

Keynote Speech by Ms Teresa Cheng, SC
Secretary for Justice
Mediation Conference 2018
18 May 2018 (Friday)

Distinguished Guests, Ladies and Gentlemen,

On behalf of the Department of Justice (“DoJ”), it is my great pleasure to welcome you all to the Mediation Conference 2018 co-organised by the DoJ and Hong Kong Trade Development Council (“TDC”), and supported by various key players in the field of mediation in Hong Kong as you have seen just now.

2. The theme of the 2018 Mediation Week is “Mediate first – Exploring New Horizons”. Mediation is by now a proven highly effective tool for achieving harmonious resolution of conflicts arising in different sectors. The DoJ avidly supports the development of mediation and we have been fortunate to have the support of many stakeholders who share our belief which is succinctly captured in the theme. And that is why we would today not just discuss what has been achieved in Hong Kong or in the international community, but perhaps to explore what new horizons can be achieved when we keep mediation first as one of our main themes.

3. Hong Kong has been organising the mediation week biennially. The aim is twofold. Domestically we wish to promote the use and understanding of mediation to the general public so as to assist them in resolving conflicts amicably and harmoniously. At an international level, we wish to bring together experts in this area

so that Hong Kong continues to provide a unique platform for exchange of views in this area as part of its aim and vision to be a leading dispute resolution centre in the Asia Pacific region.

4. In alternate years, however, we are not dormant. Hong Kong also has been organizing activities such as training and seminars, promoting mediation in different sectors, and following up on the discussions that took place in the mediation week and so forth. You will therefore appreciate the importance of discussion and the ideas that Hong Kong get from the conferences such as this particular one today. We have also launched the Hong Kong Mediate First Pledge and many sectors and organisations have signed up to the pledge, and we will continue to promote it and attract more people to understand the concept as well as appreciate the importance of mediate first. For instance, I understand that the entertainment industry has expressed interest in this particular area after the Entertainment Mediation seminar held earlier this week.

Latest Development of Mediation in Hong Kong

5. It is apt for me to give you a brief update on the latest development of mediation in Hong Kong.

6. Since the first Mediation Week, much has happened in the promotion and development of mediation in Hong Kong. The Government has been working closely with the mediation community and other stakeholders so as to foster a mediation-friendly environment and strengthen the legal infrastructure. In particular we have introduced legislations, started to conduct a study on aspects of certain mediation skills and brought mediation to the people. And importantly, we are also

working on a mediation framework for investments between the Mainland and Hong Kong. Let me give you a little bit more about these ideas and experience.

(i) *Apology Ordinance and Third Party Funding*

6. First, allow me to introduce to you the legal framework that Hong Kong has put in place after the Mediation Ordinance.

7. In December 2017, we enacted the Apology Ordinance. Hong Kong made history that day as the Apology Ordinance is the first piece of such legislation in Asia. It aims to encourage the making of an apology with a view to preventing escalation of differences into disputes thereby ultimately facilitating amicable settlement.

8. Hong Kong has also passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. This also took place in 2017 and this piece of legislation would put beyond doubt that third party funding for mediation is not prohibited by the common law doctrines of maintenance and champerty.

9. The enactment of these two pieces of legislation will enable Hong Kong's mediation regime to stay at the forefront of international development and reinforce Hong Kong's position as a leading centre for international dispute resolution.

(ii) *Special Committee on Evaluative Mediation*

10. Secondly, Hong Kong is conducting a review of the scope and utility of evaluative mediation. Facilitative mediation and

evaluative mediation tend to be viewed as mutually exclusive, but are they? Whilst all mediation would focus on the interests of the parties when it comes to the point of reaching a settlement, it is, in my own experience, inevitable that certain evaluative skills will have to be deployed in some way during the mediation process. This is sometimes called playing the devil's advocate. It will encourage the parties to be realistic about its own strengths and weaknesses, re-assess the alternative to no agreement, leading ultimately to focus on the interests of the parties. Indeed the interaction of using facilitative and evaluative skills reflects the very essence of mediation, that of flexibility. After all, the role of the mediator is to use appropriate skills to assist the parties to communicate and facilitate settlement. Under the Steering Committee on Mediation set up by the Department of Justice, a Special Committee on Evaluative Mediation has been formed to explore and research on the proper use of evaluation in mediation. You will hear more from the chairperson of the special committee on this topic later today.

(iii) West Kowloon Mediation Facilities – Pilot Scheme

11. Thirdly, we bring mediation to the people. One of the purposes of organizing Mediation Week is to promote the understanding and use of mediation by the general public. To achieve this aim, one of the best ways is to allow them to experience the advantages of mediation. In consultation with the Judiciary, the DoJ will implement a pilot scheme to provide mediation services to litigants of Small Claims Tribunal cases that are suitable for mediation, and other suitable cases can also be brought in. For this purpose, we have completed the construction of new mediation facilities, a unique facility dedicated to mediation,

next to the West Kowloon Law Courts Building. We believe that the purpose-built mediation facilities will mark the Government's strong commitment to promote the use of mediation and to enhance public awareness of its benefits.

(iv) *CEPA Mediation Mechanism*

12. The last development I would like to mention is actually the start of one of the new horizons that Hong Kong is exploring and pursuing, and that is investment mediation.

13. Not only do we push ahead with various initiatives within Hong Kong, the Government is also capitalising on our unique competitiveness in promoting international investment mediation services.

14. As Asia's World City, Hong Kong is a well-connected cosmopolitan hub. Under the "one country, two systems" principle enshrined in the Basic Law, Hong Kong maintains its common law system which the international commercial community is familiar with. Apart from a sound legal system and infrastructure, we also have a mature dispute resolution regime. Hong Kong courts are also highly regarded for their judicial independence and well-reasoned judgements. Furthermore, Hong Kong also enjoys the advantage of sharing the same language and culture with the Mainland whilst also having a style of living and cultural empathy with the West. Our legal system instils confidence, provides predictability and certainty. All of these unique strengths provide solid foundation for Hong Kong to act as a perfect "springboard" for inbound and outbound investments involving the Mainland.

15. To strengthen trade and investment between the Mainland and Hong Kong, in 2003, the Mainland and Hong Kong Closer Economic Partnership Arrangement (“CEPA”) was concluded. The latest enhancement is the CEPA Investment Agreement concluded in June 2017. This is the first investment agreement made between the Mainland and Hong Kong under the framework of CEPA.

16. Among other things, the CEPA Investment Agreement aims to provide protection for investors in the host jurisdictional territory. It has all the key features of a bilateral investment treaty such as protection accorded under fair and equitable treatment, full protection and security, non-discriminatory protection, etc..

17. The CEPA Investment Agreement will undoubtedly be a catalyst for inbound and outbound investments of the Mainland. I would say that Hong Kong is best placed to play the role of a “deal maker” for these investments. Further if disputes do arise, Hong Kong can play the role of a “dispute resolver”.

18. The CEPA Investment Agreement provides that the mechanism for settlement of investment disputes is mediation, which offers the benefits of flexibility and confidentiality without the need for parties to go through the more expensive and sometimes tortuous arbitration route. You may wish to know that research in 2014 shows that on average, a party to an investment arbitration paid approximately US\$5 million in legal cost. On average, parties jointly paid arbitral tribunal fee to the amount of

about US\$1 million¹.

19. The parties to CEPA Investment Agreement recognise that the better way forward for resolving investment disputes is mediation. The reduced cost is a huge incentive. With mediation as the first mechanism to be attempted and bearing in mind that no investor would wish to end up litigating in the other side's court, it provides a strong impetus and reason to settle the disputes amicably through the mediation mechanism established under the CEPA Investment Agreement. That is exactly why our theme is "Mediate first – Exploring New Horizons".

20. Hong Kong is finalising a detailed mediation mechanism to resolve investment disputes under CEPA. This is a significant move and a sign of our commitment in taking forward mediation to the next level.

21. Under the CEPA Mediation Mechanism, Hong Kong and the Mainland will respectively designate their own mediation institutions and mediators, and publish the list of mediation institutions and mediators mutually agreed by both sides. Whilst both sides can in principle have different mediation rules, we are engaging with the relevant Mainland bodies to agree on similar, if not identical, sets of mediation rules so as to create certainty and harmony for the benefit of the users.

22. With regard to mediators to be designated for Hong Kong, we have developed a set of eligibility criteria which, among other things, requiring the mediators to possess necessary professional

¹ Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide (2014) 29 ICSID Review 66, at 77-78.

knowledge in investment law and the requisite mediation skills.

23. International mediation is clearly gathering importance. This is evidenced by the intensity of the interests in the United Nations Commission on International Trade Law (“UNCITRAL”) Working Group II’s recent preparation of a draft Mediation Convention. This is for the enforcement of international mediated settlement agreements² and there is a draft amended Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. Again, you would hear a lot more on this particular aspect later today.

24. The United Nations’ move to effect the enforceability of mediated settlement agreements across the globe attests to the growing importance of mediation. Just as the New York Convention has provided a solid framework for arbitration and is clearly responsible for the increased use of international arbitration in commercial and investment disputes, the Mediation Convention, once concluded and coming into effect, will have the same implications on the growth of international mediation.

25. The value of mediation in resolving investment dispute has also been recognised by the UNCITRAL Working Group III. Working Group III has been entrusted with a mandate to work on the possible reform of investor-State dispute settlements. At a recent session in 2017, there was a “generally-shared view” amongst members of the Working Group that mediation could operate to prevent the escalation of disputes to arbitration and could

² Article 15(1) and Article 16(1) of the draft amended UNCITRAL Model Law on International Commercial Mediation (2002), available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/083/22/PDF/V1708322.pdf?OpenElement>.

alleviate concerns about the costs and duration of arbitration.³ Hong Kong is actively participating in this Working Group and hopes to bring to it an Asian perspective.

26. With this growing interest in investment mediation and with the CEPA Mediation Mechanism in place, Hong Kong will provide dedicated training for investment mediators.

27. Almost all of the investment conciliation cases conducted under the International Centre for settlement of investment disputes (“ICSID”) Conciliation Rules involve African states. It is noteworthy that they are generally conducted by local law firms of host states as opposed to major international law firms. It tends to suggest that costs and culture have a bearing on the choice of the form of dispute resolution for investment disputes.

28. It may be said that if investment mediation works, it will work also in this part of the world which has a strong common historical culture of mediation. Asians are less litigious and more conciliatory in nature, and very much prefer harmony. Whilst conciliation requires more of an evaluative mind-set or approach, the skills for interest-based mediation are indispensable as the aim is ultimately to reach a mutually acceptable settlement.

29. For investment mediation to take root in Asia, it is necessary to build up a team of investment mediators in Asia. For that reason, we are very pleased to inform you that Hong Kong and ICSID are working together to provide an investment mediator

³ See UNCITRAL’s ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Part I)’ (available at: http://www.uncitral.org/pdf/english/commission/sessions/51st-session/CN.9_930-REV_1_ADV_COPY.pdf), para. 31.

training course which will focus on a scheme for training in investment law and mediation skills. We are hopeful that the first training session will take place around October this year and we hope to attract investment mediators as well as government officials in Asia.

30. To further enhance the use of mediation (and for that matter also arbitration), Hong Kong representative from DoJ is chairing a Working Group in APEC promoting the use of on-line dispute resolution system, focusing on the needs of small and medium sized enterprises. This initiative benefits from the synergy in the private sector in Hong Kong which actually is also working towards providing a similar platform in the name of eBRAM.hk. The platform of such online dispute resolution aims at reducing costs and dealing with the geographical distance that the parties in dispute. It would be no doubt another very important enhancement to the promotion and use of mediation.

31. Needless to say, one cannot overlook the immense opportunities offered to Hong Kong's legal and dispute resolution services sector under the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Bay Area Development. In this particular aspect, Hong Kong is also looking into how mediation and other forms of dispute resolution can be amalgamated in order to serve the needs of the users, whether it is "mediate first and arbitrate next" or Med/Arb or Arb/Med.. We will closely monitor the latest developments and step up our efforts on these fronts.

32. Ladies and Gentlemen, Hong Kong has been, and will continue to, actively develop and promote the use of mediation as an efficient means of dispute resolution, while staying alert to the

challenges and promises of the future, and what it holds for mediation. Hopefully, one day we will develop an Asian way, a Hong Kong way, an international way of resolving investment disputes through mediation, or an amalgamation of mediation and other forms of dispute resolution to better serve the needs of social development that is happening around the world.

33. Open dialogues as is going to happen today will no doubt provide a lot of food for thought for all of us, and for us in Hong Kong as a matter of making our future policy for dispute resolution to see how that can be taken forward even further. On this note, I wish this event every success. For those coming from overseas, I wish you an enjoyable stay in Hong Kong.

Thank you.

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