Speech by the Hon Rimsky Yuen, SC, JP
Secretary for Justice of the Hong Kong SAR
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Members of the Practising Law Institute, Distinguished Guests, Ladies and Gentlemen,

1. First of all, thank you very much for inviting me to this event, and for giving me the opportunity to address such a distinguished audience. Since the Hong Kong SAR ("Hong Kong") is an international financial centre, the importance of corporate and securities law is blatantly obvious both for the purpose of maintaining Hong Kong's status as an international financial centre as well as Hong Kong's overall competitiveness.

2. The ultimate purpose of any law is to serve the community, whether domestically or internationally. Hence, the contents of law and any law reform cannot and should not be made in a vacuum. Instead, any legislation and legal rules should closely follow the social (if not international) development so as to meet the needs of the community. Besides, as an international city, the laws of Hong Kong should seek to stay in the forefront of international development.

3. May I therefore express my gratitude to the Practising Law Institute ("PLI") for organizing this event, which I am sure provides an effective platform for experts, practitioners and members of the academia to exchange views and share experience in areas of corporate and securities law which are of

interest to the legal profession and indeed the community as a whole. Needless to say, my thanks also go to Freshfields for acting as the sponsor and for bringing this important event to Hong Kong.

4. Today, I choose the topic of "***Future Directions of Corporate and Securities Law: Some Thoughts from the Legal Policy Perspective***". This, admittedly, is a big topic, since corporate and securities law cover many different forms of commercial activities as well as an extensive array of legal issues. Besides, I do not have a crystal ball, nor am I an expert in the study of horoscope. So, what I intend to do is to focus on the impact brought about by the trends of globalization, regional integration and advance of technology, and to consider their impact on the law from from the legal policy perspectives with special reference, where appropriate, to corporate and securities law. The views expressed, if I may stress, are my personal views and the aim is to invite comments so that the relevant questions can be further explored and studied.

The Impact and Incidental Questions

5. Globalization, regional integration and advance of technology are different processes and each of them arose against different historical, social and economic backgrounds. However, they are not totally separate and distinct processes. Instead, they are in one aspect or another inter-related. In particular, the advance of technology definitely speeds up the processes of globalization and regional integration.

6. More importantly, the combination of these processes led to the breakdown of national barriers, the increase of transnational

activities (be they commercial or otherwise) as well as the emergence of new form of commercial transactions or activities that could not possibly have been anticipated a few decades ago. A corollary of such a new state of affairs is the impact of these processes on both domestic as well as international law.

7. Among others, the impact of financial technology ("Fintech") may serve as a good demonstration. Fintech is now a growingly popular concept in many jurisdictions. It has been reported that Fintech ventures, usually start-ups leveraging technology from cloud data storage to smartphones to provide loans, insurance and payment services, raised US$2.7 billion in Mainland China last year, and over US$1.5 billion in India[1]. Ventures in the United States, on the other hand, attracted investment in the region of around US$7.4 billion[2].

8. No doubt, the emergence of Fintech is a trench that we can ill afford to ignore. I understand that there will be further discussions later today by various experts on Fintech. Let us, for the present purpose, look at three specific areas simply to illustrate the questions that may arise as a result of the change of commercial landscape.

9. The first is peer-to-peer ("P2P") lending. Imagine the following scenario. The platform for P2P lending is based in Mainland China. The borrower is a start-up company incorporated also in Mainland China. Though the P2P platform, lenders from around the world including Hong Kong, England, the United States, Japan and Korea advanced money to the borrower.

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1 See, Thomas Wilson, "Land of the Rising Fintech", *Asian Legal Business* (April 2016), p. 38.

2 *Ibid*.

10. If the loan transactions were not handled in a sophisticated manner and the loan documentation not properly prepared, there would be all sort of questions, at least insofar as Hong Kong is concerned, including: (1) what is the governing law; (2) whether the court of the place where the lender is situated should have jurisdiction in the event of dispute, or whether it should be the court of the place where the P2P platform is located or the borrower is incorporated; (3) whether parallel litigations in different jurisdictions should be permitted, and if so, to what extent.

11. On the other hand, if the loan transactions were handled in a sophisticated manner, the relevant documents may include provisions concerning choice of law, choice of jurisdiction and dispute resolution. In such a scenario, there remain questions of: (1) whether such choice of law or choice of jurisdiction clauses should be uphold according to traditional conflict of laws principles; and (2) whether the regulatory authority of more than one jurisdiction should have authority to impose control and sanction on the ground of investor protection.

12. Another area is equity crowdfunding, where investors invest in a project or a business, usually a startup, and gain in return an interest in shares in or debt issued by a company or an interest in participating in the profits or income of a collective investment scheme. Apart from conflicts of law questions, other fundamental questions that may spring to one's mind include how should the court decide the true nature of such investment, and what exactly is the legal relationship between the investor and the relevant company (including whether the only conclusion is a relationship of lender and borrower).

13. A further example is the reward / pre-sale crowdfunding, where physical goods or services are provided in return for the funds invested by the investors. In such cases, likewise, there may be questions as to the true legal nature of the transaction, including whether it is a loan (in the traditional sense) or whether the court may hold that it is a pre-paid sale of goods or a provision of service.

14. In some jurisdictions (such as the United States), some of these questions are being dealt with by legislation. Another approach, such as the one adopted by the UK, is to embrace crowdfunding into its existing regulatory framework whereby the Financial Conduct Authority licenses platforms and imposes both prudential and conduct requirement. In Mainland China, the People's Bank of China has decided that various types of Fintech activities are to be dealt with by specific regulations to be issued by the respective authorities including the China Securities Regulatory Commission. Yet, in some jurisdictions, legislation or legal regulations are yet to be introduced and questions arising from Fintech activities remain to be dealt with by their prevailing domestic law.

15. Viewed against this brief survey, a few aspects merit attention and consideration, namely:

    (1) the question of whether to introduce legislation to regulate Fintech and similar activities; and if so, what should be the approach;

    (2) the importance of private international law;

    (3) the significance of comparative law;

(4) the relevance of legal education.

Whether to Legislate

16. The question of whether to introduce legislation to govern a certain type of activities is not a pure legal question. Rather, it is a policy decision, or a legal policy question.

17. Admittedly, when there is no specific law to deal with a new type of activities, the introduction of legislation may have its advantages. Clarity, certainty and predictability of law are generally regarded as some of core elements of the rule of law. A properly drafted legislation can achieve these objectives, and enable members of the public (including overseas investors) to know their legal rights and responsibilities.

18. However, legislation may not always be the best way to regulate human activities. To begin with, I guess we would all agree that we should not legislate solely for the sake of making law. Over legislation may indeed constitute an unintended strict-jacket whereby future development, especially in this fast-changing world, may be stifled. Indeed, the philosophy of the Department of Justice, when asked to advise whether to introduce new legislation, is to invite the relevant policy bureau or department to serious consider the question: "Is legislation really necessary?" Unless the answer is in the affirmative, we believe we should think twice before introducing new or amending existing legislation.

19. In my view, more often than not the fundamental questions are: (1) what are the objectives of introducing a new regulatory regime; and (2) whether such an intended regulatory regime

can be best achieved by legislation, or whether it can be achieved (in an equally effective or even better manner) through some other means, such as an administrative regime or (in the case of common law jurisdictions) judge-made law.

20. Further, irrespective of whether the regulatory regime is to be achieved by legislation or some other means, the following are pertinent considerations.

21. First, given the speed at which technology advances and transforms the world, the regulatory regime should be as technology neutral as possible, so that new types of activity which are of the same nature can be regulated even though they are achieved through new (or even unexpected) technology.

22. Second, investor protection is certainly important and should certainly be an objective of any regulatory regime dealing with Fintech activities. However, equally important is the facilitation of Fintech activities, so that the developing Fintech ecology would not be suffocated. In other words, a proper balance should be struck, although this is often easier said than done.

23. Third, simplicity and clarity are also of utmost importance. In some jurisdictions, legislation tends to be lengthy and complex, so much so that even legally qualified persons find it difficult to understand. On my part, I always have doubt as whether this is the best way to prepare legislation. In my view, one always has to bear in mind that legislation is not intended to be read solely be lawyers. Irrespective of how complex the subject-matter may be, a properly prepared legislation should be simple, clear and easy to understand. The test is whether a layman without legal training would find it easy to understand

the language, the substance and the spirit of the legislation.

24. In March 2016, the Hong Kong Financial Services Development Council published FSDC Paper No. 21 entitled "*Introducing a Regulatory Framework for Equity Crowdfunding in Hong Kong*". Part V of this Paper examined the potential approaches for Hong Kong to regulate equity crowdfunding, which ranged from full legislative actions, to maintaining the *status quo*, and to a middle option through regulatory initiative. Naturally, the Government would have to consider the situation and the various possible options carefully before any decision can be made.

Private International Law

25. Moving on, if I may, to private international law.

26. In around 1870-1875, a group of lawyers in Europe were faced with one of the most imposing social consequences of the industrial era, namely, the dramatic intensification of international communication. What did they do? They eventually established the organization of what is presently known as the Hague Conference on Private International Law[3]. This part of legal history demonstrates the relationship between significant social change and the importance of private international law.

27. History, sometimes, did repeat itself. While the industrial era led to the growing awareness of the importance of private international law, the fast-changing world we are currently living in likewise demonstrates that private international law,

[3] See: Arthur Eyffinger, *The Hague International Centre of Justice and Peace* (Jongbloed Law Booksellers, The Hague), p. 93.

as well as a platform for building bridges among different legal systems, is even more important than before. As I highlighted at the outset, the forces of globalization, regional integration and advance of technology have effectively removed national barriers. I have also given examples as to how Fintech activities may give rise to questions of conflict of laws. One may ask why private international law is more important now than before since most developed jurisdictions have mature legal rules dealing with issues of conflict of laws. Yes, it is true that conflict of laws is not a new subject. However, it is important to bear in mind that different jurisdictions have adopted or enacted different private international law principles. Accordingly, as demonstrated by the works of the Hague Conference of Private International Law[4] as well as the work of the United Nations' relevant body, UNCITRAL, there remains a strong need to build bridges among different legal systems with different regimes of private international law.

28. I have given examples about Fintech. Perhaps I should also briefly touches on the law of corporation. Nowadays, it is not uncommon for transactional companies to have their headquarters in one place, and subsidiaries or branches in various different jurisdictions. Further, the winding up of one company in one jurisdiction may often raise questions of recognition and enforcement in other jurisdictions, since it is likewise not uncommon for a company to have properties and assets all around the world. Indeed, insolvency practitioners around the world have for a considerable period of time made great efforts in developing enabling regimes for handling cross-border insolvency disputes. Examples include Professor

[4] One example is the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary, concluded on 5 July 2006 (but not yet in force in the Hong Kong SAR).

Bob Wessels' efforts in respect of the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*. Another example is the Transnational Insolvency Project of the American Law Institute, which led to the report made in March 2012 entitled "*Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*".

29. To what extent (if at all) and how these various efforts should be taken forward deserve serious consideration. The ultimate test is how to foster effective international cooperation while at the same time giving full respect to each jurisdiction's own domestic legal regime.

30. Before moving on to the next topic, may I add a footnote. I have thus far only dealt with private international law. I should stress that I do not mean to suggest that public international law is not important. On the contrary, forces such as advance of technology have also brought about new questions of public international law. I do not profess to be an expert on public international law, so I would have to use the excuse that the time available today does not allow me to venture into that area. However, I can give one example, namely, the issue of sovereignty in cyberspace is now an important topic in public international law and is a topic, depending on how it develops, may also have certain impact on commercial transactions.

Comparative Law

31. Let me move on to comparative law. The short point I wish to make is this. In the past, comparative law was often regarded as a subject for the academic circle. First, I do not agree to that observation. Second, in any event, it certainly cannot be true now. Bearing in mind the three forces of globalization, regional

integration and advance of technology that I have sought to stress through this discussion, I take the view that more importance should be attached to the study and research of comparative law. Indeed, more and more jurisdictions nowadays embark upon comparative law studies before preparing new legislation or implementing law reform.

32. The reason is obvious. With the breakdown of national barriers and (as some people describe) the world getting smaller, one problem faced by one jurisdiction is often repeated in another jurisdiction (whether in the same or modified form). Accordingly, it is definitely worth studying how other jurisdictions deal with the same or similar problem. One example you may think of is Uber, or similar applications dealing with the provision of passenger transport service. Different jurisdictions around the world is faced with the same or similar issue as to how such a new service should be dealt with, bearing in mind its impact on traditional regulation of taxi or other form of hired car services.

Legal Education

33. Lastly, let me also briefly touch on legal education. Professor Michael Reisman, a professor of law of the Yale Law School in New Haven, once remarked that planning and designing programmes of legal education that are both professionally relevant and intellectually enriching must take account of a number of coinciding world revolutions[5]. Professor Reisman further pointed out that global integration calls for professional facility in regional or international languages, and in the law

[5] W Michael Reisman, "Designing Curricula: Making Legal Education Effective in the 21st Century", collected in *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @2020* (Butterworths), p. 271.

and procedure of other national and international jurisdictions, as well as the ability to operate effectively in diverse cultures[6].

34. These observations were made in the general context of legal education for lawyers in the 21st century. In my view, they are certainly applicable to the education and training of law students who aspire to be corporate and securities lawyers. Indeed, as vividly demonstrated by Professor Richard Susskind in his two thought-provoking books "*Transforming the Law: Essays on Technology, Justice and the Legal Marketplace*"[7] and "*Tomorrow's Lawyers: An Introduction to Your Future*"[8], lawyers of the current and future generations would have to be equipped to face the technological challenges.

35. In short, to be able to provide effective services to clients on corporate and securities law, a global perspective is a necessary prerequisite and not a luxury. The sooner future corporate and securities lawyer are aware of this need the better.

Conclusion

36. Ladies and gentlemen, let me conclude by repeating what Thomas Jefferson said in 1816:

> "*Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.*"

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6 *Op. cit.,* p. 276.
7 (OUP) (2000).
8 (OUP) (2013).

37. As our world evolves and changes, the future of corporate and securities law would be a fascinating one, both from the domestic angle and from the international perspective. No doubt, there are challenges ahead (whether as a result of further advances in technology or otherwise), but I am sure the joint efforts of the legal communities from different jurisdictions can help to shape the future corporate and securities law that are effective both domestically and internationally.

38. As the Secretary for Justice, I cannot emphasise more that Hong Kong is keen to share our experience and to learn from other jurisdictions. Accordingly, let me once again express my gratitude to PLI and Freshfields for holding this meaningful event in Hong Kong.

39. On this note, it remains for me to wish this conference every success.

Thank You.