

Corporate Counsel Forum Hong Kong 2015
Keynote Speech of Mr Frank Poon, Solicitor General,
Department of Justice
at the Renaissance Hong Kong Harbour View Hotel on 18 June 2015
An Outlook on Legal Industry in Hong Kong – The Way Forward

Good morning, Ms Meller, Distinguished Guests, Ladies and Gentlemen,

It is my great pleasure today to join you at this Forum. May I start off by extending my warmest welcome to all of you.

2. My topic today is on the outlook of the legal industry in Hong Kong and the way forward. I have a ready answer on the outlook of the Hong Kong legal industry even if I were given just one minute. And that is something which we have been saying on many occasions: Hong Kong is a leading legal hub and we will continue to be one of the most important centres for legal and dispute resolution services in the Asia Pacific Region. In fact, it is the Government's policy to enhance Hong Kong's status as a regional hub for legal and dispute resolution services. This Government policy has its logical underpinning in Hong Kong's role as a global business and financial centre and the historical development of its legal system.

Rule of Law as bedrock of Hong Kong's success

3. There are many factors behind Hong Kong's success as a leading global financial and commercial centre such as our simple tax system and an efficient and clean Government. The rule of law, I would say, should stand out as one of the key reasons for Hong Kong's success. A good reputation for rule of law is not something that could be built up in a short time. The rule of law in Hong Kong has been tried and tested before and after the handover in 1997.

4. The concept of "One Country, Two Systems" is firmly rooted in the Basic Law and it is part of the basic policies of the People's Republic of China. If you read the Basic Law carefully, you will note that under Article 159, the Basic Law cannot be amended in a way that is contrary to the

established basic policies of the People's Republic of China regarding Hong Kong. Fundamental rights and freedoms are guaranteed at the constitutional level because these rights have been incorporated in the Basic Law. Rights to property, the ownership of enterprises and investment from outside Hong Kong are also protected by the Basic Law and the laws of the HKSAR.

5. Judicial independence is critical to the rule of law. The future of Hong Kong is underpinned by our unwavering adherence to the rule of law, in particular judicial independence. They together bring about a secure and predictable environment for individuals and organizations, enable everyone to enforce his or her legal rights and obligations as well as guarantee a level playing field for businesses.

Constitutional Development and the Occupy Movement

6. At this very moment, the Government proposal for electing the Chief Executive of Hong Kong in 2017 is being debated in our Legislative Council. This is not an occasion to debate the merits or otherwise of the Government proposal on constitutional reform. I just wish to point out that the ability of anyone in Hong Kong to express his or her view openly and freely without coercion and suppression, to openly disagree with the Government, to engage in public assembly outside the LegCo building, and to lobby or influence LegCo members' vote on the constitutional reform package are sound testament to the fundamental rights and political freedom enjoyed by all of us in Hong Kong. This is proof that our community is very tolerant of different political opinions and the ways in which they are expressed. This is the beauty of Hong Kong that we may sometimes take for granted.

7. At this juncture, some of you may ponder whether there would be a second "Occupy Movement" after the crucial vote on constitutional reform. No one can tell at this moment but from our experience with the "Occupy Movement" last year, I can assure you that the rule of law in Hong Kong is strong and robust enough to withstand the test of the Occupy Movement.

8. I would like to share with you some remarks made by the court in a case concerning the legal rights of those involved in the “Occupy Movement” which very clearly set out the role of our independent judiciary:

“... in deciding cases, including the present ones, the court would determine them *only* by applying the law and would not take into account any political considerations. ... this is precisely what this court is doing: adjudicating and resolving disputes concerning the parties’ legal rights in accordance to the law, and the law alone. The fact that it also happens that there is political underlying to these disputes does not and should not affect the court’s role and duty in adjudicating those *legal* rights. Nor should the court refrain from adjudicating those *legal* rights in the dispute.”¹

Sound regulatory framework

9. Our law, our legal system and our lawyers have a significant role to play in shaping the future of our legal industry. In this connection, it is very important to ensure that our regulatory environment remains attractive to both local and foreign law firms.

10. As I have mentioned last year, the introduction of two pieces of legislation which respectively allow a law firm in Hong Kong to either operate in the form of a limited liability partnership or incorporate its legal practice in the form of a solicitor corporation, are but examples of our commitment to maintaining and developing the competitiveness of our legal services. I am happy to say that three pieces of subsidiary legislation providing details for the conversion of a law firm, including a foreign law firm, to a limited liability partnership were already gazetted on 29 May by the Law Society of Hong Kong. Our aim is to bring the principal legislation into operation in the second half of 2015. As corporate counsel, you may wish to take note of the changes introduced by new LLP legislation which may affect the distribution of liability among partners in an LLP.

¹ Per Au J in *Kwoon Chung Motors Co Ltd v Persons Who Erected or Placed or Maintained Obstructions on the Portion of Connaught Road Central Eastbound between Edinburgh Place (Western Portion) and Edinburgh Place (Eastern Portion)*, HCA 2222/2014 (1 December 2014), at paragraph 51.

11. Law firms seeking to convert to LLPs or solicitor corporations will have to put in place new risk management measures and adopt new procedure to protect themselves as well as the interest of their clients. At the same time the ability to practise in LLPs and solicitor corporations will open up new possibility for collaboration and mergers among law firms, allowing legal professionals with different specialisation to come together to offer better as well as one-stop legal service to their clients.

Corporate dispute resolution strategy

12. As corporate counsel, you serve as the first contact point before or after a dispute has arisen, as well as a crucial source of advice on how best to resolve or deal with it. For this reason, you will appreciate the importance of having a clear and well-defined dispute resolution strategy that will channel different types of disputes either to litigation or other means of alternative dispute resolution having regard to considerations such as confidentiality, the need for certainty and predictability, as well as corporate strategy.

Litigation

13. The Government policy in making Hong Kong a legal and dispute resolution hub coincided with the excellent efforts by the Judiciary to streamline and speed up court proceedings by enhancing the case management power of the courts. The various initiatives introduced under the civil justice reform in the past few years have been the subject of positive comments by practitioners and court users.

14. We are also glad to know that our arrangement with the Mainland on reciprocal enforcement of commercial judgments based on exclusive choice of court agreements which commenced operation in 2008 is being put to use by some commercial parties seeking to enforce Hong Kong judgments in the Mainland and *vice versa*. The possibility of using the said arrangement to enforce a Hong Kong judgment in the Mainland is an option that every corporate counsel should consider seriously in deciding the dispute resolution strategy in transactions with Mainland parties.

Class Actions

15. While I am looking at the future litigation landscape, one of the areas where reform might affect corporations and businesses in Hong Kong is class actions which may be allowed as a result of a Law Reform Commission Report recommending that Hong Kong should introduce a class action regime, starting with consumer cases first. I am now chairing the Working Group on Class Actions comprising representatives of the legal profession, business sectors and Government officials. The principal task of the Working Group is to consider the proposals of the Law Reform Commission and make recommendations to the Government. The Working Group intends to conduct a consultation exercise later this year or in early 2016 before finalising its recommendations to the Government.

16. The Working Group fully appreciates that class actions may bring about changes to the litigation culture in Hong Kong. While such a regime may improve access to justice and achieve judicial economy, it may also entail additional costs to businesses and may bring about changes in some business practices. Some say that a class action regime might have similar impact on corporations in Hong Kong as the new competition law. However, I would simply say that it is just too early to draw any conclusion as the scope of the regime, for example whether it should be limited to consumer claims or the definition of “consumer”, has not yet been decided. I do look forward to receiving suggestions from corporate counsel when the Working Group conducts its consultation exercise.

Arbitration

17. I would be remiss if I do not mention arbitration as far as dispute resolution is concerned. There are a number of interesting developments that may affect arbitration.

Advisory Committee on Promotion of Arbitration

18. To facilitate the overall co-ordination and strategic planning for the future development and promotion of Hong Kong's arbitration services, the Department of Justice has set up the Advisory Committee on Promotion of Arbitration chaired by the Secretary for Justice in December 2014. We are confident that the Advisory Committee would serve as a forum for discussing initiatives that would benefit the development of arbitration in Hong Kong. While on new initiatives on arbitration, I would like to highlight the following.

Arbitration Study

19. To promote wider use of Hong Kong's arbitration services, we are collaborating with the Hong Kong Trade Development Council to conduct a comprehensive study on the development of arbitration in Hong Kong so as to identify: (a) the benefits to, and challenges faced by, Hong Kong in promoting arbitration; and (b) the ways and means for the Government and relevant stakeholders to enhance Hong Kong's position as a venue for international arbitration.

20. The objective of the study is to analyse and make recommendations relating to the elements and actions required to further enhance Hong Kong's position as a leading international arbitration centre in the Asia Pacific region, particularly in the face of regional and international competition. The findings and recommendations from the study will greatly assist our long-term policy planning and strategic development.

Focus on specialised areas of arbitration

21. We are also working with stakeholders to enhance our capability in specialised areas of arbitration such as maritime arbitration and intellectual property arbitration. Maritime arbitrations are not new to Hong Kong. However we consider that Hong Kong should further enhance our ability to

provide first class arbitration service in these disputes as we have been traditionally a regional maritime hub.

22. Hong Kong is also a leading jurisdiction in the region for its intellectual property law and protection of intellectual property rights. It would be natural for Hong Kong to develop its capability in IP arbitration as we continue to develop Hong Kong as an IP centre and IP trading hub. Looking forward, we will review how our arbitration law may be amended to assist and facilitate IP arbitration in Hong Kong.

Third Party Funding of Arbitration

23. Another recent development which may have potential impact on the future development of arbitration relates to third party funding of arbitrations. This is an interesting subject that is attracting the attention of businesses as well as corporate counsel. Under such a funding agreement, a third party funder agrees to fund part or all of the expenses of an arbitration in exchange for a cut as well as its costs from the amount recovered in a claim.

24. For one reason or another, a reputable and perfectly solvent company may choose to enter into a funding agreement with a third party funder. This might either be because it wishes to better manage its cash flow, or limit its exposure to risk, or better utilise its internal operation resources including human resources. For arbitrators and institutions, the introduction of third party funders creates problems such as disclosure of the funding agreement and issues relating to security for costs. For Government, it may beg the question of whether the activities of third party funders should be regulated to prevent abuse, and whether arbitration legislation will need to be reviewed to assist the arbitral tribunal in cases where a third party funder is involved.

25. All these are reasons why the Law Reform Commission has been conducting a study on third party funding in arbitrations. It will publish its consultation paper later this year. This is a topic in respect of which contribution from corporate counsel will be especially useful.

Mediation

26. The Mediation Ordinance which came into effect in 2013 provides a legislative framework for the conduct of mediation. The Mediation Ordinance highlights the importance of the confidentiality of mediation communications and admissibility of mediation communications in evidence.

27. Mediation, a voluntary, flexible and interest-based process, could help companies manage legal costs, resources and the uncertainty of litigation. Business reputation and relationship that have been cultivated over many years and future commercial relationship may be more valuable assets for many companies than any gain that may be derived from litigation or arbitration. The confidential process of mediation may open the door to creative solutions that are otherwise not available through litigation or arbitration.

The China Factor

“One Belt One Road”

28. I alluded to the China Factor in my speech here last year. I have more to say on this as there are interesting developments for lawyers in general and corporate counsel in particular in relation to the role of Hong Kong as a “super-connector” to the Mainland, to coin a favourite term used by our Chief Executive to describe Hong Kong’s role *vis-a-vis* the Mainland. In fact, Hong Kong has always been the most effective springboard to the Mainland China market because of our cultural ties to the Mainland, our strategic geographical location, our east-meet-west culture and our outstanding legal and financial system. Today, the remarkable shift of the global economic centre of gravity eastwards is even more evident with the recent announcement by the Central Government that it will pursue the “one belt, one road” development strategy. This refers to the economic belt of the silk road and the 21st century silk road of the sea. This is an ambitious plan to develop closer economic ties with economic partners stretching from Central Asia to Europe on land and through South East Asia to South Asia and Africa ending up in Europe again by sea.

29. Critics might see the strategy as a gimmick or rhetoric on the part of the Central Government. But action speaks louder than words. The Chinese Government has taken the initiative to spearhead the establishment of the Asia Infrastructure Investment Bank (the “AIIB”) which has now attracted close to sixty countries as its members. I expect that the AIIB will be a ready source of funding for many of the projects, including construction of infrastructures in countries along the routes of “one belt, one road”. This will open up immense opportunities for many businesses in the Mainland and Hong Kong and will surely encourage more and more enterprises of Mainland China to go global.

30. The Hong Kong SAR Government is already formulating plans to take advantage of the opportunities which may come within our reach as a result of the “one belt, one road” strategy. Hong Kong companies will be able to avail themselves of opportunities in infrastructure construction, project management and planning as well as financial services that may spring from the different development projects forming part of the “one belt, one road” strategy. Our companies must take a hard look at its business development plan to review how their business operations may benefit from the strategy. We envisage that these economic activities and developments will create massive demand for high-end cross-boundary legal and dispute resolution services and will provide ample opportunities for Hong Kong legal and dispute resolution professionals.

CEPA

31. The “one belt, one road” strategy has added further impetus to the opening up of the legal service market in the Mainland for Hong Kong lawyers. It is yet another reason for seeking further liberalisation measures under CEPA which we have pursued continuously since the first CEPA with the Mainland dated 2003. 2014 saw a breakthrough in enhancing the mode of cooperation between the law firms of the two sides.

32. From September 2014 onwards, a Hong Kong law firm and a Mainland China law firm may join hands and operate in association under a partnership model in three pilot areas in Guangdong Province, namely Qianhai, Hengqing and Nansha. We understand that four such associations

have been established. Furthermore, Guangdong law firms may now second Mainland lawyers to work as consultants on Mainland law in representative offices set up by Hong Kong law firms in the Guangdong Province. Likewise, Hong Kong law firms may second Hong Kong lawyers to work in Guangdong law firms. These pilot measures would enable law firms of the two places to address the increasing demand for one-stop cross-border legal services.

Legal Hub

33. Last but not least, I would like to mention our initiative to establish a physical legal hub in the heart of Hong Kong which will come to fruition in 2018. This is the Government's plan to create an international legal and dispute resolution hub in the former Central Government Offices in Central. The planned legal hub will be located at the West Wing of the former Central Government Offices and the adjacent former French Mission Building which is currently occupied by the Court of Final Appeal. Arbitral and mediation institutions and non-profit making law-related organisations are currently scattered around the city. The creation of the legal hub will not only bring these institutions together to create synergy, but will also be an opportunity to give these institutions a face-lift with better and more modern hearing and training facilities. The legal hub will also highlight Hong Kong's role as a leading centre for legal and dispute resolution services.

Concluding remarks

34. Ladies and gentlemen, Hong Kong is an international city and it will remain so as we move forward. The Hong Kong SAR Government fully appreciates the pivotal role played by the rule of law, the legal system and legal services in shaping the future of Hong Kong. We will spare no efforts to ensure that our legal infrastructure will stay at the forefront of international development so as to maintain and fortify Hong Kong's status as a global centre for finance and commerce.

35. The importance and influence of corporate counsel are growing. Many of you are an integral part of top management in your organizations. In my view, you also have an important part to play in shaping the future

legal landscape of Hong Kong as well as changing and improving legal practice areas such as corporate governance and compliance. The Department of Justice will look forward to further opportunities to exchange views and cooperate with the corporate counsel community to enhance Hong Kong's legal system and service commitment.

36. On this note, I wish you a very fruitful and successful conference.

37. Thank you.