

LCQ15: The Hague Convention on Choice of Court Agreements

Following is a written reply by the Secretary for Justice, Mr Rimsky Yuen, SC, to a question by Hon Dennis Kwok in the Legislative Council today (June 25):

Question:

The Hague Convention on Choice of Court Agreements (the Convention) was adopted at the twentieth session of the Hague Conference on June 30, 2005. The Convention aims to assure that when the contracting parties agree on a court to hear a civil or commercial dispute, the agreement and any resulting judgement will be recognised and enforced in any Contracting State to the Convention. The Department of Justice published two consultation papers in 2004 and 2007 respectively to seek comments on the Convention, particularly with regard to the question of whether the Convention should apply to Hong Kong. In this connection, will the Government inform this Council:

(1) whether it has decided to seek the application of the Convention to Hong Kong under Article 153 of the Basic Law; if it has, of the views of the interested parties and stakeholders received in the aforesaid consultations; if not, whether it will conduct consultations again before it makes the decision;

(2) whether it has assessed what effects the application of the Convention to Hong Kong will have on the Judiciary in respect of its workload, manpower and court facilities, and particularly, the potential impact on the civil and commercial lists; if it has, of the findings and details; if not, the reasons for that;

(3) whether it has explored to what extent Hong Kong could, upon the application of the Convention to it, encourage more contracting parties to choose this jurisdiction as the seat

for the resolution of international civil or commercial disputes, and bring about potential development opportunities for the legal profession; if it has, of the detailed findings; if not, the reasons for that; and

(4) given that the Minister for Law of Singapore stated during a recent Parliamentary sitting that Singapore was studying the feasibility of acceding to the Convention, and in the light of the proposed establishment of an International Commercial Court in Singapore, whether it has explored the adoption of appropriate measures and reform proposals, apart from seeking the application of the Convention to Hong Kong, to maintain and enhance Hong Kong's status as an international dispute resolution centre in the Asia Pacific region?

Reply:

President,

The Hague Convention on Choice of Court Agreements (the Convention) was adopted in 2005. So far, it was only acceded to by Mexico in 2007 and signed by United States of America (USA) and the European Union (EU) in 2009. The Convention has not yet entered into force.

Our replies to each of the four parts of the question are as follows:

(1) and (2) The public consultation exercise by the Hong Kong Special Administrative Region (HKSAR) Government in relation to the Convention was first conducted in 2004 (on the basis of the draft Convention) and again in 2007 (on the basis of the adopted Convention). It invited views and comments on a number of issues in relation to the Convention, including the question of whether the Convention should be applied to Hong Kong. On this question, the HKSAR Government received mixed views during these consultation exercises. While some respondents (such as the Judiciary and the Law Society of Hong

Kong) were generally in favour of the application of the Convention to Hong Kong, others including the Hong Kong Bar Association (HKBA) have expressed reservation on such application due to concerns such as the provision in Article 3(b) of the Convention that deems choice of court agreements designating courts of a State or specific courts of a State to be exclusive, which in the opinion of HKBA is "somewhat unfair". The HKBA also considered Article 4(1) of the Convention would require Hong Kong courts to enforce a foreign judgement granting remedies not conventionally granted under the laws of the HKSAR.

The question of whether the Convention should be applied to the HKSAR is not a simple one. One has to carefully consider the pros and cons as well as the consequential implications of applying or not applying the Convention to Hong Kong. The HKSAR Government has not yet come to a conclusion as to whether the Convention should be applied to the HKSAR, but will keep the issue in view from time to time. When considering whether the Convention should be applied to the HKSAR, we will no doubt take into account all relevant considerations including the comments received during the previous consultation exercises, the implications of such application to the existing laws of the HKSAR and our Judiciary (such as its workload, manpower and facilities), and the number of jurisdictions to which the Convention is applied. If necessary, further consultation will be conducted with the relevant stakeholders on issues of their concern.

(3) The international legal regime to be established by the Convention aims to provide certainty and ensure the effectiveness of choice of courts agreements between parties to commercial transactions. It would govern the recognition and enforcement of judgements resulting from proceedings based on such agreements. If the Convention is to be applied to the HKSAR, it may have the effect of attracting more business parties to choose the HKSAR to resolve commercial disputes by way of litigation.

The efficacy and attractiveness of the Convention regime, however, would be subject to a number of relevant factors, including the number of jurisdictions to which the Convention is applied, the extent to which business parties would choose litigation to resolve international or cross-border commercial disputes rather than using alternative dispute resolution methods such as arbitration and mediation and, if the parties choose litigation, the extent to which they would adopt a choice of court agreement in their contracts, as well as the extent of specific matters that may be excluded from application of the Convention by state parties as permitted under Article 21 of the Convention.

As stated in parts (1) and (2) of the reply above, the Convention has so far been acceded to by Mexico and signed by the USA and EU only. The impact of the Convention, which has not yet entered into force, on the behaviour of business parties in respect of international or cross-border commercial disputes is not yet certain. Although the Convention is yet to be applied to the HKSAR, thus far the impact (if any) on the HKSAR's competitiveness as a centre for international legal and dispute resolution services in the Asia Pacific region is very limited. Nevertheless, we will of course continue to keep a close eye on the latest development at the international level and the responses of other jurisdictions in relation to the Convention.

(4) The HKSAR Government has been making every possible effort to consolidate and enhance the status of the HKSAR as a centre for international legal and dispute resolution services in the Asia Pacific region, and will continue to do so. We will step up our promotional efforts, improve the legal framework for arbitration and mediation, and work closely together with all the relevant stakeholders.

Amongst others, the Department of Justice will pursue the following initiatives to facilitate the further

development and growth of international legal and dispute resolution services in Hong Kong:

- (a) launching a consultancy study on the development of arbitration in Hong Kong;
- (b) enhancing the promotion of international legal and dispute resolution services of Hong Kong in emerging economies in the Asia Pacific region (through local and overseas seminars as well as other appropriate activities);
- (c) establishing an advisory committee to advise on the development and promotion of Hong Kong as an international arbitration centre in the Asia Pacific region;
- (d) continuing the promotion of mediation through the Steering Committee on Mediation;
- (e) facilitating the establishment and growth of additional world class law-related or dispute resolution organisations in Hong Kong ; and
- (f) taking up the former French Mission Building upon the relocation of the Court of Final Appeal from there and providing space in the Building for use by legal and dispute resolution institutions, on top of the allocation of office space to them in the West Wing of the former Central Government Offices.

In addition, we will continue to keep a close eye on the latest development at the international level and the initiatives taken by other jurisdictions (including Singapore, as mentioned in the question) as well as to take appropriate measures as and when necessary, so as to ensure that our regime stays at the forefront of international development and enhance our status as a leading hub for international legal and dispute resolution services in the Asia Pacific region.

Ends/Wednesday, June 25, 2014