

**Speech by the Hon Wong Yan Lung, SC JP  
Secretary for Justice,  
at the Luncheon of  
Asia Pacific Regional Arbitration Group Conference 2006  
on Tuesday, 5 December 2006**

**Dispute Resolution**

Ladies and Gentlemen,

I am conscious that you have a very tight schedule and the last thing I want to do is to cause you any indigestion by my speech. First of all, for those of you who are visiting from the Mainland and overseas, may I extend to you our warmest welcome. Weather-wise, you could not have chosen a better time. But accommodation-wise, it must have been a little bit hectic to arrange when your conference clashes with the ITU Telecom World 2006.

2. Talking about indigestion, I have to confess I am in the high-risk category, as there are constantly too much on my plate, filled with a bewildering array of issues – ranging from questions of fundamental constitutional importance, to decisions on the office Christmas party.

3. One issue that has repeatedly come before me, in many different forms, is how to provide better ways to resolve disputes. Arbitration is one of the options, and this conference provides an excellent forum for you to explore ways to make arbitration even more attractive.

4. But there are, of course, other ways. Apart from the main-stream formal court system of civil justice, mediation and other forms of ‘alternative dispute resolution’ (or ADR) are also becoming more and more important.

5. In the next 10 to 15 minutes, I would like to share with you some steps Hong Kong is taking to improve on the various methods of dispute resolution.

## I. THE COURT SYSTEM

### Civil Justice Reform

6. No doubt in a conference such as the present one, delegates will be advocating the merits of arbitration and other ADRs. However, one should not forget that in Hong Kong we in fact have one of the best judicial systems in the region, which plays a cardinal role in dispute resolution.

7. According to the survey on “Confidence in Asian Judicial Systems” conducted by the Political and Economic Risk Consultancy Ltd. published on 19 July this year, Hong Kong’s grade is 1.55 in the 10 grade range with zero being the best grade possible and 10 the worst. This is the best grade obtained among the Asian Judicial Systems. 1.55 is only second to that of Australia which is 1.35, but better than that of the US which is 1.83.

8. However, as in other countries, concerns have been raised about the cost-effectiveness, complexity and delays involved in litigation. In 2000, the Chief Justice appointed a working party to review the civil rules and procedures of the High Court, and to recommend changes with a view to improving access to justice at reasonable cost and speed.

9. The report of that working party, published in March 2004, contained 150 recommendations. Many of those were inspired by the Woolf reforms in the UK. Recommendations that would be of particular interest to users of international arbitrations include amendment to the High Court Ordinance making it clear that Mareva injunction can be sought in aid of foreign proceedings and arbitrations as an independent, freestanding form of relief, without having to commence fresh proceedings in Hong Kong.

10. Following the publication of the report, a Steering Committee was set up to oversee the implementation of the reform. That Steering Committee issued a consultation paper in April 2006 to seek views. The consultation

period has expired in July 2006, and responses are now being considered by the Steering Committee.

11. The process of reform must, of necessity, take some time but, in due course, I have no doubt that our system of civil justice will be significantly improved.

12. In short, the Courts are becoming more user-friendly. The reforms within the formal judicial system do remind me of the efforts taken by the Hongkong Post Office in recent years to improve and diversify its services. Faced with intense competition from courier service providers and e-mails in recent years, our Hongkong Post managed to break new grounds beyond the traditional postal services into new and innovative business areas such as inventory management, logistics and electronic post, etc. In devising a strategy that meets the ever changing needs and aspirations of the public it serves, the Post has been very successful not only in maintaining a strong local foothold, but also developing a wide global reach in its lines of business.

### **Conditional fees**

13. We have also made other endeavours to tackle the problems of hefty legal costs and access to justice from within the judicial system.

14. In Hong Kong we have a well-established legal aid system. However, no system of legal aid can cover everyone. One possible way to help those who cannot afford a lawyer and may not be eligible for legal aid is through a system of conditional fees – the so-called ‘no win, no fee’ system.

15. Hong Kong does not currently permit such arrangements, but our Law Reform Commission has issued a consultation paper suggesting that this be changed. It does not recommend the American-style contingency fee system, under which the lawyer for a successful litigant receives a percentage of the damages. It does, however, recommend that, in specified class of cases, the

lawyers be permitted to charge a slightly higher fee than normal for accepting the risk of receiving no fee if the case is lost.

16. The consultation exercise in respect of this recommendation has now been completed and the Law Reform Commission is considering the submissions received. It is too early to say whether or not its final report will make a positive recommendation on the introduction of conditional fees. However, I am sure that both the legal profession and the community at large are awaiting that report with great interest.

### **Reciprocal enforcement of judgments**

17. I cannot leave the subject of dispute resolutions within the judicial system, without mentioning the expansion on reciprocal enforcement of judgments with other jurisdictions.

18. Of course, in deciding which method of dispute resolution to use, a key issue is how effective can one enforce the decision in a jurisdiction where the assets are located. This is particularly relevant in Hong Kong where so many disputes involve parties who have assets in another jurisdiction, often the Mainland.

19. At present, enforcement of Hong Kong court judgments in many jurisdictions is not a straight forward matter at all. However, work is in hand to improve the situation in two respects.

20. First, Hong Kong participated, as part of the PRC delegation, in discussions on the Hague Convention on Choice of Court Agreements. This led to the conclusion last year of a multilateral convention. The convention, when implemented, will enable litigants to enforce judgments obtained in the court of one state party, on the basis of a choice of court agreement, in the courts of other state parties. Consultation will commence soon to ascertain the level of support for such a regime. If and when the PRC ratifies the convention, and extends it to Hong Kong, this will be a major step forward.

21. Secondly, and more immediately, the Department of Justice is preparing a Bill to implement an arrangement, signed in July this year, for the reciprocal enforcement of certain commercial judgments as between Hong Kong and the Mainland. This arrangement applies to money judgments, given by designated courts of Hong Kong or the Mainland when exercising their jurisdiction pursuant to a valid exclusive choice of court clause, contained in a business-to-business agreement.

22. This will mean, for example, that a Mainland judgment will be enforceable in Hong Kong if the judgment arises from a business contract which provided that the Mainland courts were to have exclusive jurisdiction over contractual disputes. The designated courts of the Mainland are the Intermediate People's Courts or above, and those Basic Level People's Courts authorized to exercise jurisdiction over foreign-related civil and commercial cases.

23. We believe that this will add to Hong Kong's attractiveness as an international dispute resolution centre. We will be promoting this development, and encouraging businessmen who are investing in the Mainland to provide in their contracts that disputes are to be resolved only by the courts in Hong Kong. In this way, they will be able to enforce any resultant money judgment in the Mainland.

## II. ARBITRATION

24. So much for developments in respect of litigation in Hong Kong courts. Let me now turn to **arbitration** [which is of course the real beginning of this speech!]. No, don't worry. Of course you do not need me to tell you anything about arbitration. You are the experts.

25. Nor do I think Mr. Philip Yang and Mr. Christopher To will forgive if I were to repeat my speech on arbitration delivered at the Arbitration Conference one year ago at another hotel.

26. However, I would just like to use this opportunity to pay tribute to the Hong Kong International Arbitration Centre (“HKIAC”) for their great efforts in promoting Hong Kong as a leading regional centre for arbitration. Let me assure you that when I was on official visits to the USA in September earlier, I did actively perform the role as the HKIAC’s promotion agent, without charge.

27. In April 2005, and with a view to assisting the Mainland companies, the HKIAC adopted institutionalised rules for arbitration. Contracting parties who wish to operate under those procedures can provide for this in their contract. If a dispute then arises, the HKIAC will administer the arbitration, and will assist the parties in handling various issues that need to be resolved with the arbitrator.

28. Another on-going effort is the reform in Hong Kong’s arbitration law. Following a report, prepared by the Committee on Hong Kong Arbitration Law, proposing that the law should be simplified by applying the UNCITRAL Model Law to all types of arbitration, my department set up a working group in September 2005 to consider and take forward this proposal. Representatives of the legal profession, arbitration experts and others were appointed to the working group, which is expected to publish a consultation paper and draft Bill next year.

29. I hope that many of you here today will comment on that draft, so that the Bill which is eventually promoted for enactment can be as attractive and user-friendly as possible.

### **III. MEDIATION**

30. I now would like to spend a little time on mediation. Again, you all know the benefits of mediation: a win/win solution, the preservation of a relationship, and a relatively quick and inexpensive procedure.

31. Mediation is not new in Hong Kong. The construction industry has been relying on it for some time. All the Government construction contracts now contain a mediation clause.

32. However, it is true that in Hong Kong, mediation has not yet developed in popularity to the extent it has in some other places. There is still scepticism, even among legal practitioners, on its effectiveness.

33. The Hong Kong Mediation Council (“HKMC”), a division of the HKIAC, together with other institutions and individuals, has been actively promoting mediation as a means of dispute resolution to the Hong Kong community. In 2003, the HKMC had launched two pilot schemes to promote mediation in specific sectors. First, free mediation service was provided for construction disputes not exceeding HK\$2 million in value. Second, low cost mediation service was provided for insurance disputes below HK\$2 million in value.

34. HKMC has also provided support to the Pilot Scheme on Family Mediation which was introduced by the Judiciary in 2000. Of the 844 mediation cases under that scheme, 69.3% reached full settlement, while 9.8% reached partial settlement. These figures are encouraging, and suggest that mediation has an increasing role to play in resolving certain types of dispute.

35. Speaking of the Hong Kong Judiciary, they are in fact actively exploring how mediation can be made part of the civil justice system. A working party has just been set up in that connection. Further, the final report on Civil Justice Reform contained a number of recommendations on mediation.

36. For example, the report proposed that the Legal Aid Department should have power in suitable cases to limit its initial funding of persons who qualify for legal aid to the funding of mediation. Even before the reform is fully implemented by legislation, the recommendation is being tried out in a pilot scheme for mediation in matrimonial disputes.

37. Secondly, the final report also recommended that the courts should be able to deprive a winning party of costs because of an unreasonable refusal of mediation. Similarly, this recommendation has already been partially implemented in a mediation pilot scheme in construction cases.

38. I believe there is a need for Hong Kong to actively develop mediation. We are taking stock on the results of the numerous pilot schemes. In fact, apart from construction, insurance and family disputes, there is much to be said for mediation to apply in other contexts such as building management disputes and other non-commercial disputes between individuals in the community.

39. There are, as you know, countless disputes within the community that will never reach the courts. A socio-legal study in the UK revealed that the vast majority of those who encounter a justiciable dispute never see a lawyer, let alone getting involved in litigation. Also, the number of unrepresented litigants has grown significantly in recent years, partly due to greater use of Chinese in court. My department has commissioned consultants to conduct a similar study in Hong Kong. Although the results of that study will not be known until next year, it is likely that a similar pattern will emerge.

40. Access to justice should not be equated with access to the courts. It may well not be cost-effective or appropriate to try to channel relatively small disputes to the courts, or even to tribunals. But studies show that if these disputes are not satisfactorily resolved, they can escalate into bigger problems that are costly to the individuals involved and to the community. I will therefore be particularly interested to see if “community mediation” can provide a real alternative in Hong Kong.

41. There is I believe a need for more concerted efforts to be made in terms of streamlining training, accreditation, and promoting awareness in mediation in Hong Kong. The Department of Justice is now in the process of liaising with various stakeholders as to how we can take mediation further in Hong Kong.



#### IV. CONCLUSION

42. Ladies and gentlemen, in a conference like the present one, it is natural to compare the different ways of resolving disputes as if they were “competing products”. That analogy has some merit, but it does not tell the whole story. Dispute resolution is not simply a product to be sold – it is an essential feature of access to justice.

43. Market forces may influence those who can afford dispute resolution services to choose one particular form over another. And they may influence the government, insurance companies and others who finance certain types of dispute resolution, to fund the most cost-effective form.

44. But it is unlikely that market forces will ensure that everyone with a dispute has access to a reliable form of dispute resolution. Fortunately, Hong Kong has a large and active body of NGOs who provide voluntary services. Many of these are increasingly resorting to mediation to resolve community problems. The challenge ahead is to ensure that, through a combination of market forces, government action, and volunteer work, there is access to justice for all.

45. Meanwhile, I whole-heartedly commend the HKIAC for organizing this regional arbitration group conference. The conference provides an excellent forum in which experts from around the Asia-Pacific region can share their experiences. It only remains for me to wish you all a successful and fruitful conference and, for those who are visiting, a very rewarding and enjoyable stay here in Hong Kong.

46. Thank you very much.