Hong Kong Shue Yan University
Dr. Hu Distinguished Lectures 2013
delivered by Mr. Rimsky Yuen, SC, JP, Secretary for Justice
on 10 September 2013

"Dispute Resolution: Past, Present and Future"

Dr. Hu, Distinguished Guests, Ladies and Gentlemen:

Let me begin by expressing my utmost gratitude for giving me this opportunity to participate in this year's Dr. Hu Distinguished Lectures. Dr. Hu is a barrister and a scholar whom I respect very much. The selfless efforts and great contribution made by Dr. Hu and his wife in establishing Shue Yan University are admirable. It is therefore a great honour and privilege to be invited to take part in this series of Dr. Hu Distinguished Lecture.

2. The topic I have chosen for this evening is "*Dispute Resolution: Past, Present and Future*". The word 'dispute' is used in the present context to mean civil disputes, as opposed to disputes of a criminal or regulatory nature. Personal interest aside, I choose this topic mainly for two reasons. First, dispute resolution is of crucial importance to any civilized society or any society which aspire to maintain the rule of law. Second, it is a subject of particular relevance to Hong Kong at this juncture, as it is the firm policy of the Hong Kong Government to consolidate and enhance Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia Pacific region.

3. What I intend to do is to outline the importance of dispute resolution, to give a brief account of the development of dispute resolution in Hong Kong, and finally to make an attempt to chart our voyage into the future.

<u>The Spectrum of Dispute Resolution</u>

4. Before dealing with the core substance of this paper, it would be convenient to outline the key modes of dispute resolution and a general change of attitude towards these options so as to set the scene for the discussion below.

5. Whilst court litigation will naturally spring to one's mind when one talks about resolving disputes, the spectrum of the various modes of dispute resolution is in fact much wider. It ranges from negotiation on the one end and litigation through court or tribunal on the other. In between, there are various other options and the list continues to develop.

6. Traditionally, all modes of dispute resolution other than court litigation were commonly known as "Alternative Dispute Resolution" ("ADR"), with the emphasis on the word "Alternative". This carries the connotation that modes of dispute resolution other than court litigation are only 'alternative' means.

7. As times went by, this philosophy has changed across the world. Nowadays, whilst the acronym "ADR" remains popular, it has often been given a new meaning. Some suggest "ADR" should mean "additional dispute resolution", other put forward the suggestion of "amicable dispute resolution"; some simply abandon the word "alternative" and prefer the term "dispute resolution". Another change is the way practitioners or lawyers describe their works. In the past, law firms had what they called "litigation department". Nowadays, more and more law firms in Hong Kong and other jurisdictions prefer to use the term "dispute resolution department". In the same vein, "litigators", as many practitioners described themselves in the past, are now known as "dispute resolution practitioners". All these changes do not simply reflect a change in nomenclature. Instead, they reflect a change of attitude, including the relative popularity of court litigation and the other modes of dispute resolution.

Court Litigation

8. Litigation through courts or tribunals is the mode of dispute resolution most commonly known to the general public. Since courts and tribunals are set up by the state (or, as in the case of the Hong Kong SAR, by a local government authorized by the state[1]), it is the primary means of access to justice provided by the state authority. One of the key features which distinguishes court litigation from ADR is its mandatory or compulsory nature. In other words, the defendant in a court litigation has no choice in the process. Once the plaintiff commences the litigation process, the defendant has to

[1] Article 2 of the Basic Law.

respond to the claim or risk an adjudication by default. Generally speaking, the parties have no choice over the judge, the venue and the procedure as all these are governed by the applicable procedural rules in the relevant jurisdiction.

Negotiation

9. As noted above, court litigation and negotiation occupy the two ends of the spectrum. 'Negotiation', in the context of dispute resolution, refers to a process through which parties move from their initially divergent position to a point where agreement can be reached. It is a wholly consensual process through which parties voluntarily attempt to reach agreement on a disputed or potentially disputed matter. What sets negotiation apart from the other modes of dispute resolution is that it allows, but does not compel, autonomy without third party intervention[2].

10. Broadly speaking, negotiation can be divided into two types. The first is 'problem-solving negotiation', which focuses on the opportunities for joint, rather than individual gain. The negotiators view the dispute as a mutual problem that has the potential for being resolved to the parties' mutual satisfaction and they then search for ways to create value so that both sides may benefit[3]. The second type is 'competitive negotiation', which involves positioning bargaining with a winner and a loser. The successful negotiator does not move far from their adopted position. It is distributive, thereby achieving the best outcome for the successful negotiator, irrespective of the outcome for the other party. The aim is to destroy the confidence of the other side, driving them to make concession leading to a less satisfactory outcome[4].

Arbitration

11. For the present purpose, arbitration as a dispute resolution process hardly requires detailed explanation. Definition of "arbitration" can be conveniently found in many of the leading texts. Put very briefly, its key feature consists of the determination of a dispute by an impartial arbitrator (or a panel of impartial arbitrators) chosen by the parties accordingly to a procedure agreed to by the parties. In other words, the parties have a free choice over the

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2 Ma (ed), *Arbitration in Hong Kong: A Practical Guide* (S&M Asia) (2003), para. 2-07 (pp. 19-20).
3 Ma (ed), *op. cit.*, para. 2-10 (pp. 20-21).
4 Ma (ed.), *op cit.*, para. 2-14 (p. 21).

arbitrator(s), the venue and the procedure. Besides, unlike court hearing, arbitral proceedings are not open to the public. Only parties to the dispute and their legal representatives are allowed to take part in the hearing, and the award is also confidential.

Mediation

12. Mediation has been widely used in both common law and civil law jurisdictions, as it is a highly flexible process. Understandably, there is no universal definition of 'mediation'[5]. In the newly enacted Mediation Ordinance (Cap. 620), which came into force in January 2013, 'mediation' is defined as follows[6]:

> "For the purpose of this Ordinance, mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following –
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> (a) identify the issues in dispute;
>
> (b) explore and generate options;
>
> (c) communicate with one another;
>
> (d) reach and agreement regarding the resolution of the whole, or part, of the dispute."

13. There are various forms of mediation. The most commonly known are 'facilitative' and 'evaluative' mediations. Put shortly, facilitative mediation is 'interest-based'; the mediator simply seeks to assist the parties to a dispute to explore options of settlement without making an assessment of the rights and wrongs of the parties and without seeking to adjudicate the dispute[7]. On the other hand, in an evaluative mediation, the mediator expresses views on the respective merits of the issues in dispute between the parties[8]. There is also the form of mediation known as 'therapeutic' mediation, which focuses on assisting the parties to communicate and understand their differences rather than on reaching a settlement[9].

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5 For a discussion in this regard and examples of different definition of 'mediation', see: *Report of the Working Group on Mediation* (Department of Justice, HKSAR) (February 2010), para. 3.2 – 3.4 (p. 8), and para. 7.39 – 7.46 (pp. 83-85).

6 See section 4(1).

7 Ma (ed.), *op cit.*, para. 2-29 (p. 26).

8 Ma (ed.), *op cit.*, para. 2-29 (p. 26).

9 Ma (ed.), *op cit.*, para. 2-30 (p. 26).

14. One other aspect which is worth noting is the differences (if any) between 'mediation' and 'conciliation'. These two terms often cause confusion. This is because these two terms are sometimes used interchangeably, but at times they are used to connote different meanings[10]. One suggested difference is that conciliator plays a more active role than a mediator by, for instance, providing an assessment as to the likely outcome in the event the matter proceeds to court litigation[11]. However, whether such a distinction is correct depends very much on the context in which the term is used.

Adjudication

15. Adjudication involves an independent third party (the adjudicator) imposing a binding decision upon parties to resolve a dispute. It is often (though not invariably) an inquisitorial process rather than adversarial. Apart from adjudication in the context of construction disputes, common examples include the engagement of an accountant to determine the value of a business in a business acquisition or in disputes arising from the retirement of a business partner.

16. In Hong Kong, adjudication is thus far only available as a dispute resolution mechanism if it is provided for in the relevant contract, or if the parties agree to use such a mechanism after a dispute has arisen. This is in contrast to some other jurisdictions, such as the United Kingdom, where adjudication is a statutory process in construction contracts subject to the Housing Grants Construction and Regeneration Act 1996[12]. There have been demands for law reform in this regard from various sectors in Hong Kong (especially the construction sector) and it would be interesting to follow the development in this area.

Early neutral evaluation

17. Early neutral evaluation ("ENE") is a process in which parties to litigation obtain from an experienced neutral person (the evaulator) an early,

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10 See, e.g.: *Report of the Working Group on Mediation* (Department of Justice, HKSAR) (February 2010), para. 3.7 – 3.9 (p. 10).

11 See, e.g.: *Report of the Working Group on Mediation* (Department of Justice, HKSAR) (February 2010), para. 3.7 (p. 10).

12 Ma (ed.), *op cit.*, para. 2-47 (p. 30).

frank, reasoned evaluation of a dispute on its merits. It is a confidential, informal and non-binding process[13]. There is no hard and fast rule as to whether ENE should begin. However, ENE generally takes place as early as feasible in the dispute process, whether before the actual commencement of litigation or in the early stage of the litigation. In short, ENE aims to enable the parties to a dispute to have an early objective view on the merits of their case. In cases where litigation has not yet commenced, ENE often facilities the parties to explore settlement options in a more realistic way. In cases where litigation has already been commenced, ENE may assist the parties to reduce the scope of their disputes so as to facilitate an early settlement.

Expert Determination

18. Another form of dispute resolution worth noting is expert determination. In short, expert determination is a means of dispute resolution whereby the parties jointly engage an impartial third party (in his or her capacity as an expert) to decide an issue between them by making use of his or her expertise. It is an informal and contract-based process. Examples of expert determination includes, amongst others, rent review and non-contentious valuation. It is a process which is particularly suitable where an expert knowledge of the subject-matter is required.

The Importance of Dispute Resolution

19. As I observe at the outset, dispute resolution is of crucial importance to any civilized society or society which aspires to maintain the rule of law. Let me illustrate the importance from four different perspectives.

The Rule of Law Perspective

20. The first perspective is the rule of law perspective. Lord Bingham, in his well-known book *The Rule of Law*, identified eight elements so as to explain the concept of the rule of law. One of the elements so identified is dispute resolution. According to Lord Bingham, "[m]eans must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve"[14].

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[13] Ma (ed.), *op cit.*, para. 2-93 (p. 43).

[14] Tom Bingham, *The Rule of Law*, (Allen Lane, an imprint of Penguin Books) (2010), Chapter 8 (at p. 85).

21. As explained by Lord Bingham, we do not live in Utopia. Instead, we live in a sub-utopian world, in which differences do arise, and it would be false to suppose that disputes only arise when there is dishonesty, sharp practice, malice, greed or obstinacy on one side or the other. It is possible for perfectly reasonable and well-motivated people to hold very different views on the meaning of a contract or a will, or the responsibility of an accident, or the application of a legislation, or indeed on what should be done in a multitude of other situations[15].

22. Besides, dispute resolution as an element of the rule of law, as explained by Lord Bingham, is "an obvious implication of the principle that everyone is bound by and entitled to the protection of the law that people should be able, in the last resort, to go to court to have their civil rights and claims determined. An unenforceable right or claim is a thing of little value to anyone"[16].

Constitutional / Human Right Perspective

23. The second perspective is the constitutional and human right perspective. In this regard, Article 35 of the Basic Law of the Hong Kong SAR provides as follows:

> "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.
> Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

24. This right, whether to be regarded as a constitutional right or a fundamental human right[17], is often referred to as the right of access to court. Apart from Article 35 of the Basic Law, such a right of access to court[18] (so as to have disputes determined in accordance with the law) is deeply rooted in the

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15 *Ibid.*

16 *Ibid*.

17 Similar (though not identical) rights are provided in the Hong Kong Bill of Rights as well as in other international or overseas instruments: examples include Article 6 of the European Convention and Article 14 of the UN Convention on Civil and Political Rights.

18 Apart from courts as such, a right to access to a tribunal or other adjudicate mechanism established by the relevant authority is just as important and fundamental as a right of access to the ordinary courts. See: Clayton & Tomlinson, *The Law of Human Rights* (OUP) (2nd edn.), Vol. I, para. 11.48 (p. 721); *R v Home Secretary, ex p Saleem* [2001] 1 WLR 443, per Hale LJ at p. 458A.

common law. Blackstone viewed the right of access to the courts as one of the 'outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty and private property'. He described it in these terms:

> "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty and property, courts of justice must at all times be open to the subject and the law be duly administered therein."[19]

25. In *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd.*[20], Lord Diplock explained the constitutional importance of this right of access to court as follows:

> "Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled."[21]

26. Apart from English cases, there is considerable Strasbourg jurisprudence on the right of access to court. Leading example include the decision in *Golder v U.K.*[22] and *Ashingdane v U.K.*[23] These cases all affirmed the fundamental importance of the right of access to court, and pointed out that such a right, though not absolute, cannot be reduced to the extent that the very essence of the right is impaired.

Economic Perspective

27. The third perspective is the economic perspective. Dispute resolution, as part of the rule of law or legal framework, has a close relationship with the relevant jurisdiction's economic development. Effective dispute

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19 R Kerr (ed), *Blackstone's Commentaries on the Laws of England* (4th edn., John Murray, 1876), 111. See also the discussion in Clayton & Tomlinson, *The Law of Human Rights* (OUP) (2nd edn.), Vol. I, para. 11.06 - 11.08 (p. 708).

20 [1981] AC 909

21 *Ibid.*, at p. 917. See also the discussions in Clayton & Tomlinson, *The Law of Human Rights* (OUP) (2nd edn.), Vol. I, para. 11.06 - 11.08 (p. 708).

22 (1975) 1 EHRR 524. See also: Clayton & Tomlinson, *The Law of Human Rights* (OUP) (2nd edn.), Vol. I, para. 11.372 (pp. 844 - 845).

23 (1985) 7 EHRR 528.

resolution regimes play a pivotal role in protecting private properties and enhance confidence in business activities, which in turn promote economic development.

28. Apart from studies conducted by scholars, economists and international institutions such as the World Bank, this relationship can be illustrated by examining the commonality in the approaches adopted by international think-tanks or institutions when assessing a city's competitiveness and related attributes. When making their assessments, many such leading institutions made references to the effectiveness of the legal system and the legal infrastructure of the relevant cities, and some expressly made reference to the effectiveness of the dispute resolution regimes. One of the notable example is the Global Opportunity Index: Attracting Foreign Investment published by the Milken Institute[24], which specifically adopted parameters including "efficiency of legal framework in settling disputes".

Sociological Perspective

29. The fourth perspective is the sociological perspective. A fair, just and cost-effective dispute resolution regime is vital in maintaining social stability. It enables citizens to have their disputes resolved through proper channels recognized by the law, so that their grievances can be properly addressed and differences dealt with.

Importance of Dispute Resolution to Hong Kong

30. So much has been said about the general importance of dispute resolution. In the specific context of Hong Kong, dispute resolution commends central importance in the positioning of Hong Kong. The overall policy objective adopted by the current Government in this regard is clear --- Hong Kong should position herself as a regional hub for international legal and dispute resolution services in the Asia Pacific region. This policy is stated in no uncertain terms in the latest Policy Address[25].

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[24] This Global Opportunity Index focus on a city's competitiveness in attracting foreign investment. In the latest report published in March 2013, Hong Kong came first amongst 98 jurisdictions (for the year 2011).

[25] See para. 39 of the 2013 Policy Address (16 January 2013).

31. Not only do we believe that Hong Kong has the necessary attributes to so position herself, we have no hesitation that such a policy is in the best interest of Hong Kong and also the Mainland. Putting aside other relevant factors such as our convenient geographical locations, our strong legal profession as well as our reputable and independent judiciary, it is pertinent to highlight the following considerations.

32. First, the promotion of Hong Kong as a legal and dispute resolution service centre complements Hong Kong's status as an international financial and commercial centre. Without the requisite support of professional services including legal and dispute resolution services, it is difficult to imagine how Hong Kong can continue to remain a vibrant international financial and commercial centre. As noted above, an effective dispute resolution is one of the tests by which international institutions gauge the competitiveness of a city.

33. Second, the promotion of Hong Kong as a centre for international legal and dispute resolution services is beneficial to our economic growth. For the year of 2010, Hong Kong's export of legal services amounted to HK$1.55 billion, an increase of 2.8% from 2009. Of this amount, Asia (including the Mainland) accounted for 46.3%, whilst North America and Western Europe accounted for 28% and 16%[26] respectively. In 2011, the total income went up to HK$1.97 billion[27]. The actual overall contribution would be even more significant when one takes into account the collateral benefits derived by other industries as a result of the provision of legal services. Examples include hotel accommodation when parties come to Hong Kong to conduct arbitration or mediation, as well as various different types of supporting services such as secretarial or translation services.

34. Third, such a policy will have a long-term benefit for both Hong Kong and the Mainland. In this regard, one point which I repeatedly stress and will stress again here is that whilst Hong Kong is an integral part of China, Hong Kong should not be contented to be just another city of China. Instead, we should make the best use of the "One Country Two Systems" concept and maintain her unique characteristics.

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[26] See: *Legal Services Industry in Hong Kong*, published by Hong Kong Trade Development Council (14 May 2012).

[27] See: *Hong Kong Trade in Services Statistics in 2011* (published in Feb 2013), Table 6 at p. 35.

35. One such unique characteristics is the fact that Hong Kong is the only common law jurisdiction within the entire China, and indeed the entire Greater China region. Our rule of law, our independent judiciary, as well as our strong legal profession[28] with ability to provide top-quality legal and dispute resolution services are well recognized by the international community. By consolidating and enhancing our status as a regional hub for international legal and dispute resolution services, we can maintain our international visibility and enhance our international image. Such "soft power", as is often called, can be of real significance to the future development of Hong Kong.

36. Besides, this characteristic places Hong Kong in the best position to act as the gateway to the Mainland, which can generate immense mutual benefit. The economic and reputational benefit to Hong Kong hardly requires further elaboration. On the part of the Mainland, Hong Kong's status as a regional hub for international legal and dispute resolution services offers an additional, and often preferred, option to the international business community as Hong Kong can be chosen as the neutral venue for resolving commercial disputes. Take the case of arbitration as an example, the perceived neutrality of arbitration offers an attraction that court litigation in a jurisdiction foreign to either party to an international commercial dispute cannot always provide. Besides, as many Mainland enterprises are minded to venture into the global market, Hong Kong's expertise and experience can be of valuable assistance in the process.

Development of Dispute Resolution in Hong Kong

37. The development of dispute resolution in Hong Kong has a long history. Given the time constraint, this evening is certainly not the occasion to give a detailed historical account. What follows is a brief narrative of the key milestone events which sharp the current arbitration and mediation landscape. As an overall observation, I would like to say that the development of dispute resolution in Hong Kong can be described as a combination of legislative evolution, law reform, government support and initiatives on the part of stakeholders in the private sectors. This model has worked well in the past, and hopefully can provide a solid foundation for future progress.

[28] As at 11 March 2013, there are a total of 1,172 barristers, a total of 7,439 practising solicitors (housed under 807 solicitors' firms), and a total of 1,428 registered foreign lawyers (under 70 foreign law firms).

Arbitration[29]

38. As far as I am aware, the earliest reference to arbitration in the context of Hong Kong can be traced back to 1836 (that is to say, even before the colony of Hong Kong was established)[30]. Whilst Hong Kong's first Arbitration Ordinance was enacted in 1844, the modern arbitration regime was only established in the early 1960s when the Arbitration Ordinance (Cap. 341) was passed in 1963. The next significant milestone is the incorporation of the New York Convention on the Recognition and Enforcement of Arbitral Awards as Part IV of the Arbitration Ordinance by the Arbitration (Amendment) Ordinance 1975 (which took effect in 1977). The incorporation of the New York Convention has proved to be a wise decision, as it paved the way for the establishment of an extensive network for the enforcement of arbitral awards (which is of crucial importance when end-users decide where to arbitrate).

39. Significant developments started to unfold in the 1980s. Following the release of the first report by the Law Reform Commission of Hong Kong ("LRC") in December 1981[31], two important changes took place. The first is the amendment to the Arbitration Ordinance in 1982, which can be regarded as the foundation for the current legislative regime. The second is the establishment of the Hong Kong International Arbitration Centre ("HKIAC") in 1985, which was only made possible as a result of both government support and efforts by the local arbitration community. HKIAC, as we all know, has since become the home-grown but internationally recognized arbitration icon of Hong Kong.

40. The next significant development is the adoption of the UNCITRAL Model Law in 1989[32]. The aim of the UNCITRAL Model Law is to promote harmonization and uniformity of national laws regarding international arbitration procedures, as well as to address problems encountered by foreign parties when arbitrating in different jurisdictions with different legal regimes[33].

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29 For a helpful account of the history of arbitration development in Hong Kong, see: (1) Michael Moser & John Choong, "Hong Kong's Development as an International Arbitration Centre: Some Historical Notes", contained as Chapter 16 in *Arbitrators' Insights: Essays in Honour of Neil Kaplan*; (B) Ma (ed.), *Arbitration in Hong Kong: A Practical Guide*, (2nd edn.), Chapter 5.

30 See the interesting account in Derek Roebuck, "Arbitration in Early Hong Kong: 1835-1867", *Arbitration* (Nov 1997) 263

31 See: Law Reform Commission of Hong Kong, "Report on Commercial Arbitration (Topic 1) (11 December 1981).

32 The adoption of the UNCITRAL Model Law was recommended by the LRC in September 1987.

33 See: Ma (ed.), *Arbitration in Hong Kong: A Practical Guide* (2nd edn.), para. 5.009.

Hong Kong can be regarded as a forerunner in this regard in that it took the lead amongst Asian jurisdictions to adopt the UNCITRAL Model Law. The result is highly satisfactory, and is one of the key reasons which contributed to the favourable development of Hong Kong as an arbitration centre.

41. The latest stage leading to the current arbitration regime is the enactment of the current Arbitration Ordinance (Cap. 609) in 2010, which replaced the previous Ordinance and came into effect on 1 June 2011. In short, the key features of the current Arbitration Ordinance include the adoption of the 2006 version of the UNCITRAL Model Law to both domestic and international arbitrations, minimal court intervention as well as other provisions which aim to cater for the needs of the arbitration community. In this regard, Hong Kong again took the lead since not too many jurisdictions have adopted the 2006 version of the UNCITRAL Model Law.

42. As a result of the joint efforts on the part of the relevant sectors and the Government, Hong Kong is now well recognized as a leading arbitration centre in Asia. Such recognition is reflected by the substantial number of international arbitration dealt with in Hong Kong, as well as the presence of international arbitration institutions. The Department of Justice will, needless to say, continue its efforts to promote Hong Kong's arbitration services.

Mediation

43. Although mediation only began to become popular in Hong Kong in the past decade or so, it has in fact been used as a means of dispute resolution in Hong Kong for a much longer period. Early examples include, amongst others, the Marriage Mediation Counselling Project established in 1988 by the Hong Kong Catholic Marriage Advisory Council and other mediation initiatives in the matrimonial context.

44. The key factors that led to the present popularity of mediation in Hong Kong include the Civil Justice Reform ("CJR") implemented in 2009, government policy and initiatives implemented since 2007 as well as support from stakeholders in the private sectors including the legal profession and other dispute resolution practitioners.

45. In the 2007/2008 Policy Address, the then Chief Executive stated in no uncertain terms the government policy to promote mediation in Hong Kong. Following this, the Working Group on Mediation was established in 2008, which prepared and issued the Report in February 2010 recommending, amongst others, the introduction of mediation legislation and the setting up of an accreditation body. These recommendations were followed up by the Mediation Task Force, which eventually led to the enactment of the Mediation Ordinance as well as the setting of the Hong Kong Mediation Accreditation Association Ltd. in 2012. These two moves are of considerable significance. The former put Hong Kong in a leading position in the Asia Pacific region, whilst the latter helps to build confidence in the mediation process.

46. Upon completion of its tasks, the Mediation Task Force was replaced by the Steering Committee on Mediation established in late 2012. This Steering Committee is assisted by three sub-committees. The Regulatory Framework Sub-committee is responsible for overseeing the operation of the Mediation Ordinance and also for studying the need to introduce an apology legislation in Hong Kong. The Accreditation Sub-committee is tasked to oversee the operation of HKMAAL and other matters incidental to the accreditation, training standards and disciplinary matters of mediators in Hong Kong. The Public Education and Publicity Sub-committee is responsible for advising on ongoing and new initiatives for the promotion of mediation in Hong Kong.

47. As the matters now stand, it is no exaggeration to say that mediation is taking root firmly in Hong Kong and is becoming a popular means of dispute resolution. Many different sectors in the community expressed interest in exploring the use of mediation to resolve disputes and the prospect is optimistic.

Looking to the Future

48. I do not have a crystal ball and cannot predict what will happen in the future. However, one may seek to identify the key driving forces which are likely to have a significant impact on the ways in which dispute resolution will develop in the years to come.

49. Amongst others, macro international economic development, globalization, regional integration as well as the advance of technology are the key driving forces which are likely to have immense impacts on the development of dispute resolution. Naturally, the impacts of these driving forces vary, depending on the mode of dispute resolution or the nature of the dispute under consideration. Besides, some impacts are more relevant to court litigation, some more pertinent to ADR whilst some are material to all modes of dispute resolution.

50. The key areas that will be addressed below are: (1) the growing importance of private international law; (2) the greater influence of comparative law studies; (3) the greater need for international judicial co-operation; (4) the growing popularity of ADR; and (5) changing needs of education and training. The first three areas are more relevant to court litigation, the fourth area is peculiar to ADR whilst the last one is of general relevance to both litigation and ADR.

Private International Law

51. Due to globalization, regional integration and advance of technology, private international law (also referred to as conflicts of law) is bound to play a more important role in court litigation and, to a lesser extent, in the ADR context. The reason is obvious. Human activities are far from being restricted by national boundary or geographical distance. Cross-border or multi-jurisdictional activities (whether commercial, family or otherwise) are ever increasing, and the tide is unlikely to turn. Such a phenomenon is not confined to international or multi-national corporations, but covers ordinary citizens. Internet shopping, if involving an overseas supplier, is a form of cross-border transaction which many of us today will have experience of. Marriage between people from different jurisdictions is getting more and more common. In the case of Hong Kong, the increasing number of marriage between Hong Kong residents and Mainlanders bespeaks the point. When disputes arise in such circumstances, the question of applicable law and other issues of private international law are likely to be relevant.

52. Apart from refining or improving conflict of law principles so as to enhance a more effective and fair resolution of disputes, better harmonization of private international law will be in the interest of the entire international

community. In this regard, there are generally two options: first, by way of entering into international conventions or treaties; second, by adopting model laws (or legal regimes of similar nature). In the former case, the Hague Conference on Private International Law is a leading example. As regards the latter, UNCITRAL Model Laws, such as UNCITRAL Model Law on International Commercial Arbitration, are the prime examples. Both the growth of influence of the Hague Conference on Private International Law[34] as well as the popular adoption of UNCITRAL Model Laws in different areas illustrate the international interests in harmonizing differences between different jurisdictions, be they common law or civil law jurisdictions.

53. As far as Hong Kong is concerned, it is of paramount importance that we shall keep abreast of and, where appropriate, participate in the latest development of such international efforts. The aim is to be part of the international legal and judicial network, so that people of Hong Kong can plug into the system and seek legal or judicial assistance as and when necessary. This is one of the reasons why the Department of Justice procured the setting up of the Asia Pacific Regional Centre of the Hague Conference on Private International Law in Hong Kong late last year. At the same time, representatives of the Department of Justice has participated and will continue to participate in relevant UNCITRAL deliberations.

Comparative Law

54. In the part, the court did make references to precedents decided in other jurisdictions. Lord Bingham is one of the judges who advocated the use of comparative law in courts. The learned judge once observed, very vividly, that the future of the common law would "flow not in a single broad channel, like the Nile, but in a mass of smaller channels, like the Nile Delta"[35].

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[34] As of 1 August 2013, the Hague Conference on Private International Law has a total of 74 Member States (one of which is the European Union), and there are also a total of 69 Non-member States which had acceded to one or more Hague Conventions.

[35] First mentioned in a speech "The Future of the Common Law" delivered at the Chatham Lecture on 30 October 1998, which was collected in Tom Bingham, *The Business of Judging: Selected Essays and Speeches 1985 – 1999* (OUP), and reiterated in "The Internationalization of the Common Law" (a paper delivered in October 2003 at a conference celebrating the centenary of the Australian High Court), collected in Tom Bingham, *Lives of the Law: Selected Essays and Speeches 2000 – 2010* (OUP). See also Mads Andenas & Duncan Fairgrieve, "'There is a World Elsewhere' --- Lord Bingham and Comparative Law", collected in Mads Andenas & Duncan Fairgrieve (ed.), *Tom Bingham and the Transformation of the Law* (OUP).

55. In light of changes brought about by globalization, it will not be surprising that comparative law will become even more important. In the past, issues faced by judiciary and arbitrators in one jurisdiction were more likely to be jurisdiction specific. Nowadays, issues faced by one jurisdictions are often faced by other jurisdictions. Comparative law can enable judges and arbitrators in one jurisdiction to see how problems similar to those faced by them were resolved in other jurisdictions.

56. Another perspective is law reform in respect of dispute resolution. Like other areas of law reform, comparative legal studies provide much assistance in the law reform relevant to dispute resolution. In one sense, comparative legal study is more important to some forms of ADR to litigation. One key example is mediation. Given the flexibility of its process, mediation is more capable of refining itself by reference to overseas experience.

International Judicial Co-operation

57. Globalization also has an impact on judicial conduct in resolving dispute. An interesting example is the emerging concept of 'network of judges' and 'direct judicial communications'. To facilitate better resolution of disputes as well as to enhancing communication between judges of different jurisdictions, the Hague Conference on Private International Law has established the International Hague Network of Judges and also issued a set of Emerging Guidance for Direct Judicial Communications, which are to be used in cases concerning international child abduction as well as for resolving disputes over jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

Growing Popularity of ADR

58. Globalization and regional integration will constitute a strong catalyst for the development of ADR, especially arbitration and mediation, and will also to a certain extent determine the types of cases which would acquire prominence. Coupled with the economic development in the Asia Pacific region, many people predict that ADR is heading towards a golden age in the Asia Pacific region.

59. As pointed out in various economic reports, the Asia-Pacific region has since become the top destination for investors, with China occupying the top rank. In the past few years, Asia is leading the global economic recovery. It is obvious that the global economic balance has shifted from the West to the East with the Greater China region being the key growth engine in the Asia-Pacific region. What does this mean? The answer is obvious: the more economic and trade activities, the greater the need for international legal and dispute resolution services.

60. In addition, the continuing trend of globalization and regional integration means that there will be more cross-border or international trade disputes. Whilst litigation will remain as a traditional form of dispute resolution, international arbitration and other forms of ADR will certainly become more and more popular as they can offer advantages that traditional litigation cannot.

61. The growing interest in investment arbitration is but one example that illustrates this point. The World Bank released a report in May projecting a threefold increase over the current level in the investment flows into the developing countries and regions in the next 20 years. By around 2030, China is likely be the largest investor in the world, accounting for around 30% of the global gross investment while India will have a share of around 7%.

62. With a significant boom in cross-border or international investment activities, private-to-government ("P2G") investment disputes, along with private-to-private ("P2P") commercial disputes, are expected to increase in the Asia-Pacific region. To provide protection for cross-border investment activities, investment promotion and protection agreements emerged in the mid-20th century. In recent years, with the World Trade Organization Doha Round repeatedly ending in deadlock, many WTO members have actively entered into bilateral and plurilateral free trade agreements, economic partnership agreements as well as regional trade agreements, many of which contain provisions on investment protection.

63. Investment protection agreements and related provisions generally allow foreign investors to submit investment disputes with a host country to arbitration. As shown by the statistics released by the United Nations Conference on Trade and Development ("UNCTAD") in May, the number of cases filed under the investor-state dispute settlement (ISDS) mechanism reached a record high of 58 last year, reflecting that foreign investors are increasingly resorting to the mechanism for resolving their disputes with the government of a host country.

64. Chinese companies as investors have also started making use of the P2G investment arbitration mechanism. For instance, China Heilongjiang International Economic & Technical Cooperative Corp and other parties submitted a request for arbitration in 2010 to the Permanent Court of Arbitration under the UNCITRAL framework pursuant to the China-Mongolia bilateral investment agreement. In addition, Ping An Life Insurance Company of China, Ltd. and another party filed a request for arbitration to the International Centre for Settlement of Investment Disputes ("ICSID") last September. Ping An was seeking compensation for its economic losses caused by the nationalisation of Fortis Bank by the Belgian government amid the financial crisis in 2008. At a time when multinational enterprises regard China as a preferred investment destination and China's own enterprises are striving to "go global", it is foreseeable that investment disputes in the Asia-Pacific region, including the Greater China region, will keep growing.

65. Apart from arbitration, mediation (including international commercial mediation) is likely to gain even greater popularity in the years to come. According to a recent survey of general counsel, nearly half of the respondents believed that mediation will grow significantly ahead of litigation in the Asia Pacific region, with Hong Kong staying in the forefront of that trend[36]. Apart from government policy, cultural characteristics of the Asia Pacific region as well as the possibility of maintaining a relatively more cordial relationship after the dispute are the key factors which contribute to the growing popularity of mediation in the Asia Pacific region.

[36] *KPMG Global General Counsel Survey 2012* (available at www.kpmg.com/global).

Education and Training

66. Professor Michael Reisman, a professor of law of the Yale Law School in New Haven, once remarked that planning and designing programmes of legal education that are both professionally relevant and intellectually enriching must take account of a number of coinciding world revolutions[37]. Professor Reisman further pointed out that global integration calls for professional facility in regional or international languages, and in the law and procedure of other national and international jurisdictions, as well as the ability to operate effectively in diverse cultures[38].

67. Although these observations were made in the general context of legal education for lawyers in the 21st century, they are equally applicable to the future education and training of dispute resolution practitioners. To be able to charter the future turf of dispute resolution, a global or regional perspective is a necessary prerequisite and not a luxury. The sooner students of dispute resolution are aware of this need the better.

Conclusion

68. Disputes, dispute resolution and related matters are often perceived in a negative light. This is not surprising since no ordinary person (except, perhaps, lawyers and dispute resolution practitioners) would like to face or handle disputes. This paper seeks to discuss dispute resolution from a different and positive angle, as well as to illustrate the importance of proper dispute resolution to a civilized society. Indeed, a proper dispute resolution infrastructure, which can offer different options to cater for the needs of different disputes in different circumstances will help to maintain social harmony, enhance economic competitiveness and uphold the rule of law.

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37 W Michael Reisman, "Designing Curricula: Making Legal Education Effective in the 21st Century", collected in *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @2020* (Butterworths), p. 271.

38 *Op. cit.,* p. 276.