

Keynote Speech
by Mr Rimsky Yuen, SC, Secretary for Justice at the
2013 (2nd) Annual Conference of the In-house Lawyers Committee
of the Law Society on 5 September 2013

“Dispute Resolution and In-house Lawyers”

Mr. Ambrose Lam [President of the Law Society], Mr. C.M. Chan [Chairman of the In-House Lawyers Committee], Distinguished Guests, Ladies and Gentlemen:

1. First of all, thank you for inviting me to this Annual Conference, and also for giving me the honour to be the keynote speaker.
2. Since I took up office as the Secretary for Justice on 1 July last year, I have attended various functions organized by the Law Society. This, however, is the first function of the In-house Lawyers Committee that I ever attend.
3. As the Secretary for Justice, it is part of my responsibilities to develop an appropriate legal environment and legal infrastructure for the profession and the community as a whole. I welcome opportunities to meet relevant stakeholders, so that legal policies developed by the Department of Justice can meet the needs of the legal profession and our ever changing society. Needless to say, in-house lawyers is an important group of stakeholders that I look forward to having more opportunities to exchange views on matters of mutual interests.
4. The topic that I have chosen for this morning is “*Dispute Resolution and In-house Lawyers*”. I would like to take this opportunity to briefly address two aspects:
 - (1) first, the role of in-house lawyers in the context of dispute resolution; and
 - (2) second, by reference to the recent development of dispute resolution in Hong Kong, the reasons why I would urge you to consider using Hong Kong as a dispute resolution centre.

Role of In-House Lawyers in respect of Dispute Resolution

5. Across the world, the importance and influence of in-house lawyers are growing not only within the legal profession, but also in the organizations they serve and in the community as a whole. In Hong Kong, the setting up of the In-house Lawyers Committee in 2011 within the Law Society and its growth in membership over the past two years are clear testimonies that verify the increasingly important role played by in-house lawyers. Besides, as candidly revealed last December by the editor of the official publication of the Law Society, *Hong Kong Lawyers*, when considering how to revamp the publication, one of the most common responses was that there should be more content targeted at specific groups such as in-house lawyers.
6. Unlike the early stage when in-house lawyers began to emerge as a specific sector of the legal profession, in-house lawyers nowadays do not simply perform technical or operational functions which were confined to pure legal matters. Instead, in developed jurisdictions such as Hong Kong, in-house lawyers have become part of the top management of the organizations they serve, and play crucial role in the strategic development of their respective organizations.
7. Amongst others, dispute resolution is certainly one of the various important functions performed by in-house lawyers, whether *vis-a-vis* third parties outside the organizations their serve, or amongst staff members within the organizations, and whether as a stand-alone area of professional responsibilities or as part of the overall risk management profile. In a recent survey conducted by CEDR (Centre for Effective Dispute Resolution) amongst in-house lawyers in England in March this year, it was revealed that dispute resolution ranked as the second most time-consuming activity¹.
8. Dispute resolution, as a process, can generally be divided into three

¹ See: *Preliminary Findings: Survey of In-House use of Commercial Mediation* (7 March 2013) (CEDR).

stages: (1) the stage when the contract was negotiated; (2) the stage during the performance of the contract; and (3) the stage when and after a dispute has arisen. In each of these stages, the role played by in-house lawyers can make a real difference to the final outcome of the dispute. For the present purpose, let me focus on the first stage, a stage where in-house lawyers often play a more influential role than external legal advisers.

9. At the contract negotiation stage, commercial men would generally focus on the commercial benefits that could be brought about by the contract. That is wholly understandable in most, if not all, commercial activities. However, from the perspective of effective dispute resolution management, the contract negotiation stage is the crucial stage when in-house lawyers can secure a dispute resolution mechanism that is most appropriate to the type of disputes that may arise and to the organization as a whole. Besides, it is also the stage when dispute prevention mechanism can be devised and put in place so as to prevent or minimize the adverse impact of disputes that may arise in the course of the contractual relationship.
10. As pointed out by James Groton and Robert Rubin², two prominent American lawyers specializing in dispute prevention and resolution, the most successful approach of dispute prevention is to acknowledge at the beginning of a contractual relationship that problems and disputes will occur, anticipate the kinds of problems and disputes that are most likely to emerge, and design a system that will ensure prompt and realistic resolution of disputes before they grow into serious problems.
11. Put in practical terms, the contract negotiation stage is the stage when one needs to consider important questions such as whether to include arbitration or mediation clauses, and if yes, further details including whether to go for institutional arbitration or *ad hoc* arbitration, the

² James P Groton and Robert A Rubin, “*Brief Review of Typical Dispute Prevention and Resolution Best Practices*”, in the Proceedings Report of “Reducing Construction Costs: Uses of Best Dispute Resolution Practices by Project Owners”, Federal Facilities Council Technical Report No. 149 (2007), National Research Council, Chapter 3.

venue of arbitration or mediation and the rules of arbitration or mediation. There is no hard and fast rule as to what one should or should not do in any given case. Every case is different, and it is exactly why in-house lawyers, who are familiar with the organizations they serve and the nature of the transactions in question, are in the best position to advise and to provide steer.

12. On the mode of dispute resolution, it is pertinent to note the result of another recent survey of in-house lawyers published by PricewaterhouseCoopers and Queen Mary, University of London³, which shows that arbitration is the most popular option amongst dispute resolution mechanisms (including litigation) for resolving contractual disputes.
13. This result is not surprising. Arbitration has indeed become a very popular and established mode of dispute resolution, especially in the context of international commercial disputes and investment disputes. This is because international arbitration can often offers advantages (including flexibility, expertise, speed and confidentiality) that traditional court litigation cannot always offer. Besides, the perceived neutrality of arbitration has the additional advantage of giving a sense of fairness to the parties that litigation in foreign courts sometimes cannot provide.
14. Apart from arbitration, mediation is another mode of dispute resolution that lawyers, including in-house lawyers, can ill afford to ignore these days. Indeed, there is a rising global trend in using mediation to resolve disputes and such trend has heavily influenced the attitude of the business communities in the Asia Pacific region. In my capacity as the Secretary for Justice, I often have the opportunity to meet representatives from consulates as well as chambers of commerce of different countries. Not only do I see immense interest in mediation, one salient feature that stands out in my discussion with those representatives is that they all favour mediation because they

³ 2013 Report on “*Corporate choices in International Arbitration*” (at pp. 6-7) (www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf)

believe mediation is conducive in maintaining commercial relationship whereas litigation often lead to the total destruction of any future co-operation prospects.

Hong Kong: An Ideal Dispute Resolution Venue

15. As I have reiterated on many occasions, it is the firm policy of the Hong Kong SAR Government to enhance and promote Hong Kong's status as a regional centre for international legal and dispute resolution services in the Asia Pacific region. As part of this policy, we endeavoured to provide top quality dispute resolution infrastructure so that parties could resolve disputes in a cost-effective manner. With a view to implementing this policy, quite a lot has been done and we believe Hong Kong can offer top quality service in the context of dispute resolution. This, indeed, is the message that I would invite you to bring home to your organizations.

Arbitration

16. Dealing first with arbitration, there is no doubt that a user-friendly legislative framework is vital in attracting parties to arbitrate in Hong Kong. The Arbitration Ordinance (Cap. 609), which came into force in 2011, is the result of a major re-vamp of our former arbitration legislation. It unifies our previous domestic and international arbitration regimes based on the UNCITRAL Model Law on International Commercial Arbitration, a model with which the international business community and dispute resolution practitioners is very familiar. It reinforces the advantages of arbitration, including respect for parties' autonomy as well as savings in time and cost for parties opting to resolve their disputes by arbitration. The Ordinance also contains new initiatives which seek to enhance the confidentiality of arbitration proceedings and related court hearings.
17. The work certainly did not stop with the enactment of the Arbitration Ordinance. We continuously monitor the international arbitration landscape with a view to ensuring that our legislative framework can

be improved to suit the needs of the end-users of arbitration. We have recently amended the Ordinance to make it even more user-friendly for parties to choose Hong Kong as the seat of arbitration. In particular, new provisions were introduced to make it clear that emergency relief granted by an emergency arbitrator before an arbitral tribunal is constituted (and whether granted in or outside Hong Kong) is enforceable under the Arbitration Ordinance. Provisions aimed at implementing the *Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards* which we concluded with the Macao SAR this January will also come into effect shortly.

18. Legislative regime aside, the courts in Hong Kong have always provided necessary judicial assistance to facilitate arbitral proceedings conducted in Hong Kong at the request of parties. The courts have all along taken an arbitration-friendly approach, be it related to stay of court proceedings in favour of arbitration or enforcement of an arbitral award. For example, in *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings*,⁴ the Court of Appeal upheld the wide discretion of arbitrators and the flexibility of the arbitral process, as well as emphasized that the courts should not interfere with case management decisions made by arbitral tribunals.⁵ The decision to refuse setting aside the award in this case was also upheld by the Court of Final Appeal earlier this year.⁶ These judgments are widely applauded in the arbitration circle. Another example is the recent decision in *Lin Ming v Chen Shu Quan*,⁷ where the court stayed court proceedings in favour of arbitration and declined to grant an anti-arbitration injunction. The court's willingness to stay the court proceedings is wholly in line with the UNCITRAL Model Law and confirms Hong Kong courts' arbitration friendly approach.
19. Any discussion about the arbitration regime in Hong Kong would not be complete without the mentioning of our enforcement regime. As of

⁴ [2012] 4 HKLRD 1

⁵ *Ibid*, para. 68

⁶ See the Determination handed down by the Court of Final Appeal in FAMV 18/2012 on 21 February 2013.

⁷ [2012] 2 HKLRD 547. A summon for leave to appeal was dismissed by the Court of Appeal in HCMP 552/2012 on 3 May 2012.

now, arbitral awards made in Hong Kong can be enforced in over 140 jurisdictions. This extensive network of enforcement is a strong factor which explains why Hong Kong should be considered as an ideal venue for arbitration.

20. In addition, Hong Kong as an ideal venue for conducting international arbitration can also be attributed to the presence of highly reputable arbitration institutions.
21. Since its establishment in 1985, the Hong Kong International Arbitration Centre (HKIAC) has been the focal point of arbitration in Hong Kong. With the initiatives taken by the Department of Justice, two other reputable arbitration institutions have established their presence in Hong Kong in recent years. In 2008, the Paris-based International Chamber of Commerce (ICC) set up its first overseas branch of the Secretariat of its International Court of Arbitration in Hong Kong. Last year, the China International Economic and Trade Arbitration Commission (“CIETAC”) also set up its Hong Kong centre, which is the first such centre established by CIETAC outside the Mainland.

Mediation

22. As noted earlier, there is a rising global trend in using mediation to resolve disputes, and Hong Kong is no exception. On the part of the Government, we have spared no effort in promoting the use of mediation in Hong Kong, with the support of the Judiciary and other relevant stakeholders. The Mediation Ordinance (Cap. 620), which came into effect in January this year, provides a legal framework for conducting mediation in Hong Kong. Hong Kong is one of the few jurisdictions in Asia to have standalone legislation on mediation. Amongst others, the Mediation Ordinance provides proper protection to the confidentiality of the mediation process, a key cornerstone of mediation and a vital factor which attracts parties to engage in mediation.

23. To continue with the promotion and development for the wider use of mediation to resolve disputes in Hong Kong, the Mediation Steering Committee, supported by 3 sub-committees, will further consider issues relating to regulatory framework, accreditation and public education and publicity. Issues being considered include further events to promote mediation, and schemes to apply mediation to resolve disputes in different sectors.
24. In-house lawyers can play an instrumental role in the promotion of the use of mediation, by encouraging their organisations to embrace mediation and taking steps to develop a mediation culture within the organizations. It is through better understanding of the mediation process, and facilitation and support of its application that mediation can realize its full benefits. In this regard, the Department of Justice hosted a “Mediate First” Pledge Reception in mid-July, which was well attended with over 200 guests, including consul generals and representatives of corporations and associations. Over 150 companies and associations have since pledged to “Mediate First”. For those of you working in the companies yet to pledge to “Mediate First”, I urge that you encourage your companies to consider making a pledge to first consider the use of mediation to resolve disputes by logging on to the website of the Department of Justice to submit the online pledge.

World Class Arbitrators and Mediators

25. In taking forward the various initiatives to promotion arbitration and mediation in Hong Kong, I am fortunate to have the full support from the relevant professions and stakeholders. As I have stressed from time to time, human capital remains one of our strongest strength as a leading centre for legal and dispute resolution services in the region. In Hong Kong, you will find the names of top-notch arbitrators on the HKIAC Panel of Arbitrators. In addition, there is also the List of Arbitrators which provide an even wider choice of arbitrators of varying expertise and experience. As of August 2013, there are 326 persons on the Panel of Arbitrators and 115 persons on the List of Arbitrators.

26. For mediators, with a view to assuring the standard and training of mediators of Hong Kong, the Department of Justice has facilitated the setting up of the Hong Kong Mediation Accreditation Association Limited (“HKMAAL”) last year as a non-profit making company limited by guarantee, with the Bar Association, the Law Society, the HKIAC and the Hong Kong Mediation Centre as the founder members. It aims to be the premier mediation accreditation body in Hong Kong discharging accreditation and disciplinary functions. Its Working Group on Accreditation Standards has formulated the accreditation standards for mediators in June 2013 for consultation by the relevant stakeholders.

Conclusion

27. Ladies and Gentlemen, it is the Administration’s long-term commitment to enhance Hong Kong’s status as an international legal and dispute resolution services centre. Looking ahead, we will stay vigilant and make timely efforts to enhance Hong Kong’s strength and competitiveness by keeping an eye on the latest development at the international level.
28. As in-house lawyers, you serve from time to time as the first contact point for the management before and after disputes arise, as well as a crucial source of advice on how best to resolve or deal with them. Given your familiarity with the organisations and their business activities, you are also well placed to advise the management on how best to prevent disputes or put in place measures to facilitate the diffusion of disputes before they actually arise. In-house lawyers are one of our key partners in the promotion of dispute resolution. I am sure the Department of Justice can continue to count on your continuous support. At the same time, if you have any insights or suggestions to share with us, please don't hesitate to let us know.

Thank you very much.