Speech by Secretary for Justice
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Following is the keynote address by the Secretary for Justice, Ms Elsie Leung, at "Law and Language in International Arbitration" at the City University of Hong Kong today (October 2):

Professor Chang, distinguished speakers and delegates, ladies and gentlemen,

I am greatly honoured to speak at this conference, which has drawn together leading experts in language, law and arbitration from around the world. The issues to be explored are of fundamental importance to the development of dispute resolution in the twenty-first century.

The globalisation of trade, industry and legal services will inevitably lead to an increasing number of disputes in multilingual and multicultural contexts. More international political issues are also being resolved through arbitration, and these may be complicated by linguistic or cultural differences. The organizers of this conference are to be commended for their initiative in exploring important issues that arise in such international arbitrations.

Language and the law

Writing in 1963, David Mellinkoff had this to say in his book on "The Language and the Law" -

"The law is a profession of words. Yet in a vast legal literature the portion devoted to the language of the law is a single grain of sand at the bottom of a great sea."

Fortunately, in the past forty years, that single grain has grown considerably. Many different aspects of language and the law have been explored : the plain language movement has grown in strength and influence; a formidable body of literature has been established in respect of forensic linguistics; and multi-lingual legal issues are the subject of ongoing research.

City University's initiative in this area is to be greatly applauded. The research project on Generic Integrity in Legal Discourse in Multilingual and Multicultural

Contexts is breaking new ground. I am sure that we will all have a lot to learn from the findings of the project, some of which will be presented at this conference.

Language issues in Hong Kong

Over the years, Hong Kong has been faced with many language issues in the law. The application here, in a Chinese-speaking community, of a legal system that was created and administered in English forced Hong Kong's legal community to find a way to bridge the language divide. Initially, the main strategy was to rely on court interpreters and bilingual law clerks. But, until recently, little was done to provide laws or legal textbooks in Chinese, or to permit proceedings to be heard in Cantonese.

It was only after the Sino-British Joint Declaration was signed in 1984, and when Reunification was approaching, that serious steps were taken to remedy these deficiencies. By the time of the handover in 1997, all Hong Kong's legislation consisted of two equally authentic texts - one English and the other Chinese - and all courts were permitted to conduct proceedings in Cantonese if it was appropriate to do so.

These were important steps - but more remains to be done. Over time, we can expect more books on the law to be written for lay readers in Chinese. It is also hoped that local lawyers can be trained to operate effectively in both languages. At the moment, many Chinese-speaking lawyers do not feel comfortable in litigation conducted in Cantonese. Such training will, in time, make it possible for more cases in the higher courts to be conducted in Chinese. At present, it is only in the Magistracies that more than 50% of cases are heard in Cantonese.

Nevertheless, Hong Kong has come a long way in the past two decades, and perhaps has useful experience in bilingualism that it can share with other jurisdictions. It certainly offers a rich source of research opportunities for language and the law experts.

International arbitration

International arbitration raises language issues similar to those faced in Hong Kong since the nineteenth century : what do you do if the language of the relevant arbitration law is different from that of the parties to the agreement; what language should the arbitration be conducted in; how do you overcome cultural differences

between the parties or the arbitrator?

The conference will explore these and related issues, in the light of the experience and research of the distinguished speakers. The conclusions will be of more than academic interest. They should help to make international arbitration both a more popular, and a more effective, method of resolving international disputes.

Advantages of arbitration

Several reasons have been advanced for resorting to arbitration as a method of international dispute resolution. First, arbitration is often seen as being more neutral than litigation. There is no truly international court for the resolution of transnational commercial disputes. Litigation is usually instituted in the courts of the state where either the defendant or the plaintiff resides. This raises the possibility of actual or perceived bias on the part of the court. Arbitration offers the possibility of a neutral panel of adjudicators, and it is no accident that the place often chosen for the arbitration is in a third country. This may, however, increase the language problems.

Another advantage of arbitration is the extent to which arbitral awards can be enforced in other countries. The New York Convention, which is in force in over 130 countries, provides that each contracting state shall recognise and enforce awards made in those countries. This compares very favourably with court judgments, where enforcement overseas depends generally upon bilateral agreements, which have less coverage than the New York Convention.

Compared with court judgments, arbitral awards also offer greater finality - since the opportunities for appeals are more limited. And, unlike most court proceedings, arbitral proceedings are not held in public. Businessmen are said to prefer to handle their disputes behind closed doors, so that their contractual arrangements and disputes are not publicised.

Other advantages that are said to be enjoyed by arbitration are the expertise of the arbitrators; the flexibility of the procedures; the speed of the proceedings; and their cost-effectiveness.

The success of arbitration and other forms of alternative dispute resolution should not, however, lead to complacency. Arbitral and other ADR bodies face increasing competition, both domestically and internationally.

In a global context, dispute resolution is a form of service that is subject to competition and market forces, just like other services. The only way to survive is by ensuring that the services offered are as good as, or better than, those of competitors.

Today's conference therefore provides an opportunity for us to explore ways in which arbitration services can be made more competitive. By exploring these services from the perspective of language, we can decide whether arbitration is, or is not, as attractive as is often claimed. Let us hear what the language experts have to say.

Consumer feedback

Research elsewhere throws some light on what consumers of arbitral services think. An American study1 asked parties to international arbitrations to rank various factors for their importance. Overwhelming relative importance was given to the fairness and justice of the process. Cost, speed, receipt of a monetary award, and arbitrator-expertise achieved a four-way tie for second place. Finality ranked third. And, surprisingly, the privacy of the proceedings was relatively low in the ranking.

So far as the justice of the process is concerned, it is important to consider both substantive and procedural justice. Substantive justice means reaching the "right" result. Procedural justice means getting the result in the "right" way. As always, the perceptions of the process are vital. In order for consumers of arbitration services to perceive that the process is fair, it would therefore be helpful to inform them of the essential qualities of the process, as well as the results. The avoidance of legal jargon, and the adoption of more user-friendly procedures, may also help to make the process more transparent and acceptable. Finding ways to overcome language problems would clearly assist.

Other studies2 have identified several features that consistently emerge as influencing perceptions about the fairness of procedures for dispute resolution. They include the neutrality of the decision-maker; the extent to which the decision-maker treats the parties in an evenhanded way, and considers their views and needs; and the extent to which the decision-maker was polite and respectful to the parties. These studies suggest that the procedures adopted by arbitrators play an important part in shaping both the appearance and reality of procedural and substantive justice.

These advantages of international arbitration are shared by all international arbitration centres. But there is, of course, competition between those centres to attract business. Since the establishment of the Hong Kong International Arbitration Centre in 1985, it has, with the full support of the government, been developing its expertise and reputation as one of the leading arbitration centres in the region.

Hong Kong has many general attributes that make it an attractive place in which to arbitrate. These include its geographic location, its first class infrastructure, communications, and transport system, and its excellent accommodation. It has an updated Arbitration Ordinance. And its arbitral awards can be enforced in all jurisdictions that are parties to the New York Convention (on the Recognition and Enforcement of Foreign Arbitral Awards) including the Mainland.

What attributes can Hong Kong claim to have that are relevant to this conference's theme of multilingual and multicultural arbitration? First, the law applicable to international arbitration is based squarely on the UNCITRAL Model Law on Commercial Arbitration. That Model Law was adopted by the United Nations Commission on International Trade Law in June 1985 and was endorsed by the UN's General Assembly in December 1985. The General Assembly commended the Model Law to all states "in view of the desirability of uniformity of arbitral procedures and the specific needs of international commercial arbitration practice."

The Model Law was designed to meet concerns relating to the state of national laws on arbitration. It was considered that domestic laws were often inappropriate for international cases and that considerable disparity existed between them. By incorporating the UNCITRAL Model into the Arbitration Ordinance, Hong Kong has not only created a regime that is appropriate for international arbitration, but also ensured that the applicable law is based on an internationally recognized text. Many of the linguistic problems that arise from a foreign arbitration law will therefore be avoided if arbitration takes place in Hong Kong.

Other advantages Hong Kong offers from a language and cultural perspective are -

* Hong Kong's unique empathy with the Asian traditions of mediation and its skills at

blending the best of east and west;

* a wealth of English-speaking legal practitioners and arbitrators for international arbitration; as well as Chinese-speaking ones who have knowledge of China and China laws for disputes involving transactions in the Mainland;

* a legal system based on internationally respected common law principles, that now operates in both English and Chinese. These are the two most widely used languages in the world.

The Mainland connection

I mentioned earlier Hong Kong's geographic location. China's accession to WTO will stimulate a vast increase in international trade in goods and services in the Mainland. Hong Kong's location, together with the attributes I have just mentioned, makes it a uniquely favourable place in which to arbitrate disputes arising from international business contracts in the Mainland.

The Hong Kong SAR Government is actively promoting the development of Hong Kong as a centre for resolving disputes arising out of international business transactions in the Mainland. As a general rule, the parties to an international contract in the Mainland can agree that Hong Kong law applies to it, or that disputes arising under it are to be resolved in Hong Kong.

The HKSAR Government is therefore encouraging parties to foreign-related contracts or joint ventures to negotiate and execute their contracts in Hong Kong, to choose the law of Hong Kong as the applicable law, and to choose the courts or the arbitral institutions of Hong Kong as the forum for dispute solution.

The advantages to Hong Kong of its being developed as a dispute resolution centre are obvious. But we consider that such a development would be equally advantageous to the Mainland and to foreign businessmen.

Mainland parties can communicate directly with lawyers in Hong Kong. Those lawyers know the Mainland well and have a good understanding of the operation of the Mainland market. Hong Kong's proximity to the Mainland means that Mainland parties do not have to travel far to attend hearings. With their experience and international perspective, Hong Kong lawyers are in a position to provide high quality

professional services. They should also be willing to transfer their expertise to their colleagues in the Mainland so as to help develop the legal professions of both places.

For the reasons I explained earlier, foreign businessmen should also find Hong Kong an appealing place for dispute resolution. Arbitration in Hong Kong of an international dispute in the Mainland can, we believe, produce a win-win-win situation!

Conclusion

Professor Chang, I hope that this summary of some of the issues relating to language, the law and arbitration in Hong Kong will provide a useful backdrop to the detailed sessions that will take place over the next three days. The programme for the conference is rich and varied, and the expert speakers bring with them a vast amount of relevant experience and research findings. May I wish you all a fruitful and enjoyable conference.

End/Thursday, October 2, 2003