Keynote Address[1]

2nd UNCITRAL ASIA PACIFIC JUDICIAL SUMMIT
HONG KONG 2017

The Hon. Mr Justice Joseph Fok, PJ[2]

Under-Secretary-General, Distinguished Judges and Arbitrators, Ladies and Gentlemen,

1. It is a great pleasure and an honour, as a member of the Hong Kong Judiciary, to be asked to give the keynote address at this Judicial Conference on International Trade Law and I welcome you all here today. The theme of the conference – the Judicial-efficient support of international arbitration and emerging topics in international arbitration – is obviously a very broad one, and this is reflected in the subjects discussed on Monday at the Judicial Roundtable, as a precursor to today's conference, and in the subjects to be discussed today in the various conference sessions.

2. Indeed, more generally, as will be apparent from the many and diverse events constituting *Hong Kong Arbitration Week 2017*, in the course of this week a great deal will be said on the subject of international arbitration and in particular on significant developments taking place in that field.

3. Two of those developments in Hong Kong are recent legislative changes to our Arbitration Ordinance.[3] As you will know, the enactment of that

[1] Delivered at the Hong Kong Convention and Exhibition Centre on Wednesday, 18 October 2017.

[2] Permanent Judge of the Hong Kong Court of Final Appeal. I wish to acknowledge my gratitude to Mr John Leung, Judicial Assistant in the Court of Final Appeal (2017-18), for his assistance in the preparation of this address.

ordinance in 2010,[4] marked a "fundamental reorientation of Hong Kong's arbitration regime"[5] and the decision then to adopt a unitary regime based on the UNCITRAL Model Law for all arbitrations conducted in Hong Kong, whether international or domestic, has materially contributed to Hong Kong's development as a leading international centre for arbitration. Indeed, the importance of a clear, effective and modern international arbitration law is recognised by Principle 1 of the Chartered Institute of Arbitrators' London Centenary Principles.[6]

4. On 14 June 2017, Hong Kong's legislature passed two sets of amendments to our Arbitration Ordinance. First, the Arbitration (Amendment) Ordinance 2017 introduces a new Part 11A[7] to the principal ordinance providing that disputes over intellectual property rights may be arbitrated and that it is not contrary to the public policy of Hong Kong to enforce arbitral awards involving such rights.

5. Secondly, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 introduces a new Part 10A to the principal ordinance to provide that third party funding of arbitration and mediation is not prohibited under Hong Kong law, in particular by the common law doctrines of maintenance and champerty.[8]

6. Others will speak at greater length on these legislative changes in the course of this *Arbitration Week* and I do not propose to address those topics in

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3 (Cap.609).

4 It came into effect on 1 June 2011.

5 *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, (2nd Ed.), John Choong & Romesh Weeramantry, at p.xi.

6 http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4

7 Save for a new s.103J concerning arbitral proceedings in relation to patents, the new Part 11A will come into operation on 1 January 2018.

8 These doctrines were confirmed to be part of Hong Kong law: *Unruh v Seeberger* (2007) 10 HKCFAR 31 at [78].

any detail now. However, it is worth noting the relative speed with which both amendment ordinances were dealt with by way of law reform, and in particular that relating to third party funding.

7. In his judgment in *Winnie Lo v HKSAR*,[9] a decision of the Court of Final Appeal in 2012 concerning a charge of conspiracy to commit maintenance by a solicitor, Mr Justice Ribeiro PJ raised for consideration the question of whether and to what extent criminal liability for maintenance should be retained in Hong Kong and suggested the matter be referred to the Law Reform Commission.[10] In June 2013, the Chief Justice and the Secretary for Justice asked the Law Reform Commission to review the subject of third party funding in arbitration and this led to a Consultation Paper in October 2015, a Final Report in October 2016 and the introduction of the bill leading to the amending ordinance later that year.

8. This is perhaps an example of a reassuring exception to what might otherwise be described as the norm concerning judicially encouraged law reform. As Sales LJ, of the Court of Appeal of England and Wales, recently put it in a lecture at the Chinese University of Hong Kong on the judicial perspective of law reform challenges:[11]

> "… many judges have had the experience – I have had it myself – of identifying some problem in legislation in the course of giving judgment in a case, seeking to draw it to the attention of Parliament in the hope that legislation will be passed to rectify the position, and then hearing nothing further about it. It can feel like transmitting radio signals to the far off

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9 (2012) 15 HKCFAR 16

10 *Ibid.* at [177]-[179].

11 *Law Reform Challenges: The Judicial Perspective*, Sir Philip Sales, Lecture at the Chinese University of Hong Kong, 21 September 2017.

stars in the hope of a response one day, only to find that there is silence out there."

9. In this case, clearly, the judicial plea would appear not to have been lost in space and, if so, I think it fair to say that this can be taken as a reflection of the relative importance placed on the promotion of international arbitration in Hong Kong and the development of its arbitration legislation.

10. But it is not only the existence of a clear and accessible arbitration law that leads to the successful development of a jurisdiction as an arbitral seat. Success in the promotion of any jurisdiction in that regard also requires the existence of, in Lord Hoffmann's words, "a local legal system which can be relied upon to be impartial and exercise unobtrusive supervision over the arbitration, intervening only when things have gone badly wrong".[12]

11. To this end, of course, the Arbitration Ordinance expressly provides, in section 3(2), that the two principles on which the ordinance is based are: (1) "that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved"; and (2) "that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance."[13] These are principles which have long, and consistently, been given effect to in various court decisions within this jurisdiction.[14]

12. But whilst the existence and application of these principles contribute to Hong Kong's status as an "arbitration friendly" jurisdiction, they are only part

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[12] *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, (2nd Ed.), John Choong & Romesh Weeramantry, Foreword to the First Edition per Lord Hoffmann at p.vii.

[13] (Cap.609) s.3(2).

[14] See, e.g., *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 at 136A-B and 139J-140A, addressing s.2AA of the Arbitration Ordinance (Cap.341).

of the formula for success; the other, very necessary, part is a reliable supervisory court system. Reliability in this context means, of course, a system founded on the rule of law and an independent judiciary that is competent, efficient, honest and impartial.

13. All this is reflected in Principle 2 of the Chartered Institute's Centenary Principles which identifies the need for "[a]n independent Judiciary, competent, efficient, with expertise in International Commercial Arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes."[15]

14. Contrary to some occasional misimpressions that see the systems as being conflicting or competing, arbitration and court processes do not exist in separate, hermetically sealed universes. There is a wide variety of matters which may properly be dealt with by the courts here in Hong Kong in relation to an arbitration. As you will probably be aware, these include: challenging an arbitrator,[16] terminating an arbitrator's mandate,[17] granting court-ordered interim measures,[18] assisting in the taking of evidence and exercising related special powers,[19] enforcing a tribunal's orders and directions,[20] extending time for the making of an award,[21] dealing with a setting aside application,[22] granting leave to enforce an arbitral award[23] and enforcing a Convention or Mainland award.[24]

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15 See FN 6 (*supra*).
16 (Cap.609) s.26.
17 (Cap.609) s.27.
18 (Cap.609) s.45.
19 (Cap.609) ss.55 and 60.
20 (Cap.609) s.61.
21 (Cap.609) s.72.
22 (Cap.609) s.81.
23 (Cap.609) s.84.
24 (Cap.609) ss.87(1)(a) and 92(1)(a).

15. In some of these instances, the court will have to balance its readiness to act in relation to an arbitration with the caution to be exercised in interfering with the primary jurisdiction and process of an arbitral tribunal. This, for example, is recognised and reflected in section 45 of the Arbitration Ordinance, which expressly sets out the provisions governing the court's powers and procedures to grant court-ordered interim measures in relation to arbitration proceedings.[25]

16. So it is to point out the obvious to say that a sophisticated arbitration system requires a correspondingly good supervisory court system and that the two systems enjoy a complementary and symbiotic relationship in the resolution of disputes. After all, arbitration has, or should have, as its ultimate end the same goal as court litigation, namely the just and timely resolution of disputes.

17. As Professor Reyes, of the University of Hong Kong, himself a distinguished former commercial judge here, put it:

> "A judge should be fully supportive of commercial arbitration. In other words, the judge should not interfere with the enforcement of an arbitration agreement, unless the agreement is inapplicable to the relevant dispute or is null and void. In respect of enforcement of an award, the judge should essentially be pro-enforcement, unless there has been some blatant lack of due process in the making of the award or the award is repugnant to the Court's fundamental conceptions of arbitrability, morality and justice."[26]

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[25] See, e.g., in this context, the recent decision in *VE Global UK Ltd v Charles Allard Jr & Anor*, HCMP 1678/2017, unrep. (Decision dated 10 October 2017) at [27] and [28].

[26] *The Role of the Judge in Commercial Arbitration*, published in (2015) 102 The Arbitration Quarterly 80 dated 31 December 2015 and delivered at a conference entitled "Seminar on the Practice of Arbitration for Judges and Arbitrators" (in translation) organised by the Chinese Arbitration Association, Taipei.

18. If a judge is to do this, though, it is of critical importance that suitable and sufficient judicial education is provided to ensure that the underlying principles on which the courts are to act whenever dealing with an application arising out of arbitration proceedings are known, understood and properly applied. The Judicial Roundtable that took place on Monday is a good example of precisely the type of dialogue that assists to develop and strengthen judicial education in this regard. And in Hong Kong, the importance attached to the efficient support of arbitration proceedings is shown by the existence of a separate specialist list in the High Court dealing with applications concerning arbitrations, which ensures that such applications are heard by judges having suitable experience and expertise.[27]

19. To further ensure that the relevant principles are properly disseminated to those involved in arbitration, I understand from the judge in charge of the Construction and Arbitration List[28] that encouragement is now being given to the publication, subject to appropriate anonymisation, of court decisions on arbitration matters where the court considers the judgment to be of major legal interest, a power which is expressly provided for under section 17 of the Arbitration Ordinance.

20. I return to what perhaps ultimately matters most in respect of judicial support for arbitration, namely the existence and maintenance of a legal system based firmly on the rule of law supported by an independent judiciary. Parties to arbitrations need to have confidence that, if and when an application to court is to be made in relation to their arbitration, it will be heard and disposed of fairly by a judge who is competent, efficient, honest and impartial.

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[27] See *Hong Kong Civil Procedure 2018* (Vol.1) at 72/2/1 on p.1391 and 72/2/13 on p.1394.

[28] The Hon. Madam Justice Mimmie Chan.

21. Each of those qualities is essential but I wish to focus on the issue of impartiality which is the crux of judicial independence.

22. Judicial independence is easily asserted but less easily demonstrated. Yet those contemplating arbitration proceedings in a jurisdiction will wish to know whether the court system of the seat of those proceedings is truly independent. It is therefore necessary to show that genuinely independent judicial support for international arbitration is available in that jurisdiction. Here, the symbiotic nature of the relationship provides the opportunity for mutual support between the two dispute resolution regimes: just as the supervisory court system needs to demonstrate itself to be reliable, so too the arbitration community in that jurisdiction can act in a positive way to promote an accurate assessment of the reliability of that court system.

23. In Hong Kong, and indeed elsewhere, there is an unfortunate tendency currently for some commentators to suggest a lack of judicial independence when they disagree with the outcome of a particular case. Wide publicity in the media often then follows, in which assertions of a decline in judicial independence are made. This happens particularly when political issues are brought before the courts. The recent proceedings in which this occurred in Hong Kong are still ongoing so I shall refrain from commenting on them. But, as an example of this phenomenon in England, one need look no further than the Brexit litigation, which resulted in the alarmist newspaper headline "Enemies of the People" under photographs of the three Divisional Court judges. And you will no doubt be familiar with similar examples in other jurisdictions.

24. Here in Hong Kong, whether or not they are connected, public assertions of a decline in judicial independence are sometimes attributed as the reason for a decline in Hong Kong's ranking in various competitiveness indices. A very

recent example of this is the reaction of some commentators to the World Economic Forum's Global Competitiveness Index released at the end of September this year.[29] In it, Hong Kong rose overall to sixth place, having improved in the factors of "innovation" and "business sophistication" but having dropped in its ranking for "judicial independence" by five places to thirteenth place. This fall, some suggested, was due to the courts being influenced by politics and, in effect, that judges had been got at in order to render a decision more to the liking of the authorities.

25. Frankly, I think one can make the obvious comment that any judiciary finding itself in the top 10 percentile worldwide need not figuratively lose sleep over minor fluctuations in individual elements of this type of "league" table. However, whenever concerns about judicial independence are raised, it necessarily does cause one to examine whether there is any basis in substance for fears of an erosion in judicial independence and the rule of law in Hong Kong.

26. The contrary can, I believe, be quite firmly asserted.

27. First, judicial independence has a long history in Hong Kong and, since 1997, the concept has been constitutionally guaranteed. The Basic Law, Hong Kong's constitutional document, refers to the exercise of independent judicial power by the courts in three separate articles.[30] Judges are immune from legal action in relation to the performance of their judicial functions.[31] They are recruited primarily from the two independent branches of the legal profession in Hong Kong and appointed on the recommendation of an independent

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29 http://www.scmp.com/news/hong-kong/politics/article/2113216/justice-chief-defends-hong-kong-courts-after-judicial (accessed 18 October 2017).

30 Basic Law Articles 2, 19(1) and 85.

31 Basic Law, Article 85.

commission.[32] They enjoy security of tenure[33] and take an oath to uphold the Basic Law and to "safeguard the law and administer justice without fear or favour, self-interest or deceit".[34]

28. In addition, the rights under Article 14 of the International Covenant on Civil and Political Rights requiring adjudicative processes to be fair and impartial, and observably so, are given effect in Hong Kong law by the Hong Kong Bill of Rights Ordinance[35] and are constitutionally protected under the Basic Law.[36]

29. Crucially, the practice of holding proceedings in public and requiring judges to provide reasoned judgments for their decisions explaining how they have arrived at findings of fact, or the legal principles which they have applied to those facts and which have led to their conclusions on the stated issues before them, is a discipline which engenders confidence that any given decision is objectively transparent, fair and independent. The best litmus test for whether any judgment is the product of an independent judiciary and fair judicial process is to read the judgment itself.

30. It is therefore reassuring to see what others, whose views are informed by close personal knowledge of the court system in Hong Kong, say on the subject of the rule of law and judicial independence here.

31. Writing in 2011 in a foreword to a commentary on the Arbitration Ordinance, Lord Hoffmann, who continues to sit as a Non-Permanent Judge of the Court of Final Appeal, said this:

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32 Basic Law, Article 88.
33 Basic Law, Article 89.
34 Basic Law, Article 104 and Oaths and Declarations Ordinance (Cap.11), Schedule 2, Part V.
35 (Cap.383).
36 Basic Law, Article 39.

> "The rule of law in Hong Kong is in good shape, as I can testify after 14 years of participation in the work of its Court of Final Appeal."[37]

32. And, more recently, in a lecture delivered at the University of Hong Kong last month, Lord Neuberger of Abbotsbury, recently retired as the President of the UK Supreme Court, and who like Lord Hoffmann sits as a Non-Permanent Judge in the Court of Final Appeal, similarly said:

> "If I had any serious concerns about judicial independence or judicial impartiality in Hong Kong, I would not be sitting in the HKCFA, and the same is I am sure true of the other common law jurisdiction Non-Permanent Judges, NPJs as they are known. They include a number of former and present members of the UK Supreme Court, a number of former members of the Australian High Court or State Supreme Courts, and I am sure that they adopt the same position as I do on this issue."[38]

33. Supported by an independent, and (I believe it can fairly be said) hard-working and dedicated, judiciary here in Hong Kong, the arbitration community has good reason to feel confident in the commitment to, and quality of, judicial support for arbitration in Hong Kong. Parties can confidently choose Hong Kong as an arbitral seat, secure in the knowledge that the legislative and institutional frameworks are in place to provide the necessary judicial support to international arbitration and that their dispute resolution processes will be firmly and genuinely complemented by a generally pro-arbitration and pro-enforcement court system.

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[37] *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, (2nd Ed.), John Choong & Romesh Weeramantry, Foreword to the First Edition per Lord Hoffmann at p.vii.

[38] Judges, Access to Justice, the Rule of Law and the Court of Final Appeal under "One Country Two Systems", lecture delivered by Lord Neuberger at the University of Hong Kong, 13 September 2017.

34. I wish you all a successful and enjoyable conference today and thank you for allowing me to address you.

Wednesday, 18 October 2017