Keynote address by Mr Wesley Wong, SC
Solicitor General of the Hong Kong SAR at
The IBA Conference on "*Mediation v Arbitration: Best Friends or Best Enemies? A View from Asia*"
on 1 December 2016 (Thursday)

Mr Jawad Sarwana (Co-Chair of the IBA Mediation Committee), Distinguished Guests, Ladies and Gentlemen,

Good evening. It is indeed my great honour to be here and be given the opportunity to address this assembly of old friends and new from the global dispute resolution community. I chose the term "dispute resolution" advisedly. First, I didn't say "ADR" because, whether you are from the arbitration or the mediation side of things (or even both), I bet you are going to agree with me that either, as an "alternative" to court litigation, has now become mainstream when it comes to methods of dispute resolution, especially for cross-border disputes.

2. Second, any "love-hate" relationship between arbitration and mediation, both being effective methods of dispute resolution, is the very subject (in fact, a well-chosen subject) of this conference. I shall leave it to all of you to make your own judgement by the end of tomorrow whatever perception (or even conviction) you may now hold as to whether they are best friends or best enemies to each other.

3. This opportunity for us all to reflect upon and explore the variety of issues identified for discussion tomorrow is made possible by the IBA's Arbitration and Mediation Committees, with the support of the IBA Asia Pacific Regional Forum. For this, I must, on behalf of the Government of the Hong Kong Special Administrative Region (and in particular the Department of Justice), send my congratulations. I must also send my heartfelt thanks to the Hong Kong International Arbitration Centre (HKIAC) which is playing host for the event. May I also extend to all of you, especially those who are coming from overseas to participate in this conference, the warmest welcome.

4. With its established role as an international legal and dispute resolution centre in the Asia-Pacific region, Hong Kong is indeed an ideal venue to hold this important international event for anyone who wishes to

obtain an Asian perspective to the variety of topics to be examined. At the same time, Hong Kong is grateful as its status as an international financial and business centre is reinforced. The presence of those seriously involved, like you are, in the provision of professional dispute resolution services here gives the global business community the assurance that any commercial dispute can, in terms of time and costs, be efficiently as well as fairly dealt with both in and out of the court system. This provides businessmen with a strong incentive to move their capital and establishments here.

What Arbitration and Mediation may have to offer

5. As the occurrence of commercial disputes cannot be entirely eliminated, the possible use of arbitration and mediation are often key considerations in terms of legal risks management because, more often than not, businesses have very good reasons to avoid litigation. In order to find some answers to the very question posed as to whether arbitration and mediation are friends or foes to each other, I believe that it is important to start from basics.

6. Arbitration, as a consensual process in which its commencement and procedures are normally governed by the terms of an arbitration clause which has already been agreed between the contractual parties usually before a dispute arises, is based on the fundamental principle of party autonomy. Be that as it may, the parties who submit their dispute for arbitration in fact agree to have the outcome determined by an impartial and independent arbitral tribunal. Mediation, by contrast, is consensual <u>both</u> in the procedure and in the outcome. The parties seeking to go through mediation, with the facilitation and assistance of a mediator, are free to enter into a settlement on such terms as may be voluntarily agreed between them.

7. As the outcome of arbitration is through the process of adjudication, it is essentially a rights-based determination albeit by way of a generally private and confidential process. After all, an arbitrator or the arbitral tribunal appointed adjudicates the matter submitted based on the merits of each party's case. Having said that, as the arbitrators are usually experts in the field in relation to the dispute and their awards are final and binding except that an appeal may sometimes be made on limited grounds, this means that prolonged multiple court appeal procedures can be avoided. And, thanks to the New York

Convention, arbitral awards are easily recognised and enforced in over 150 jurisdictions.

8. Mediation, on the other hand, is much more informal. A mediator will, however, through a structured process, assist the parties to identify their respective underlying needs and concerns with a view to facilitating them to negotiate a viable settlement. Although in some places, such as in Hong Kong, litigants sometimes participate in mediation only after taking into account the potential risks of an adverse court order on costs for failing to do so without reasonable grounds, it is still up to the parties to decide the issues to be addressed before making their own informed decisions whether or not to enter into any settlement which may best enhance their future interests.

9. Precisely because mediation is an interests-based method of dispute resolution, the parties who have complete freedom to explore any solution which may allow them to move on are not limited to remedies which are available through a rights-based method of dispute resolution, such as litigation or arbitration proceedings. And, it is also for this reason why, once a settlement can be reached, enforcement is rarely a problem although the settlement agreement is in any event binding and enforceable in the same manner as any other contract.

10. As good partnership, for example, cannot be measured by dollars and cents, mediation has proven to be a popular dispute resolution method as it is generally recognised that it can maintain business relationship more effectively than an adversarial process. It is for a good number of reasons why mediation is a welcomed choice, side by side with arbitration, as an efficient means to resolve disputes.

11. Moreover, since communication in the course of mediation is confidential and do not prejudice their respective rights in the event no agreement can be reached, the parties often benefit by having known better about themselves and their options even if their dispute remains not fully resolved. This is why Hong Kong finds it so important that the protection of mediation communications deserves statutory underpinning since the commencement of the operation of the Mediation Ordinance (Cap. 620) in 2013.

Hong Kong's Dispute Resolution Landscape

12. Speaking of legislation, both arbitration and mediation are underlaid by their own comprehensive statutory framework, setting the scene for Hong Kong's dispute resolution landscape. The two pieces of dedicated legislation are designed with how best parties can take full advantage of either method of dispute resolution in mind whilst at the same time without forgetting the possible interface between them.

13. In the context of arbitration, Hong Kong's first Arbitration Ordinance was enacted as early as in 1844. This really brings us back to those days when Lord Palmerston described Hong Kong as "a barren rock with hardly a house upon it". Although Hong Kong had been using its comprehensive Arbitration Ordinance (the then Cap. 341) since 1963, modelled after the English Arbitration Act 1950, we made the quantum leap five years ago in 2011 by re-vamping the whole statutory scheme with the aim of unifying our domestic and international arbitration regimes.

14. The current Arbitration Ordinance (Cap. 609) is based on the latest version of the UNCITRAL Model Law on International Commercial Arbitration which is familiar to the international business and arbitration community. Through this exercise, our arbitration law has become clearer, more certain and readily accessible to users and practitioners around the world.

15. As in the case for mediation, confidentiality in arbitral proceedings as well as court hearings related to them receives express statutory protection. The advantage of conducting arbitration in Hong Kong is, of course, not limited to this either.

16. It is one thing to devise an elaborate arbitral process which works outside the court process but it is quite another to weave that in with the court system which operates as a help rather than a hindrance to those who opt for arbitration in order to have their disputes resolved. This is why although minimum court intervention with arbitral proceedings is preferred or even revered, coercive measures in aid of arbitration in appropriate situations are welcome, if not essential.

17. Hong Kong is among the first jurisdictions in the world to strengthen the powers of its own courts and arbitral tribunals to make orders for interim measures of protection[1] to support arbitrations, as well as to provide for the enforcement of interim measures made by foreign courts or arbitral tribunals presiding over arbitral proceedings seated abroad.

18. Just about two years after our new Arbitration Ordinance had come into operation, it was amended in 2013 to allow Hong Kong courts to enforce relief granted by an emergency arbitrator, whether made in or outside of Hong Kong[2]. Such provisions complement the ICC Arbitration Rules 2012, the HKIAC Administered Arbitration Rules 2013[3] and later the CIETAC Arbitration Rules 2015[4]. To keep up with international practices, the Government has plans to introduce further amendments to the Arbitration Ordinance within this legislative year, the details to which I shall return in a moment.

19. Given the obvious importance of the enforceability of arbitral awards to anyone who considers the use of arbitration especially for the resolution of cross-border disputes, the HKSAR Government has taken active steps to enhance the enforcement network of arbitral awards made in Hong Kong. In this regard, to supplement the system of reciprocal enforcement of arbitral awards between contracting parties to the New York Convention, the HKSAR also entered separate arrangements with Mainland, China in 1999 and the Macao SAR in 2013 concerning reciprocal recognition and enforcement of arbitral awards with these two jurisdictions.

20. In line with international practices, parties to arbitrations in Hong Kong are free to choose arbitrators from anywhere in the world. There is also no restriction to engage lawyers from outside Hong Kong to advise or represent a party in arbitral proceedings. Without restrictions as to nationalities and professional qualifications, parties do have a large pool of multi-lingual and multi-national professionals from which to choose as advisers.

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1 See Section 35 (Article 17 of the UNCITRAL Model Law) and Section 45(2) to (10) of the Arbitration Ordinance (Cap. 609).

2 See Sections 22A and 22B, Cap. 609.

3 See Article 23, HKIAC Administrated Arbitration Rules 2013.

4 See Article 77(2), CIETAC Arbitration Rules 2015.

21. With the concerted efforts of both the Government on one part and the legal and arbitration sectors on the other, Hong Kong has been ranked by the users of international arbitration as the most preferred arbitration seat outside Europe (just after London and Paris) in the 2015 Queen Mary University of London survey. The same survey also shows that Hong Kong ranks third globally as the seat that the survey respondents or their organisations had used the most over the past five years.

22. Let me now turn to mediation the promotion and development of which Hong Kong is also committed to. The Mediation Ordinance not only protects, as I mentioned before, confidentiality, it also provides a regulatory framework for the conduct of mediation without affecting the flexibility of the process.

23. On accreditation of mediators, the Hong Kong Mediation Accreditation Association Limited (HKMAAL), a non-statutory, industry-led body was incorporated in August 2012 to regulate the standard and discipline of mediators in order to enhance public confidence in mediation services and maintain the standard of mediation. In the short time since its inception, over 2,000 general and family mediators[5] have already been accredited. In terms of cross-border mediation, the Mainland-Hong Kong Joint Mediation Center set up by the China Council for the Promotion of International Trade (CCPIT) and the Hong Kong Mediation Centre (HKMC) has been in operation for almost a year since its inauguration on 9 December 2015.

24. Further, in order to foster the continuous development of mediation in Hong Kong, the Secretary for Justice has set up a Steering Committee on Mediation comprising members from different sectors such as legal professionals, medical practitioners, academics, administrators, *et al*. The Steering Committee is assisted by a Regulatory Framework Sub-committee, an Accreditation Sub-committee and a Public Education and Publicity Sub-committee.

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[5] According to HKMAAL (as at 30 November 2016), there are 1,774 General Mediators, 238 Family Mediators and 51 Family Mediation Supervisors.

Importance of a Supportive Judiciary

25. One key underlying objective of Hong Kong's Civil Justice Reform implemented since April 2009 is "to facilitate the settlement of disputes"[6]. This is not some aspirational statement expected to be paid lip service but a guiding principle written into the rules of court, breach of which may be visited with an adverse costs order. The relevant court rules actually go on to ask judges to further the identified underlying objectives by active case management[7] which includes "encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure" and "helping the parties to settle the whole or part of the case".

26. The successful use of arbitration and mediation in Hong Kong owes a lot to the Judiciary's determination to enhance access to justice by fully recognising the need to improve the speed and cost-effectiveness of any form of dispute resolution and to better prioritise the deployment of valuable judicial resources.

27. It is against this background that in Hong Kong, the Judiciary encourages parties to resolve their commercial disputes through private dispute resolution processes. More specifically, the courts have been, on the one hand, taking a realistic approach to respect party autonomy by ordering a stay of proceedings in favour of an agreement to go for arbitration and, on the other, vigorously enforcing arbitral awards in line with the New York Convention requirements. In both situations, our first instance and appellate courts have consistently held that costs on an indemnity basis should be awarded against a party who made an unmeritorious challenge against the enforcement of an arbitral agreement or award[8].

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6 See O.1A, rule 1(e) of the Rules of the High Court (Cap. 4A).

7 See O.1A, rule 4(1) and (2)(e)&(f) of the Rules of the High Court (Cap. 4A).

8 See *American International Group and AIG Capital Corporation v. X Company*, HCCT 60/2015 (30 August 2016), applying *Gao Haiyan & Anor v. Keeneye Holdings Limited & Anor*, CACV 79/2011 (12 January 2012) at [12].

28. Many may agree from experience that the less judicial scrutiny to the arbitral process, the more arbitration-friendly the jurisdiction is said to be.[9] According to the Asia-Pacific Arbitration Review 2017 published by Global Arbitration Review, decisions handed down by Hong Kong courts in the past year (2015/2016) continue to reflect the Judiciary's strong pro-arbitration stance and robust approach to the enforcement of arbitral awards in Hong Kong[10].

29. This conclusion is well evidenced in a series of Hong Kong judgments.[11] Not only can one expect court proceedings to be stayed in favour of arbitration in the presence of a valid arbitration agreement, one may also have the comfort that the courts will pay deference to the wide discretion of arbitrators and the flexibility of the arbitral process. This non-interventionist approach is in fact an important reason why parties tend to regard Hong Kong as a preferred seat of international commercial arbitration.

30. As highlighted in the relevant chapters on Hong Kong in the 2016 and 2017 issues of the Asia-Pacific Arbitration Review, judgments handed down in Hong Kong over the past two years not only continue to reflect the city's robust Judiciary and its firm pro-arbitration stance, but they also help explain why Hong Kong is the prime go-to jurisdiction in the Asia-Pacific region for international commercial arbitration. For instance, in *KB v. S & Others*, HCCT 13/2015 (15 September 2015), the Court of First Instance laid down what some may more affectionately call the "ten commandments"[12] relevant to applications to set aside or resist enforcement of awards in Hong Kong. It was emphasised that enforcement of arbitral awards should be "*almost a matter of administrative procedure*" and the courts should be "*as mechanistic as possible.*"

31. On the mediation front, the Practice Direction on Mediation (PD 31) as promulgated to implement the Civil Justice Reform has become effective

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[9] Professor Anselmo Reyes, "*How to Be an Arbitrator: A Personal View":* "… commentators are accustomed to refer to states as 'arbitration friendly' or not, depending on the degree to which the Courts of that jurisdiction scrutinise awards before enforcing them. The more scrutiny there is, the less friendly the jurisdiction is said to be. …" at p. 142 – emphasis added.

[10] See Asia-Pacific Arbitration Review 2017, Global Arbitration Review at p. 46.

[11] *Chimbusco International Petroleum (Singapore) Pte Ltd v. Fully Best Trading Ltd*, HCA 2416/2014 (3 December 2015) and *Bluegold Investment Holdings Ltd v. Kwan Chun Fun* Calvin, HCA 1492/2015 (4 March 2016)

[12] Gavin Denton and Brian Lin Po Yen, "Hong Kong High Court's '10 commandments' on arbitration" in *China Business Law Journal* (3 December 2015)

since 2010 (with slight revisions in 2014). It gives detailed guidance to the parties in litigation regarding the steps to be taken leading to mediation. By serving as a clear reminder of the court's discretion to make an appropriate decision on costs, it also provides a strong incentive for the parties to seriously consider trying mediation. Litigants as well as potential litigants soon find out that it is always tactically advantageous and sensible for them to explore mediation early. This quickly brings about a change in litigation culture in Hong Kong because people soon realise the huge savings in terms of time and costs for everyone in the event of a successful mediation.

32. According to the statistics published by the Judiciary[13], the rate of settlement through mediation for cases in the Court of First Instance (which has unlimited jurisdiction for civil cases) has increased from 38% in 2011 to 46% in 2015. For the District Court (which basically has jurisdiction for claims up to HK$ 1 million), the rate has reached the region between 42% and 48% over the years. In my view, that the reform has so far been such a success is due as much to the vigilance with which the bench deals with those who go through mediation perfunctorily as to the usefulness of the Judiciary's Mediation Information Office and a dedicated mediation webpage to inform litigants.

Interface between Arbitration and Mediation

33. As regards the interplay between arbitration and mediation, one cannot afford to miss two sections in the Arbitration Ordinance which encourage the use of mediation-arbitration (Med-Arb) and arbitration-mediation (Arb-Med). Under section 33, an arbitrator, upon receiving the written consent of all the parties, is empowered to act as a mediator during the course of the arbitration. The arbitral proceedings must then be stayed to facilitate the mediation. The arbitrator wearing the mediator hat can, in that capacity, communicate with the parties jointly and individually during the mediation subject to an obligation to treat the information obtained from a party as confidential. If the mediation fails, the parties' rights to natural justice (or the rule against bias) are protected by requiring the arbitrator to disclose to the parties all confidential information obtained during the mediation that the arbitrator considered to be material. This provision is aimed at preventing a

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[13] See Mediation Figures & Statistics for Civil Justice Reform related cases, available at http://mediation.judiciary.gov.hk/en/figures_and_statistics.html.

party from mounting a challenge against an arbitral award solely on the ground that the arbitrator had previously acted as a mediator.

34. The Med-Arb procedure under section 32 of the Arbitration Ordinance, on the other hand, permits the parties who, having attempted mediation as required by the terms of an arbitration agreement but failed to reach settlement, submit their dispute for arbitration by the same person who had acted as mediator. This provision is intended to facilitate and encourage parties to make greater use of Med-Arb as an expeditious form of dispute resolution.

35. I hope I can be excused for carrying on this examination by following the order in which tomorrow's programme will study the interface between arbitration and mediation, namely:

(a) the contract negotiation stage;
(b) the dispute resolution stage; and
(c) the enforcement of awards / settlement stage.

(a) Contract Negotiation Stage

36. Panelists in ***Session One*** (to be moderated by Mr Andy Soh) will address the issues on drafting, negotiating and enforcing dispute resolution clauses, focusing on how best to tailor an ADR clause. As part of the dispute avoidance mechanism to save time and costs of litigation or arbitration, many commercial contracts nowadays include clauses that require disputes to be referred to negotiation between senior executives and/or mediation. These contractual provisions, sometimes referred to as "escalation clauses", "waterfall clauses" or "multi-tiered" dispute resolution clauses, lay down a number of different steps that parties agree to undertake before either of them may commence litigation or arbitration.

37. In some cases, the dispute resolution procedures as set out in these clauses are regarded as conditions precedent. For instance, the English Commercial Court decision in *Emirates Trading*[14] endorsed a clause requiring friendly discussions in good faith within a limited period of time before

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[14] *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2014 (Comm) (1 July 2014).

commencing arbitration. In the case of *DST Steel and Cladding*[15], it was held that the court had an inherent jurisdiction to stay a civil action in support of contractual dispute resolution procedure.

38. Very recently, the effect of this type of clauses becomes apparent from a Court of First Instance decision in Hong Kong. In *William Lim and Anor v. Hung Ka Hai Clement and Ors*, HCA 1282/2016 (24 August 2016), Madam Justice Mimmie Chan ordered a stay of court proceedings when the plaintiffs skipped certain escalation steps stipulated in a dispute resolution agreement. Properly drafted escalation clauses for dispute resolution require the parties to engage in a series of steps before resorting to litigation or arbitration. In her ladyship's judgment, the plaintiffs have not exhausted the dispute resolution procedure as stipulated in the shareholders' agreement to deal with the residual disputes between the parties. Failing to grasp the significance of a dispute resolution clause is especially costly in Hong Kong as the party who unsuccessfully challenged the validity of the same is likely, as was the case here, to bear the costs on an indemnity basis.

39. Therefore, a well-structured multi-tiered clause (especially in international construction contracts) can effectively deal with a range of conflicts with a minimum of disruption to the project. Structuring dispute resolution to a series of tiers also encourages early resolution of disputes with minimum hostility achieved by facilitating initial discussions in less adversarial settings. We are going to benefit from a panel of renowned arbitrators and legal experts giving us practical tips on the skillful drafting of multi-tiered dispute resolution clauses. In this way, non-binding processes (such as corporate executives' negotiation or settlement discussions, expert determination or early neutral evaluation and voluntary mediation) may precede a binding process of arbitration[16].

40. Well-crafted provisions for specific, clear and time-limited stepped processes (e.g. mediation and then arbitration) are more likely to be enforceable. This is very important because mediators are by training equipped to break impasse at early stages of conflict. It has been well acknowledged that "Even if the parties could not resolve their differences on substantive issues during the

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[15] *DST Steel and Cladding Ltd v Cubitt Building and Interiors Ltd* [2007] EWHC 1584 (TCC).

[16] See *"Promoting Peace Before Conflict: Integrating Alternative Methods of Dispute Resolution into the Arbitration Process"* by John M. Townsend in *Arbitration Advocacy in Changing Times* (2011) (General Editor: Albert Jan Van Den Berg) at pp. 35-37.

mediation process, mediators may nevertheless facilitate agreements on dispute resolution process elements and help parties set the stage for arbitral proceedings with features that are effectively tailored to the issues at hand."[17]

(b) Dispute Resolution Stage

41. Panelists in ***Session Two*** (to be moderated by Mr Jawad Sarwana) will discuss the interplay of mediation with arbitration in the pursuit of justice. Under ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration[18], the arbitral tribunal should promote settlement by informing the parties that they are at liberty to settle all or part of the disputes at any time during the course of the on-going arbitration. Parties may also request the arbitral tribunal to suspend the arbitration proceedings for a specific period of time while settlement discussions (including direct negotiations or any form of ADR proceedings under the ICC ADR Rules) take place.

42. Arbitrators do sometimes play a part to facilitate mediation and thereby encouraging amicable settlement or preserving a long-term relationship instead of imposing a decision against parties' wishes. In the case of *Gao Haiyan*[19], the Hong Kong Court of Appeal allowed the enforcement of a Mainland arbitral award and found no apparent bias in the med-arb process. In assessing whether a failed mediation process resulted in apparent bias on the part of an arbitrator who had been involved in it, Mr Justice Tang, V-P (as he then was), giving the judgment of the Court of Appeal, recognised the culture of the parties and the practice that was normally accepted in Xi'an which was the seat of the arbitration in that case.[20] In fact, a post-award challenge before the Xi'an Intermediate People's Court of Shaanxi was rejected.

43. This is despite the fact that a different perception of impartiality may pertain in a common law jurisdiction such as the USA. There, both judges and arbitrators are expected to confine themselves to adjudicating the dispute, and are not expected to suggest or facilitate consensual solutions. American arbitrators

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[17] See *"Managing Construction Conflict – Unfinished Revolution, Continuing Evolution"* by Thomas J Stipanowich in *Defining Issues in International Arbitration* edited by Julio Cesar Betancourt (Oxford University Press 2016) at pp. 411 to 413.

[18] See Clause 43, ICC Techniques for Controlling Time and Costs in Arbitration (Appendix 4.3).

[19] *Gao Haiyan & Anor v. Keeneye Holdings Limited & Anor*, CACV 79/2011 (12 Jan 2012).

[20] *"The Proper Use of Med-Arb in the Resolution of International Disputes"* by Alexis Mourre, ICC International Court of Arbitration (Paris) in Asian Dispute Review [2016] (April 2016 issue) at pp. 94 to 99.

may offer to adjust the arbitration schedule to accommodate an effort to mediate but taking further steps from the role of deciding fairly the issue presented for arbitration may put the enforceability of the ultimate award at risk and thus causing the parties to lose confidence in the neutrality of the arbitrator.[21]

44. It is perhaps important to bear in mind that the party seeking to set aside the award in Xi'an and resisting its enforcement in Hong Kong in this case did not make any complaint when the arbitral process resumed before the arbitral tribunal immediately after the mediation attempt had failed. This may leave one to wonder whether the Court of Appeal would have still enforced the award had any of the parties before the arbitral tribunal taken the point that one of the arbitrators was involved in the abortive mediation but was overruled by it. A party in an invidious position who does not wish to risk antagonising the arbitrator may not receive the sympathy of the court[22].

45. It is therefore useful to bear in mind any *indicia* of bias, actual or perceived. Potential grounds of challenge against an arbitrator-mediator include accusations of pre-judging or pre-determination of the outcome when an arbitrator expresses a preliminary view on the merits of a case in evaluative mediation process. *Ex parte* communication in private caucusing session may offend the overriding arbitral obligations to provide for equal treatment and reasonable opportunity for each party to present its case.

46. Moreover, problems may also arise as to whether the release of confidential materials to an arbitrator-mediator would constitute waiver in relation to its admissibility at a subsequent arbitral hearing.[23] Once an arbitrator in his/her dual role as arbitrator and mediator has seen the privileged documents obtained during the mediation, it will be very difficult to disregard them completely. This again may create a basis for challenge.

47. Suggestions to resolve these problems include drawing reference to only those documents that are already in the record, with no additional submission of documents during mediation; avoiding *ex parte* caucusing with the

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[21] See footnote 16 (above).

[22] Cf. *Hebei Import & Export Corp v Polytek Engineering Co Ltd*, FACV 10/1998 (9 February 1999).

[23] *"Optimizing the Use of Mediation in International Arbitration: A Cost-Benefit Analysis of 'Two Hat' Versus 'Two People' Models"* by Jeffrey Waincymer in *Defining Issues in International Arbitration* (Oxford University Press 2016) at pp. 305 to 316.

parties in accordance with the IBA Guidelines on Party Representation in International Arbitration 2013[24] and parallel processes with mediation dealing with less important issues or gateway issues that would in due course streamline the arbitration and minimise operation time. It can also protect the arbitrator from accusations of bias where there is any evaluative discussion[25]. Indeed, the flexibility in ICC Mediation Rules and ICC Rules of Arbitration allow parties to attempt different combinations of mediation and arbitration.

48. So long as the inherent risks of combining mediation and arbitration are borne in mind and arbitral tribunals adopt precautionary procedures to avoid potential challenges to their appointments or the resulting awards, Arb-Med can be a useful tool to help resolve disputes. We all look forward to the discussions in ***Session Three*** (to be moderated by Mr Gaëtan Verhoosel) in finding out more about a variety of issues in this connection.

(c) Enforcement of Awards/ Settlement Stage

49. ***Session Four*** (to be moderated by Dr Jil Ahdab) will be about the enforcement of mediated settlement agreements in cross-border trade or investment arbitrations under an international treaty analogous to the New York Convention.

50. Given that mediation is a comparatively less expensive, procedurally uncomplicated, quick, voluntary, consensual and effective process, it can provide a valuable dispute resolution tool either as an independent process in its own right or otherwise as an element in managing a litigation or arbitration process. The UNCITRAL Working Group II on international enforcement of settlement agreements reached through mediation and conciliation has considered issues, amongst others, the requirements as to the form of settlement agreements that would fall within the scope of the instrument and defences to recognition and enforcement, etc.[26] I am sure that many of us will follow the development of this important project with considerable interest.

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[24] Guidelines 7 and 8, IBA Guidelines on Party Representation in International Arbitration

[25] See footnote 23 (above), conclusion section

[26] *"Conciliation and Mediation of International Commercial Disputes in Asia and UNCITRAL's Working Group on the International Enforcement of Settlement Agreements"* by Kim M Rooney in Asian Dispute Review (October 2016 issue).

Future Development of Dispute Resolution Services for Hong Kong

51. Looking ahead, Hong Kong will not be sitting on our laurels. In fact, we will seek to capitalise on the *"Outline of the 13th Five-Year Plan for the National Economic and Social Development of the People's Republic of China"*, promulgated by the Central People's Government this March. Its dedicated chapter on Hong Kong and Macao expressly (a) supports Hong Kong in developing as a centre for international legal and dispute resolution services in the Asia-Pacific region and (b) encourages Hong Kong's participating in the "Belt and Road" Initiative covering some 60 countries along the Silk Road Economic Belt and the 21st Century Maritime Silk Road. In embracing these opportunities, the HKSAR Government will spearhead the following reforms and projects so that Hong Kong will not be found wanting in anticipation of the demand for dispute resolution services.

(a) Arbitrability of Disputes over Intellectual Property (IP) Rights

52. To strengthen Hong Kong's status as a leading international forum for legal services and dispute resolution centre and with the recent surge in IP transactions and disputes, the Government gives its full support to the development of specialised areas of arbitration, for example IP arbitration.

53. Our home-grown arbitral institution, the HKIAC has just recently set up a new Panel of Arbitrators for IP disputes with experienced arbitrators from more than 10 jurisdictions[27]. Hong Kong's capability in handling IP arbitration is self-evident and in order to improve the legal framework and set up the necessary infrastructure for speedy and effective resolution of IP disputes, an amendment bill will be gazetted tomorrow with a view for introduction to the Legislative Council on 14 December 2016.

54. The Arbitration (Amendment) Bill 2016[28] seeks clarify that disputes relating to IP rights are capable of being resolved by arbitration and it would not be contrary to public policy to enforce an arbitral award solely because an award is in respect of a dispute or matter which relates to IP rights.

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[27] They include Australia, Brazil, Mainland China, France, Germany, Hong Kong, India, New Zealand, Nigeria, Portugal, Singapore, South Korea, Switzerland, United Kingdom and United States.

[28] See press release at: http://www.info.gov.hk/gia/general/201611/30/P2016113000326.htm.

(b) Third Party Funding for Arbitration

55. The legality or otherwise of third party funding is in sharp focus for users and practitioners of international arbitration. Parties who are considering whether to resolve their disputes by arbitration may take into account the potential financing options available to them in conducting such arbitrations. Parties may wish to obtain third party funding as a form of financing for the efficient allocation and management of their financial resources. Accordingly, clarity and certainty of the law allowing third party funding in arbitration is essential as it is not allowed for court proceedings under Hong Kong's common law.

56. In 2013, the Third Party Funding for Arbitration Sub-committee established under our Law Reform Commission conducted a review of our law and analysed the legal regimes for third party funding in a number of common law and civil law jurisdictions.

57. The Final Report published last month recommends that the Arbitration Ordinance should be amended to expressly allow for third party funding and that the common law doctrines of maintenance and champerty (both as a tort and as a criminal offence) do not apply to arbitration. The proposed legislative amendments would also apply to services provided in Hong Kong for arbitrations taking place outside Hong Kong. The Government welcomes the recommendations and is taking serious steps to procure support from the legislature to enact the necessary amendments within this legislative year.

(c) Use of evaluative mediation and apology legislation

58. Mediation has been growing and developing in Hong Kong for more than 20 years. Looking ahead, we believe that mediation should be promoted with an emphasis on professionalism, specialisation, integration and internationalisation. To maximise the potential of mediation, we may further explore how mediation can best fit into the overall landscape and interact constructively with other means of dispute resolution. Collaboration and co-operation between different mediation organisations, regardless of where they are from, will enhance cross-fertilisation and thereby generate synergy for the development of mediation.

59. The Steering Committee on Mediation I mentioned previously has been taking the lead in implementing initiatives in the promotion of wider use of mediation to resolve disputes, including cross-border disputes, particularly in the IP, commercial and medical sectors as well as within the local community generally.

60. To enhance the use of mediation, Hong Kong is currently exploring the possible use of evaluative, in addition to the traditional facilitative, approach, for example, to resolve IP disputes. Evaluative mediation involves the neutral expression of views on the merits of the case or on the appropriateness of settlement offers. Our aim is to provide more choices for the end-users so that mediation will be put to its best possible use.

61. Experience shows that the making of timely apologies often facilitates amicable settlement of disputes and reduces hostile litigation. In order to encourage this, the Department of Justice has proposed the enactment of apology legislation for Hong Kong and two rounds of public consultation have taken place after extensive research and study. It is expected that an apology bill can soon be introduced.

62. The series of recently proposed legislative changes would enable Hong Kong's arbitration regime to stay at the forefront amongst Model Law jurisdictions and ensure that the latest developments in the international arbitration and mediation sectors can be promptly reflected in our laws.

Concluding Remarks

63. Although arbitration and mediation are obviously different methods, both actually set out to resolve disputes efficiently and effectively. There is no reason why the international dispute resolution community should not put our heads together to make them good partners to each other.

64. Speaking for myself, I would liken a close partnership between arbitration and mediation to an essentially Asian solution to picking up food at dinners – chopsticks! It may be a little bit difficult, even uneasy, to begin with

but once you have mastered the skills, you wish you had acquired them earlier than you did.

65. With the list of eminent moderators and panellists, I am sure that the exchange of views, which I am sure has already begun, will be as enlightening as it is fruitful in understanding this new partnership. On this note, it remains for me to wish this conference every success.

66. Thank you.

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