

**Welcome Address by the Hon Rimsky Yuen SC  
Secretary for Justice at the BREXIT Conference  
on 2 December 2017 (Saturday)**

***“Impact of Brexit on the Development of Common Law,  
Dispute Resolution and  
Judicial Co-operation in Civil and Commercial Matters”***

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The Rt. Hon. Lord Justice Hamblen [Judge of the Court of Appeal, England and Wales], Mr. Andrew Heyn [British Consul General to the HKSAR and Macao SAR], Lord Pannick QC, our Guests and Speakers from the United Kingdom, Fellow Members of the Legal Profession, Colleagues, Distinguished Guests, Ladies and Gentlemen,

1. First of all, thank you for joining us at this Brexit Conference. On behalf of the Department of Justice, may I extend our warmest welcome to all of you here, and in particular, to our overseas guest speakers who travelled all the way to Hong Kong to take part in this conference.
2. Today, we are very privileged to have a number of leading figures of the British and local legal communities joining us in this conference. Before handing over the floor to our speakers, may I set the scene by briefly addressing two questions, namely: (1) why the Department of Justice organises this conference; and (2) why we pick the two areas which form the themes of this conference.
3. Dealing with the first question first: why we organise this conference?
4. Ever since the result of the EU Referendum was known, the British Government has taken various steps for effecting and managing the exit process. Apart from giving the Article 50 Notice, other examples of such steps include the 12 principles announced by the

Prime Minister Theresa May on 17 January 2017, the publication of the White Paper which sets out the basis of the 12 Principles, as well as the introduction of the European Union (Withdrawal Bill) in July 2017 which aims to transpose EU law onto the UK statute book to avoid legal vacuum when the UK eventually leaves the EU in March 2019. In addition, the British Government have published other papers, such as the *Position Paper on Judicial Cooperation in Civil and Commercial Matters* (published in July 2017), as well as the paper entitled “*Providing a Cross-border civil judicial cooperation framework: A Future Partnership Paper*” published in August 2017.

5. These steps have attracted considerable attentions and discussions both within the UK and at the international level. In the legal community, questions have been raised as to how these steps would affect the future development of UK law. For instance, some commentators have asked what exactly would be the status of those EU legislation which would be converted and transformed to become part of the domestic law of the UK (which is the aim of clause 3 of the EU (Withdrawal) Bill)? Indeed, the House of Lords Constitution Committee have once pointed out that the direct EU legislation incorporated by clause 3 and the EU law incorporated by clause 4 have “no equivalent status in UK law and the Bill makes no provision for them”<sup>1</sup>. Further, clause 3(3) of the Bill introduces the novel concept of a law being “operative”, and the Bar Council of England and Wales has once expressed concerns as to whether this new concept will lead to uncertainty.
6. Hong Kong has a close connection with the UK, whether in terms of trade, commerce or otherwise. Not only have a lot of British and European companies set up offices in Hong Kong, a lot of Hong Kong enterprises have business connections with the UK and other

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<sup>1</sup> See, e.g., “*The European Union (Withdrawal) Bill: Retained EU Law*”, the Briefing Paper No. 08136 of 9 November 2017 (House of Commons Library) (prepared by Jack Simson Caird and Vaughne Miller), at p. 18.

members of the EU. These business people and their legal advisers are understandably concerned with the future development of Brexit, including how the exit measures would impact upon the future of the UK legal system. Indeed, the impacts would go beyond the commercial community. For instance, certain matrimonial law practitioners have pointed out that some “international family” might also be in one way or another affected by the outcome of the Brexit measures, especially when a divorce takes place<sup>2</sup>.

7. It is against this background that the Department of Justice believes that we should find out more as to what is happening in the Brexit process, so that the legal community in Hong Kong can understand more and be better equipped to deal with such issues as may arise in the future.
8. Moving on, if I may, to the second question: why do we choose the two main areas which form the theme of today’s conference?
9. To begin with, we are very lucky to have Lord Pannick QC to be our keynote speaker today. As you would know, the *Miller* case<sup>3</sup> is first important litigation since the EU Referendum. The case has attracted much attention. Indeed Lord Neuberger, in a recent interview conducted in Hong Kong, described the *Miller* case as his “most memorable case”<sup>4</sup>. Lord Pannick QC, being the leading counsel acting for Mrs. Miller (the 1<sup>st</sup> Respondent in the appeal)<sup>5</sup>, is surely one of the best persons to tell us more about the case, as well as to share with us his views on the post-Brexit development of the UK legal system.
10. Lord Pannick QC’s keynote speech will be followed by Session I of

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<sup>2</sup> See, e.g., “Eleanor Moodey, “The long farewell: leaving the EU (Part 3)”, *New Law Journal*, 13 October 2017 Issue, at pp. 11-12.

<sup>3</sup> [2017] UKSC 5 (24 January 2017).

<sup>4</sup> See, Cynthia G. Claytor, “Face to Face with Lord (David) Neuberger of Abbotsbury”, *Hong Kong Lawyer* (November 2017 Issue, Official Publication of the Hong Kong Law Society) 15 (at p. 17).

<sup>5</sup> Lord Pannick QC is also a member of the House of Lords Constitution Committee which, as mentioned above, has expressed views on the European Union (Withdrawal) Bill.

this conference, which focuses on the legal implication of Brexit on the development of common law as well as the legal and dispute resolution professions in the UK and Hong Kong. Session II, on the other hand, will focus on the impact of Brexit on judicial cooperation in civil and commercial matters in EU and the international community, including the recognition and enforcement of judgments.

11. Under the “one country, two systems” policy, Hong Kong retains the common law legal system after it became one of the special administrative regions of the People’s Republic of China. Article 84 of our Basic Law expressly provides that our courts, when adjudicating cases, “may refer to precedents of other common law jurisdictions”. This provision has enabled Hong Kong to develop its own common law since 1 July 1997.
12. Lord Millett, one of the NPJ of our Court of Final Appeal pointed out in the case of *China Field Ltd. v Appeal Tribunal (Building) (No. 2)*, “the common law is no longer monolithic but may evolve differently in the various common law jurisdictions”<sup>6</sup>. Further, in the case of *Solicitor (24/07) v Law Society of Hong Kong*, our former Chief Justice pointed out as follows<sup>7</sup>:

*“After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems*

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<sup>6</sup> [2009] 5 HKLRD 662, at para. 78 (p. 690). See also the observation of Bokhary PJ at para. 11 (pp. 669 – 670).

<sup>7</sup> (2008) 11 HKCFAR 117, at para. 16 (p. 133).

*which come before them. This is underlined in the Basic Law itself. Article 84 expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions.”*

13. Naturally, the Hong Kong courts from time to time refer to UK decisions. At times, the Hong Kong courts also refer to EU jurisprudence, especially in the context of human rights. In the course of the Brexit discussions and given that there would be a break with the Court of Justice of the European Union (“CJEU”), questions have been raised as to whether in future there would be any divergence between the UK law and the EU jurisprudence on areas such as human rights and competition law. From the perspective of long term development of jurisprudence, this and other related questions are naturally of interest to the Hong Kong legal community, and we look forward to hearing more from our speakers. In this regard, apart from our other distinguished guest speakers who will take part in Session I, we are very lucky to have the Right Honourable Lord Justice Hamblen of the Court of Appeal of England and Wales (who is also the Chairman of the European Sub-committee of the Judge’s Council) to share his insights from the judicial angle.
  
14. Apart from the future development of the legal system, one other question often raised in the Brexit discussion concerns the possible impact on the dispute resolution landscape. Among others, due to the uncertain future of reciprocal enforcement of judgments to be made by the UK courts, one question that arises is whether the international commercial community would be more inclined to opt for international arbitration, since Brexit would not affect the UK’s status as a party to the New York Convention, which renders enforcement of arbitral awards speedy and expeditious. There is also the question of how other EU members would react in the context of dispute resolution. For instance, the Netherlands issued draft plans to become one of several EU members to establish an English law commercial court targeting international dispute

resolution (which is set to open on 1 January 2018).

15. These, and other incidental questions (such as those concerning investor-state disputes<sup>8</sup>, as well as whether London's status as an international arbitration centre would be even more consolidated since Brexit might (according to one view) enable British courts to issue anti-suit injunctions whereas inter-EU anti-suit injunctions are incompatible with EU law)<sup>9</sup>, will also be explored in the first as well as the second sessions.
16. Before I conclude, may I once again express my gratitude to all our speakers and moderators. We are most grateful that they take time out from their hectic schedules to attend this conference and to share with us their invaluable views on this important topic. May I also express my gratitude to Mr. Andrew Heyn, the British Consul General to Hong Kong and Macao, as well as all the other relevant staff members of the British Consulate in Hong Kong. Their assistance has been instrumental in making this conference possible.
17. On this note, may I wish this conference every success and wish all of you an enjoyable and fruitful day.

Thank you!

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<sup>8</sup> See, e.g.: (1) "How could the UK replace the CJEU?", *New Law Journal* (10 February 2017 Issue), at p. 4; and (2) Alison Ross, "Could Brexit Trigger Investment Claims?", *Global Arbitration Review* (19 June 2017) pp. 12-14.

<sup>9</sup> See: James Rogers, Simon Goodall and Charles Golsong, "How will Brexit impact arbitration in England and Wales?" (Norton Rose Fulbright - 2016), at pp. 17-18.