

Speech of Ms. Teresa Cheng, SC
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An Introduction to the Hague Academy of International
Law's 2021 Hong Kong Programme

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Outline

I. Introduction	2
II. The 2021 HAIL Course – Current Trends on International Commercial Dispute Settlement	7
III. The Advanced Course in Hong Kong.....	20
<i>A. Constitutional Structure of Hong Kong</i>	<i>21</i>
<i>B. Cooperation with the Mainland</i>	<i>23</i>
<i>C. Vision 2030</i>	<i>27</i>
IV. Conclusion.....	28

I. Introduction

1. Good afternoon, good morning, good evening. Dr Neoh [Dr Anthony Neoh, Chairman, Asian Academy of International Law], Dr Bernasconi [Dr Christophe Bernasconi, Secretary General, Hague Conference on Private International Law], Professor Thouvenin [Professor Jean-Marc Thouvenin, Secretary-General, The Hague Academy of International Law (“HAIL”)], Professor Arroyo [Professor Diego Fernandez Arroyo, Member of the Curatorium, HAIL], Ladies and Gentlemen,
2. It gives me great pleasure to speak at this webinar. As you may well be aware, the First Edition of the Hague Academy of International Law’s Advanced Course in Hong Kong was due to be held this year. However, due to the pandemic, a lot of plans had to be changed, and we have to wait one more year before the

first edition of this wonderful course can be held in Hong Kong. Nevertheless, in these challenging times and the new normal, the organisers of this course, which are the Department of Justice, the Hague Academy of International Law and the Asian Academy of International Law, have decided to hold this webinar to give you all a glimpse of what to expect at the Hague Academy Advanced Course in Hong Kong next year.

3. As you all know, courses held by The Hague Academy of International Law are one of the best in the world in the field of both public and private international law, with eminent and distinguished academics, judges and practitioners serving as teaching staff. The teaching requirements are also very stringent at The Hague Academy - as noted on the Academy's website, quoting from the Former President of the International Court of Justice, Dame Rosalyn Higgins, "[t]o teach at

The Hague Academy is an undertaking like no other.”¹

4. Whilst it is always correct to say that the Hague Academy of International Law needs no introduction for it is well known to anyone who is serious in the practice and research of law, it is nonetheless worth noting that the objective of the Hague Academy is to be a “*centre for the advanced study of and research into international public and private law and related sciences, with the aim of promoting in-depth academic research into issues relating to international legal relationships by conducting educational and research activities and any other activity that could contribute towards achieving this objective*”². Through this objective, it seeks to serve the public interest.

5. This the Hague Academy has been actively and successfully pursuing since 1923. It has run courses,

¹ See <https://www.hagueacademy.nl/>.

² See <https://www.hagueacademy.nl/about/support/>.

seminars and conferences; and academics, international lawyers and judges who are the most competent men and women would be called upon to teach in these courses. Students literally from all parts of the world attend these courses thereby carrying the knowledge and messages back to their home country spreading the international rule of law slowly and steadily.

6. The Asian Academy of International Law is an independent and non-profit making body, set up in Hong Kong to further the study, research and development of international law in Asia. One of its visions and missions is to provide training and education in public and private international law, on its own or in collaboration with other academic or professional institutions. The Asian Academy is a comparatively young body and the fact that it can now jointly organise a course on “Current Trends on

International Commercial Dispute Settlement” with the Hague Academy will no doubt lend strength and confidence to further its other objects in Asia.

7. Capacity building, especially in the area of international law, is much needed in Hong Kong. It is for the reason of serving the legal sector here, and seeing the need for structured international law training to be provided in Hong Kong by reputable and knowledgeable bodies such as the Hague Academy, that when I visited the Hague in April 2019, I made a special visit to the Hague Academy of International Law and to meet with its Secretary-General Professor Thouvenin. I recall that at the meeting, after the exchange of greetings and remarks about our own work, I boldly made the suggestion that a training be done in Hong Kong to be jointly organised by the Hague Academy and the Asian Academy. Hong Kong must have done something good, for the

Secretary-General had no hesitation in agreeing to this and I recalled we actually shook hands across the table so that the working level will implement this great collaboration. And, here we are.

II. The 2021 HAIL Course – Current Trends on International Commercial Dispute Settlement

8. It was not difficult to come to an agreed view that the Advanced Course should focus on the Current Trends on International Commercial Dispute Settlement. The expertise that is within the Curatorium and the interest of Hong Kong in keeping abreast with the developments in this area make this a most suitable subject for the first course to be held in Hong Kong by the Hague Academy of International Law.
9. I often describe dispute resolution or dispute settlement as a spectrum starting with the much practised but

sometimes overlooked process of direct negotiation, through to litigation, an adjudicative system provided under the framework of the constitution of the relevant States. The procedures that engage third party neutrals can in fact be an infinite amount of permutations, the most common of which are arbitration followed by mediation. Needless to say, even within these two procedures there are also many adaptations that will or can be used to suit the particular dispute at hand.

10. Most of us premise our views on the assumption that investment is a commercial activity. However as no doubt you will hear from the course, this may not be as simple as it seems in the context of, for instance, enforcing arbitral awards or mediated settlement agreements under the relevant conventions. Indeed, even in understanding the word "international", the more orthodox views of some may be that the word

"international" should only be confined to describe matters between states. Most practitioners would not agree but one cannot rule out such a view. Another matter that may be worth considering and it may perhaps be covered would be whether dispute avoidance could be included into the concept of dispute settlement. When a dispute is avoided, there is nothing to settle. Yet, dispute avoidance is clearly the trend to go and cannot be ignored.

11. I look forward to sharing with you some of my experience and thoughts in this area at the Opening Lecture of the course next year.

12. The theme of "Current Trends on International Commercial Dispute Settlement" is designed to cover the three major topics of international litigation, arbitration and mediation, and is also intended to explore the latest developments in dispute resolution

and treaty interpretation. This topic is highly relevant and of interest to academics and practitioners alike, and is complementary to the course “Perspectives on Treaty-Based Investor-State Arbitration” offered in The Hague Academy’s 2019 Summer Course³, and the Inaugural Lecture of the Hague Academy’s 2021 Summer Course titled “The Growth, Challenges and Future Prospects for Investment Dispute Settlement”⁴.

13. As a brief overview and introduction, the course next year will consist of five lectures, the topics of which have been carefully curated. However, it should be highlighted that before the lectures, an important session is the Foreword given by Dr Bernasconi, Secretary-General of the Hague Conference on Private International Law. It is important for Dr Bernasconi to speak at the Foreword, since private international

³ <https://www.hagueacademy.nl/wp-content/uploads/2020/02/THAIL-Summer-Poster-2019-Cours-d%C3%A9t%C3%A9.pdf>.

⁴ <https://www.hagueacademy.nl/wp-content/uploads/2020/10/PROGRAMME-2021.pdf>.

law plays a significant part in international commerce (in particular international commercial dispute settlement), and the Hague Conference on Private International Law is a major stakeholder on this important subject. We are not only honoured to have Dr Bernasconi at the Advanced Course in Hong Kong next year, but we will hear from him today too.

14. The first lecture for the Advanced Course next year is on mediation, in particular the “*United Nations Convention on International Settlement Agreements Resulting from Mediation*” (the “Mediation Convention”)⁵, signed in Singapore on 7 August last year. As you may well know, this Mediation Convention is a significant development to the use of mediation around the world. The United Nations Commission on International Trade Law

⁵ The text of the Mediation Convention can be found at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf.

(“UNCITRAL”) described the Mediation Convention as “*an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes*”⁶.

Ms Natalie Morris-Sharma, Deputy Senior State Counsel from the Attorney-General’s Chambers in Singapore will share her insights as to this Convention as Chairman of the Working Group that developed the Mediation Convention.

15. The next topic is on Investor-State Dispute Settlement, which Professor Arroyo will give an introduction on in his presentation in a moment. With the number of bilateral and multilateral investment treaties that are currently in force and under negotiation around the world today, it would be an understatement to say that this is an important topic. Given the extensive academic and practical knowledge of Professor Arroyo

⁶ See the website of UNCITRAL at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

on the subject, one would greatly benefit from his insights.

16. We then move on to the topic of International Commercial Arbitration. With the 2018 Queen Mary University of London International Arbitration Survey noting that an overwhelming 97% of respondents surveyed indicating that international arbitration is their preferred method of dispute resolution⁷, the topic of arbitration is now part and parcel of international commercial dispute settlement today. With international and cross border commerce becoming commonplace and soon to be seamless due to the advances in technology and the increasing interconnectivity of the world, this will result in significant developments in the law in this area. Professor Franco Ferrari of the NYU School of Law is well placed to discuss some of these developments.

⁷ See <http://www.arbitration.qmul.ac.uk/research/2018/>.

17. With the onset of COVID-19, the use of technology has become prevalent, including in dispute settlement. One cannot help but wonder whether this pandemic has actually enhanced and made these dispute settlement procedures in international disputes even more affordable. With the experience of practitioners in the use of videoconferencing, it would not be difficult to assume videoconferencing will continue to be an option in the future even when the pandemic is over. The length of time for hearings as a result may well be shortened and costs significantly reduced.

18. Legal questions, however, may arise when it comes to questions of applicable law in various aspects of a dispute settlement procedure, and indeed whether the legal seat of the arbitration is in any way affected when everything is done online. This is an interesting question, for the only matter that may then necessitate

the consideration of where the seat of an arbitration is to be would only be a matter of the choice of the supervisory jurisdiction. In other words, in light of the change of the landscape caused by the pandemic in the way mediations and arbitrations are conducted, the focus now may not be just on the rules of the arbitral institutions, but the professional qualities of the judiciary that is to be the forum for the supervisory jurisdiction. I would expect that technology, whilst having solved the problems relating to the inaccessibility of various places as a result of the pandemic, may actually bring out a new area of law in the use of cyberspace.

19. The topic of the fourth lecture is the Settlement of International Disputes before Domestic Courts. International commercial dispute settlement mechanisms, whether they be mediation, arbitration, or otherwise, no doubt may run into issues that might

require the adjudication of domestic courts. Issues such as what the law applicable to the arbitral agreement is, and the interpretation of the relevant conventions and the way domestic courts deal with the applicability of international jurisprudence will be a matter of great interest. Other more general issues such as the capacity of parties, and the grant and enforcement of interim measures, will often have to be considered. In this session, Professor Mathias Weller of Bonn University in Germany will be presenting his thoughts on this very intriguing subject.

20. Finally, the Advanced Course will not be complete without a lecture on the Latest Development of International Commercial Courts with a special focus on the China International Commercial Court. There is certainly an attraction in the use of the national constitutional structure to resolve international commercial disputes but the question is how it can

actually be structured so as to provide a “one stop shop” for disputants. Only when that is achieved will the use of specialised international commercial courts be of utility to the commercial world and the disputants.

21. International commercial courts have become quite fashionable, with various jurisdictions setting up special courts that deal exclusively with commercial matters before it. They often comprise of judges from other jurisdictions. The Singapore International Commercial Court for instance comprises of judges from both civil and common law jurisdictions and will hear cases that are assigned to it but they are confined only to commercial matters⁸. The same is the case with the court in the Dubai International Financial Centre⁹, and the more recently set up Astana International Financial Centre¹⁰. The courts in these

⁸ <https://www.sicc.gov.sg/who-we-are/overview-of-the-sicc>.

⁹ The Dubai International Financial Centre Courts has a common law judiciary and only has jurisdiction in certain civil and commercial matters - see <https://www.difccourts.ae/about-courts-2/>.

¹⁰ The Astana International Financial Centre Court is based on the common law court system and only has jurisdiction in certain civil and commercial matters – see <https://court.aifc.kz/an-introduction/>.

“special legal zones” apply common law, a system of law that businesses tend to be more familiar with.

22. We in Hong Kong are very fortunate in the Advanced Course to have invited Judge Zhang Yongjian, former Judge of the China International Commercial Court, to share with us the inner workings of this Court. The China International Commercial Court is quite different to other international commercial courts since it aims to provide a platform that amalgamates arbitration, mediation and litigation into its processes, and it represents a new way of looking at international commercial courts and international commercial dispute settlement mechanisms.

23. On the subject of international commercial courts, I must make an observation about China's policy of "One Country, Two Systems". As most of you will know, under "One Country, Two Systems", the

judiciary in Hong Kong is empowered to adjudicate on matters, including the power of final adjudication.

24. Hong Kong practices the common law. Save for provisions in the Basic Law which can be finally interpreted by the Standing Committee of the National People's Congress in accordance with Article 158 of the Basic Law, judges in the Court of Final Appeal, which consists of non-permanent judges from overseas, have final adjudicative power in relation to all cases, be they commercial, criminal, constitution, or otherwise.

25. As you can see, the teaching faculty of the upcoming Advanced Course in Hong Kong are highly qualified, and are eminent experts in their respective fields. We hope by having them speak on these topics, participants will have a comprehensive and complete understanding of the different perspectives in the

current trends of international commercial dispute settlement, and will leave with a deeper appreciation of the subject.

III. The Advanced Course in Hong Kong

26. I am deeply indebted to the Hague Academy and the Asian Academy for agreeing to organise this Advanced Course here in Hong Kong. I hope that our dedication to uphold the rule of law and to provide capacity building opportunities here has helped to secure the Hague Academy's interest in running this course in Hong Kong. As discussed with Professor Thouvenin, it ought not be a one-off course but a series of courses. This is the only way in which an impression can be made and the word of the international rule of law be spread.

27. I would like to take this opportunity to say a few words about the constitutional structure of Hong Kong and our “Vision 2030 for Rule of Law” Initiative.

A. Constitutional Structure of Hong Kong

28. The Constitution of the People’s Republic of China and the Basic Law together forms the constitutional order of the HKSAR. Matters within “One Country”, including foreign affairs, defence, national security, etc. are the responsibility of the Central People’s Government. However, the HKSAR also exercises a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law¹¹.

¹¹ Article 2 of the Basic Law.

29. Judicial independence in Hong Kong is also well protected under the Basic Law, with judges being free to decide their cases in accordance with law and evidence - indeed they are bound to so do under the judicial oath. In the HKSAR, the only criteria upon which judges are appointed is their judicial and professional quality, and their appointment by the Chief Executive is upon the recommendation of an independent statutory commission¹². No political vetting is involved in the appointment process. Judicial independence is premised on the solid infrastructure that has been laid down primarily in the Basic Law - the security of tenure¹³, the immunity of judges¹⁴, the non-revolving door¹⁵, and importantly the expressed provision in Article 85 of the Basic Law that

¹² Articles 88 and 92 of the Basic Law.

¹³ Article 89 of the Basic Law guarantees the security of tenure for judges, and states that they can only be removed for inability to discharge his or her duties or for misbehavior.

¹⁴ Article 85 of the Basic Law provides that members of the judiciary shall be immune from legal action in the performance of their judicial functions.

¹⁵ Upon appointment, judges at the District Court level and above are precluded from returning to practice in Hong Kong as a barrister or solicitor. This “non-revolving door” system prevents perceived conflicts of interest and enhances the independence of the judiciary.

guarantees judicial independence, free from any interference¹⁶.

30. Article 63 of the Basic Law additionally provides that the Department of Justice shall control criminal prosecutions, free from any interference. Any prosecutorial decisions will be considered upon the evidence, the law, and on the basis of the Prosecution Code, and never upon any political, improper or undue influence¹⁷.

B. Cooperation with the Mainland

31. As a result of Hong Kong being a Special Administrative Region and actually practicing a different legal system from that of Mainland China, the

¹⁶ Article 85 of the Basic Law reads:

“The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.”

¹⁷ SJ’s blog: “Prosecutorial decisions never involve political considerations” at https://www.doj.gov.hk/eng/public/blog/20200426_blog1.html.

Basic Law, Article 95 in particular, provides Hong Kong with the opportunity to enter into arrangements with the Mainland on a variety of topics, including civil and commercial matters. Hong Kong has greatly benefited from this "One Country, Two Systems" policy as it is able to enter into unique arrangements with the Mainland, such as the *“Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the [HKSAR]”*¹⁸. This arrangement makes Hong Kong the first and only jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitral proceedings administered by eligible arbitral institutions would be able to apply to the Mainland courts for interim measures. Similarly, the *“Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial*

¹⁸ See https://www.doj.gov.hk/en/mainland_and_macao/pdf/arbitration_interim_e.pdf for the Courtesy English Translation of the Arrangement.

Matters by the Courts of the Mainland and of the [HKSAR]”¹⁹ makes reference to the Judgments Project of the Hague Conference on Private International Law, and seeks to establish a bilateral mechanism for the reciprocal recognition and enforcement of judgments in civil and commercial matters. The Arrangement also covers judgments involving intellectual property rights, which goes beyond the scope of the Hague Judgments Convention.

32. Just two weeks ago, the “*Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the [HKSAR]*” concluded in 1999²⁰ was amended by the signing of the “*Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the [HKSAR]*”²¹. Two of the four aspects of the 1999

¹⁹ See https://www.doj.gov.hk/en/mainland_and_macao/pdf/Doc3_477379e.pdf for the Courtesy English Translation of the Arrangement.

²⁰ See https://www.doj.gov.hk/en/mainland_and_macao/pdf/mainlandmutual2e.pdf for the Courtesy English Translation of the Arrangement.

²¹ See https://www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangementr_e.pdf for the Courtesy English Translation of the Supplemental Arrangement.

Arrangement that were amended are noteworthy. First, a party may now apply for preservation measures before or after the court's acceptance of an application to enforce an arbitral award. Secondly, the current restrictions have been removed to allow parties to make simultaneous applications to both the courts of the Mainland and HKSAR for enforcement of an arbitral award.

33. The *“Regulations of the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone of the Shenzhen Special Economic Zone”* passed by the Shenzhen Municipal People's Congress in late August this year²² also allows some 11,000 wholly-owned Hong Kong enterprises (“WOKEs”) registered in Qianhai to choose Hong Kong law by agreement in civil and commercial contracts in the absence of

²² The text of the “Regulations of the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone of the Shenzhen Special Economic Zone” can be found at http://www.szrd.gov.cn/szrd_zyfb/szrd_zyfb_cwhgb/202009/t20200901_19315946.htm?from=timeline&isappinstalled=0 (Chinese only).

foreign-related elements.

34. The above illustrates some of the benefits Hong Kong has in the practice of law in its unique position of being a Special Administrative Region of China and being the only common law jurisdiction within the country.

C. Vision 2030

35. Capacity building is a major policy initiative for Hong Kong. The “Vision 2030 for Rule of Law” initiative is a 10-year project that the Hong Kong SAR Department of Justice is currently undertaking to building and maintaining a fair and rule-based society underpinned by the rule of law, and corresponds to Goal 16 of the United Nations 2030 Agenda for Sustainable Development, which is to provide access to justice for all and build effective, accountable and

inclusive institutions at all levels²³. Vision 2030 aims to advance the rule of law and achieve the United Nations Sustainable Development Goals in related fields through four aspects: facilitating inclusive stakeholders' collaboration; encouraging academic and professional exchange and research; enhancing capacity building and dissemination of proper information; and organizing promotional activities and contributing to building a strong rule of law community within this region and beyond²⁴.

IV. Conclusion

36. Ladies and gentlemen, thank you for listening to my presentation and introduction on the Advanced Course to be held in Hong Kong next year. You are all very well-advised to register quickly for this Advanced

²³ For more information on Goal 16 of the United Nations Sustainable Development Goals, see <https://sdgs.un.org/goals/goal16>.

²⁴ For more information on Vision 2030, please see https://www.doj.gov.hk/en/legal_dispute/vision_2030.html.

Course and to seize the opportunity to learn from a pool of illustrious teaching faculty. Thank you very much.