

For discussion  
on 12 December 2006

## **LegCo Panel on Administration of Justice and Legal Services**

### **Development of Hong Kong as a Legal Services Centre**

#### **I. Objective and targets**

One of the Department of Justice's policy objectives is to assist in the building up of Hong Kong as a regional centre for legal services and dispute resolution.

2. Our targets in pursuing this policy objective are –

- to improve the regulatory framework within which lawyers can provide their services in Hong Kong;
- to make Hong Kong more attractive as a legal services and dispute resolution centre;
- to assist Hong Kong lawyers to gain access to the Mainland legal market; and
- to promote understanding in the Mainland and in other territories and countries of the advantages that Hong Kong offers as a regional centre for legal services and dispute resolution.

3. In pursuing these targets, the Department keeps in close contact with the two legal professional bodies, and bodies such as the Hong Kong International Arbitration Centre (“HKIAC”), Hong Kong Institute of Arbitrators, Chartered Institute of Arbitrators, Hong Kong Mediation Council, Hong Kong Mediation Centre, Hong Kong Society of Notaries and Association of China Appointed Attesting Officers.

#### **II. Major measures taken and progress made (during the last two years)**

##### **Improving the regulatory framework**

###### **Notaries Public**

4. The Legal Practitioners (Amendment) Ordinance 1998, which was passed in April 1998, provides for the setting up of a new appointment system

for notaries public in Hong Kong. The Hong Kong Society of Notaries, with the drafting assistance provided by the Department of Justice, undertook the preparation of the relevant rules.

5. Eight sets of Rules relating to the new system of appointment of notaries public were gazetted on 11 March 2005 and were implemented on 30 June 2005. These rules mainly govern the professional practice and conduct, the qualifying examinations, qualification for appointment and disciplinary proceedings of notaries public.

### **Conditional Fees**

6. One way to help those who cannot afford a lawyer and may not be eligible for legal aid is through a system of conditional fees – the so-called ‘no win, no fee’ system. The Law Reform Commission has issued a consultation paper recommending that the lawyers be permitted to charge a slightly higher fee than normal for accepting the risk of receiving no fee if the case is lost. The consultation exercise in respect of this recommendation has now been completed and the Law Reform Commission is considering the submissions received.

### **Making Hong Kong more attractive as a legal services and dispute resolution centre**

7. The liberalisation of the Mainland markets has created a strong demand among Mainland enterprises, as well as foreign investors in the Mainland, for high standard legal services, including litigation and arbitration services. Hong Kong can offer such services, and must encourage international and Mainland businessmen to choose Hong Kong as the centre for dispute resolution.

8. As a general rule, Mainland laws allow parties to a foreign-related contract to choose applicable laws, including the laws of Hong Kong, to resolve disputes, or to choose such disputes to be resolved in another jurisdiction (such as Hong Kong). Hence, in negotiating and signing contracts with Hong Kong and Mainland enterprises, the parties concerned (including foreign investors) may consider choosing courts or arbitration bodies in Hong Kong as the venue for resolution of contractual disputes and the law of Hong Kong as the applicable law.

9. The Department of Justice has been keeping abreast of these developments and has initiated the following measures to facilitate the resolution of cross-boundary civil and commercial disputes. These measures

will help to develop Hong Kong as a regional centre for legal services.

### **Arbitration Services and Enforcement of Arbitral Awards**

10. When parties consider whether to arbitrate in any particular place, the extent to which an award in that place can be enforced elsewhere is of paramount importance. In this regard, awards made in Hong Kong can be enforced in more than 135 jurisdictions that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Hong Kong SAR's membership of that Convention has, since 1 July 1997, been by virtue of the fact that China is a signatory to the New York Convention and has applied it to Hong Kong.

11. Being an international treaty, the New York Convention is not applicable to mutual enforcement of arbitral awards between the HKSAR and the Mainland. Pursuant to Article 95 of the Basic Law (which provides for juridical assistance between the Hong Kong SAR and other parts of China), an arrangement for reciprocal enforcement of arbitral awards between the Hong Kong and the Mainland was entered into in June 1999 and came into effect on 1 February 2000. The Arrangement is of great significance to Hong Kong's status as a venue for resolving Mainland commercial disputes through arbitration. In these disputes, as the assets involved or the relevant parties (or some of them) are likely to be located in the Mainland, enforcement of some kind may have to be sought in the Mainland.

12. The 1999 Arrangement generally reflects the principles and spirit of the New York Convention. It provides that Mainland awards made pursuant to the Arbitration Law of the People's Republic of China by recognized Mainland arbitral authorities may be enforced in Hong Kong. At present, there are 148 such recognized Mainland authorities.

13. Since the operation of the Arrangement, the Department of Justice has been actively monitoring its implementation. Views have been collected from the Working Party on the Review of the Enforcement of Hong Kong Arbitration Awards in the Mainland, on which the Department is represented. These views have been reflected to the Mainland authorities by the Secretary for Justice, and appropriate adjustments and measures have been taken on board.

14. Between the coming into effect of the Arrangement in February 2000 and September 2006, a total of 71 applications for enforcement of Mainland arbitral awards were made and only 5 of which were subsequently set

aside.

15. As the awards made in Hong Kong can also be enforced in the Mainland, the Arrangement no doubt serves to encourage Mainland enterprises, as well as foreign investors in the Mainland, to employ arbitration services in Hong Kong and thereby strengthen Hong Kong's role as a regional dispute resolution centre.

16. Hong Kong has many attributes that make it a leading regional centre for arbitration. These include its location, its infrastructure, professional expertise, bilingualism, and the world-class HKIAC.

17. The number of cases in which HKIAC was involved with during 2005 stood as 281 as compared with 280 cases in 2004; 287 cases in 2003 and 320 cases in 2002. Amounts in dispute range from HK\$175,980 to over HK\$710 million and parties' nationalities ranges from Chinese (Mainland of China), British, Singaporean, American, Korean, Japanese, Chinese (Hong Kong SAR), Taiwanese. Of the 281 cases, 15 cases were from the Mainland of China, where both parties were entities/nationals of the Mainland of China in which the arbitration clause specified Hong Kong as the place of arbitration. This compares with 20 cases in 2004, 14 cases in 2003, 13 cases in 2002, 7 cases in 2001 and 5 cases in 2000. These figures are indicative of an increasing acceptance of Hong Kong as one of the world's preferred centres for disputes resolution internationally.

18. The increasing number of Mainland companies choosing to arbitrate in Hong Kong has led to a recent development in local arbitration procedures. It became apparent to the HKIAC that many Mainland companies are not familiar with the ad hoc procedures that commonly apply to arbitrations in Hong Kong. Under the Mainland system, all arbitrations are referred to an arbitration commission which then administers the arbitration. Mainland parties are not therefore familiar with Hong Kong arrangements whereby, after an arbitrator is appointed, he or she may handle the arbitration independently of any arbitration commission.

19. In order to assist Mainland companies, in April 2005 the HKIAC adopted institutionalised rules for arbitration. Contracting parties who wish to operate under those procedures can provide for this in their contract. If a dispute then arises, the HKIAC will administer the arbitration, and will assist the parties in handling various issues that need to be resolved with the arbitrator.

20. The HKIAC's Domain Name Dispute Resolution Services has achieved a lot of success lately. The Centre administers domain names in

China (.cn); Hong Kong (.hk); Paulau (.pw); and Philippines (.ph). Under the Asian Domain Name Dispute Resolution Centre (“ADNDRC”) the HKIAC has handled a total of 75 domain name disputes. As of June 2006 the ADNDRC has 3 offices, one in Hong Kong, one in Beijing and recently one formed in Seoul, Korea. The HKIAC is in talks with Japan and Malaysia with the view of further opening offices in these countries. The HKIAC is the co-ordinating office and the founder of the ADNDRC, which is one of four approved centres around the world and the only one in Asia.

21. The HKIAC is developing a dispute resolution scheme for the office of the Telecommunications Authority in relation to consumer complaints pertaining to telecommunication services. In addition, it is finalizing a dispute resolution scheme for the Semiconductor Intellectual Property Trading Centre, a joint undertaking by the University of Science and Technology and the Hong Kong Science Park. The HKIAC is also putting forward a bid to host the 2007 United Nations “Online Dispute Resolution Forum” here in Hong Kong.

22. The HKIAC received financial assistance from the Commerce and Industry Branch of the Commerce, Industry and Technology Bureau under the Professional Services Development Assistance Scheme in 2005 to a figure of HK\$716,000.00 for a two year project to promote Hong Kong’s arbitration services in the United States of America.

23. An area in which there is room for improvement is Hong Kong’s arbitration law. This has been updated on a number of occasions in the past few decades in response to developments. In particular, it was amended in 1989 in order that the UNCITRAL Model Law should apply to international arbitrations. At that time, it was decided to retain a separate regime for domestic arbitrations. And, in order to respect the autonomy of contracting parties, provisions were added that allowed parties to opt in or out of the two regimes.

24. In recent years, concern has been expressed that this legislation is not readily comprehensible by foreign businessmen and lawyers. A report, prepared by the Committee on Hong Kong Arbitration Law, proposed that the law should be simplified by applying the UNCITRAL Model Law to all types of arbitration. The Department of Justice set up a working group in September 2005 to consider and take forward this proposal. Representatives of the legal profession, arbitration experts and others were appointed to the working group, under which a sub-Committee was tasked with drawing up a draft on which the new legislation would be based. It is expected a consultation paper and draft Bill will be published next year.

## **Reciprocal Enforcement of Judgments**

25. In deciding which method of dispute resolution to use, a person may well want to know whether a decision in his favour can be enforced in another jurisdiction. This is particularly relevant in Hong Kong where so many disputes involve parties who have assets in another jurisdiction, often the Mainland.

26. At present, Hong Kong court judgments are not easily enforceable in many other jurisdictions. But there is work in hand to improve the situation in two respects. First, Hong Kong participated, as part of the PRC delegation, in discussions on the Hague Convention on Choice of Court Agreements. This led to the conclusion last year of a multilateral convention which, when implemented, will enable litigants to enforce judgments obtained, on the basis of a choice of court agreement, in the courts of one states party in the courts of other states parties. The government will be conducting a consultation exercise to ascertain the level of support for such a regime. If and when the PRC ratifies the convention, and extends it to Hong Kong, this will be a major step forward.

27. More immediately, the Department of Justice is preparing a Bill to implement an arrangement, signed in July this year, for the reciprocal enforcement of certain commercial judgments as between Hong Kong and the Mainland. This arrangement applies to money judgments, given by designated courts of Hong Kong or the Mainland when exercising their jurisdiction pursuant to a valid exclusive choice of court clause, contained in a business-to-business agreement.

28. This will mean, for example, that a Mainland judgment will be enforceable in Hong Kong if the judgment arises from a business contract which provided that the Mainland courts were to have exclusive jurisdiction over contractual disputes. The designated courts of the Mainland are the Intermediate People's Courts or above, and those Basic Level People's Courts authorized to exercise jurisdiction over foreign-related civil and commercial cases.

29. The fact that certain Hong Kong judgments, based upon exclusive choice of court clauses, will be enforceable in the Mainland is significant. We believe that this will add to Hong Kong's attractiveness as an international dispute resolution and legal services centre. We will be promoting this development, and encouraging businessmen who are investing in the Mainland to provide in their contracts that disputes are to resolved only by the courts in Hong Kong. In this way, they will be able to enforce any resultant money judgment in the Mainland.

## Mediation services

30. Over the last decade, mediation has become an effective and popular form of alternative dispute resolution in overseas jurisdictions, in particular, UK, Australia and Singapore. The benefits of mediation can be succinctly described as a relatively quick and inexpensive procedure producing a win/win solution, by which a relationship can be preserved, and with which both parties can live. However, until recently, legal aid was not available for mediation in Hong Kong, and so the question of funding does arise.

31. For those who can afford mediation services, this form of dispute resolution should be attractive. But it appears that mediation in Hong Kong has not yet developed in popularity to the extent it has in some other places.

32. The construction industry has been relying on mediation for some time. When the government was developing the new Hong Kong airport and related projects, all the construction contracts contained a mediation clause. This proved to be extremely successful. As a result, all government construction contracts have since included such a clause.

33. The Hong Kong Mediation Council (“HKMC”), a division of the HKIAC, has been actively promoting mediation as a means of dispute resolution to the Hong Kong community. In January 2003, it launched a Construction Industry Mediation Pilot Scheme, under which HKIAC-accredited mediators would provide up to three days of their time, free-of-charge, for a construction dispute not exceeding HK\$2 million in value. Further, in July 2003 it initiated an Insurance Mediation Pilot Scheme, which provides low cost mediation service for an insurance dispute below HK\$2 million in value.

34. The HKMC has also provided support to the Pilot Scheme on Family Mediation introduced by the Judiciary in 2000. Of the 844 mediation cases under that scheme, 69.3% reached full settlement, while 9.8% reached partial settlement. These figures are encouraging, and suggest that mediation has an increasing role to play in resolving certain types of dispute.

35. More recently, the HKMC has initiated an Employees Compensation Insurance Scheme with the assistance of the Hong Kong Federation of Insurers to provide mediations services to employees injured as a result of accidents at work.

36. The Judiciary is exploring other ways in which mediation can be used with a view to litigants reaching a settlement. The final report on Civil Justice Reform contained a number of recommendations on mediation. For

example, it recommended that the courts should provide litigants with better information and support with a view to encouraging greater use of purely voluntary mediation. It proposed that the Legal Aid Department should have power in suitable cases to limit its initial funding of persons who qualify for legal aid to the funding of mediation. And it recommended that the courts should be able to deprive a winning part of costs because of an unreasonable refusal of mediation.

37. Each of these proposals is already being implemented, at least in part. For example, a Practice Direction has been issued in respect of the pilot scheme for mediation in construction cases stating that “Parties’ unreasonable refusal to attempt mediation may result in an adverse award of costs at the end of court proceedings”. And there is a pilot scheme under which legal aid is available in respect of matrimonial disputes.

38. What these developments indicate is that there is mounting pressure for mediation to be used to save costs – whether of individual litigants, insurers, or legal aid. Given market forces, it is anticipated that an alternative form of dispute resolution that can be proved to be quicker and cheaper than formal court proceedings will draw cases away from the courts.

39. A socio-legal study in the UK revealed that the vast majority of those who encounter a justiciable dispute never see a lawyer, let alone get involved in litigation. The Department of Justice has commissioned consultants to conduct a similar study in Hong Kong. The analyses and results of that study would help suggest what could be done to assist people involved in community disputes, which may never reach the court. It may well not be cost-effective or appropriate to try to channel relatively small disputes to the courts, or even to tribunals. But studies show that if these disputes are not satisfactorily resolved, they can escalate into bigger problems that are costly to the individuals involved and to the community.

40. It appears that there is a role for mediation in dealing with these conflicts. There is a growing number of trained mediators in Hong Kong, many of whom are underemployed. The challenge will be to encourage members of the public to use mediation services.

41. Apart from those cases handled by the HKIAC and HKMC, there are cases taken by individual arbitrators and mediators, many of them are members of the Chartered Institute of Arbitrators, Hong Kong Institute of Arbitrators and Hong Kong Mediation Centre. Some of them are also on the panels of the arbitration commissions in the Mainland. They handle cases in Hong Kong, the Mainland and overseas. It appears that over the last few years,



these cases are increasing in numbers. The Hong Kong Bar Association and the Law Society of Hong Kong also have a list of members who are qualified and prepared to act as mediators.

### **Closer Economic Partnership Arrangement between the Mainland and Hong Kong (“CEPA”)**

42. The Department of Justice has actively promoted measures that will assist Hong Kong lawyers to gain access to the Mainland legal market.

#### **CEPA I**

43. CEPA, which came into force on 1 January 2004, includes measures that allow Hong Kong lawyers to have better access to the Mainland legal services market ahead of foreign counterparts, within the confines of the WTO regulations. These measures include –

- i) permitting the representative offices of Hong Kong law firms to operate in association with Mainland law firms situated at the same place as their representative offices;
- ii) allowing Hong Kong legal practitioners to be employed by Mainland law firms;
- iii) allowing Hong Kong permanent residents who are of Chinese nationality to sit the State Judicial Examination;
- iv) allowing those Hong Kong residents who pass the Examination to practise as Mainland lawyers in non-litigation matters; and
- v) reducing the residence requirement for the representatives of Hong Kong law firms in the Mainland from six to two months a year, except for Guangzhou and Shenzhen where the requirement is completely lifted.

#### **CEPA II**

44. On 27 August 2004, the Hong Kong SAR Government and the Central People’s Government (“CPG”) reached an agreement on further liberalisation measures on trade in goods and services by way of a supplement to CEPA. Under CEPA II which came into operation on 1 January 2005, Hong Kong lawyers providing professional assistance at the request of Mainland law firms on the basis of individual cases will no longer be required to apply for a Hong Kong legal consultant permit.

### **CEPA III**

45. The second supplement to CEPA was signed on 18 October 2005. CEPA III provides further liberalisation measures in relation to legal services and the following specific commitments have been made by the CPG:

- i) allowing a Hong Kong law firm that has set up a representative office in the Mainland to operate in association with one Mainland law firm situated in the province, autonomous region or municipality where its representative office is situated; and
- ii) a Hong Kong resident who is allowed to practise in the Mainland will practise in one Mainland law firm only, and will not simultaneously be employed by the representative office set up by a law firm of a foreign country in China, or the representative office set up by a law firm of Hong Kong or Macao in the Mainland.

### **Further Liberation of CEPA III**

46. The third supplement to CEPA was signed on 27 June 2006. The following specific commitments in relation to legal services have been made by the CPG:

- i) waiving the requirement on the number of full-time lawyers employed by Mainland law firms that operate in association with Hong Kong law firms;
- ii) waiving the residency requirement in the Mainland for representatives stationed in representative offices of Hong Kong law firms in the Mainland;
- iii) allowing Hong Kong residents who have acquired Mainland lawyer qualifications or legal professional qualifications and hold a Mainland lawyer's practice certificate to engage in activities as agents in matrimonial and succession cases relating to Hong Kong in the capacity of Mainland lawyers;
- iv) allowing Hong Kong barristers to act as agents in civil litigation cases in the Mainland in the capacity of citizens; and

- v) allowing Hong Kong residents who have acquired Mainland lawyer qualifications or legal professional qualification to undergo internship in a branch office of a Mainland law firm set up in Hong Kong in accordance with the Outline for Practical Training and the Guidelines on Practical Training as required in the Mainland.

47. As this new package of liberalization measures will not be implemented until 1 January 2007, the Department of Justice will in the interim closely work with the Mainland authorities with a view to putting in place relevant revised rules and regulations and obtaining clarification on the related issues.

48. The liberalisation of market access to the Mainland legal services sector has an immediate and profound impact on Hong Kong legal practitioners who plan to extend their professional services in the Mainland. The relevant measures would effectively give Hong Kong practitioners a competitive edge over their counterparts in other jurisdictions. Under the framework of CEPA, the legal profession of both sides would have more opportunities for quality and cost-effective professional co-operation. Through such co-operation, experience in a wide range of areas of practice, such as corporate finance, intellectual property, information technology, international trade and commercial disputes resolution, and from next year onwards litigation, could be exchanged. The implementation of CEPA is also expected to help attract Mainland and foreign investors, as well as lawyers, to employ the services rendered by the Hong Kong legal profession, thereby strengthening Hong Kong's position as the regional hub for legal services.

49. The concluding of CEPA is just the initial step to open up the legal services market in the Mainland by the CPG and the Hong Kong SAR Government. A great deal of effort has also to be contributed by the local legal profession to make CEPA work as it is intended. The Department of Justice will continue to assist local practitioners to develop further inroads in the Mainland, by gauging the effectiveness and implementation of the current arrangements, and constantly reflecting the feedback and suggested improvements to the Mainland authorities.

### **Promoting Hong Kong as a legal services centre**

#### **Visits, Speaking Engagements, Briefings, Conferences, Seminars etc.**

50. The Department of Justice has been actively promoting Hong Kong's legal services by organising, supporting or sponsoring visits, conferences, symposiums, forums, seminars and exhibitions. This promotional

work is often carried out in collaboration with professional and trade related bodies in Hong Kong, the Mainland and overseas. Examples of these bodies include the Law Society of Hong Kong, Beijing Office of the Hong Kong Government, Hong Kong Economic and Trade Offices in Guangdong, Invest HK, HKTDC, Municipal Bureaux of Justice and lawyers associations in the Mainland. In view of the long term and macroscopic benefits resulting from CEPA, the Secretary for Justice and his senior directorate have been leading delegations of our legal profession to have direct talks with Mainland authorities and counterparts.

51. These visits and conferences are not only attended by lawyers, journalists and government officials, but also by entrepreneurs from the business sector. Many of these gatherings in the Mainland are supplemented by “meet-your-clients” sessions, whereby lawyers from Hong Kong would provide free consultation to those attending. This form of exchange provides opportunities for Hong Kong lawyers and potential clients (including legal practitioners) to understand the services supplied and demanded, and to build the necessary contacts and networking.

52. During the period 2005 through 2006, a total of 13 such visits were made to overseas countries (including the UK, U.S.A., Switzerland, Australia, and Thailand), and 28 visits were made to the Mainland and Macao. During the same period, 152 visitors or delegations were received and briefed, of which 81 were from the Mainland. Moreover, the Secretary for Justice and his staff participated in 25 conferences and seminars held in Hong Kong. On all of these occasions, Hong Kong’s attributes as a regional legal services centre were fully explained.

53. The feedback from local practitioners has been that enquiries about their legal services from the Mainland and overseas have increased markedly, and an upward trend in terms of business volume has also been suggested. The Department of Justice is pleased that Hong Kong lawyers are now offering services in respect of, for example, the organisation of Beijing Olympic Games 2008, the listing of Mainland companies in Hong Kong, acquisition and mergers, financing and restructuring of corporate finances, as well as expanding their markets internationally.

### **Information Dissemination**

54. The Department of Justice has engaged in disseminating information on Hong Kong’s legal system, including the legal profession and services provided, through the Department’s website and briefings. Speeches and information papers are uploaded regularly, including the regulations governing various aspects of the implementation of CEPA. Information about

Hong Kong's legal profession and services has also been disseminated through the outlets set up by the Government's Economic and Trade Offices overseas and in the Mainland, as well as an exchange mechanism between the Department and other relevant authorities and institutions on a regular basis.

### **III. The Way Forward**

55. The Department of Justice will continue to work closely with all the stakeholders to pursue the policy objective and targets for strengthening Hong Kong as an regional legal services centre. More specifically, we will

- i) support or work in conjunction with the professional bodies to maintain the strengths of Hong Kong legal services by improving the standard and competitiveness;
- ii) lead or work in conjunction with the practitioners and academia in Hong Kong and the Mainland to achieve a greater understanding of the each other's law and legal system;
- iii) step up efforts in reinforcing and promoting Hong Kong as a regional centre for legal services and resolution of commercial disputes, in particular those involving the Mainland and foreign countries;
- iv) support and assist the professional and other relevant bodies in securing inter-regional and international legal and dispute resolution services;
- v) explore further legal services outlets and markets for the local practitioners where appropriate; and
- vi) help evaluate the standard of legal education and formulate reforms in conjunction with the law schools, Standing Committee on Legal Education and Training and the legal services sector.

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