

Keynote speech by SJ at the ADR in Asia Conference 2012 (English only)

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Following is the keynote speech by the Secretary for Justice, Mr Rimsky Yuen, SC, at the ADR in Asia Conference 2012 organised by the Hong Kong International Arbitration Centre (HKIAC) at the Four Seasons Hotel this morning (October 17):

Mr Huen Wong (Chairman of HKIAC), distinguished guests, ladies and gentlemen,

Good morning, and may I extend a warm welcome to our visitors from overseas. Not only am I delighted to attend this year's ADR in Asia Conference, I feel very honoured to have an opportunity to address this gathering of distinguished arbitration professionals and practitioners from Asia and overseas.

I have no doubt whatsoever that an event like this is of great value to the arbitration community and to Hong Kong as a whole. It provides an excellent platform for participants to exchange views and share experience on the trends and developments of arbitration.

The theme for this conference concerns "Party Autonomy" and asks the pertinent question: "Does Party Autonomy Help or Hinder the Arbitral Process?". The importance of party autonomy hardly requires further elaboration. As early as 1923 when the Geneva Protocol on Arbitration Clauses in Commercial Matters was signed, the concept of party autonomy gained international recognition (Note 1). More recently, party autonomy has been described as "a key principle of current arbitration law" (Note 2) and "the cornerstone of modern arbitration" (Note 3).

In support of the principle of party autonomy and in line with the spirit of the UNCITRAL Model Law, Hong Kong's new Arbitration Ordinance that commenced operation on June 1, 2011

attaches great importance to party autonomy. Section 3(2) of the Ordinance, which sets out the principles upon which the Ordinance is based, highlights two key aspects of the concept. First, it states in no uncertain terms that, subject to 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. Second, it stipulates that "the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance".

I note from today's programme that various interesting topics including third party funding, freedom of contract in respect of arbitration agreements, control of arbitrators and management of arbitration proceedings will be discussed. These topics illustrate that party autonomy is not absolute. Instead, there are other competing considerations. The ultimate question is how to strike the right balance, so as to "facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense", which is the ultimate object of our new Arbitration Ordinance. Given the presence of so many arbitration experts here, I am sure enlightening views will be exchanged in the course of today.

On my part, may I take this opportunity to share with you some of my thoughts on the development of arbitration in Hong Kong.

#### Policy to Promote Arbitration in the HKSAR

To begin with, may I stress this. As the Secretary for Justice, I can assure all of you that the Government will continue to do its utmost to promote Hong Kong as a leading centre for international arbitration and dispute resolution in the Asia Pacific region.

The promotion and development of arbitration and ADR will continue to be a major and top priority policy of the Department of Justice. We shall strive to strengthen the status of Hong Kong as an international centre for dispute resolution and enhance its competitiveness in providing arbitration services

in the region. As always, the Government will work in partnership with the legal and arbitration community and will give such support as we can to the development of arbitration.

In this regard, one may perhaps ask the question: what are the fundamentals that make Hong Kong excel as a leading arbitration centre? In my view, there are at least three key attributes: (1) our strong legal infrastructure; (2) our world class arbitration institutions; and (3) our modern and user-friendly arbitration law as well as our effective enforcement regime.

### Strong Legal Infrastructure

Many of you, especially those from the Asia Pacific region, would be familiar with the legal regime of Hong Kong. Hong Kong, which continues to be a common law jurisdiction after 1997, is well known for its rule of law, and her Judiciary is renowned for its independence. In the context of arbitration, the courts in Hong Kong are well known for their support of party autonomy. There have been no shortages of judgments from our courts which are seen by many commentators as supporting, rather than interfering with, the arbitration process. It also has a good record of enforcing arbitral awards, whether domestic or foreign.

Moreover, we have a strong legal profession, consisting of around 8,600 local lawyers and 1,300 foreign lawyers from 28 jurisdictions. Their areas of expertise are as diverse as one can imagine - corporate finance, investment, international trade, maritime law, intellectual property - you name it. They offer clients specialist advice and assistance in legal matters and dispute resolution. There are no restrictions on foreign lawyers and law firms engaging in or advising on arbitration in Hong Kong, with the exception of arbitration related court proceedings. Parties in arbitration may retain advisers without restrictions as to their nationalities and professional qualifications.

### World Class Arbitration Institutions

The second important attribute is the presence of world class arbitration institutions. Established in the 1980's, the HKIAC has earned international recognition and has been providing excellent support and services to the arbitration community as an independent and non-profit-making body. In June 2011, the Hong Kong SAR Government announced that substantial additional office space would be made available to the HKIAC to enhance its hearing capacity. Now, a year after the announcement, the HKIAC is able to operate from the entire floor of its current address in Two Exchange Square, with a total floor space of about 1,270 square metres, doubling the size of the past establishment. As you may know, the HKIAC will launch the grand opening of its new premises later today.

As a leading international dispute resolution centre, Hong Kong continues to attract internationally known arbitration institutions to set up their branch office or secretariat in Hong Kong. The Paris-based International Court of Arbitration of the International Chamber of Commerce opened in Hong Kong the first branch of its Secretariat outside Paris in November 2008. It is a vote of confidence in Hong Kong's leading position as a centre for dispute resolution.

Equally encouraging is the setting up of the Hong Kong branch of the China International Economic and Trade Arbitration Commission (CIETAC) last month. It is the first such CIETAC arbitration centre established outside the Mainland. No doubt, the presence of the CIETAC Hong Kong Arbitration Centre, as the branch office is called, will boost the reputation and competitiveness of Hong Kong as a leading centre for international arbitration.

#### Accessible Arbitration Laws and Enforcement Regime

The third and equally important factor in Hong Kong's success is our modern arbitration law and effective enforcement regime. The new Arbitration Ordinance, which came into operation in June 2011, offers a unified arbitration regime based on the UNCITRAL Model Law on International

Commercial Arbitration. It has features that encompass the latest and best international practice, and will surely provide a solid foundation for the future healthy development of arbitration in Hong Kong.

As regards enforcement, arbitral awards made in Hong Kong can be enforced in all state parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, whose number now stands at over 140. This is complemented by an arrangement concluded between Hong Kong and the Mainland in 1999 for reciprocal enforcement of arbitral awards.

Until recently, there have been issues concerning the enforceability of Hong Kong arbitral awards in India. After working closely with the Ministry of Foreign Affairs and our arbitration community, the Indian Government formally declared in March this year that the People's Republic of China (including Hong Kong and Macau) is a reciprocating partner for the purposes of enforcement of arbitral awards under the New York Convention. With this helpful clarification and confirmation, parties to commercial contracts with an Indian connection should not have any further hesitation to choose Hong Kong as an arbitration venue.

At the moment, the Department of Justice is working very hard to expand further the network of award enforcement in Greater China. We are very close in formalising with Macau an Arrangement on Mutual Recognition and Enforcement of Arbitral Awards. The proposed arrangement will similarly adopt the New York Convention principles. Its formal conclusion will provide greater legal certainty and convenience to arbitration parties in the two SARs in enforcing arbitral awards. At the same time, we are also canvassing the possibility of concluding a similar arrangement with Taiwan. With these initiatives, Hong Kong will have a complete enforcement network with other parts of Greater China.

Opportunities in Greater China

The above legal fundamentals and recent developments give us the impetus to explore further opportunities for providing legal and arbitration services to Mainland enterprises and parties doing business in the Mainland. In this regard, we enjoy some distinct advantages: Hong Kong's geographical proximity to the Mainland of China and its understanding of Asian traditions, the phenomenal economic development in the Mainland in recent years as well as the opening up of the Mainland market, particularly to Hong Kong under the Closer Economic Partnership Arrangement (CEPA), to name just a few. We have witnessed substantial demand for more sophisticated and effective business dispute resolution mechanisms, making Hong Kong an ideal neutral venue for arbitration of Mainland-related disputes. Indeed the number of arbitrations involving Mainland parties is noticeably on the rise.

Just last month, we showcased in a legal services forum the strengths and advantages of Hong Kong as a leading centre for legal and arbitration services. The Forum, held in Guangzhou under the theme "Think Global, Think Hong Kong", was attended by around 700 participants from the legal and business sectors in the Mainland and about 100 legal and arbitration professionals from Hong Kong. The well-attended event is evidence that there exists great synergy between Hong Kong as a regional centre of legal services and arbitration and the Mainland as the economic power house of the world.

#### Development of Qianhai

In August 2010, the State Council of the PRC endorsed the Qianhai Development Plan, which designates Qianhai as a Hong Kong/ Guangdong modern service industry co-operation zone with a view that it may play a pilot role in promoting co-operation in service industries between Hong Kong and Mainland. In June 2011, the Shenzhen People's Congress adopted the "Regulations on Qianhai Shenzhen - Hong Kong Modern Services Industries Co-operation Area", in which

provisions are made to "encourage Hong Kong arbitration institutions to provide arbitration services in Qianhai".

The Department of Justice has been keeping a close interest in the Qianhai project. In August I visited Shenzhen and Qianhai and exchanged views with the Shenzhen authorities on the ways to enhance co-operation among the legal/arbitration professions of Hong Kong and the Mainland, as well as the provision of arbitration services to enterprises in Qianhai by the Hong Kong arbitration sector.

We shall continue to maintain close dialogue with the Hong Kong legal and arbitration professions and the Mainland authorities on the development of Qianhai to promote greater use of Hong Kong arbitration. Amongst others, the key objective is to promote the use of Hong Kong law by parties conducting business in Qianhai (and indeed the rest of Guangzhou if not beyond) and the choice of Hong Kong as an arbitration venue.

#### Development in Greater China

To foster closer co-operation, the Mainland and Taiwan signed the Economic Cooperation Framework Agreement in June 2010. This will no doubt lead to more direct investment between the Mainland and Taiwan. In May this year, the HKSAR Government set up its Economic, Trade and Cultural Office in Taiwan to promote Hong Kong-Taiwan economic ties in areas such as investments, financial services and business exchanges, as well as cultural, educational and tourist exchanges. Just two months ago, the Mainland and Taiwan signed an investment protection agreement. It encourages private parties (P2P) to resolve commercial disputes by choosing arbitration in a third, neutral place.

With this closer relationship and co-operation and the promotional efforts of the Hong Kong Economic, Trade and Cultural Office in Taiwan, there will be huge potential for Hong Kong to act as a neutral venue to handle commercial arbitration between parties from the Mainland and Taiwan.

This will in turn provide a timely opportunity for Hong Kong to establish a stronghold and to entrench our position as an international arbitration base for Greater China.

#### Way Forward

With this brief review of the legal and arbitration fundamentals of Hong Kong, I trust you will agree that there are growing opportunities for arbitration services in Greater China. As I said earlier, the Department of Justice will continue to work hard to promote Hong Kong's position as a leading centre for arbitration in the Asia Pacific region. We shall work closely with you, members of the legal and arbitration community, to promote the settlement of disputes by arbitration and to make Hong Kong the most efficient and user-friendly place for arbitration of international commercial disputes. We look forward to your continuous support.

On this note, may I wish you all a very successful conference and, for those from overseas, a very enjoyable stay in Hong Kong. Thank you very much.

Note 1: Gary B Born, International Commercial Arbitration, Vol. I, p. 59.

Note 2: Bay Hotel & Resort Ltd v Cavalier Construction Co Ltd [2001] UKPC 34 (16 July 2001)

Note 3: Diagnostica Inc v Centerchem Inc (1998) XXIV a YbkComm Arbn 574-90 (26 March 1998) (Supreme Court, NSW)

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