Speech by The Honourable Chief Justice Geoffrey Ma
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Hong Kong and its Role in International Arbitration

Opening Remarks

1. Just over three weeks ago, a conference took place in London partly organised by the Bingham Centre for the Rule of Law, at which one of the Non-Permanent Judges of the Hong Kong Court of Final Appeal, Baroness Hale of Richmond, spoke on the topic "Safeguarding London's Standing in International Dispute Resolution: The Rule of Law and Judicial Independence". There is an inclination in analysing the attractiveness (or more relevantly, the integrity) of any place for arbitration to link this to a discussion of the legal system and the reputation of the judiciary in that place, with particular regard to the rule of law. It is quite natural and

perfectly legitimate to do this because the common factor that denominates both a judicial system and arbitration is that both institutions are involved in ensuring a fair and just adjudication of legal disputes. In order to convince relevant stakeholders, the integrity of the workings of these two institutions must be demonstrated objectively and empirically. In the context of the judiciary, this integrity is known as the administration of justice and this term can be defined as the practical implementation of that vital concept in any community, the rule of law. This concept is no less important when examining arbitrations. I begin by discussing the significance of looking at the legal system and judiciary of any given place.

2. The significance lies in the simple proposition that, whether logical or not, it is natural for persons involved in arbitration to gauge standards not just by looking at the

arbitration regime in place, but also by reference to the legal system and judiciary of the relevant seat of arbitration. Support for this proposition comes of course readily (though not exclusively) from the fact that courts do have a direct and vital role in arbitrations: for example, resort to the courts is needed when interim measures of protection are required and the enforcement jurisdiction of the courts is a critical part of the arbitral process. Party autonomy and a large measure of independence from the courts are hallmarks of international arbitration, but the courts' role, albeit diminished by comparison to former times, remains vital.

3. The courts of any given jurisdiction therefore assuming importance in this discussion, it does become relevant to ask two questions: what is the legal system in place; and what is the reputation of the judiciary in that place? The

first question involves looking at the infrastructure, the second involves looking at the reality.

4. The infrastructure – or more accurately, the legal system in place – in Hong Kong is clearly set out and prescribed. There is some debate these days as to whether the legal system in Hong Kong ought to be the same as before, whether certain concepts or principles hitherto taken for granted as integral parts of our legal system should still hold good. One such concept is that of an independent judiciary. Yet, this integral facet of the legal system is clearly dealt with in the very document that defines the infrastructure for the governance of Hong Kong. This document (as its Preamble states) prescribes "the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong". This document, a

constitutional document, is the Basic Law of the Hong Kong Special Administrative Region. One does not therefore have to guess or theorise as to what is Hong Kong's legal system or guiding principles governing the administration of justice: it is set out in the Basic Law itself. And it is to be remembered that the Basic Law is a law that was passed by the National People's Congress, promulgated on 4 April 1990.

5. What does the Basic Law tell us about Hong Kong's legal system and the administration of justice? The following are the more important aspects:-

(1) Hong Kong is a common law jurisdiction. The Basic Law is full of references that support this. Two examples make this point:-

(a) Article 82 states that the power of final adjudication in Hong Kong vests in the Court of Final Appeal "which may as required invite judges from other common law jurisdictions". This theme is continued in Article 92 which provides that judges "shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions".

(b) Article 84 specifically refers to Hong Kong courts being able to "refer to precedents of other common law jurisdictions". (Emphasis added)

(2) The independence of judiciary is emphasised in three places in the Basic Law: in two articles

(Article 2 under the chapter heading of "General Principles" and Article 19 under the heading "Relationship between the Central Authorities and the [HKSAR]"), reference is made to Hong Kong having "independent judicial power"; the third Article is Article 85 (under the section heading "The Judiciary") states that the courts "exercise judicial power independently, free from any interference".

(3) The only other aspect of the Basic Law I would emphasise are those parts of the "one country, two systems" constitutional model that give Hong Kong an international dimension. We see reference in Article 39 to the applicability of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. Next, I have already referred to the

makeup of judges in Hong Kong as including judges from other common law jurisdictions. This is complemented by Article 94 which provides for lawyers outside Hong Kong to practise in Hong Kong. The existence of so many international law firms providing legal services in Hong Kong, especially in the arbitration field, is the practical manifestation of this provision in the Basic Law.

6. The concept of an independent judiciary is a critical part of Hong Kong's legal system and such is its importance to the rule of law that it needs to be properly understood. As a concept, it does not differ much in substance from the independent role played by arbitrators. At its heart is the ultimate objective of a fair and just hearing. Article 87 of the Basic Law actually uses the term "fair trial" and this is inherent in the ICCPR, to which I have earlier referred. Also

central to the independence of the judiciary is the fundamental requirement of impartiality: there can be no question of judges being actually biased nor giving a perception of bias. This requirement is naturally of paramount importance as far as arbitrators are concerned in accepting appointments. Statute makes this clear.[1] And, as Sir Anthony Mason NPJ said in an appeal heard by the CFA involving the enforcement of a Convention award, "the opportunity of a party to present his case and the determination by an impartial and independent tribunal …. are basic to the notions of justice and morality in Hong Kong".[2]

7. The fundamental requirements of a fair trial and judicial impartiality, essential to and taken for granted in any jurisdiction governed by the rule of law, may sometimes be

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1 See for example, s46(3) of the Arbitration Ordinance Cap 609, referring to Article 18 of the UNCITRAL Model Law.

2 *Hebei Import and Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR III, at 139H-I.

forgotten especially in the heat of politics. Today is not the occasion to discuss in detail the criticisms that have been levelled against the judiciary in Hong Kong arising from recent decisions of the courts, particularly at the Magistrates' Court level. Many of these criticisms are based on no more than dissatisfaction with the mere result of cases, depending on which end of the political spectrum the critics find themselves. However, politics and political biases simply do not have a place in the determination of a legal dispute as far as the courts are concerned.

8. Central to the evaluation of the integrity of a judiciary is the requirement that the proper administration of justice and the rule of law must be shown to exist in reality. This is the second of the two questions I earlier posed, and the answer depends on whether this can be demonstrated objectively and empirically.

9. I have six principal indicators (I accept there may be more and you may have more) to demonstrate whether those facets of the administration of justice and the rule of law which I have earlier identified, can be said to exist. They go to establishing the integrity and trustworthiness of a judiciary.

10. First, transparency of the legal system. The idea of open justice whereby most court proceedings are open to the public to observe,[3] is an obvious indication of the rule of law. The fact that any member of the public is able to observe court proceedings provides an effective supervision of the whole of the judicial process. Closely connected to this is the freedom, save in exceptional and recognised circumstances, of the press to report and comment.

[3] Save for the most sensitive cases, such as certain matrimonial proceedings (especially where children are concerned) or Mareva injunctions or Anton Piller orders.

11. Secondly and this for me provides a crucial indication of the existence of the rule of law, the reasoned judgments. This is an important characteristic of the common law. Reasoned decisions demonstrate not only to the parties to the particular suit but also to the world at large, the precise thought process of the court in arriving at any decision. It exposes for detailed analysis and scrutiny the reasons for a decision and, where these reasons are not convincing, the judgment will enable the losing party to consider an appeal. A reasoned judgment will demonstrate that a court has discharged its responsibility of determining the outcome of cases strictly according to law, and legal principle, and has acted independently. Conversely, where the decision of a court is not accompanied by any reasons at all or wholly inadequate reasons, this may give rise to speculation as to whether a court has really acted strictly according to the law or whether it has instead taken into account extraneous and

illegitimate factors. Of course, it does not follow that where judgments do not contain reasons or have inadequate reasons that the court is not independent but certainly, the existence of the reasoned judgment will go a long way to dispel any such speculation.

12. Thirdly, connected to the second factor just discussed, a reasoned judgment will indicate clearly the court's adherence to the law, legal principle and the spirit of the law.

13. Fourthly, the appointment process of judges is also a relevant consideration in determining the independence of the Judiciary. I have already referred earlier to that provision in the Basic Law which mandates the judges should be appointed on the basis of their judicial and professional qualities. Integrity is also an important factor to be considered.

14. Fifthly, effective access to the courts or justice. That facet of the rule of law, namely, the existence of an independent institution (the court) to enforce laws, implicitly carries with it the necessity of ensuring effective access to justice.

15. Sixthly and lastly, and this is perhaps a somewhat nebulous but I believe a real factor in relation to determine the existence of the rule of law, the views of the users of the courts (mainly being perhaps the lawyers) towards the courts and their confidence in the system, provide some indication to support (or, as the case may be, not support) the existence of the rule of law.

16. I mentioned at the outset the relevance of rule of law considerations as far as arbitrations are concerned. They are relevant to be taken into account because, just as in the

case of looking critically at a judiciary in any given jurisdiction, it is of considerable importance also to examine closely the structure in place for arbitrations in any given jurisdiction in order to be satisfied of its integrity. The six indicators just discussed can be adapted to cover arbitrations:-

(1) As regards transparency, while arbitrations are not open to the public, it would not be right to describe them as secret hearings in which the applicable procedures and process of decision-making are somehow unknown. Indeed, quite the contrary in that the procedures adopted in arbitrations are well known, with the whole process often contained (and published) in rules if not statutes.

(2) Awards, like judgments, are detailed in their reasoning. While arbitral awards are not made

public, they are made available to the parties themselves and their lawyers. They will show how an arbitral tribunal has adjudicated on a dispute and how it has done so in accordance with the applicable law, legal principle and spirit.

(3) Just as a cogent appointment process for judges generates confidence that a dispute will be properly dealt with by a competent and skilled professional, in arbitrations the availability (or not) of well-known and experienced arbitrators is proof of the calibre and expertise that exist.

(4) As for access to justice, arbitrations of course differ from court proceedings in that access is confined to those who have agreed to employ this method of dispute resolution. It is pertinent to inquire in this

respect whether there is ready access to arbitrators of the right ability who can be relied upon to provide the basics of a fair hearing and to dispense justice. Equally important is to identify the types of persons who use arbitration. In this context, one can see that often users include large corporations and of course States, arbitrating over enormously high stakes. Do they feel they have ready access to arbitration?

(5) The views of the users of arbitrations, particularly the lawyers, can speak volumes on the suitability of any jurisdiction that provides arbitration services. Conferences such as the present one provide an invaluable opportunity for all those who are involved in arbitration to exchange frank views.

17. I would like to think that Hong Kong passes the test whether one is referring to the courts or arbitration. As I have tried to impress, the matter needs to be looked at objectively and dispassionately. No doubt many challenges exist and more will arise in the future, but I am confident that as far as the Hong Kong judiciary and Hong Kong arbitrators are concerned, the fundamentals of the rule of law will always be the guiding light.

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