

**Speech by Ms Teresa Cheng, SC  
Secretary for Justice  
Talk at Gray's Inn on "The development and future of dispute resolution  
in Hong Kong"  
14 June 2018 (Thursday)**

Distinguished guests, ladies and gentlemen,

What a great pleasure to be here at my Inn, having been called here some years ago. It is always good to be back in London in my new capacity, as the Secretary for Justice.

2. Let me start by sharing with you some of the developments that have happened in Hong Kong, and then to look a little bit forward as to what we are planning to do in Hong Kong in terms of dispute resolution. Thereafter I would love to hear your views, suggestions, observations and questions.

3. Hong Kong has been very fortunate because the Hong Kong Branch of the Chartered Institute of Arbitrators was set up in Hong Kong in 1976. That has allowed Hong Kong to grow and

develop arbitration in its very own way and become one of the centres that help breed and teach arbitration in the region.

4. I remember when I was the branch chairperson, I was given a piece of paper negotiating with the headquarters of the Chartered Institute. The paper looked into how we in Hong Kong could help spread arbitration in the region. I remember I drew a map, the only time in my life that I was able to decide how big our “territory” was going to be. So I drew up the map and discussed with London. That was how the East Asia Branch was established. That was an important moment. The establishment of the East Asia Branch helped Hong Kong spread the word of arbitration, and it also marks one of the very important features of Hong Kong, which is our long rooted arbitration culture, probably the longest in Asia.

5. The development of dispute resolution in Hong Kong then moved to the next stage, which was the establishment of the Hong Kong International Arbitration Centre (HKIAC) in 1985. I remember John Uff, QC (he may or may not remember) was the

arbitrator in the very first arbitration. It was the very first major hearing in HKIAC. Climbing up the stairs of the old Central Magistrates' Court building, I had the benefit of sitting in two days of that hearing. The building now becomes a heritage building that is going to be open to public.

6. That hearing was back in 1986. At the time when HKIAC was set up in 1985, a lot of its work related to construction arbitration. Since then, HKIAC has grown from strength to strength. There were 527 arbitration-related matters from domain name disputes to international disputes in Hong Kong last year.

7. There are three main reasons why Hong Kong has been developing very well as a dispute resolution center throughout the years.

## **Arbitration**

8. First, in terms of neutrality, one in the old days talked about country A and country B going to country C. But now, to look at it very realistically, neutrality attracts three angles, and these are the three angles that I think Hong Kong has thrived and will continue to thrive as a centre for dispute resolution.

9. One is the neutrality of the arbitral tribunal. One beautiful thing about Hong Kong is that it is always attracting people from different parts of the world, England in particular. A lot of the arbitrators fly to Hong Kong to deal with disputes there. There is much momentum in developing the practice and knowledge in this area in Hong Kong. The neutrality of the tribunal is very much enshrined, and you can choose any arbitrator you want, whether a local or overseas arbitrator from civil law jurisdictions or common law jurisdictions.

10. The second angle is the adoption of relevant and importantly up-to-date arbitration law, and that is the UNCITRAL Model Law. Hong Kong has been following the English

Arbitration Act for many years. In 1998, Hong Kong decided to adopt the UNCITRAL Model Law for international arbitration but keep the part on the domestic arbitration regime there.

11. More recently, we moved onto the next stage when we adopted the 2006 UNCITRAL Model Law. We removed the distinction between domestic and international arbitration, and looked at everything as if they were international arbitration under harmonised law practised around the world. So this is the second angle, which is the procedural law that does not favor one side or the other.

12. The third important matter is the judicial independence in Hong Kong. It is a core feature because however good your arbitration practice is, you need a safety net system. I am sorry to call our judges the safety net, but they have the supervisory jurisdiction to oversee and ensure that the processes in Hong Kong are being properly conducted, and that the arbitration has integrity and credibility. If anything goes wrong, one would rely on the

UNCITRAL Model Law, go to the court to set aside the award and have the judiciary to deliver a just result. And if the award should be set aside, it will be set aside. If it should not, it will not.

13. It is very important that the judiciary is not just blindly upholding arbitral awards, but properly addressing them. We are very fortunate because we have top international judges, a substantial number of whom are from the UK, sitting in the Court of Final Appeal. Judges from Australia, New Zealand, and recently Canada, have also been appointed to be the overseas non-permanent judges of our Court of Final Appeal.

14. I always like to share this little analogy. It has been said that the overseas non-permanent judges are like the canaries, which were brought into coal mines in the old days to detect poisonous gas. The presence of renowned overseas judges serves as a very good testament to the independence of the judiciary which we have in Hong Kong, thereby reinforcing our role as an international arbitration center.

15. And I always like to look at the judicial independence in a place by asking these questions: would one be able to sue the government in that place? Is that a place where you can take the government to court and that when you should win, you win? Hong Kong is such a place. I am often named, as the Secretary for Justice, as the respondent in applications to court for judicial review which run to thousands. The applicants do not usually win, fortunately, but Hong Kong is not going to stop people from doing so. That is also a testament to our rule of law as well as our judicial independence.

### **Mediation**

16. Let me then also say a few words about the other angle of the dispute resolution, which is mediation. Hong Kong's mediation has taken root more so in the domestic sector.

17. Mediation for court cases has been working very well, reaching a recent success rate of about 40%. The Financial Dispute

Resolution Center has also achieved a success rate of about 80-90% in mediating financial disputes. The Ombudsman told me that some of the complaints made to her have been dealt with through mediation. Furthermore, the Apology Ordinance that has been introduced in Hong Kong facilitates people to apologise, resolve some of the personal grudges and dissolve differences, preventing them from escalating into disputes. These are all the things that are happening domestically in the mediation scene.

18. On promoting the use of mediation, we have held the Mediation Week in Hong Kong in May in a number of past years.

### **Opportunities and initiatives**

19. Then I will look a little bit forward on what is going to happen in the future. Is there something that allows us to think a little bit different from what we already have? Shall we not be complacent given the competition and the changing circumstances? This brings to me two things that you would have heard a lot about:



the Belt and Road Initiative and the Greater Bay Area. These two policies are economic policies promulgated in China, providing us with good incentive to think further on how best to capitalise on our strengths and opportunities.

20. The Belt and Road Initiative is growing, primarily in construction-related matters as there would be infrastructure projects, such as roads and bridges, energy power plants and hydroelectric power plants, and telecommunication. At the moment, there are over 90 countries which have signed up with China for these types of cooperation arrangements, and therefore participating in the Belt and Road Initiative.

21. I would like to suggest that the Initiative is something akin to the UN Sustainable Development Goals, which you would have no doubt heard about. They are the goals of, amongst others, developing infrastructure, connectivity, as well as rule of law.

22. The Greater Bay Area is a project closer to Hong Kong, because the Greater Bay Area comprises cities in the Guangdong province and the Hong Kong and Macao Special Administrative Regions. One important area in the Greater Bay Area is the developments of innovation and technology, and therefore intellectual property (IP) rights. This will allow us and indeed urge us to look at dispute resolution for IP rights closely.

23. As a result, we passed a law last year to state clearly that IP rights disputes are arbitrable in Hong Kong, removing the concerns of some IP lawyers, and therefore allowing arbitral awards involving IP rights to be enforceable.

24. In the light of the developments of commercial arbitration, the need for third party funding seems to be growing. Therefore, Hong Kong has also passed a law allowing third party funding in the arbitration sector, so that parties who are not otherwise able to pursue their rights can have access to justice by way of third party

funding. Those two pieces of legislation have been put in place, and they will no doubt be put into use.

25. In the light of the Belt and Road Initiative and Greater Bay Area development, the private sector in Hong Kong has been working on developing an online dispute resolution platform, so that some of the disputes can be entirely resolved online with virtual chatrooms. Hopefully, it will come into use generally for anyone who wants it, or any institution that wishes to adopt an online process as part of the arbitration process.

26. The platform is named “eBRAM” and has the aim of providing both online mediation and arbitration. This ties in very much with Hong Kong’s policy of promoting online dispute resolution in the APEC region, where a representative from our Department of Justice is chairing a working group to look at how online dispute resolution can help businesses, in particular micro, small and medium sized enterprises.

27. On the other hand, a group has been formed to look at how Hong Kong can capitalise on the Belt and Road Initiative, and what the group has done is looking at whether there is a need to set up a broader institution to deal with Belt and Road disputes.

28. In this particular angle, it is noteworthy that the Central People's Government has supported Hong Kong's role as the international legal hub as well as the dispute resolution hub for the Belt and Road projects. There are ample opportunities for us to develop our services to cater for these major projects which are coming through. Whether, and if so how, the dispute resolution mechanism could be adapted for the Belt and Road projects is something that is being looked at closely.

29. Under the Investment Agreement between Hong Kong and the Mainland under the Closer Economic Partnership Arrangement (CEPA), Hong Kong companies investing in Mainland China would now have investment protection and vice versa for the

Mainland companies investing in Hong Kong, just as most of the bilateral investment treaties (BITs).

30. The investor protection will protect investments between the two jurisdictions in a much more effective way. What is noteworthy is that instead of arbitration, which is what most BITs provide for, the Investment Agreement provides for investment mediation. Therefore, mediation is the mechanism that is being adopted to resolve investment disputes between Hong Kong and the Mainland.

31. With that being in place, Hong Kong is taking other initiatives in promoting investment mediation as a mechanism that can be used beyond Hong Kong and the Mainland, and in any other types of disputes using the UNCITRAL Rules. As you would all know UNCITRAL is hopefully endorsing the mediation convention next month.

32. Hong Kong wishes to promote the use of mediation for resolving investment disputes, triggered by the arrangements between Hong Kong and the Mainland under the CEPA Investment Agreement. Training courses have been put in place. We will be working together with the International Centre for Settlement of Investment Disputes (ICSID) to provide training with a view to ensuring that the investment side will be looked at rather than just the mediation techniques.

33. The last thing is to look at how arbitration and mediation can be worked together. In the Mainland, as some of you may be aware, the two mechanisms were put together naturally, as if it does not need a lot of effort. In the international world and in particular the common law jurisdictions, we find that very difficult to accept.

34. I used to be a great sceptic about that. How can you, as an arbitrator, become a mediator, trying to mediate and settle, and if not then you go back to write an award. I have been very sceptical, until I participated in some of such procedures. Ultimately, it is a

matter of the wish of the parties. Nevertheless, there are safeguards that can be introduced to enhance the current system that the Mainland is adopting.

35. I think with Hong Kong knowing how the international law and common law work, we would be able to enhance and improve on those procedures so as to allow mediation cum arbitration to cater for the needs of the parties in a very useful way.

36. Those are some areas that I would like to share with you as something we in Hong Kong are hoping to embark on. I would love to hear your views and answer any questions.

Thank you very much.

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