

Speech by Secretary for Justice at 6th Asian Law Institute Conference (English only)

Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the 6th Asian Law Institute Conference today (May 29):

Professor Chan, Professor Ago, Professor Amirthalingam, Governors, distinguished guests, ladies and gentlemen,

Good morning and welcome to Hong Kong. The theme of your conference today is "Dynamics of Change in Asia". In recent months, the single most significant force compelling the entire world to change is probably the global financial crisis, erupted in the United States and spilling over to the rest of the world. And in more recent weeks, the entire world has been shaken by the pandemic threat of H1N1 influenza A. The International Monetary Fund has successfully marked down its global growth forecasts for 2009 from 0.5% in early January to minus 1.3% last month.

So far, and touch wood, Asia has fared better than North America in terms of the swine flu transmission. And so far, and although the path to recovery is still long and winding, Asia is showing greater resilience in combating the onslaught of the financial crisis. Last year, the Asian Development Bank gave a positive outlook for Asia in its Strategy 2020 report. The report predicts that the Asia Pacific region will account for some 45% of global GDP by 2020 in terms of purchasing power parity. It also forecasts the region to contribute about a third of the world trade by 2020.

Resilience can only come about in harsh times. In addressing the challenges that have arisen from the financial turmoil, we in Asia have been given an added incentive to break down barriers in trade and to strengthen co-operation to make the most of the business opportunities in this dynamic region.

This financial turmoil facing us has also highlighted the fact that Mainland China has become one of the key engines of global economic growth and a stabilising force in turbulent times. Further to the huge RMB 4 trillion economic stimulus package, Mainland China has also announced a plan to establish a US\$10 billion China-ASEAN investment co-operation fund to promote infrastructure that enhance connectivity with ASEAN nations. It is also one of the largest contributors to a liquidity fund against potential capital flight in the region.

Two years ago, before the financial crisis set in, we heard of the term "NyLonKong", equating New York, London and Hong Kong as the three leading financial centres of the world. Many economists debated whether it was New York or London who was number one. However, today, a new term has just been coined, "Shangkong", meaning Shanghai and Hong Kong, and the debate became whether Shanghai will one day take over from Hong Kong as the international financial centre of China.

Despite the competition with rising cities of the Mainland, Hong Kong is undoubtedly benefiting from the tremendous economic growth of Mainland China,

and contributing towards it at the same time. I believe Shanghai and Hong Kong will complement each other. But one edge Hong Kong still has is our robust legal system and our independent judiciary upon which all business, finance and industries so heavily rely. Under the innovative principle of "One Country, Two Systems", Hong Kong is in the best position to supplement what Mainland China is still actively developing in terms of law and governance.

Today, more than 6,600 Mainland and overseas companies have a base in Hong Kong, and nearly 60% of them serve as regional headquarters or regional offices. This is an all-time high figure over and above that in 1997. Throughout the financial turbulence, our stock market has remained the seventh largest in the world and third largest in Asia by market capitalisation. In terms of competitiveness, according to the newly released World Competitiveness Yearbook 2009 by the International Institute for Management Development, Hong Kong ranks second in the world and tops the list within Asia Pacific.

Against that backdrop, I would like to share with you 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, to enhance our strength as an international city in China and in Asia.

Sharpening our edge

As you know, upon the establishment of the Hong Kong Special Administrative Region 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, numerous 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 still going strong in Hong Kong and the rights and freedoms guaranteed are being jealously guarded. This has been confirmed by the reports prepared by independent outside observers including international rating agencies, the US and UK Governments.

Enriching the common law and judicial independence

Common law is not only preserved but is enriched by the Basic Law. Since 1997, we have moved on from the predominantly English basis to a more international jurisprudential repertoire. As guaranteed by the Basic Law, precedents from other common law jurisdictions can be referred to in our courts. Eminent judges from other common law jurisdictions sit on our Court of Final Appeal.

One of the pillars of Hong Kong's success is of course judicial independence and the Court of Final Appeal is Hong Kong's pride.

The rule of law entails core values and commitments which must not be subject to any compromise. After 1997, the 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.

As the record shows, our courts have robustly 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 and the power of the Basic Law as an 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.

Our 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 legal expertise. 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, and the Mainland is a different jurisdiction for this purpose.

Riding on the strengths and advantages we already possess, one of the most important directions we are working on is to develop Hong Kong into a leading international dispute resolution centre, in particular, a hub for international arbitrations.

Promoting international arbitration

In promoting international arbitrations, we enjoy a clear advantage by virtue of the "One Country, Two Systems" principle.

Anyone engaged in international arbitration practice would agree that large international arbitration cases involving Chinese parties are clearly on the rise. As a result, some international arbitration bodies are 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, opened its first ever branch Secretariat in Hong Kong last November. 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. I learn that within a few months, they have already had a caseload exceeding 100, and one third of those cases involve

Hong Kong or Mainland Chinese parties. Such an encouraging development proves that ICC has made a wise decision to come to Hong Kong.

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 2nd in Asia in terms of number of international cases handled in 2008 and is rapidly expanding into a forum for the resolution of new areas of disputes such as those over domain names.

We are also actively reforming our arbitration law. My department, the Department of Justice, will introduce a new Arbitration Bill shortly, which will seek 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 arbitration, but not to interfere with it. 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.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been applied to Hong Kong for a long time and remains so after 1997. 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 external affairs, Hong Kong enjoys a unique international status under the Basic Law. As many of you come from APEC economies, pictures of Hong Kong's Chief Executive appearing alongside President Hu Jintao at APEC Economic Leaders Meetings won't be strange to you. That's the deliberate design under our unprecedented constitutional order. Since 1997, Hong Kong has negotiated and concluded about 160 bilateral agreements with foreign governments. More than 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 also actively developing Hong Kong's status as a major player in promoting global co operation in this area. Last September, my department jointly organised with the Hague Conference on Private International Law the Third Asia Pacific Regional Conference in Hong Kong. It was attended by more than 200 representatives from 27 jurisdictions.

As you know, the Hague Conference is the world's leading organisation whose missions are to promote and oversee 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 in 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 different systems of law are practised.

Secondly, at the same time on the "One Country" level, officials from Hong Kong have been participating in meetings of the Hague Conference since 1998 as members 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, which is the leading international organisation specialising in anti-money laundering efforts.

Legal Co-operation with Mainland

Agreements in different fields

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 a 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. The Arrangement was implemented by law last August.

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 agreement, contained in a business-to-business contract. 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 mainly because of our courts' doubt about 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 very 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.

At the end of 2008, CEPA had 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 had induced HK\$5.1 billion of capital investment into the Hong Kong market and 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 CEPA on January 1, 2004, Hong Kong lawyers have enjoyed easier access to the legal services market in the Mainland. Examples of the concessions include allowing representative offices of Hong Kong law firms in the Mainland to operate in association with Mainland law firms; and allowing Hong Kong barristers to act as agents in civil litigation cases in the Mainland in the capacity of citizens.

Under Supplement VI to the CEPA announced earlier this month, Hong Kong legal practitioners who have at least five years' experience in legal practice and who have passed the National Judicial Examination will only have to undergo a one-month intensive training and assessment, instead of having to undergo internship for one year, before they are qualified to practice in the Mainland. In addition, Hong Kong law firms which have set up representative offices on the Mainland are allowed to operate in association with Mainland law firms in Guangdong Province under more relaxed rules.

Currently, more than 77 representative offices have been established by Hong Kong law firms in 13 Mainland cities. In Hong Kong, some law firms that originally began life as foreign law firms have successfully transformed themselves and become Hong Kong law firms after their members qualified as Hong Kong solicitors. 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 through their status as Hong Kong law firms.

CEPA has opened a main 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 special 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 on the Mainland.

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 provides Mainland officials with opportunities to study common law in Hong Kong and to familiarise themselves with the legal system in Hong Kong. The Law Schools of the University of Hong Kong and the Chinese University of Hong Kong are our partners in this programme. In the past nine years, more than 120 Mainland officials have benefited from it.

Administration of justice in Hong Kong

Ladies and Gentlemen, 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, is changing very rapidly. As in other matters, what is

required is not merely the capacity to adapt to changes and to meet new 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

You may have heard of the Civil Justice Reform in Hong Kong, which is a good example of the dynamics of change in the legal field. The Reform, which was implemented in April this year, aims at improving the cost-effectiveness of our civil justice system. Amendments are made 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.

Improvement of access to justice - Mediation

Another significant change in the legal practice, which is also part of the Civil Justice Reform, is the greater use of alternative dispute resolution particularly mediation. The Judiciary, the Department of Justice, the legal profession and other stakeholders are working closely 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. Legal Practitioners are embracing the challenges positively and are responding swiftly by getting accredited as mediators. The business world in Hong Kong is also warming to the idea. In response to our "Mediate First" campaign launched recently, more than 100 companies and organisations have signed a pledge to mediate first before resorting to litigation.

Solicitors Rights of Audience

More changes are still to come. Following years of debate and study, and a working party report, my department will introduce a Bill to enable solicitors experienced in advocacy work to gain higher rights of audience within this legislative year. In due course, we will see more wigless advocates in action in the higher courts. Further still, legal changes allowing solicitors to practice in limited liability partnership are also in the pipeline. So lawyers qualifying in say five years' time will be practicing in quite a different legal landscape and environment.

Conclusion

Ladies and gentlemen, American economist Paul Romer once said, "A crisis is a terrible thing to waste." We are working hard to make sure we don't waste the current "crisis" opportunity to become stronger and more resilient. A crisis is also a time to call for unity and co-operation. I am glad that this conference provides a vibrant platform for Asian legal experts throughout the region to share ideas and to explore collaboration to respond most effectively to the dynamics of changes in Asia.

On that note, ladies and gentlemen, I wish you all a very successful conference and an enjoyable and memorable stay in Hong Kong. Thank you very much.

Ends/Friday, May 29, 2009