

**Speech by Ms Teresa Cheng, SC  
Secretary for Justice  
Talk at King's College London on "Opportunities for Hong Kong in the  
International Arena"  
14 June 2018 (Thursday)**

Distinguished guests, Ladies and Gentlemen,

What a nice pleasure to be back here. We used to have only this part of the building and not the Somerset House. It was always around here at the Macadam Building where we hung out. Those were the good old and very memorable days when I studied here. Those of you who are studying here no doubt will cherish your time here later on in life. I assure you that when you look back, it will be something you will never forget. I hope you do take your time as a student in London at King's but also save a little bit of time for the London life, if you are from overseas and I see some of you may well be.

2. Now, what I would like to share with you is not so much a lecture, but I would like to give you some thoughts about what I think Hong Kong experience will allow us to develop further in Hong Kong. Perhaps I will allow more time for you to ask some questions and I will try to exchange some views with you.

3. I would like to look at the way Hong Kong has worked, and will develop, from three aspects. I would also like to look at the opportunities provided by “one country, two systems”, our strengths in arbitration and mediation.

### **“One country, two systems”**

4. Some of you may well be familiar with “one country, two systems” which is unique to Hong Kong. When we reunited with China in 1997, we had the “one country, two systems” principle in place and enshrined in the Basic Law. The Basic Law provides for the high degree of autonomy of Hong Kong and also preserves a number of important things. I will focus on the legal system which has been in place for over 150 years. Hong Kong has been practising the common law and the position has remained exactly the same after 1997.

5. This unique structure, with China being a major civil law jurisdiction and Hong Kong as a Special Administrative Region practising the common law, is proved to be a very successful constitutional structure that allows Hong Kong to prosper, as it does today. So much so, I would like to think that our success has been emulated in other places.

6. If you look at the Dubai International Financial Centre (DIFC), for instance, it is a particular area within Dubai where the common law is practised. It has a separate judiciary and allows people to enter into contract governed only by the common law. In the DIFC, the common law, if chosen, will apply to the contract, as opposed to the United Arab Emirates law. That emulation itself has been very successful.

7. Another example was in Qatar, and that, to some extent, has also taken the form of the “one country, two systems”, because Qatar allows certain financial and commercial laws to be practised differently from the mainstream of the law of the country.

8. The latest invention and replication of “one country, two systems” can be found in Kazakhstan. The Astana International Financial Centre (AIFC) allows the common law to be applied when you enter into certain contracts there, and they have a different arbitration system from the rest of Kazakhstan..

9. The judiciary is one of the very important features in the “one country, two systems” model. The final adjudication power rests with the Hong Kong courts under our regime. In brief, we have the Court of First

Instance (CFI), Court of Appeal (CA) and Court of Final Appeal (CFA) in Hong Kong.

10. The setting up of the CFA constitutionally guarantees our judicial independence. The CFA has the blessing of a number of foreign judges to sit as overseas non-permanent judges (NPJs). Among them are a number of incumbent and former Chief Justices of other jurisdictions. Recently Baroness Hale has joined the league of NPJs in Hong Kong, and so has Madam Justice McLachlin, the former Chief Justice of Canada. We now have judges from the UK, Australia, and Canada.

11. This system provides a very important feature of our judicial system in terms of guaranteeing judicial independence. If I may borrow what Lord Neuberger said, the NPJs are like the canaries, they are brought into the mines to make sure that everything is going well. Therefore as long as we have these judges who are sitting as NPJs in the CFA, we know that our judiciary is working very well because they might not otherwise want to be part of our judicial system.

12. We are very grateful for these judges who spend their times with us in Hong Kong, helping us not just develop the common law in a way that

would allow us to learn from other jurisdictions, but also provide testament to the independence of our judiciary.

13. Furthermore, our judges are selected for their professional and judicial qualities. There is nothing to do with any suggestions of nationality or political inclinations being an issue. The appointment of judges is made by the Chief Executive on the recommendation of the Judicial Officers Recommendation Commission, and appointments of CFA judges require the endorsement by the Legislative Council. The whole judicial system is extremely important for Hong Kong's rule of law.

14. Why do I mention all these? I would like to show that our success is again emulated elsewhere where judges only came from within their own jurisdictions. Under the Basic Law, Hong Kong was the first jurisdiction to introduce foreign judges to sit in the final appellate court. As I said, it has been working very well and has gained a lot of respect from the international community.

15. Some years ago, Singapore established the International Commercial Court as part of its judiciary and allowed foreign judges to sit in the International Commercial Court. Apart from common law jurisdictions, Singapore introduced judges from civil law jurisdictions into the International

Commercial Court. We have to see how it works because I think the Court has not handled a large number of cases so far.

16. The point that I was trying to make is that our judicial system with the NPs participating in the CFA has been so successful that the adoption of the Basic Law in Hong Kong is contributing to a larger international arena.

17. The last matter about the constitutional structure that I would like to share with you is how Hong Kong has been participating in the common law and international law development. In that angle, Hong Kong continues to practise the common law after 1997. One of the interesting things is that a lot of our judgments decided by the Hong Kong Courts have been cited in other jurisdictions, including England and Wales, as part of the jurisprudence that helps develop the English common law.

18. We find that the cross-fertilisation of Hong Kong's practices and case law has actually helped and contributed to the development of other jurisdictions, as compared with in the old days when very often it was the English decisions that were influencing significantly the Hong Kong Courts. That cross-fertilisation became more prevalent after 1997.

19. The experience of Hong Kong in the development of the common law also has an impact on China, which we are part of. Why do I say that? One of the beauties of the common law, as you all would appreciate it, is that judges write judgments with more detailed reasons as compared to, for example, judges in civil law jurisdictions. This exercise of writing good reasons for judgments was not very commonly practised in the Mainland in the old days. One thing that Hong Kong has done is to provide judicial training to some of the judges in Asia, including those in the Mainland.

20. The way that Hong Kong has been placed in the context of the Basic Law has helped contribute to the development of substantive laws, the rule of law and judicial attributes that are necessary for any society to survive and prosper.

21. Apart from providing judicial craft training, Hong Kong was actively participating in the Judicial Summit organised by the United Nations Commission for International Trade Law (UNCITRAL). The Summit has an important feature in the international arena because not only does it promulgate a lot of model laws, including the model law on arbitration, but it also helps promote the enforcement of arbitral awards.

Hong Kong has organised the UNCITRAL Asia Pacific Judicial Summits in 2015 and 2017, contributing to the development in different areas of laws, including the United Nations Convention on Contracts for the International Sale of Goods and the Public Private Partnership arrangements.

### **Arbitration**

22. I now move on to the next area that I think Hong Kong will be able to continue to look into in terms of where we stand in the international arena, and that is the ambit of arbitration.

23. For those of you who are not familiar, allow me to iterate a little bit on the advantages of arbitration. Most cross-border contracts nowadays will not end up in the national court of either of the parties, because they feel that it would be much better dealt with by a neutral tribunal that is not influenced by any national court.

24. It would be difficult to say: “My court is very independent, but yours is not, so come to mine”. So, those sorts of arguments no longer feature in commercial transactions or negotiations when parties enter into the contract. Therefore, the typical way in which disputes are being dealt with



would be arbitration whereby one can choose an independent and neutral tribunal, and more importantly, your “judge”.

25. The other important advantage of arbitration is that the award can be enforced in more than 150 jurisdictions around the world under the New York Convention. I think the last count was 159 countries around the world that are parties to the New York Convention. As a result, your award can be easily enforced, and a lot easier, if I may say, than court judgments.

26. We are waiting for the Judgments Project to be endorsed by the Hague Conference on Private International Law, and that would allow judgments to be more easily enforced. But short of that at the moment, arbitration is definitely the way to go if you want to ensure the award of your legal action comes into reality.

27. The third advantage of arbitration is confidentiality. A lot of the disputes nowadays involve major corporations. Technologies, intellectual property rights and other competitors could be involved. If it were in a national court, it would be sitting in the open court where all the evidence, including the expert evidence on the technologies, will be heard. Therefore the confidentiality, the enforceability, and the ability to find an appropriate

tribunal become three very important features for which parties would choose arbitration as their dispute resolution mechanism.

28. Some might think if the arbitral awards are confidential, how is the commercial law going to develop? There are pros and cons to this argument, but some arbitral institutions, such as the International Chamber of Commerce, would publish redacted awards. That allows people to know how some of the commercial law positions are being made, and helps formulate the development of the commercial law in an indirect way, a non-binding way but nonetheless persuasive.

29. There is another angle of arbitration which is investment arbitration. Investors investing in a host country get protection from bilateral investment treaties. That will allow the disputes to be arbitrated. At the moment, these investment arbitrations are becoming more and more transparent.

30. I remember I sat in arbitration where there was a live broadcast in a room next door, so that the public could attend. There is now also investment arbitration which is streamed online as the hearing goes on, and therefore it is becoming more and more transparent. Transparency applies not just to the awards, but also to the proceedings and how the arguments are being dealt with. There are parts of the proceedings which will have to be conducted in

camera and will not be broadcast, but the proceedings become largely more and more transparent.

31. Further, there are rules on transparency under the auspices of UNCITRAL which would apply if the arbitration and the relevant treaty come after the Rules enter into force. The level of transparency under the UNCITRAL Rules is higher than what one would expect at the International Court of Justice.

32. Investment arbitration, where the investors and the host State resolve disputes, is becoming more and more transparent and their awards are published. In that sense, arbitration provides a very important pillar for the development of the rule of law in the international arena. How does Hong Kong fit into what I have broadly introduced?

33. Hong Kong fits into it because we have been one of the leading arbitration centres in Asia and in the world (after London and Paris). Hong Kong's arbitration or culture of arbitration began back in the 1970s when the Chartered Institute of Arbitrators set up its first branch outside of London and outside of Great Britain in Hong Kong, which has now become the largest branch other than the London branch..

34. Then, we saw the needs to promote arbitration beyond just Hong Kong. I was the branch chairperson, so I am speaking with first-hand knowledge of what was happening. I remember I took a map of Asia, and drew out the boundaries within which the Hong Kong branch was going to “take charge of”. And that was the beginning of the East Asia branch based in Hong Kong. From there, chapters in various places including Singapore, South Korea and so on began to take place.

35. Through this development, Hong Kong spread the word of arbitration in Asia, in a way that Hong Kong took the lead. The Hong Kong International Arbitration Centre (HKIAC) which is our home-grown centre for arbitration was set up in 1985. It was first located in the former Central Magistracy building in 1985, which is now a heritage building.. HKIAC is now located in the Exchange Square which is a very top-class venue.

36. One may also look at the soft infrastructure in terms of the laws being put in place. Hong Kong was one of the first jurisdictions in Asia that adopted the UNCITRAL Model Law in 1985, and, again, one of the first in Asia to adopt the latest version of the UNCITRAL Model Law in 2006. It shows that Hong Kong’s infrastructure, in terms of the legal system, has always been at the forefront. It facilitates the use of Hong Kong's arbitration

services because the UNCITRAL Model Law undoubtedly harmonises a lot of the practices used in the international arbitration community.

37. On top of that, Hong Kong also lately introduced two pieces of legislation. One deals with third party funding, and another one deals with arbitrability of intellectual property rights. These two steps, which have been lately completed, will help codify and clarify the law. They meet the expectation of the international arbitration community. That is what I called the soft infrastructure in terms of the law.

38. Then I would like to talk about the soft infrastructure that relates to the people, which is our soft power. I briefly told you how Hong Kong started the arbitration training in Asia, back in the 1970s and 80s. The number of talents in the international community coming to Hong Kong to provide arbitration services is not to be underestimated. A lot of solicitors from London, Australia and other parts of the world come to Hong Kong to arbitrate. They are not just lawyers, but also the experts in other areas, such as those dealing with financing valuation of business. In that sense, Hong Kong has the second important element for being an international arbitration centre which is the soft power.

39. The third aspect is the judiciary. The very important feature of any arbitration system is a good and sound supervisory court, ensuring that the process is conducted properly and fairly. Hence no one will be able to get away if they fail to observe the rule of natural justice. The judicial system in Hong Kong as I have explained has a lot to do with the success of arbitration in Hong Kong.

40. We emphasise judicial independence. Apart from being ranked the first in Asia in terms of judicial independence by the Global Competitiveness Report of the World Economic Forum, Hong Kong's ranking in rule of law has also improved from a top 70 place to a top 15 place in the world over the past 20 years according to the Worldwide Governance Indicators Project of the World Bank.

41. This positive and upward movement has reinforced Hong Kong as a very good jurisdiction to provide supervision for the arbitration conducted in Hong Kong. One easy way to test how independent the judiciary is to ask whether you will be comfortable to sue the government. If you feel the government is not doing the right thing, you can challenge either by judicial review or by way of civil claim. Hong Kong has no problem with that. As the Secretary for Justice, I am often named in the proceedings as a defendant, and we are happy with that. Because we believe that with the rule of law and

judicial independence, the courts will deal with the disputes and decide on whether the government has been doing right or wrong.

42. If the government is not doing right, then naturally we would be very happy to correct it as told by the court. Therefore, the question that I would like you to ask is: can you sue the government in the place where you go for arbitration? If not, do you want to think twice?

43. Having told you the importance of arbitration and why I think Hong Kong is good, how do I merge the two together and look at the opportunities in the international arena? Some of you here might want to go back and think about whether or not to come to Hong Kong to work as a lawyer or otherwise. You would want to see what opportunities there are.

44. You are exposed to some of the top international practices here in England, and no doubt you would want to continue to see the international community thriving in wherever you are working. Hong Kong would be able to give you just that, because the activities in Hong Kong are so international that you would be able to meet international lawyers, as well as international judges and arbitrators who come through. Conferences and seminars, as well as courses and workshops, are conducted regularly in Hong Kong, to update you on the knowledge of the international law, thereby enhancing your

profile in the provision of services in the international arena. This is one of the attractions that I would like you to bear in mind, when you are thinking about where you are going to develop the career.

## **Mediation**

45. The last aspect that I want to talk about is mediation, something that Hong Kong is rather uniquely placed. As compared with the comparatively more adversarial western culture, mediation, very much an Asian culture, is embraced in Asia. Mediation has taken deep roots in a lot of Asian places. For example, in Japan, they would deal with business disputes by getting the most respectable person in the group, to try to mediate disputes between two subsidiaries of the same group, instead of going to the court or arbitrations.

46. Mediation has taken roots in Hong Kong society and a lot of court cases are now attended by mediation. The success rate is now about 80-90% for those who go for mediation of financial dispute in the Financial Dispute Resolution Centre set up in Hong Kong.

47. Recently, mediation is more widely practised in dealing with complaints about the civil service. The Apology Bill was passed by the



Legislative Council last July, aiming to dilute differences and resolving them in an amicable manner, rather than allowing it to escalate. These have taken roots in the society domestically, but what about the next level?

48. Hong Kong and the Mainland have recently entered into an Investment Agreement under the Closer Economic Partnership Arrangement (CEPA). Under that Agreement, Hong Kong's companies investing in the Mainland or Mainland's companies investing in Hong Kong would receive investor protection, similar to a lot of the bilateral investment treaties (BITs) between States.

49. Such protection put in place between Hong Kong and the Mainland has made Hong Kong a very good platform for investments in the Mainland, and for Mainland companies to use Hong Kong as a platform for their outbound investments. Unlike some of the BITs that have investment arbitration, the CEPA Investment Agreement adopts investment mediation.

50. When there are disputes, Hong Kong investors and Mainland authorities will resolve the dispute by mediation. There is a big incentive to mediate because one does not want the dispute to end up in anyone's courts. This mediation mechanism has been put in place, and rules are to be developed and mediators to be formed in a panel.

51. I mentioned this because the International Centre for Settlement of Investment Disputes (ICSID) under the World Bank is also looking at investment mediation. A lot of the ICSID disputes are resolved by arbitration, but ICSID is also promoting investment mediation as another form of resolving disputes. At the moment, there is not enough investment mediation being conducted. They are generally successful but there is a lot more that can be done. You may have heard that legal fees to be involved in the courts of investment arbitration can reach tens of millions of dollars.

52. Mediation for investment disputes is something that has already been in place in Hong Kong and that will be developing further. We will organise training for mediators who deal with investment disputes, not just those between Hong Kong and the Mainland, but also investment disputes in the international arena. The training allows government officials to understand investment mediation from an Asian angle, as well as mediators to utilise the investment law knowledge and mediation skills to resolve these disputes.

53. To conclude, apart from the developments of dispute resolution in Hong Kong, our rule of law and independent judiciary are also able to

contribute to the international arena. I would like to leave you with that thought and I will be very happy to take any questions that you may have.

Thank you.

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