

**Speech by the Hon Rimsky Yuen, SC, JP
Secretary for Justice
at the Global Pound Conference Series 2017 – Hong Kong
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***“The Development of Dispute Resolution in Hong Kong:
Past, Present and Future”***

Mr Julian Copeman [*Head of the Greater China and disputes practices at Herbert Smith Freehills Hong Kong and Chair of the Local Organising Committee*], Distinguished Guests and Delegates, Ladies and Gentlemen,

First of all, thank you for giving me this opportunity to address this distinguished audience at the Global Pound Conference (“GPC”) here in Hong Kong. On behalf of the Government of the Hong Kong Special Administrative Region, may I extend our warmest welcome to all of you, especially to those who travelled from overseas jurisdictions to attend this conference. I would also like to express our gratitude to the International Mediation Institute (which initiated the GPC), the Local Organising Committee (chaired by Mr Julian Copeman), Messrs. Herbert Smith Freehills (as global diamond founding sponsor and main organiser of the Hong Kong event), local sponsors as well as all supporting organisations, for making this event possible and for choosing Hong Kong as the venue for this important conference.

2. As I understand, today’s event is part of a series to create a dialogue on what can be done to improve access to justice and the quality of justice around the world in civil and commercial conflicts. Named in honour of the former Dean of the Harvard Law School (Roscoe Pound), the original Pound Conference was held in 1976. Since then, GPC events have taken place globally in various cities around the world. Around 30 more events will take place in 2017. Hong Kong is greatly honoured to have the opportunity to participate in this spectacular global project.

3. As I have emphasized on many different occasions, the Hong Kong SAR Government has a steadfast policy for promoting dispute resolution services. I would therefore like to take this opportunity to briefly outline some of the relevant development in Hong Kong, and to share with you a few personal thoughts on the future development of dispute resolution.

Rationale for Promoting Dispute Resolution

4. To begin with, perhaps a few words as to why the Hong Kong SAR Government sees fit to place importance in the development and promotion of dispute resolution. We believe there are, among others, two important reasons.

5. The first reason concerns the rule of law and access to justice. Lord Bingham, in his well-known book *The Rule of Law*, identified eight key elements when explaining the concept of the rule of law. One of the eight elements is dispute resolution. According to Lord Bingham, “[m]eans must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve”¹. We echo Lord Bingham’s view. Law serves various functions in human societies. One of the functions is to provide the standard or criteria for determining people’s rights and wrongs when disputes arise. Accordingly, unless there is in place an effective dispute resolution regime, no law (however perfect it may be) cannot fully discharge this function.

6. Traditionally, access to justice was equated with access to court. However, as the concept of civil justice evolves, this is no longer the case. Other means of dispute resolution, including arbitration and mediation, have become an integral part of the dispute resolution landscape in many jurisdictions (be they common law or civil law jurisdictions) around the world, and is indeed a global trend. Just by way of example, it would be pertinent to note that access to justice has been defined broadly by the European Union to

¹ Tom Bingham, *The Rule of Law* (Allen Lane) (2010), Chapter 8 (at p. 85).

include not only access to court, but also access to out-of-court or extra-judicial dispute resolution².

7. Second, we believe dispute resolution has a close relationship with economic development and competitiveness. An effective dispute resolution regime can play a significant role in protecting private properties and enhancing confidence in commercial activities. As an international financial and commercial centre, we believe it is important to ensure that the Hong Kong SAR can provide robust and effective means to resolve disputes, including commercial disputes.

8. It is against this background that the Hong Kong SAR Government has been, over all these years, working closely with the dispute resolution community, the legal profession and other stakeholders to promote dispute resolution services in Hong Kong and beyond, with emphasis on providing a modern and robust legislative framework and supporting infrastructure.

The Past: A Synopsis

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

10. From the GPC data analysed to date, disputing parties, perhaps unsurprisingly, prioritise efficiency when selecting dispute resolution processes. In Hong Kong, the priority of efficiency is underscored by the object of our current Arbitration Ordinance (Cap. 609) to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. To

² See: Simone White, "Directive 2008/52 on certain aspects of mediation in civil and commercial matters: a new culture of access to justice?" (2013) *Arbitration* 52, at 54.

achieve this object, the Ordinance 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 is clear, certain and readily accessible to users and practitioners around the world.

11. For arbitral proceedings conducted here, our legislation gives parties the right to select arbitrators and legal representatives of their choice regardless of whether they are legally qualified or whether they are from within or outside Hong Kong. Without restriction as to nationalities and professional qualifications, parties do have a good-sized pool of multi-lingual and multi-national arbitrators and advisers with diversified backgrounds and experiences from which to choose to suit their needs.

12. Further, arbitral awards made in Hong Kong are enforceable in over 150 jurisdictions which are contracting states to the New York Convention. Arbitral awards made in Hong Kong can also be enforced in Mainland China and the Macao SAR through reciprocal arrangements with these jurisdictions.

13. On the other hand, mediation, as a voluntary dispute resolution process held in confidence by an impartial mediator who does not adjudicate on the dispute, is generally recognized to be capable of maintaining business relationship much more effectively than an adversarial process such as court litigation. Mediation has also proved to be a welcomed choice as an efficient means to resolve disputes.

14. It is obvious that two key features of mediation in particular have contributed to its growing popularity. They are confidentiality and privilege of mediation communication. Communication in the course of mediation is confidential and does not prejudice respective rights of the parties, whether or not any settlement can ultimately be reached. Even if a dispute remains not fully resolved, parties to the dispute often benefit by having known better about themselves and their options at the end of mediation. Hong Kong therefore finds it so important to protect the confidentiality and privilege of mediation communications with statutory underpinning by way of the Mediation Ordinance (Cap. 620) which came into effect in January 2013. The

Ordinance provides a legal framework for the conduct of mediation without hampering the flexibility of the process.

Current Development: A Summary

15. Allow me to now turn to our latest efforts in reviewing and reforming our law to develop Hong Kong's legal regimes of arbitration and mediation in response to changing circumstances and needs.

IP Arbitration and Mediation

16. In recent years, we witness a significant increase in intellectual property ("IP") activities in Hong Kong. With increasing IP transactions, there is a growing demand for dispute resolution services. IP disputes often involve companies or entities from various countries and regions. Having to turn to a foreign court system in order to resolve disputes through litigation can be very time consuming, costly or otherwise unattractive to the parties.

17. In a survey conducted by the Queen Mary University of London in 2016 on the resolution of disputes in the technology, media and telecom sectors (in which half of their disputes involved IP), 92% of the respondents indicated that international arbitration is well suited for their disputes, while 82% believe that there will be an increase in the use of international arbitration.

18. Some members of the arbitration and IP communities, however, express concerns from time to time over the arbitrability of disputes over IP rights in Hong Kong, arising particularly from the lack of any specific provision dealing with such disputes or relevant authoritative judgment in Hong Kong. We have therefore introduced amendments to the Arbitration Ordinance into the Legislative Council in December last year to clarify the legal position that disputes over IP rights are capable of being resolved through arbitration, and that it is not contrary to the public policy of Hong Kong to enforce an arbitral award involving IP rights.

19. The legislative amendments will remove any legal uncertainties surrounding the arbitrability of disputes over IP rights. If enacted, they will

enhance Hong Kong's competitiveness as a leading international arbitration centre and give it an edge over other jurisdictions in the Asia-Pacific region as a venue for resolving IP rights disputes.

20. In addition, the Department of Justice ("DoJ"), in consultation with the Steering Committee on Mediation, is exploring the possibility of the use of evaluative mediation, in addition to the traditional facilitative mediation, to resolve IP and other disputes. As part of the events during the Mediation Week 2016 organised by the DoJ held in May last year, a seminar on "Assessing the Suitability of Evaluative Mediation to Resolve IP Disputes" was delivered which generated much interest and discussion among stakeholders of the IP industry. The DoJ will, in consultation with the Steering Committee and other key stakeholders, study in further detail the measures to be taken and the infrastructure to be in place for facilitating the use of evaluative mediation in addition to facilitative mediation in Hong Kong. Our aim is to provide more choices for end-users so that mediation will be put to its best possible use.

Third Party Funding for Arbitration and Mediation

21. Another matter of importance to parties in commercial disputes and the international arbitration community is third party funding for arbitration.

22. Parties who are considering whether to resolve their disputes by arbitration will take into account the potential financing options available to them in conducting such arbitrations. Increasingly, parties who do have the financial resources to fund contentious proceedings may nevertheless seek third party funding as a financial or risk management tool.

23. As the legal position of third party funding for arbitration is not entirely clear under Hong Kong's common law, clarity and certainty of the relevant law will likely attract more arbitrations to be conducted in Hong Kong. Following recommendations put forward by the Law Reform Commission in its Report on *Third Party Funding for Arbitration* dated October 2016, we have introduced legislative amendments last month to make clear that third party funding of arbitration is permitted in Hong Kong. The

amendments also apply to funding of services which are provided in Hong Kong for arbitrations taking place outside Hong Kong.

24. We have also introduced consequential amendments at the same time to clarify that third party funding of mediation is permitted in Hong Kong.

Apology Legislation

25. Experience shows that the making of timely apologies often facilitates amicable resolution of disputes and reduces hostile litigation. In order to encourage this, we introduced an Apology Bill earlier this month to provide that an apology does not constitute an admission of fault or liability in most civil proceedings. Neither could an apology be taken into account nor is it admissible as evidence for determining fault or liability to the detriment of the apology maker. This bill also provides that an apology does not void or otherwise affect any insurance cover under a contract of insurance or indemnity. It was formulated on the basis of the recommendations made by the Steering Committee on Mediation, which had conducted 2 rounds of public consultation in 2015 and 2016. When enacted, Hong Kong will become the first jurisdiction in Asia to have apology legislation.

The Future: Just a Few Thoughts

26. Looking ahead, whilst there are bound to be challenges, we continue to see the bright prospects for dispute resolution services. For the present purpose, let me focus on two areas.

27. The first area concerns the impact that may be brought about by the Belt and Road Initiative. As you know, the Belt and Road Initiative is the mega project, first announced by President Xi of the People's Republic of China in late 2013, which seeks to enhance connectivity and promote trade among the over 60 countries along the Belt and Road routes. It is generally agreed that the Belt and Road Initiative will provide a strong catalyst in the economic development for a whole host of countries along the routes.

28. The relationship between the Initiative and the future of dispute resolution is an interactive one. It is a two-way, instead of a one-way, relationship.

29. First, given the likely increase of commercial and investment activities, the demand for dispute resolution services including arbitration is bound to increase. One of the key areas of the Initiative is infrastructure connectivity. It has been projected that Asia alone need about \$8 trillion worth of basic infrastructural projects for the 2010-2120 period. In the circumstances, the first few areas that are likely to feel the positive impact includes dispute arising from infrastructure projects and related matters. Needless to say, disputes concerning the logistics and maritime sectors are also likely to be amongst the first category of professionals who will feel the positive impact of the Initiative.

30. Second, from the legal policy perspective, a question arises from the implementation of the Initiative is the future development of the international dispute resolution regime.

31. On the one hand, there are more and more people calling for harmonization of international law and regulations on dispute resolution (especially those concerning international arbitration). For instance, Liu Jinxin, regional logistics expert and chief architect of the Bangladesh-China-India-Myanmar Corridor³, as well as Ong Ka Ting, who is Malaysian Prime Minister's special envoy to China and also the chairman of the Malaysia-China Business Council⁴, have both raised the question of harmonization. Further, in October last year, the International Academy of the Belt and Road released the *Blue Book on the Dispute Resolution Mechanism for the Belt and Road*. The Blue Book, which is the joint efforts of a panel of academics and experts on dispute resolution, puts forward a proposed uniform dispute resolution mechanism adopting the principle of mediation first and then followed by arbitration.

³ "Who's afraid of China's One Belt One Road Initiative?" *East by Southeast* (24/4/2015) (<http://www.eastbysoutheast.com/whos-afraid-of-chinas-one-belt-one-road-initiative/>)

⁴ "China, Malaysia Mull Dispute Resolution for 'Belt and Road' Countries", *The Diplomat* (20/9/2016) (<http://thediplomat.com/2016/09/china-malaysia-mul-dispute-resolution-for-belt-and-road-countries/>)

32. On the other hand, there are suggestions that the better approach is to adapt the current international dispute resolution regime, including the UNCITRAL Model Law and the New York Convention, to the specific needs arising from the Initiative. If this approach is to be adopted, the next natural question that calls for consideration is how should the current regime be revised to take into account the diversities that exist among the countries along the Belt and Road route. Such diversities are indeed huge. Not only are is the number of countries involved significant (i.e. over 60 countries, as noted above), the countries covered by the Belt and Road route have very different legal system, legal culture and are at very different stage of development in terms of using arbitration as a means of dispute resolution.

33. As matters now stands, it remains uncertain which of these two different schools of thought will prevail in future. But what is certain is that whichever school of thought is to prevail, there are bound to be significant impact in the global dispute resolution landscape.

34. The second area I would like to touch on is shape of our future dispute resolution process. Let me begin by telling a real-life story that happened about a year ago in Britain. A commercial dispute was about to be tried before the court. The parties attempted mediation but failed. Yet the parties still wished to explore ways to settle the disputes. At the end, the parties engaged a retired judge and went through effectively a mock trial, with the parties' counsel making submissions and the judge making a ruling (save that no cross-examination of witnesses was involved). The parties, having gone through this "mock trial" (which has the characteristics of a neutral evaluation and yet not quite the same), soon settled their disputes.

35. I tell this story not to suggest that this is the future way of dispute resolution. Rather, I would like to use this story to illustrate that we can perhaps think out of the box when designing future dispute resolution process, whether by combining current means of dispute resolution, or by inventing completely new ways to approach old problems.

Concluding remarks

36. Before I conclude, may I thank all distinguished speakers and every participant for taking time out of your busy schedule to take part in this

conference and for sharing your valuable insights and expertise. With the list of eminent moderators and panelists, I am sure the exchange of views today will be both enlightening and fruitful in facilitating the achievement of the GPC's objective to improve the resolution of commercial disputes in the 21st century.

37. On this note, may I wish you all a very fruitful conference.

Thank you.