SJ's Speech on Dispute Resolution
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Following is a speech by the Secretary for Justice, Ms Elsie Leung, at the Christmas Luncheon 2002 of the Hong Kong Exporters' Association today (December 9)(English only):

Good afternoon, ladies and gentlemen. It is a great honour for me to be invited to speak at this luncheon of your Association. Although this is the coldest day so far this winter, I feel the warmth in this room which is filled with the festive atmosphere when one is reminded of joy, peace and goodwill that Christmas brings. In particular, I shall not be speaking today on the Proposals to Implement BL23 for a change, having been on the issue day in and day out for more than two months. Since you are in the export business, may I talk about dispute resolution in relation to transnational businesses since export business is transnational by its nature.

A major feature of international trade is that it involves parties in different jurisdictions. No matter how reliable an exporter's buyer may be, the exporter should plan for the possibility of having to act against the buyer for breach of the contract. This makes a well-planned dispute resolution strategy of great importance. In this speech, I propose to outline the major means of dispute resolution in transnational businesses, their respective advantages and disadvantages, the basic elements of the choice where to sue (or to be sued), the enforcement of any judgment or award that emerges from the dispute settlement procedure and, recent development in this regard insofar as Hong Kong is concerned.

Major means of dispute resolution

I will start with the major forms of dispute resolution. There are three principal means available to him by which he may settle the dispute:

(a) court proceedings;

(b) arbitration; or

(c) some form of alternative dispute resolution, usually known by its acronym "ADR".

Choice between arbitration and court proceedings

It is a commonly held view that arbitration has advantages over litigation for the following reasons:

(a) Parties to an international contract can refer the resolution of their dispute to arbitrators of their own choice. This is a distinct advantage to parties who live in different countries, with different legal and cultural backgrounds, as they may be unwilling to submit themselves to the other side's home court.

(b) Finality is the preference of many international businessmen. Whilst an arbitral award is final - there being no appeal except on a point of law, a judgment of a court is subject to appeal with the result that it may take considerable time for the matter to be finally determined.

(c) Arbitration is confidential to the parties, its hearings are not open and the pleadings are not available for public perusal. This is useful to parties who wish to keep their dispute private.

(d) There are international conventions (e.g. the New York Convention of 1958) which facilitate the recognition and enforcement of foreign arbitral awards and thereby make execution of award relatively easy. I will return to this enforcement issue a little later.

It is sometimes claimed that arbitration is less expensive and less time-consuming than court proceedings. However, this is not necessarily true in each case. In the international context, arbitration is generally preferred mainly because it offers a neutral and ostensibly amicable forum for dispute resolution.

Further, the choice between litigation and arbitration is not one that can be made in a complete vacuum. The particular circumstances of each case will have to be taken into account in making the choice. For instance, arbitration may not be appropriate in the following cases:

(a) where the dispute is not "arbitrable" under the law applicable to the arbitration

agreement itself, or under the law of the country where it is intended that the arbitration should take place, or under the law of the country where the award is to be enforced;

(b) where one of the intended parties lacks the capacity, under the law of its domicile, to participate in an arbitration. For example, some governments cannot be a party to an arbitration agreement;

(c) where coercive action may be required by way of final relief (for example, where final injunctions are required);

(d) where faster and cheaper judicial proceedings are available (for example, summary judgment on liquidated debts);

(e) where the dispute involves multiple parties, as some of the existing arbitration rules do not provide for joinder of parties.

ADR procedures

In recent years, there is a tendency that instead of resorting to court proceedings or arbitration, more and more business people decide to settle disputes by ADR procedures. The goal of ADR is to achieve a friendly settlement of the dispute by using the services of a third party (e.g. a mediator or conciliator) to facilitate such settlement so that you have satisfied clients on both sides because they voluntarily accept the agreement that resolves their dispute.

ADR procedures are designed to address the concern about the length and cost of both court proceedings and arbitration. However, they require the active co-operation of the parties, and are more likely to succeed if the parties are well disposed towards it. Further, it may be noted that if they fail to reach an agreed settlement, the parties will have to fall back on arbitration or court proceedings to resolve their dispute.

Express choice of dispute resolution method in contracts

It is preferable for parties to an international contract to agree upon the method of dispute resolution at the outset of contract negotiations. Parties failing to do so are faced with two options, neither of which appears attractive. The first option is to seek to

conclude a dispute resolution agreement after a dispute has arisen. The conclusion of such an agreement may, however, be difficult given the deterioration of the relations between the parties. The second option is for the claiming party to identify the courts of a particular state which have jurisdiction over the dispute. But these may turn out to be ones which are foreign to the claimant. Further, in such a case the claimant's success ultimately hinges on any resulting judgment being enforceable in a jurisdiction where the defendant has assets.

Choice of forum

When contracting parties do provide for disputes to be settled by court proceedings, they can designate the courts (or forum) which shall have jurisdiction. The choice of forum is influenced by a whole series of factors, including the following:

(a) whether the forum in question will take jurisdiction according to its domestic rules;

(b) whether the system of the relevant court affords speedy and effective judicial remedies in respect of a breach of the contract;

(c) the experience of the judiciary and the lawyers dealing with disputes of an international nature;

(d) the independence and impartiality of the judicature and the legal profession;

(e) the extent to which the judgments of the particular courts will be recognized and enforced by the courts of other countries;

(f) differences in the substantive law that applies in the possible venues);

(g) differences in the procedural law and the differences in professional practice; and

(h) mundane considerations of time, expense, language, climate and distance.

Under the law of some jurisdictions (e.g. England and Hong Kong), although the parties to a contract may have agreed to refer all disputes to the exclusive jurisdiction of a foreign court, such an agreement cannot prevent the local courts from exercising

jurisdiction. While a stay of local proceedings brought in breach of the forum agreement may be granted, the courts possess a measure of discretion whether to grant such stay.

Enforcement of judgments and awards

Enforcement of judgments and awards is a critical stage of the procedures for settling international contractual disputes. In the case of arbitral awards, the New York Convention provides for a simple and effective method of obtaining recognition and enforcement of both arbitration agreements and arbitral awards. The Convention has been ratified by more than 120 states. It applies to the recognition and enforcement of any arbitral award that is final and dispositive of the subject-matter with which it deals. Enforcement may only be refused on seven exclusive grounds. These include situations where the arbitration agreement is invalid under the law governing it; where a party is under an incapacity under the law applicable to him; and where the party against whom the award is invoked has not been given proper notice of appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present his case.

Like arbitral awards, judgments may be recognized or enforced in countries other than those in which they were made. However, the credit they receive depends on the vagaries of the rules and practices of each recognition state. Legal systems tend to be reluctant to accord the same deference to foreign judgments as to foreign law. Further, the network of treaties providing for recognition or enforcement of foreign judgments is of less extensive geographical application than the system for the recognition or enforcement of foreign arbitral awards under the New York Convention. Currently, there are a number of regional international conventions on the subject of jurisdiction and enforcement of judgments, e.g. the Brussels Convention of 1968 and the Lugano Convention of 1989. The former applies to member states of the European Community, whereas the latter applies to member states of the European Community as well as of the European Free Trade Association.

Hague Conference initiative

Recently, the Hague Conference on Private International Law took the initiative to investigate the possibility of developing a Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. One of the principal objectives of such

a Convention would be to bring about increased certainty on important jurisdictional issues relating to international litigation and to prevent duplication of effort, costs and procedures.

In October 1999, a draft text of the Convention was adopted by a Special Commission of the Hauge Conference. In June 2001, a new version of this interim text was drawn up. Member states of the Hague Conference are now working to attain general consensus of the terms of the Convention.

Hong Kong as a regional centre of dispute resolution

The Hong Kong SAR Government is actively promoting Hong Kong as a regional dispute resolution centre, whether regarding litigation, arbitration or ADR. In particular, it is 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 Hong Kong SAR 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 have no language difficulty in communicating with lawyers in Hong Kong. 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 and are ready and willing to co-operate with their Mainland counterparts to ensure that their clients will have the best legal services for the solution of their disputes.

Foreign businessmen should find Hong Kong an appealing place for dispute resolution. I would like to highlight some of Hong Kong's strengths. They include:

(a) a sound legal system, based upon the rule of law, an independent judiciary, and the application of common law principles which are widely recognized and respected by the international business sector;

(b) a clean government with minimal intervention in commercial activities - one of the freest cities in the world;

(c) a wealth of English-speaking legal practitioners and internationally renowned arbitrators specializing in litigation and arbitration services;

(d) Hong Kong is a world centre of expertise in commerce, finance, I.T., shipping and construction, with an enormous pool of experienced professionals offering specialist advice and assistance in dispute resolution;

(e) an ideal geographic location, which enables both Mainland and overseas investors to conduct business efficiently and cost-effectively;

(f) a combination of superb infrastructure, first rate communication and transport systems, and excellent choices of accommodation;

(g) the world-class Hong Kong International Arbitration Centre which makes over 300 awards each year; and

(h) Hong Kong arbitral awards are enforceable in the Mainland and in all countries that are members of the New York Convention.

Moreover, I should add that steps are being taken to make Hong Kong even more attractive as a litigation centre.

The Civil Justice Review, which is being undertaken by the Chief Justice's Working Party, aims to make litigation in Hong Kong more speedy and cost-effective. Responses to the Working Party's Consultation Paper are now being considered and firm proposals will be made in due course.

The Hong Kong SAR Government is hoping to put in place with the Mainland limited arrangements for the reciprocal enforcement of judgments. At present, Hong

Kong judgments are not enforceable in the Mainland. In order to make Hong Kong a more attractive place for international litigants, we have proposed that local judgments at District Court level or higher should be enforceable in the Mainland if the following criteria are satisfied -

(a) the judgment is a money judgment arising from a commercial contract; and

(b) the parties to the contract have expressly provided for the HKSAR courts to have exclusive jurisdiction over disputes.

Under the proposal, Mainland judgments given at the Intermediate People's Court level or higher would be enforceable in Hong Kong if similar criteria were satisfied.

We are also actively participating in negotiations at the Hague Conference as a member of the PRC delegation. If these negotiations result in a treaty, and it applies to Hong Kong, it would mean that relevant Hong Kong judgments would be enforceable in all other countries that were parties to it. This would certainly add to Hong Kong's status as a dispute resolution centre.

Conclusion

Like many other jurisdictions, we in the HKSAR are committed to creating an efficient, reliable, cost-effective and comprehensive system of dispute resolution. With the consolidated effort of the Government, the Judiciary, the legal profession and the arbitration community, I am confident that we will make HKSAR an ideal situs for international business dispute resolution. It is a time of change. We must take advantage of the opportunities arising from China's accession to WTO to meet the challenges brought about by economic transformation and globalisation and come out of it with flying colours. Making Hong Kong a regional services centre is one of our goals that I'm sure you will all support and this we can achieve with your support.

It leaves me to wish you all a joyous Christmas and a prosperous New Year. Thank you.

End/Monday, December 9, 2002
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