Speech by SJ at 25th Anniversary Lectures of The Academy of Experts

"*Experts and the Future Development of ADR*"

Mr. Michael Cohen [Chairman Emeritus], Distinguished Guests, Ladies and Gentlemen:

It is a great pleasure to join you on this occasion of the Closing Lecture for the 25th Anniversary of the Academy of Experts. It is also a great honour to be given this opportunity to address such a distinguished audience comprising leading experts as well as members of the Judiciary and the legal profession.

2. The engagement of experts' assistance in litigation has a long history and can at least be traced back to the sixteen century if not earlier[1]. The importance of expert evidence hardly requires elaboration. In 2002, Dame Elizabeth Butler-Sloss of the English Court of Appeal described expert witnesses as "a crucial resource. Without them, we could not do our job"[2].

3. Founded in 1987 with the objective of providing a professional body for experts to establish and promote high objective standards, the Academy of Experts has made huge contribution in the context of dispute resolution and beyond since its inception. Apart from facilitating end-users of dispute resolution to enjoy the services of high quality experts, the Academy provides valuable training to experts and lawyers in matters relating to expert evidence. Hong Kong is fortunate to have fostered a close tie with the Academy, both in the form of training and as regards other activities which enhance the exchange of views and sharing of experiences. The past 26 years or so are years of great success on the part of the Academy. On behalf of the Department of Justice, may I extend our warmest congratulations to the Academy of Experts for its outstanding performance and achievements.

4. The topic that I have chosen for this evening is "Experts and the Future Development of ADR". Since the Academy was first established, the landscape of dispute resolution has undergone substantial changes, both on a worldwide level and more so in the Asia Pacific region. Against this background of changes, I would like to share with you a few thoughts of mine concerning the

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1 For an interesting account of the historical development of expert evidence, see: Déirdre Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge University Press) (2008), Chapter 5.

2 Dame Elizabeth Butler-Sloss, "Expert Witnesses, courts and the law" (2002) 95(9) *Journal of the Royal Society of Medicine*, 431 (quoted and discussed in Christopher Ennis, "Experts: when should they be brought in an how they can best save time and costs", (2013) 79(1) *Arbitration* 80.

relationship between the service of experts and the future development of the resolution of civil disputes, with specific reference to the Asia Pacific region.

The Changing Scene

5. Let me begin by highlighting two key changes in the field of dispute resolution in the past decade or so.

6. The first and most obvious change is the ever growing popularity of alternative dispute resolution ("ADR"), both at domestic and international level. The reasons behind such a growing popularity are numerous, but the implementation of civil procedure reform (such as the Woolf Reform in Britain, the Civil Justice Reform in Hong Kong), the enactment of specific legislations to encourage the use of ADR (such as the Australian Civil Dispute Resolution Act (2011) (Cth) and the Mediation Ordinance of Hong Kong), the impact of globalization and regional integration as well as the changing attitude of the international commercial community are certainly some of the key factors.

7. The most popular forms of ADR are no doubt arbitration and mediation. Apart from the growing number of cases dealt with by way of arbitration or mediation, the attitude of corporate counsel is also revealing. For instance, the 2012 KPMG General Counsel survey found that 48% of the general counsel who responded to the survey believe that mediation will grow significantly ahead of litigation in the Asia Pacific region[3]. On the other hand, the survey entitled "*International Arbitration Survey 2013: Corporate Choices in International Arbitration*" jointly conducted by PricewaterhouseCoopers and Queen Mary, University of London in April this year, revealed that 52% of the corporate counsel who responded to the survey regarded arbitration as the most preferred dispute resolution mechanism[4], and 73% of them either agreed or strongly agreed that arbitration is a means suitable for resolving international disputes.

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[3] See also: Danny McFadden, *Mediation in Greater China: The New Frontier for Commercial Mediation* (Wolters Kluwer) (2013), para. 8-170 at p. 234.

[4] See also the speech "The Trends of International Arbitration" made by Christopher To at the APRAG Conference 2013 (2nd para.)

8. The growing popularity of ADR is most notable in the context of international commercial disputes. A natural and direct consequence of globalization and regional integration is the upsurge of cross-border or international trade disputes. This led to a need to find an appropriate and effective means of dispute resolution, and international arbitration and mediation can offer advantages that traditional court litigation cannot[5].

9. The growing interest in investment arbitration is but one example that illustrates this point. Due to the significant boom in cross-border investment activities in the Asia Pacific region, private-to-government investment disputes as well as private-to-private commercial disputes, are expected to increase in the region. To provide protection for such investment activities, investment promotion and protection agreements emerged in the mid-20th century. In recent years, with the World Trade Organization ("WTO") Doha Round repeatedly ending in deadlock, many WTO members have resorted to bilateral and plurilateral free trade agreements, economic partnership agreements or regional trade agreements. One notable feature of these agreements is the presence of provisions prescribing arbitration or mediation as a means of dispute resolution for the purpose of investment protection. As the statistics published by the United Nations Conference on Trade and Development ("UNCTAD") in May this year show, the number of cases filed under the investor-state dispute settlement ("ISDS") mechanism reached a record high of 58 last year.

10. The popularity of ADR is also reflected in other aspects, which demonstrate the change of mindset and attitude towards dispute resolution. Whilst the acronym "ADR" traditionally stood for "alternative dispute resolution", many people have since preferred to use it to denote "amicable dispute resolution" or "appropriate dispute resolution". The replacement of the word "alternative" by "amicable" or "appropriate" is reflective of the change of attitude towards the importance of non-litigation modes of dispute resolution such as arbitration and mediation. Indeed, some take the view that international arbitration or international mediation is "alternative" to nothing, since court litigation is not always a real option for resolving international commercial disputes. Besides, section in law firm traditionally known as "litigation section" are now often known as "dispute resolution section", and international corporate clients, when choosing their corporate law firms, are increasingly interested in finding out the law firms' experience in handling arbitration and mediation, on top of traditional litigation expertise.

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[5] Flexibility of procedure and neutrality of arbitrators/mediators are, amongst others, the key perceived advantages.

11. The second most obvious change in the landscape of dispute resolution is the shift of focus from the West to the East. The tremendous economic development in Asia (especially China and other emerging markets) over the past two decades has led to a significant surge in the interest in international arbitration and mediation. In addition to the growing number of disputes resolved by arbitration and mediation, the growth in the number of international dispute resolution bodies and centers in the region is also clear evidence of such a change. Apart from Hong Kong and Singapore, Malaysia and the Republic of Korea have also recently set up their respective centers for international dispute resolution. The setting up of the Asia Secretariat of the International Court of Arbitration of the International Chamber of Commerce ("ICC") in Hong Kong in 2008, which is the first such office outside its Paris Headquarters, also illustrates the growing importance of the Asia market to the international arbitration community. Indeed, quite a number of leading figures in the field of dispute resolution took the view that the Asia Pacific region is heading towards a golden age of dispute resolution.

12. Having set the scene in respect of the recent development of dispute resolution, I would endeavor to address the relationship between such development and matters relevant to experts.

Arbitration

13. In the context of arbitration, it is pertinent to discuss one of the questions that has been discussed from time to time, but which has gained more attention recently than before, namely, the question of how to manage the arbitral process so as to make it cost-effective. This question is of fundamental importance; once arbitration becomes less than cost-effective, it is difficult to see how arbitration (whether domestic or international) can maintain a sustainable and healthy development.

14. Arbitration is traditionally regarded as more expeditious and less expensive than litigation. However, as arbitration develops, there are from time to time complaints that arbitration, including international arbitration, is becoming more and more complex, drawn out and expensive[6]. These complaints are of course not always justified. Equally, it cannot be gainsaid that some of such complaints merit serious attention, and that the use of expert evidence or the way in which expert evidence is handled during the arbitral process is occasionally the cause of such complaints.

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[6] See, e.g.: Doug Jones, "Techniques in managing the process of arbitration", (2012) 78 *Arbitration*, 140.

15. In the Asia Pacific region, issues concerning the handling of evidence, including expert evidence, have an added dimension, namely, the huge diversity amongst jurisdictions in the region, whether in terms of history, culture, language, legal system, legal infrastructure or otherwise. Such diversities are not just differences between common law system and continental legal system.

16. Professor Doug Jones, a well-known figure in the international arbitration circle and currently the President of the Australian Centre for International Commercial Arbitration (ACICA), once observed as follows[7]:

> "*The increase in economic activity in Asia has undoubtedly resulted in an increase in the number of arbitrations in the region. Given the diversity of legal systems within Asia, an issue that is becoming increasingly apparent is the difficulty of finding a suitable arbitral procedure that adopts an appropriate middle ground between the various cultural backgrounds of the parties involved. At the simplest level, the disparity in procedural expectations can be attributed to the cultural divide between civil and common law traditions, and as parties, practitioners and arbitrators from each of these traditions are forced to interact, tensions inevitably arise. While certain trends can be generalized from the common law/civil law divide, it is important to note that broad differences exist between jurisdictions within each legal tradition, and nearly all jurisdictions have adopted various aspects of both civil and common law tradition.*"

17. In the context of expert evidence, the question is how to devise a procedure for managing expert evidence that can ensure the cost-effectiveness of the arbitral process, and at the same time can take into account the diversities (including cultural diversities as well as diversities between the common law and civil law systems) in the Asia Pacific region. There is no easy answer to this question. For the purpose of this evening, I would like to highlight two aspects so as to invite discussions and, if thought appropriate, further researches and studies.

18. The first aspect concerns the efforts made by international bodies in respect of, amongst others, how expert evidence should be handled or managed. The IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules")[8], as well as the Protocol for the Use of Party-Appointed Witnesses in

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[7] Dong Jones, "Tapping Asia's growth: harmonizing arbitral procedure across the Asia region" (2013) 79 *Arbitration*, 413, at 413.

[8] Initially developed in 1999 by a Working Party of the International Bar Association ("IBA")'s Arbitration Committee, the IBA Rules were revised by a Rules of Evidence Review Committee and subsequently adopted

International Arbitration published by the Chartered Institute of Arbitrators, represent admirable efforts by reputable international bodies to tackle the issue of expert evidence in international arbitration.

19. However, the question remains whether these and similar rules and protocols are sufficient and effective to address the issues, especially if one takes into account the diversities exist in the Asia Pacific region. I would urge members of the Academy to join hands with arbitration bodies and institutions in Hong Kong and other jurisdictions in the Asia Pacific region to conduct further research and studies into the issue, so as to consider whether revisions would be necessary to either the IBA Rules or the Protocol issued by the Chartered Institute of Arbitrators, or whether some new rules or guidelines should be issued[9].

20. The second aspects concerns "expert conferencing", or "concurrent evidence", or the more vivid expression of "hot-tubbing"[10]. Having emerged successfully in Australia, this mode of taking expert evidence has found its way to Britain. Following the Manchester Concurrent Evidence Pilot Scheme, Practice Direction 35 was revised as an update to the Civil Procedure Rules and came into effect on 1 April this year. This revised Practice Direction 35 empowers the court to order expert conferencing or concurrent evidence.

21. Concurrent evidence is certainly not appropriate in each and every case. However, for reasons yet to be ascertained, the use of expert conferencing or concurrent evidence is generally far less popular in the Asia Pacific region than in Australia, Britain and a few other jurisdictions. Given the presence of both common law and civil law systems in the Asia Pacific region and bearing in mind the non-confrontational mentality embedded in Asian culture, there is much to be said for the further development of expert conference or concurrent evidence for the purpose of international arbitration in the region. Likewise, I would urge

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officially by the IBA in May 2010. The IB A Rules sought to achieve a compromise between civil law and common law procedures, in an attempt to provide the framework for a generally acceptable arbitration procedure.

9 In making this suggestion, I do not intend to make any criticisms against either the IBA Rules or the Protocol published by the Chartered Institute of Arbitrators. Instead, the aim is to encourage enhanced participation of the Asian arbitration community in the drafting or refining of such rules or protocols, so that the needs or unique features of international arbitration conducted in the Asia Pacific region can be properly taken into account.

10 The Hon. Mr. Justice Peter McClellan, Chief Judge at Common Law of the Supreme Court of New South Wales, described concurrent evidence as follows: "a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a co-operative endeavour to identify the issues and arrive where possible at a common resolution of them. Where resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one adviser but has the benefit of multiple advisers who are rigorously examined in public." (quoted in para. 2 of "*Manchester Concurrent Evidence Pilot - Interim Report*" (prepared by Professor Dame Hazel Genn, UCL Judicial Institute) (January 2012).

members of this Academy to consider how best this issue can be further researched and explored for the purpose of developing international arbitration in the Asia Pacific region.

Mediation

22. The appearance of experts is generally less frequent in mediation than in litigation or arbitration. This is understandable, since the nature of mediation (especially facilitative mediation, as opposed to evaluative mediation) is quite different from litigation and arbitration. Insofar as they are involved, experts generally only participate by providing reports so that both sides may see fit to present their expert reports to the mediator in the course of mediation.

23. In my view, it is worth considering how experts may play a greater or more active role in mediation. Amongst others, the following matters merit further study and exchange between the experts community and the mediation community.

24. First, what procedure can be adopted to enable the parties and the mediator to have a better and more realistic understanding of the differences between the parties' respective experts, which would enable the mediator to be in a better position to conduct "reality test", which in turn would enhance the chance of settlement. Thus far, apart from general discussion in mediation literature, there does not appear to be any structured or empirical studies on this subject, nor any guidelines issued by leading mediation institutions.

25. Second, the appointment of a single joint expert solely for the purpose of mediation is another option worth considering. Whilst the costs involved may outweigh the benefit in some less than substantial cases, there are certainly cases where the engagement of a single joint expert can provide assistance in the process of mediation[11]. Again, the publication of guidelines or recommendation by professional bodies, after appropriate research and consultation, will be welcome by the dispute resolution community and end-users.

26. Both of these options discussed above could not be properly achieved without the participation and involvement by experts in the design and consultation stage. These are matters which merit the joint efforts of the mediation community (whether mediators, mediation advocates or mediation institutions) and the experts community such as the Academy.

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[11] See, by way of illustration, the discussion in Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (OUP), para. 14.56 to 14.58 (especially para. 14.57) at p. 166.

Expert Determination

27. May I also very briefly touch on expert determination, which can provide great assistance to parties in the context of construction disputes, shareholders disputes or financial disputes. However, while expert determination is a process well known to the dispute resolution practitioners and lawyers, many potential end-users in the Asia Pacific region are apparently either ignorant of this mode of dispute resolution or they do not know enough to make them feel comfortable to make use of this mode of ADR.

28. This unfortunate state of affairs, I believe, is partly due to a lack of matured dispute resolution culture in the Asia Pacific region and partly due to lack of sufficient promotion.

29. From a policy perspective, the business community and other sectors which can be potential end-users of expert determination, and indeed other forms of dispute resolution, should be properly informed of such choices. Put shortly, different modes of dispute resolution are no more than different instruments or channels to resolve resolves; end-users should be given as many choices as reasonably possible so that they, with proper advice, can make an informed decision and pick the right mode of ADR which is most appropriate and effective to resolve their specific dispute in question.

Conclusion

30. Ladies and gentlemen, may I conclude by reaffirming the important role played by experts in the context of dispute resolution, whether as expert witnesses, as consultants, as the adjudicators in expert determination or otherwise. Since it is the current Administration's steadfast policy to promote Hong Kong as a center for international legal and dispute resolution services in the Asia Pacific region, the Department of Justice looks forward to seeing a closer ties between Hong Kong and the Academy of Experts. May I also wish the Academy every success in all its ventures and projects, whether in Britain, Hong Kong or otherwise, in the many more years to come.

Thank you.