

Corporate Counsel Forum Hong Kong 2014
Keynote Speech of Mr Frank Poon, Solicitor General,
Department of Justice
at the Renaissance Hong Kong Harbour View Hotel on 19 June 2014

Behind Every Successful Economy – A Lawyer’s Perspective

Good morning, Sophia, Distinguished Guests, Ladies and Gentlemen,

It is my great pleasure today to join you at this Forum. Thank you for giving me the opportunity to address this distinguished audience comprising leading corporate counsel across a wide range of industries from Hong Kong and the Asia Pacific region. I extend my warm welcome to those who have travelled to Hong Kong from overseas.

2. The vote of confidence in Hong Kong’s investment and business environment has been unfaltering since our reunification with Mainland China in 1997. In the 2014 Index of Economic Freedom jointly released by the Heritage Foundation and the Wall Street Journal, Hong Kong ranked first for the 20th consecutive year. Further, the latest Global Financial Centre Index published by the Z/Yen Group based in London lists Hong Kong as the third global financial centre, after New York and London. These ratings speak volume for the contribution made by the financial sector to the economic well-being of Hong Kong.

Hong Kong’s success anchored on the rule of law

3. Behind Hong Kong’s success as a leading global financial and commercial centre lie many factors. Bankers and businessmen might see Hong Kong’s success as a reflection of the friendly business environment in Hong Kong and the freedom with which they can operate. As a lawyer, I would say that the rule of law enshrined in our legal system is undoubtedly the cornerstone of our success. The rule of law provides a secure and predictable environment for individuals and organisations so that they know what their rights and obligations are. It also ensures a

level playing field for all businesses. International businesses are attracted to Hong Kong because they can rest assured that their investments and interests are protected by a good legal system and impartial courts.

4. Judicial independence is critical to the rule of law. Events in the last couple of weeks in Hong Kong, such as the publication of the White Paper on Hong Kong by the Central People's Government and the disturbance at LegCo, have highlighted the importance of judicial independence. I cannot emphasize enough the importance of an independent judiciary for Hong Kong. It is not only a necessary pre-condition for long-term sustainable economic growth, it is also crucially important for the development of our society and an open and accountable government.

5. Judicial independence is constitutionally guaranteed by the Basic Law. Judges of Hong Kong do not only command respect and trust of the local people in Hong Kong, but also the international business community. Our Court of Final Appeal is internationally renowned, comprising not only the best judicial talents from within Hong Kong, but also top judges from other common law jurisdictions like the United Kingdom, Australia and New Zealand. Time and again our judges have demonstrated their independence by providing well-reasoned and impartial decisions which may go against the Government. A good example is the famous "W" case concerning the right of post-operational transsexual persons to marry.

6. I have complete confidence that our judges will continue to uphold the rule of law in Hong Kong without fear or favour, and without being affected by any controversy about the quality required of our judges which is already laid down in the Basic Law. On our part, the Department of Justice will spare no efforts in ensuring that the rule of law, including the independence of the judiciary, continues to thrive in Hong Kong, not least because this is Hong Kong's strongest comparative advantage.

A strong and diversified legal profession

7. A legal system cannot work to its best without the support of first-class practitioners in the legal profession. Hong Kong benefits from keen and healthy competition from overseas law firms which have resulted in a sophisticated legal sector with cross-fertilisation of experience. As a corporate counsel wearing both hats as a member of the legal profession and at the same time a user of Hong Kong's legal services, you may be in a better position to testify to the strengths and diversity of our legal profession.

8. An important policy objective of the Department of Justice is to maintain and develop the competitiveness of our legal services and to create more opportunities for them in Hong Kong and abroad. To this end, we have in recent years promoted two important pieces of legislation that would expand the choice of business models for lawyers practising in Hong Kong.

9. The first piece of legislation enables lawyers to incorporate their legal practice in the form of a limited liability company, namely as a solicitor corporation, such that their liability will in general not be extended beyond their financial interests in the solicitor corporation. The second piece of legislation allows a law firm in Hong Kong to operate in the form of a limited liability partnership (LLP). The personal assets of a partner in an LLP who is not in default himself would be protected from liability arising from professional default of another partner in the firm. We are currently working closely with the legal professional body to bring the legislation into operation as soon as practicable.

10. Many lawyers in Hong Kong are well connected with their Mainland counterparts. In fact, under the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), Hong Kong lawyers enjoy an edge over foreign lawyers in forming associations with Mainland law firms, in setting up representative offices in the Mainland, and in

gaining access to the vast legal service market in the Mainland. This continues to hold true notwithstanding the liberalised measures announced in respect of the Shanghai Free Trade Zone.

11. We have been working closely with our legal and dispute resolution community to further promote their services in the Mainland and other parts of the world, including emerging markets in the Asia Pacific region. As far as the Mainland legal service market is concerned, we have been stepping up our efforts in putting forward proposals for “pilot measures” on legal and dispute resolution services under the framework of CEPA, with focus on new development areas such as Qianhai in Shenzhen and the Free Trade Zone in Shanghai.

12. Some of the initiatives we have been pursuing include the proposals to allow enterprises in the Mainland to choose Hong Kong laws as the applicable law for their commercial contracts, to choose Hong Kong as a venue for litigation and arbitration should disputes arise, and to allow Hong Kong arbitration bodies to provide services directly in the Mainland. We believe that development in new co-operation areas in the Mainland would present opportunities for Hong Kong’s legal and dispute resolution professionals to further develop their practice in both Hong Kong and the Mainland. Moreover, Mainland enterprises could also capitalise on the strengths of Hong Kong legal and dispute resolution services, which may also have the effect of enhancing the environment for doing business in the Mainland.

Dispute resolution services

13. As aptly put by Lord Bingham in his book “The Rule of Law”, one essential element of the rule of law principle is that means must be provided for resolving *bona fide* civil disputes in an effective and efficient manner. The existence of effective and diverse dispute resolution facilities in Hong Kong gives international investors the assurance that any commercial dispute can be efficiently and fairly dealt with, both in and out of the court system. This provides investors with a strong incentive to

move their money and establishments here. In this regard, the Government, in particular the Department of Justice, has devoted resources and effort to enhance Hong Kong's role as an international legal and dispute resolution centre in the Asia Pacific Region. In fact, this has been made a policy of the Hong Kong SAR Government.

Arbitration

14. In the context of arbitration, we have conducted a major re-vamp of our arbitration legislation which came into effect in June 2011. The new legislation unifies the regime of domestic and international arbitration on the basis of the 2006 version of the UNICTRAL Model Law for international commercial arbitration. One innovation the new legal framework brings about is the ability of the arbitral tribunal and the court to make orders for interim measures of protection to support arbitrations. Hong Kong is among the first jurisdictions in the world to strengthen the powers of our courts to make such orders, and enforce such orders made by a foreign court or arbitral tribunal, in relation to arbitral proceedings conducted outside Hong Kong.

15. Further amendments were introduced to the Arbitration Ordinance in July 2013 whereby new provisions are put into place for the enforcement of emergency reliefs granted by emergency arbitrators before an arbitral tribunal is established. With these amendments, our arbitration regime has become clearer, more user friendly and more readily accessible to arbitration users and practitioners from around the world.

16. We have also taken active steps to enhance the enforcement network of arbitral awards made in Hong Kong. For example, we obtained clarification from the Indian Government that Hong Kong arbitral awards are enforceable in India under the New York Convention. In January 2013, we concluded an arrangement with Macao on reciprocal recognition and enforcement of arbitral awards which has taken effect since December 2013, whilst a similar arrangement with the Mainland has been in effect since the year 2000. Together with the enforcement

network under the New York Convention, Hong Kong arbitral awards are enforceable in over 140 different jurisdictions in the world.

Internationalism

17. A key to Hong Kong's success as a regional centre for legal and dispute resolution services is internationalism. Hong Kong should stay international. Apart from our home-grown Hong Kong International Arbitration Centre which has earned an excellent reputation for offering independent and efficient arbitration services in the region, we have welcomed major international arbitration bodies to Hong Kong. The International Court of Arbitration of the International Chamber of Commerce (ICC) opened the first branch of its Secretariat in Hong Kong in 2008. The China International Economic and Trade Arbitration Commission (CIETAC) also set up in Hong Kong in September 2012 its very first and at present the only arbitration centre outside the Mainland. Next on the pipeline is likely to be the CMAC (China Maritime Arbitration Commission) which has also confirmed its in-principle agreement to set up a branch office in Hong Kong in the latter part of 2014. It would also be its first branch office outside the Mainland. No doubt, this would further entrench Hong Kong's position as a leading maritime centre in the region.

18. Apart from international arbitral bodies, the Asia Pacific Regional Office of the Hague Conference on Private International Law was set up in Hong Kong in December 2012. The Hague Conference promotes a number of conventions on international judicial co-operation in the areas of civil litigation, commercial law as well as the protection of family and children. The Hague Conference may further develop its work and extend its influence through its regional office in Hong Kong.

19. Looking ahead, we will continue to engage in discussions with reputable international legal and dispute resolution institutions to explore the feasibility of their establishing a presence in Hong Kong. This includes the Permanent Court of Arbitration, a leading international institution providing services on resolution of international investment

disputes. Their presence would fortify Hong Kong's competitiveness as a regional hub for legal and dispute resolution services.

Mediation

20. As a corporate counsel, you will no doubt be keen to help your company to manage risks as far as dispute resolution cost is concerned. An increasingly popular alternative dispute resolution method is mediation. Mediation is a flexible and more client-oriented process, which has the potential of facilitating settlement at lower costs, and at the same time saving business relationship which takes a long time and a lot of efforts to build up.

21. You may have noticed that mediation has long established a foothold in Hong Kong in areas such as family disputes and construction contract disputes, where mediation has proved effective. Voluntary mediation becomes a regular feature for cases under the Construction and Arbitration List. The Government is making efforts to promote mediation to a wider audience in our community. Indeed, mediation should be promoted to cover a broad array of disputes ranging from complex commercial disputes to conflicts among ordinary citizens.

22. The establishment of the Financial Dispute Resolution Centre ("FDRC") in June 2012 is a good example of the Government's work in this aspect. FDRC impartially administers a scheme under which monetary disputes between individual consumers and financial institutions are resolved by way of "mediation first, arbitration next".

23. We are also committed to building up a legislative framework that facilitates mediation. Our new Mediation Ordinance came into force in January 2013. It sets out a legal framework for the conduct of mediation with emphasis on the protection of confidentiality of mediation communications. Further, the Hong Kong Mediation Accreditation Association was incorporated in August 2013. The Association provides an effective accreditation system aiming at ensuring the quality of

mediators. It also handles matters concerning training standards and disciplinary issues. In addition, the Steering Committee on Mediation, under the chairmanship of the Secretary for Justice, monitors our legislative framework and continues to explore initiatives in promoting mediation.

The China Factor

24. Hong Kong is strategically positioned as the gateway to Mainland China. As an international city at the heart of Asia, Hong Kong links the booming economies of Mainland China and Asia with major markets worldwide. Thanks to the “One Country Two Systems” design, Hong Kong is the only common law jurisdiction within the whole of China. It seems fair to say that common law remains principally the legal backbone upon which international business is being transacted. Whilst the China factor has always been, and will continue to be, the comparative advantage Hong Kong enjoys over other cities in the region, we shall continue to do our utmost to fully utilize our unique and strategic position.

25. Our initiative to strengthen Hong Kong’s role as an international legal services and dispute resolution centre has received support from the Central People’s Government. I have previously mentioned the arrangement between Hong Kong and the Mainland on reciprocal enforcement of arbitral awards which has been in operation for over 14 years. We have continued our efforts in fostering closer legal co-operation with the Mainland. To this end, we concluded with the Mainland in 2006 an arrangement to facilitate mutual enforcement of court judgments concerning certain commercial disputes. The Arrangement, which took effect in August 2008, covers money judgments given by a designated court of either the Mainland or Hong Kong exercising its exclusive jurisdiction pursuant to a choice of court agreement. I am pleased to report that there are already successful applications for enforcement of Mainland judgments in Hong Kong under that Arrangement. I am particularly encouraged by this development because

of the difficulty of enforcing Mainland judgments in Hong Kong under the common law due to questions on the finality of Mainland judgments.

26. We are maintaining a dialogue with the Mainland side as well as stakeholders in Hong Kong on the operation of the existing legal co-operation arrangements and finding ways to further improve them. We are also exploring with the Mainland side co-operation in other areas, for example the recognition and enforcement of court orders in family matters.

Building up Hong Kong's strengths

27. As corporate counsel, you will surely appreciate that we live in a competitive environment. We should stay vigilant. We should not take for granted the comparative advantages that Hong Kong enjoys from our close ties with the Mainland. It is of paramount importance that Hong Kong should stay ahead and tackle challenges by further developing our own strengths.

28. For this reason, the Government is committed to ensuring that our legal and legislative framework is up-to-date to meet the needs of a fast changing society. We will endeavour to update our law and to improve the regulatory framework to keep pace with global market development. The underlying principles of an effective regulatory regime are: to maintain a level playing field; to promote fair competition; and to balance the interests of different stakeholders, such as investors and consumers.

29. I notice that a number of current legislative reform such as the establishment of the Insurance Authority and the new competition law have already been featured for discussion in this Forum. On top of these, you will surely notice that the new Companies Ordinance has come into force in March 2014. This new Ordinance enhances corporate governance and at the same time facilitates business development. Meanwhile, the Government is studying comments received on the

legislative proposals to reform and modernise corporate insolvency law and winding-up provisions in Hong Kong.

30. Finally I should also mention the current reform to the common law doctrine of privity of contract. The Contracts (Rights of Third Parties) Bill is being scrutinised in the Legislative Council and we expect its enactment by the end of this year. The Bill seeks to enable contracting parties to confer legally enforceable rights on a third party, i.e. a non-party to the contract. It addresses the anomalies and, at times, unfairness caused by the doctrine of privity and hence improves our contract law regime by bringing it in line with other major common law jurisdictions.

Concluding remarks

31. Ladies and Gentlemen, as we continue to surf the waves of globalisation, it is a time to consolidate and to re-think so that we can all stand together steadfastly to help Hong Kong scale new heights as a leading global financial and commercial centre.

32. As I have emphasised at the outset, Hong Kong's success is buttressed by our firm commitment to the rule of law. This defines Hong Kong uniquely. May I appeal for your continued support for this cause in your role as corporate counsel and leaders in your businesses and industries. We call upon your vital input in all possible aspects of your company operation which will help to consolidate the rule of law in Hong Kong. This may range from formulation of dispute resolution strategies on a practical level, to the broader issues of helping your company to attain a high standard of business practice and implementing effective measures to ensure vigorous compliance with regulatory standards. All of us in Hong Kong take benefit from our success as a first class global financial centre which is firmly rooted in the rule of law. Therefore the support, however small and insignificant, that each of us gives to the development of the rule of law will ultimately benefit Hong Kong as a whole.

33. Today's Forum provides an excellent platform to share ideas and experience, to explore ways to collaborate in view of the changing dynamics in global economy and the regulatory framework. On this note, I wish you a very fruitful and successful conference. Thank you.