"One Country, Two Systems" and the Development of Arbitration in Hong Kong

The HKSARG has a long-standing policy of promoting Hong Kong as a leading international legal and dispute resolution services centre in the Asia Pacific region. This has been underscored by each of the CE's Policy Addresses during this term of government and is one of the key priorities of the Department of Justice. This objective also receives the express support of the "Outline of the 13th Five-Year Plan for the National Economic and Social Development of the PRC" (March 2016)[1] which includes a dedicated chapter on the Hong Kong and Macao Special Administrative Regions.

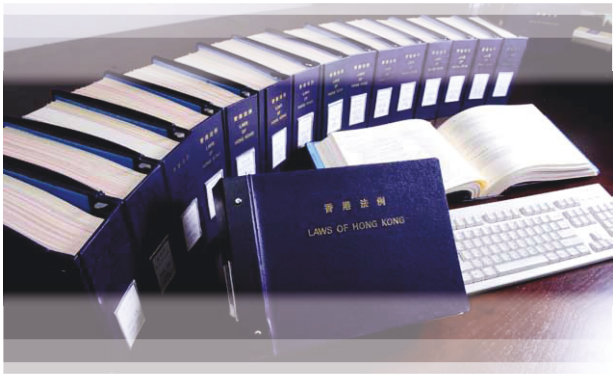
The continued success[2] of Hong Kong as an international legal and dispute resolution services centre both before and after 1997 is no doubt attributable to its good reputation in maintaining the rule of law and our sophisticated legal services sector. Hong Kong remains a separate jurisdiction from Mainland China and retains its own legal system. After the handover, the common law continues to apply in Hong Kong as provided for by the BL. By it, the independence of the judiciary is also fully guaranteed and protected at a constitutional level. Our own CFA is vested with power of final adjudication. Further, BL 9 categorically provides that English, in addition to the Chinese language, may also be used as an official language. The ability to provide bilingual services has added one additional competitive edge to the HKSAR in providing international legal and arbitration services.

The principle of "one country, two systems", enshrined by the BL, facilitates the development of the arbitration system in Hong Kong since 1997 in various aspects. We shall discuss below how it has benefitted from this cardinal principle.

The common law system

Through the implementation of the "one country, two systems" principle by the BL, the common law system which Hong Kong practises is familiar to the international community. It is the only common law jurisdiction within China.

According to BL 18, the laws in force in the HKSAR shall be the BL, the laws previously in force in Hong



[1] The National 13th Five-Year Plan serves as the blueprint and action agenda for the country's development from 2016 to 2020. Promulgated by the CPG, the National Five-Year Plans outline the direction and targets of national development in the ensuing five-year planning period, and set out the specific work focus of the central government. They serve as the blueprint and action agenda for the economic and social development of the country.

[2] In the 2015 International Arbitration Survey by Queen Mary University of London, Hong Kong was ranked 3rd globally as the seat of arbitration that the survey respondents or their organisations had used the most over the past five years, after London (1st) and Paris (2nd). London, Paris and Hong Kong were also listed as the top three seats preferred by respondents.

Kong and the laws enacted by the legislature of the HKSAR. National laws enacted by the NPC and its Standing Committee shall not be applied in the HKSAR except for those listed in Annex III to the BL.

At the same time, BL 8 provides that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene the BL, and subject to any amendment by the legislature of the HKSAR.

The common law jurisprudence in Hong Kong is not necessarily identical to that in other common law jurisdictions. In fact, one of the strengths of the common law is its very ability to adapt to changing social conditions and to meet the needs of each particular jurisdiction. Many important principles evolved, and continue to evolve, through judge-made law. The applicable legal principles might have originated from decisions of judges in England and Wales, but now, insofar as the HKSAR is concerned, they can continue to be developed by the courts of the HKSAR, in particular our CFA.

As other common law jurisdictions may also experience, changing circumstances, global or local, could have made some of the previous decisions an anachronism and no more applicable than an analogy for consideration. A final appellate court (such as the CFA in the case of Hong Kong) must therefore often look to what the rest of the common law world may offer. For this reason, two landmark decisions by the CFA in *A Solicitor (24/07) v Law Society of Hong Kong*[3] and *China Field Ltd v Appeal Tribunal (Buildings)(No.2)*[4] have elaborated on the doctrine of *stare decisis* and provided guidance on the development of common law principles in Hong Kong.

In the *A Solicitor* case, the CFA held that, as from 1 July 1997, with the CFA being Hong Kong's final appellate court, its decisions were binding on the lower courts in Hong Kong. Moreover, as the final court at the apex of Hong Kong's judicial hierarchy, the CFA might depart from previous decisions of the Judicial Committee of the Privy Council in London on appeal from Hong Kong and the CFA's own previous decisions. However, it would approach the exercise of its power to do so with great circumspection and exercise such power most sparingly.

It is relevant to note that the CFA was of the view

[3] *A Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKLRD 576.

[4] *China Field Ltd v Appeal Tribunal (Buildings)(No.2)* [2009] 5 HKLRD 662.

that after 1 July 1997, in the new constitutional order, it was of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This included 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. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them. This is underlined in the BL itself. BL 84 expressly stipulates that the courts in Hong Kong may refer to precedents of other common law jurisdictions.

The pivotal role of the CFA to develop the common law of Hong Kong has also been further explained by that court in the *China Field* case: Now that the jurisdiction to ascertain, declare and develop the common law of Hong Kong was exercisable by it, the CFA would continue to have respect for and regard to the decisions of the English courts but would decline to adopt them when it considered their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong and also when it considered that the law of Hong Kong should be developed along different lines.

The ability of Hong Kong courts to draw on the best of common law precedents from other jurisdictions and to continue developing its own common law jurisprudence is fundamental in building confidence on the part of users of Hong Kong's international arbitration service.

For example, the Hong Kong CFI in *Lin Ming v Chen Shu Quan*[5] followed the principles set out by the English Court of Appeal[6] and Queen's Bench Division[7] in holding that the jurisdiction to grant an injunction to restrain an arbitration must be exercised very sparingly, with due regard to the principles of party autonomy and self-restraint by the courts when intervening in the arbitral process and with great caution. The CFI held that injunctive relief against arbitral proceedings might be granted only if: (i) it would not cause injustice to the claimant in the arbitration; and (ii) continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

Besides, the Hong Kong CFI in *Jung Science Information Technology Co Ltd v ZTE Corp*[8] affirmed the principle on appearance of bias on the part of arbitrators laid down by the English Court of Appeal[9] deciding that the same test ("the reasonable apprehension of bias test") which applied to judges applied equally to arbitrators, i.e., whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.[10] The court in *Jung Science* also followed the principles laid down by the Federal Court of Australia[11] and the English Court of Appeal[12] with regard to the application of the reasonable apprehension of bias test to the facts under consideration.

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5 *Lin Ming v Chen Shu Quan* [2012] 2 HKLRD 547 (at paras 41, 46 and 53). The application for leave to appeal against the CFI's refusal of the injunction was dismissed by the CA in HCMP 552/2012 on 3 May 2012.

6 The *Oranie and The Tunisie (UK)* [1966] 1 Lloyd's Rep 477.

7 *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd (UK)* [2007] EWHC 1262, [2007] BLR 439.

8 *Jung Science Information Technology Co Ltd v ZTE Corp* [2008] 4 HKLRD 776.

9 *AT & T Corp v Saudi Cable Co.* [2000] 2 All ER (Comm) 625.

10 See the House of Lords decision in *Porter & Another v Magill* [2002] 2 WLR 37.

11 *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd & Another* (1996) 135 ALR 753.

12 *Taylor v Lawrence* [2002] 2 All ER 353.

Independent Judiciary

As a matter of first principles, BL 2 acknowledges that the high degree of autonomy enjoyed by the HKSAR embodies independent judicial power, including as mentioned before, that of final adjudication. More specifically, BL 85 further demands that the courts of the HKSAR shall exercise judicial power independently, free from any interference.

Under BL 82, the CFA may as required invite judges from other common law jurisdictions to sit on the CFA and under BL 92, judges and other members of the judiciary of the HKSAR may be recruited from other common law jurisdictions. It is particularly noteworthy that judges from overseas common law jurisdictions who are appointed non-permanent judges of the CFA have been of the highest international standing and calibre, including leading retired or serving judges of the Supreme Court of the United Kingdom, the former House of Lords, High Court of Australia, and New Zealand Supreme Court and Court of Appeal.

The Hong Kong judiciary is well known for its quality and independence[13]. Its arbitration-friendly approach is well documented in the court judgments[14]. In the presence of a valid arbitration agreement between the parties in dispute, the court is expected to stay the court proceedings in favour of arbitration. The court also upholds the wide discretion of arbitrators and the flexibility of the arbitral process.[15]

In this regard, Mr Justice Hamblen of the High Court (now Lord Justice Hamblen of the Court of Appeal) of England and Wales in *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* succinctly summed up the position of Hong Kong as an ideal venue for resolving disputes through arbitration in this manner: "… whilst Hong Kong is no doubt geographically convenient, it is also a well-known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts."[16]

Worldwide recognition and enforcement of arbitral awards

The continuing application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in the HKSAR after 1997 ensures that arbitral awards made in Hong Kong can be enforced in all contracting states to the New York Convention (over 150 states so far). Similarly, awards in a contracting state to the New York Convention can also be enforced in Hong Kong by way of summary procedure.

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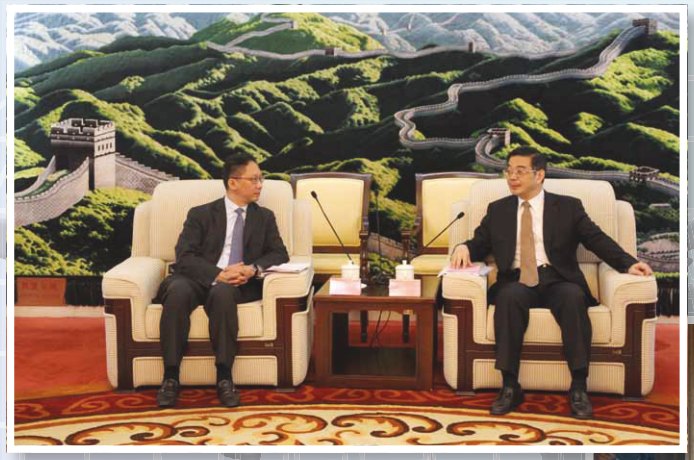
[13] Hong Kong was ranked 8th in judicial independence out of 138 countries/economies by the World Economic Forum in the Global Competitiveness Report 2016-17, or 3rd (only after New Zealand and Ireland) amongst the common law jurisdictions and the only Asian jurisdiction in the top 10.

[14] In *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKLRD 582 (at para. 11), Madam Justice Mimmie Chan said, "The modern trend of the courts is to uphold arbitration agreements, to facilitate arbitrations, and (save in circumstances necessary to safeguard due process and as allowed under the international Conventions) not to intervene in an arbitration, which is the parties' free choice as to the method of dispute resolution, and the substantive law and forum to govern and oversee the arbitration."

[15] In *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1, the CA emphasised that the courts should not interfere with a case management decision, which was fully within the discretion of an arbitral tribunal (at para. 68). In respecting the wide discretion of arbitrators and the flexibility of the arbitral process, the CA said that before a court could find that a party "was otherwise unable to present his case" under Article 34(2)(a)(ii) of the UNCITRAL Model Law (as adopted in section 81 of the Arbitration Ordinance) to set aside an award, the conduct complained of must be "serious, even egregious" (at paras. 93 and 94). The CA's decision to refuse to set aside the award was upheld by the CFA (FAMV 18/2012, 21 February 2013).

[16] *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm) (at para. 37).



Under BL 153, the application to the HKSAR of international agreements to which the PRC is or becomes a party shall be decided by the CPG, in accordance with the circumstances and needs of the HKSAR, and after seeking the views of the HKSARG. With CPG's support, the continuing application of the New York Convention in the HKSAR has made it possible for the HKSAR to benefit from the regime of the Convention for the recognition and enforcement of foreign arbitral awards — a crucial element to support Hong Kong in maintaining its competitiveness as a leading dispute resolution centre worldwide.

This is complemented by tailor-made arrangements, one between Hong Kong and the Mainland and another between the Hong Kong and Macao Special Administrative Regions for reciprocal enforcement of arbitral awards: The 1999 Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR ("1999 Arrangement") and The Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the HKSAR and the Macao Special Administrative Region in 2013 ("2013 Arrangement").

The 1999 Arrangement and the 2013 Arrangement are made on the basis of BL 95 which provides that "the HKSAR may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country" — a special arrangement permitted as a manifestation of the "one country, two systems" principle for different parts of the country operating their own different legal systems to enter into regional arrangements for juridical assistance.

Being an international treaty, the New York Convention cannot be invoked to compel mutual

enforcement of arbitral awards between different territories within the same contracting state, i.e. the PRC. The 1999 and 2013 Arrangements, based on the spirit of the New York Convention, are made possible because of BL 95 which permits juridical assistance between the HKSAR and other parts of China.

The conclusion of the two Arrangements adds certainty to the enforceability of Hong Kong arbitral awards in the Mainland and Macao and vice versa, and provides a simple and effective mechanism in these jurisdictions on reciprocal enforcement of arbitral awards. It also fosters co-operation between Hong Kong and these jurisdictions on arbitration in civil and commercial matters and enhance Hong Kong's position as a regional arbitration centre for resolution of commercial disputes.

Enactment of the Arbitration Ordinance

Under BL 17, the HKSAR shall be vested with legislative power. The legislative competence of the HKSAR to update or even revamp our statutory framework for arbitration has enabled the HKSAR to develop its own arbitration system to address local needs and to bring it in line with the international trend so as to fulfil the HKSARG's objective to develop and promote Hong Kong as a leading centre for dispute resolution in the Asia Pacific region.

In 2011, the Arbitration Ordinance, re-enacted as Cap. 609, came into effect to reform the arbitration law of Hong Kong by unifying the legislative regimes for domestic and international arbitrations on the basis of the 2006 revised version of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law. The aim of the reform

was to attract more international arbitration to Hong Kong. The arbitration legislation has since been regularly updated to provide for a more user-friendly statutory framework for conducting arbitration.

The Arbitration Ordinance was updated in 2013 and 2015 to ensure that the latest developments in the arbitration sector can be promptly reflected in legislation. The 2013 amendments, for example, were introduced to make it clear that emergency relief granted by an emergency arbitrator before the establishment of an arbitration tribunal, whether in or outside Hong Kong, is enforceable in accordance with the provisions of the Arbitration Ordinance. In 2015, amendments were enacted to remove some legal uncertainties relating to the opt-in mechanism under Part 11 of the Arbitration Ordinance, so that parties opting for domestic arbitration could decide on the number of arbitrators, whilst retaining their right to seek the court's assistance on the matters set out in sections 2 to 7 of Schedule 2 to the Arbitration Ordinance.

World Class Arbitration Institutions

The Hong Kong International Arbitration Centre ("HKIAC"), one of the region's most well-known arbitration centres, is Hong Kong's own home-grown arbitration institution which was established in 1985. In November 2015, the HKIAC has reached an important milestone by being the first international arbitration institution to open a representative office in Mainland China. The representative office is located within the China (Shanghai) Pilot Free Trade Zone.

Over the last ten years, we have seen an increasing number of reputable international legal and dispute resolution institutions setting up offices in Hong Kong. Some reputable international arbitral institutions have chosen Hong Kong as the first location to establish their presence outside their home jurisdiction.

In 2008, the International Chamber of Commerce ("ICC") opened the Asia Office of the Secretariat of its International Court of Arbitration in Hong Kong to accommodate a case-management team, which is the first such team outside the ICC Paris headquarters. In 2012, the China International Economic and Trade Arbitration Commission ("CIETAC") set up its Hong Kong office, which is the first such centre established by CIETAC outside Mainland China. In 2014, the China Maritime Arbitration Commission also set up an arbitration centre in Hong Kong, which is its first such centre outside Mainland China.

In recent years, we have seen a growing number of investor-State disputes in Asia, involving either Asian claimants or Asian respondents. With the support of the CPG, a Host Country Agreement between the CPG and the Permanent Court of Arbitration ("PCA") on the conduct of dispute settlement proceedings in Hong Kong and a related Memorandum of Administrative Arrangements concerning such proceedings between the HKSARG and the PCA were signed in January 2015. The signing of these two documents will facilitate the conduct of PCA-administered arbitration in Hong Kong, including investor-State arbitration. Headquartered at The Hague, the PCA was established by the Convention for the Pacific Settlement of International Disputes (1899). It has an excellent reputation in handling international investment arbitration.

The arrangement made by the CPG to facilitate the establishment of the PCA in the HKSAR has reflected a unique feature of the "one country, two systems" principle in the HKSAR context, i.e. the power of the CPG to conduct foreign affairs relating to the HKSAR and the recognition and provision of legal status, privileges and immunities for international organizations (such as the PCA) in the HKSAR by local legislation.

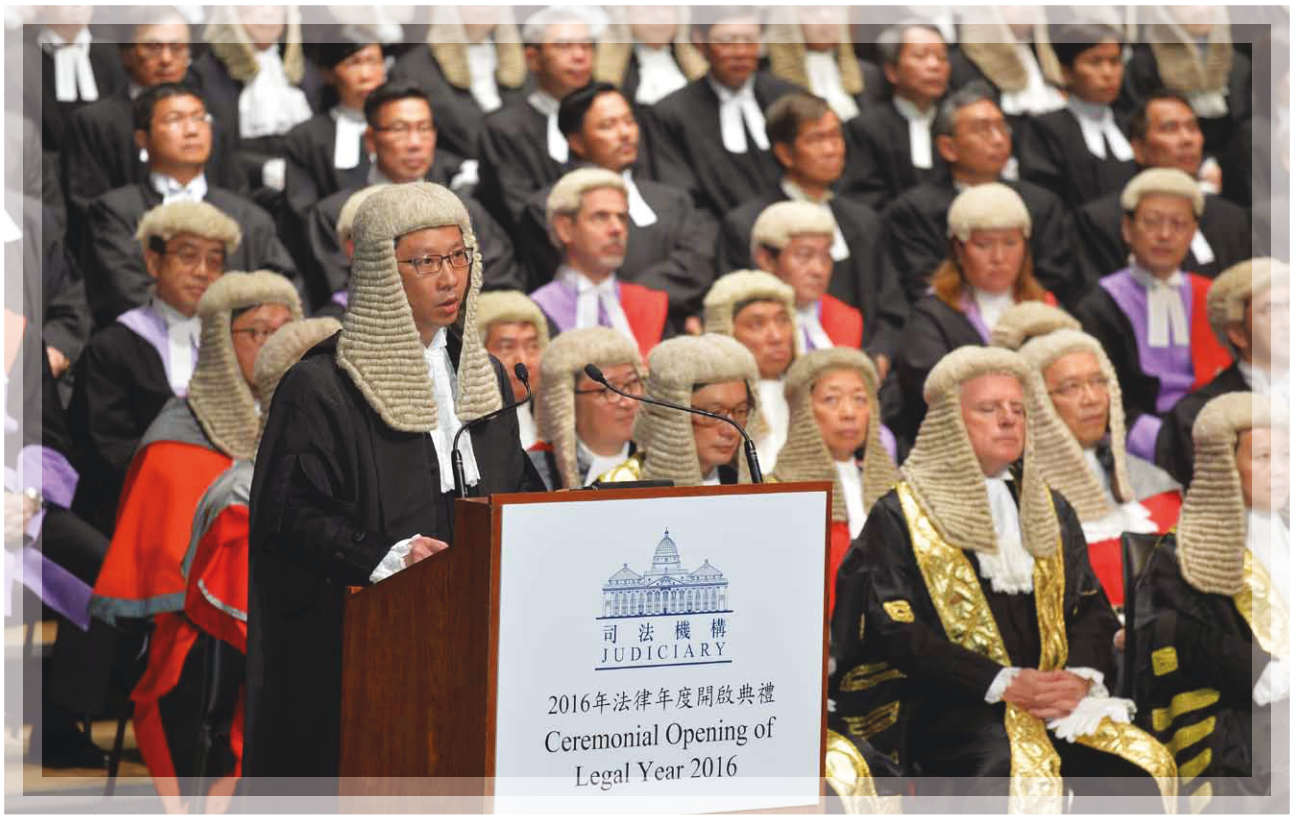
As part of the effort to provide a more favourable environment for the provision of legal and dispute resolution services by law-related organisations in Hong Kong, the HKSARG has announced its decision to allocate part of the office space in the West Wing of what has been renamed as Justice Place (the former Central Government Offices) and the former French Mission Building (accommodating the CFA since its establishment up to September 2015) to accommodate them. Together with the Department of Justice which is housed in the Justice Place, the whole area will emerge as a legal hub in the central business district of Hong Kong.

Legal profession

Hong Kong has a strong legal profession. As of 30 November 2016, there are over 1,300 practising barristers, over 9,000 practising solicitors and more than 1,300 registered foreign lawyers in Hong Kong. The presence of such an array of local and international lawyers enables Hong Kong to provide top quality legal services in many areas of civil and commercial law, including finance, investment, international trade, maritime law, intellectual property and commercial contracts. A strong legal profession will ensure that there will be sufficient experienced and skillful lawyers who can act as arbitrators or appear in arbitral proceedings conducted in Hong Kong.

Under BL 94, on the basis of the system previously operating in Hong Kong, the HKSARG may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the HKSAR. Under BL 142, the HKSARG shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions.

The Department of Justice has been working closely with the legal professional bodies to improve the regulatory framework within which lawyers can provide their services in Hong Kong. The Legal Practitioners (Amendment) Ordinance 2012 which came into operation on 1 March 2016 allows law firms to operate in the form of a limited liability partnership ("LLP") in which the personal assets of innocent partners, other than their interests in partnership property, are protected from liability caused by the negligence, wrongful act or omission, or misconduct of any



other partner(s) in the provision of professional services by the firm. The introduction of LLP as an additional business model for law firms in Hong Kong will also encourage overseas law firms to come and operate in Hong Kong as LLPs which will enhance Hong Kong's position as an international legal services hub. As at 30 September 2016, there are already 18 LLPs in Hong Kong.

The future

The HKSARG also actively works with the legal profession to promote their services in Mainland China, and to explore market liberalisation measures under the framework of the Closer Economic Partnership Arrangement between Hong Kong and Mainland China. Legal services forums and seminars have been held in recent years in Shanghai, Guangzhou, Xiamen, Qingdao, Chongqing, Chengdu, Guiyang, Xi'an, Wuhan and Changsha to promote Hong Kong's legal and dispute resolution services. In the fourth quarter of 2016, the Department of Justice has held a fourth legal services forum in Nanjing, after the three previous forum held in Shanghai, Guangzhou and Qingdao. The forums and seminars served as a useful platform to showcase the attributes of, and the recent development in, Hong Kong's legal and dispute resolution services and how our professionals could contribute and render assistance when Mainland enterprises and organisations implement the "Belt and Road" Initiative[17].

With the establishment of the various Free Trade Zones including those in Shanghai, Guangdong,

[17] The "Belt and Road" Initiative is a long-term key national development strategy of the central government. The "Belt" (the "Silk Road Economic Belt") and the "Road" (the "21st Century Maritime Silk Road") are two initiatives put forward to boost economic, trade, cultural and people-to-people ties among the Mainland and more than 60 countries spanning Asia, Europe and Africa.

Fujian and Tianjin, and the adoption of the Belt and Road Initiative by the CPG, the HKSARG continues to explore ways to enable Hong Kong's legal and dispute resolution (including arbitration) professionals to embrace these opportunities and to gain wider access to the Mainland Chinese and the international legal and dispute resolution services market.

The Department of Justice is also stepping up the promotion of legal and dispute resolution services of Hong Kong in emerging economies in the Asia Pacific region (e.g. Vietnam, Cambodia, Myanmar and Indonesia), and has recently organised a promotional trip to Peru in Latin America including the holding of a workshop on dispute resolution at the meeting of the Asia-Pacific Economic Cooperation in Lima in February 2016. In October 2016, the Secretary for Justice led a delegation of legal and dispute resolution professionals to visit Bangkok, Thailand. A thematic session on "Legal Risk Management: Key for International Trade and Investment", jointly organised by the Department of Justice and the Hong Kong Trade Development Council, was held during the "In Style • Hong Kong" Symposium to promote Hong Kong's legal and dispute resolution services.

Building on solid foundations and embracing the principle of "one country, two systems", the Department of Justice will continue its joint efforts with stakeholders in championing Hong Kong's status as an international legal and dispute resolution services centre.