the programme first attend a post-graduate course in common law at the University of Hong Kong. After that arrangements will be made for them to be attached to various law-related departments of the Government and other organisations. This year, in addition to the existing scheme, we have also arranged seven Mainland officials to undertake a similar common law course at the Chinese University. It is being expanded to allow more Chinese officials to study law in Hong Kong.

These training programmes and other exchange activities have not only enhanced mutual understanding among legal officials of both Hong Kong and the Mainland, but have also provided valuable opportunities for us to make a contribution to China's development on the rule of law.

In recent years, we have seen vigorous efforts on the part of China to modernise its legal regime, not only in respect of international trade and commerce, but also in the area of legal and judicial proceedings as well as measures and procedure to safeguard public interests better. It is heartening to read the White Paper issued by the State Council in February this year entitled "China's Efforts and Achievements in Promoting the Rule of Law". The Paper frankly acknowledged the shortcomings of the Mainland Legal System and mentioned specific problems in enforcement, local resistance and corruption, and called for greater efforts to deepen the concept of the rule of law among the people. In 2007, the Law on Property was promulgated to provide equal protection for public and private property in the Mainland. The amended Lawyers Law which took effect in June 2008 provides for improved protection for Mainland lawyers in litigation practice and better administration of the profession by regulatory bodies of the Mainland.

CEPA has opened a door to the legal profession in Hong Kong. Although we are seeing only the beginning of the liberalisation measures, I believe they are sufficiently significant to reinforce Hong Kong's status as a centre for legal services in tapping into the Mainland legal services market, as well as resolving international business disputes involving Mainland parties. But there is more beyond business and financial gain. Hong Kong has benefited from our well-established legal system and practice. This advantage together with our experience and determination to uphold the rule of law mean that Hong Kong's legal profession is in a good position to make a positive impact on the development of the legal system in the Mainland.

Administration of justice in Hong Kong

In these rapidly changing times, we cannot afford to remain static. The landscape for the legal system and legal services, both in Hong Kong and internationally, has been changing very rapidly. As in other matters, what is required is not merely the capacity to adapt to changes and to meet the challenges, but also the foresight, the ability to see beyond the current state of play, and to be equipped for the future.

Civil Justice Reform

Following extensive consultation, our Chief Justice has recently introduced a wide-ranging Civil Justice Reform under which 150 recommendations were made to improve the cost-effectiveness of our civil justice system. Amendments have been made to existing legislation to enhance the case management powers of the court at different stages of the civil proceedings with a view to streamlining procedures and facilitating easy settlement. The amended provisions will be implemented in April next year. All legal professionals, including judges and colleagues of my department, are busy arranging training, seminars and workshops to ensure we are ready for the imminent changes ahead.

Improvement of access to justice - Mediation

One of the key changes is the greater use of alternative dispute resolution particularly mediation. We are grateful for the sharing from the judiciary in Australia. We have learnt a lot from you.

Australia is a pioneer jurisdiction in mediation, particularly, court-annexed mediation. On this trip, I have had the great opportunities to speak to the key players, including the Attorneys-General and Chief Justices on various facets of the development of mediation, and have benefited tremendously.

I have to confess many Hong Kong lawyers were horrified when we heard that in Australia, judges are ordering parties to mediate even if they are unwilling.

But I was told by almost all my Australian friends that I should follow in the footsteps of the Israelites crossing the Red Sea, namely, take a step of faith and set foot into the water, and the Red Sea will divide. Well, Hong Kong is taking it more gradually. The court will rather exert background coercion in relation to costs, rather than resorting to compulsory mediation outright. I am currently leading a cross-sector Working Group on Mediation to consider and recommend ways to promote and facilitate the wider use of mediation in Hong Kong, from the commercial disputes on the higher end to disputes at a community level.

Solicitors Rights of Audience

In Hong Kong, you may like to know, solicitors will soon enjoy rights of audience in the higher courts. But this is going to change soon. Following the recommendations made in the Report of the Working Party on Solicitors' Rights of Audience, my department aims to introduce a Bill to enable solicitors experienced in advocacy work to gain higher rights of audience within this legislative year. In due course, there will be more wig-less advocates in action. Although the barristers in the UK have got rid of their wigs in civil courts, as far as I know the Hong Kong barristers are still adamant to keep them on.

Conclusion

Ladies and gentlemen, the last decade has not been all plain sailing in Hong Kong. We have weathered through the Asian financial crisis, the economic fallout of the 9-11 attacks in the US, and the devastating SARS outbreak in 2003. When we take stock of the experience so far, I believe fair-minded observers will agree that the implementation of “One Country, Two Systems” has been a great success and Hong Kong has proved its mettle more than once in the past decade.

Prime Minister Kevin Rudd said that confidence was a rare commodity at the time of crisis. But I am confident that there is sufficient quantity of this commodity in Hong Kong to enable us to prevail again this time. This is not hubris or just unfounded optimism. It is just an acknowledgment of the resilience, flexibility and determination of Hong Kong, its people as well as its international business community, to meet the challenges head on – and to look for ways to transform crisis into opportunities.

While it calls for global concerted action to tackle the current crisis, we will take every opportunity to reinforce our financial infrastructure to ride out the current storm and to protect against future shocks. We will strengthen our co-operation with key economic partners such as Mainland China, Taiwan, our Asian neighbours as well as Australia, in search of new opportunities. We will also be vigilant not to compromise the integrity of our legal system, which is based on the long tradition in the rule of law, our core value, and which enables Hong Kong to thrive above all the ups and downs.

I hope you will see Hong Kong not just as a business hub in Asia, but as a city with a deep commitment to the rule of law, a mature civil society, a responsible global citizen, a versatile and resilient city with a unique role to play in China’s development, and the trusted platform for Mainland China’s outward reach.

On that note, ladies and gentlemen, may I wish you good health and happiness in the many challenging years to come.

Thank you very much.

Ends/Wednesday, November 26, 2008