

SJ's Speech at ceremonial opening of the Legal Year 2012

\*\*\*\*\*

Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the Ceremonial Opening of the Legal Year 2012 today (January 9):

Chief Justice, Chairman of the Bar Association, President of the Law Society, Members of the Judiciary, Distinguished Guests, Ladies and Gentlemen,

I was speaking at the commemoration of the 50th Anniversary of the Apostille Convention in the historic and glamorous Ministry of Justice building in Paris last October. Hong Kong has been subscribing to this Hague Convention, using the Apostilles for over 40 years, while the Convention is not yet applicable to the Mainland. I used that opportunity to appeal for support of Hong Kong's collaboration with the Permanent Bureau of the Hague Conference on Private International Law to set up a regional office here. The Secretary General wrote back to say many participants of the event were impressed by Hong Kong's example and potential.

That caused me to ponder anew where Hong Kong stands in the world today from the legal, historical, international and strategic perspectives, and to think harder as to what bigger agenda we should contemplate as the HKSAR moves towards the 15 year mark since the Reunification. Plainly, as affirmed by all international rating agencies, the continual upholding of the rule of law will ensure our competitive edge as the only common law jurisdiction within China under the new constitutional order, and maximise our strength as a leading international financial centre, the world's freest and most competitive economy, commanding confidence of both local people and international investors alike.

The common law is not static. The operation of the common law under the new constitutional order was put to test in the case of Democratic Republic of the Congo & Ors v. FG

Hemisphere Associates LLC (FACV 5-7/2010). The majority of the Court of Final Appeal (CFA) ruled last year that, as a matter of common law, it is not open to the courts of the HKSAR to adopt a legal doctrine of state immunity in respect of foreign states which is different from the principled position of the People's Republic of China.

For the first time the CFA also invoked the mechanism provided under Article 158(3) to refer the relevant provisions of the Basic Law to the Standing Committee of the National People's Congress for interpretation. The CFA affirmed its constitutional duty to make such a reference once the relevant conditions are satisfied.

The issues raised in this landmark case are difficult and the judgment was not unanimous. The case, however, illustrates the readiness of our highest court to discharge its duty and to faithfully apply the common law in an unprecedented constitutional setting. Important decisions such as the Congo judgment put flesh on the skeleton, and play the important role of deepening our constitutional law jurisprudence towards greater maturity.

Following the judgment, questions have been raised on the enforceability of arbitral awards in Hong Kong. Views such as those suggesting that Mainland state-owned enterprises stand to enjoy absolute immunity in Hong Kong by virtue of this decision are misconceived, as a Mainland state-owned enterprise is simply not an entity of a foreign state. Further, the fact is arbitration cases affecting foreign states are few in Hong Kong, and legislation has been introduced or enacted in jurisdictions such as the UK and the US to curb activities of buying and enforcing sovereign debts incurred by developing countries. In any event, parties are now better placed to organise their affairs when the law has been put beyond doubt.

On the other hand, regarding the development of

international arbitration, 2011 has certainly been a landmark year in the most positive sense. On June 1, not only did the new paradigm-changing Arbitration Ordinance come into operation, but the Government had also announced that substantial additional office space would be made available to the Hong Kong International Arbitration Centre (HKIAC) to enhance its hearing capacity. The HKIAC will be able to operate from the entire floor of its current address in Two Exchange Square, with the total floor space of over 1 200 square metres, doubling the size of the present establishment. The commitment of the HKSAR Government to support international arbitrations is both firm and deliverable.

The potential of international arbitration business is further boosted by the exciting project being pursued in Qianhai, Shenzhen. Following Vice-Premier Li Keqiang's indication of support for the provision of services in Qianhai by Hong Kong arbitration bodies last August, I led a delegation comprising legal and arbitration professionals to Shenzhen for a useful discussion with the Shenzhen authorities. It precipitated the signing of a "Co-operative Arrangement on Legal Matters" in November with the Shenzhen Municipal Government, which would facilitate the early implementation of new pilot measures and benefit the long term development of Qianhai and of our legal and arbitration professions. There are high hopes for the Qianhai project including the use of Hong Kong law to resolve commercial disputes. I appeal to the legal professionals not only to be proactive but also to look at the bigger and longer-term picture as they prepare themselves for this potentially ground-breaking venture.

Work on the other head of ADR has not stopped. We introduced the Mediation Bill into the Legislative Council in November last year, which is aimed at providing a statutory framework to conduct mediation in Hong Kong regulating important issues such as confidentiality and admissibility of evidence. We believe such a framework is urgently needed

in view of the wider use of mediation since the introduction of Practice Direction 31 in 2010.

Accreditation of mediators is undoubtedly crucial. However, no consensus has yet been reached among the stakeholders to allow a statutory regime to be set up. The Mediation Task Force is actively working with the various service providers on the structure of a non-statutory industry led accreditation body for mediators in Hong Kong. It is hoped that this will be a forerunner of a more universally accepted statutory body to come. I appeal to the stakeholders to look at the wider public interest for such a body to be set up, which will provide the most solid foundation for the healthy development of mediation in Hong Kong.

Working together for the common good is also the spirit on the criminal justice side. Last February, the Prosecutions Division of my Department jointly organised a training programme with the Bar Association and the Law Society providing a one-day seminar for young lawyers with less than 5 years' experience on legal knowledge and techniques in prosecution. Upon attending the seminar, the lawyers were engaged for two weeks to prosecute on fiat in the Magistrates' Courts to enhance and consolidate their skills. The programme would be conducted twice a year. It has been very well received indeed.

The significance of equipping practitioners goes beyond providing my Department with quality prosecution service. It has the longer term effect of strengthening the criminal law practice and thereby underpinning the criminal justice system which is a cardinal part of the administration of justice.

The collaborative spirit with the legal fraternity does not stop there. On the legislation side, we are still working hard and discussing hard with the Law Society on the Legal Practitioners (Amendment) Bill 2010 to enable solicitors to practise as limited liability partnership. It is also our

intention to bring the legislation on solicitor corporation into operation after the Law Society has completed the preparation of the relevant rules. On the progress of the higher rights of audience for solicitors, thanks to the efforts of the Assessment Board, we expect the Higher Rights of Audience Rules will be laid before the Legislative Council within this legislative session.

We also maintain an active dialogue with the Bar and the Law Society to address matters of common interest such as jury trials and the reform of hearsay evidence in criminal matters.

The reform of the hearsay rule is based on a Report of the Law Reform Commission (LRC). Last year I spoke on the importance of the implementation of LRC reports within a reasonable time. I am pleased to report that in October last year the Administration issued a set of guidelines whereby responsible bureaus or departments will have to provide public responses to the LRC reports under their purview within specific time limits. Briefly, at least an interim response should be provided within six months of the publication of the report, setting out a clear timetable for completion of the detailed response and the steps taken so far, and a detailed public response should be provided within 12 months of a report's publication, unless otherwise agreed by the Chairman of the LRC.

Furthermore, a number of LRC reports have been actively followed up in the past year. For example, the Guardianship of Minors (Amendment) Bill 2011, implementing the LRC proposal, received its first reading in June last year, and the second reading debate will resume this week. The sexual offence conviction records checking scheme, which was based on the LRC proposal, started operating since December 1 last year. This was followed by the passing of the Enduring Powers of Attorney (Amendment) Bill 2011 which again was based on the LRC's recommendation. Further still, consultation on stalking and joint parental responsibility, both subjects of

LRC reports, commenced also last December.

While on the subject of law reform and new legislation, I should add that this month sees the publication by the Law Drafting Division of my Department of a Guide to the Styles and Practices used by colleagues in the Division in drafting legislation. It is being published in hard copy format and may also be downloaded from the Departmental website. I am confident that all users of legislation in Hong Kong will find this informative and practical Guide invaluable in understanding the considerations that go into the design and writing of legislation.

As we look back at 2011, a number of court decisions stood out attracting widespread public attention. Judicial decisions are of course not above criticism. There is no shortage of harsh attacks on individual judgments in law journals. Decisions touching on important matters of public interest understandably attract comments, favourable or adverse, in the media and other public arenas.

However, judicial decisions (and for that purpose I also count prosecution decisions and legal opinions rendered by all legal practitioners) must be independent and impartial and must not be dictated by public opinion or convenience. While we have every confidence in our judges discharging their duties in accordance with the judicial oath, as we exercise our right to freedom of expression, we could help strengthen judicial independence by carefully preserving an environment where judges may decide cases strictly in accordance with the evidence and the law, free from any extraneous considerations as well as improper influences or pressure, direct or indirect, even though the judgment may result in serious consequences for the community as a whole. Of course, for any decision and opinion to be right, the objective status, values and aspirations of the society in which the law operates should also be considered.

Controversial legal issues abound. The debates and the resolution of them hopefully will lead to greater knowledge and deeper insight. Lawyers do disagree among themselves. And so do Judges. Thus judgments got overturned on appeal and appellate judges do dissent at times. However, what is important is that, while we may disagree on the contents of the law, we concur on the important principle that "the law is the law, come what may". That is also the spirit pervading the opening of the legal year.

The world and our society move on. Many familiar ideas, legal norms or "givens" are being challenged today. How to ensure the law also moves on to provide justice, fairness, protection, balance, service and incentive to the community of Hong Kong amidst rapid globalisation and economic integration with the Mainland, and yet not compromising on the substance of the Basic Law or the core values of our common law system, is the challenge for all of us - not just those involved in the administration of justice but the community at large.

Chief Justice, it only remains for me to wish you and other members of the Judiciary good health and fulfillment in the New Year.

Ends/Monday, January 9, 2012