

Keynote Speech by Mr Rimsky Yuen, SC
Secretary for Justice
at the Regional Arbitral Institutes Forum Conference
on 14 October 2017 (Saturday)

Ms Sylvia Siu [President, Hong Kong Institute of Arbitrators], Madam Justice Shen Hongyu [Judge, Court No. 4, Supreme People's Court], Ms Elise Leung [Deputy Director, HKSAR Basic Law Committee, Standing Committee of National People's Congress], Fellow Members of the Legal and Dispute Resolution Sectors, Distinguished Guests, Ladies and Gentlemen,

It gives me great honour to attend this year's Regional Arbitral Institutes Forum ("RAIF") conference here in Hong Kong and to have the privilege to address such a distinguished audience. On behalf of the Government of the Hong Kong Special Administrative Region ("HKSAR"), may I extend to all of you, especially those who have come from other jurisdictions, our warmest welcome.

The Macro Picture

This is the second time the Hong Kong Institute of Arbitrators hosts the RAIF Conference in the HKSAR. The world, including the Asia-Pacific region, as well as the international arbitration landscape, have undergone very significant changes since this Forum was last held in Hong Kong in 2009.

Among others, Asia's economy has experienced unprecedented transformation. Asia's GDP, for instance, grew faster than the rest of the world. Trade and investment flows have also expanded substantially in

this region. The pace of economic changes in China has been very impressive. According to the IMF, China continues to enjoy strong growth — projected at 6.7% for 2017, and has potential to sustain strong growth over the medium term. Growth in the Mainland economy between 2017 and 2021 is now expected to average 6.4%.¹

International commercial arbitration plays an increasingly important role in the Asia-Pacific region. As countries expand their economies, a rising number of companies worldwide are engaging in contracts with counterparts in the region. These contracts will inevitably result in some disputes, creating a need for adequate dispute resolution mechanisms.

As we talk about global economic development, we certainly cannot afford to omit the Belt and Road Initiative, which was first put forward by President Xi in 2013. The Belt and Road Initiative is a collaborative and inclusive strategy aimed at promoting integration, connectivity, trade and investment, as well as people-to-people bonding among countries along the Belt and Road corridors. Spanning across 9,000 kilometres, the Initiative covers more than 60 countries in Asia, Africa and Europe (and essentially all the home countries of the RAIF members). Altogether, these countries represent over 60 per cent of the world's population, around 31 per cent of the world's GDP and over one-third of global merchandise trade.

The growth in China's outward investment grows with the closer cooperation with Belt and Road countries. China's outward foreign direct investments (FDI) flows (US\$145.7 billion) ranked as the world's

¹ “China's Economic Outlook in Six Charts”, IMF Country Outlooks, 15 August 2017, <https://www.imf.org/en/News/Articles/2017/08/09/NA081517-China-Economic-Outlook-in-Six-Charts>.

second-largest source of FDI for the first time in 2015.² Further, Mainland enterprises' direct investment in places along the Belt and Road route continued to grow sharply in 2016.³ As at early 2017, China has established 56 economic and trade cooperation zones in over 20 countries along the Belt and Road with a total investment of US\$18.55 billion, creating about 180,000 jobs for local people in the relevant places.⁴

Mainland enterprises require extensive and high quality professional legal support, especially in the context of legal risk management, in their “going global” in pursuit of opportunities arising from the Belt and Road Initiative. In this context, the Central People's Government fully supports the HKSAR's participation in the Belt and Road Initiative. In March 2016, the Central People's Government released the “Outline of the 13th Five-Year Plan for the National Economic and Social Development”. In the dedicated chapter on the HKSAR and the Macao SAR, the HKSAR received express support in establishing itself as a centre for international legal and dispute resolution services in the Asia-Pacific region.

The Belt and Road Initiative thus presents abundant opportunities for the HKSAR legal and dispute resolution professionals, working in conjunction with their counterparts in other jurisdictions, to

² HKTDC Research Article – *China takes Global Number Two Outward FDI Slot: Hong Kong Remains the Preferred Service Platform*, 11 November 2016, <http://economists-pick-research.hktdc.com/business-news/article/Research-Articles/China-Takes-Global-Number-Two-Outward-FDI-Slot-Hong-Kong-Remains-the-Preferred-Service-Platform/rp/en/1/1X000000/1X0A804W.htm>.

³ MOFCOM Department Official of Outward Investment and Economic Cooperation Comments on China's Outward Investment and Cooperation in 2016, 18 January 2017, <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201701/20170102503092.shtml>.

⁴ Belt and Road Portal – *China sets up 56 cooperation zones in B&R countries*, 2 March 2017, https://eng.yidaiyilu.gov.cn/info/iList.jsp?tm_id=139&cat_id=10068&info_id=8905, and MOFCOM Department Official of Outward Investment and Economic Cooperation Comments on China's Outward Investment and Cooperation in 2016, 18 January 2017, <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201701/20170102503092.shtml>.

provide services to enterprises engaging in investment and other business activities in economies along the Belt and Road route.

One aspect which stands out in this big picture is the importance as well as the need to have a neutral forum which is geographically convenient and which has the talents to deal with trade and investment disputes. In this regard, it is pertinent to note the result of a recent study supported by the Canada-ASEAN Business Council and Norton Rose Fulbright. According to this study, about 57% of the respondents did not always include an arbitration clause in their contracts.⁵ This is apparently due to the fact that they were not familiar with international treaties on the enforcement of arbitral awards and the norms of international arbitration. It is regrettably that such a knowledge gap may prevent the ASEAN businesses from fully utilising the opportunities offered by the legal and dispute resolution services sectors that will enable them to solve their cross-border commercial disputes in a cost-effective manner.

Against this background, there is ample scope for the legal and dispute resolution community in the region to promote international commercial arbitration in the region.

The Development in the HKSAR

In this regard, the HKSAR is more than ready and willing to work with other jurisdictions, including of course jurisdictions in the region, to promote the use of international arbitration as a means to resolve commercial and investment disputes. As a matter of fact, the promotion of dispute resolution (including international arbitration and

⁵ Locknie Hsu, Pearlie Koh and Yip Man (3 August 2017) *Improving Connectivity between ASEAN's Legal Systems to Address Commercial Issues (Interim Report)*, pp 65 – 66, <http://www.canasean.com/uploads/Interim%20Report%20Final%20Sep%202017.pdf>.

cross-border commercial mediation) has been one of the top policy objectives of not just the Department of Justice, but the entire Government of the HKSAR. Such a stance is firmly reiterated in the 2017 Policy Address promulgated by the incumbent Chief Executive Mrs. Carrie Lam on this Wednesday (11 October 2017)⁶. Among others, Hong Kong stands ready to act as an ideal neutral venue for resolving international commercial and investment disputes involving Mainland parties, and is actively positioning itself as a dispute resolution services centre for the Belt and Road Initiative.

The implementation of the “one country, two systems” policy by way of constitutionally entrenched safeguards under the Basic Law, the HKSAR enjoys the benefits of being a special administrative region of China, capitalizing, at the same time, on the city’s economic and legal systems separate and distinct from the rest of China. Indeed, the HKSAR is the only jurisdiction in China practising the common law system which remains principally the legal backbone upon which international business is transacted.

For the purpose of implementing this policy objective, the Department of Justice has been constantly modernising and updating our statutory framework for conducting arbitration and other forms of dispute resolution, so as to ensure that it is in alignment with international best practices and that it will meet the changing needs and expectations of the end-users.

Most recently, we have introduced two amendment bills to the Arbitration Ordinance and the Mediation Ordinance which were both passed by the Legislative Council this June.

⁶ See para. 114-116.

The first one is the Arbitration (Amendment) Ordinance 2017, which clarifies that disputes over intellectual property rights (“IPRs”) can be resolved by arbitration, and that it would not be contrary to public policy to enforce an arbitral award solely on the ground that the award involves IPRs dispute. This amendment will come into operation on 1 January 2018.

The second one is the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, which puts it beyond doubt that third-party funding for arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty. Further, to ensure that safeguards are in place for funded parties in arbitration and mediation, an authorized body soon to be established will issue a code of practice with which third party funders are expected to comply.

Arbitration, be it domestic or international, is not conducted in a legal vacuum. Apart from the legal regime that provides a favourable environment for the conduct of arbitration, the judiciary has an important role to play. In this regard, not only are arbitral awards made in the HKSAR enforceable in over 150 jurisdictions pursuant to the New York Convention or under reciprocal arrangements made with the Mainland and the Macao SAR, our Judiciary has a fine reputation for its quality, independence and arbitration-friendly stance.

Judgements handed down by the HKSAR courts in recent years not only continue to reflect the region’s robust judiciary and its firm pro-arbitration stance, but also highlight Hong Kong as one of the key arbitration-friendly jurisdictions in the Asia-Pacific region. In this regard,

you may already be aware of Reyes J' observation in *A v R (Arbitration: Enforcement)*⁷, which the learned judge explained as follows:

“Abortive and unmeritorious attempts to challenge or to frustrate enforcement of or compliance with a valid award should not be encouraged. Where a party unsuccessfully resists enforcement, or seeks to set aside an award, or as in this case, seeks unsuccessfully to reopen through court proceedings an issue dealt with in arbitration, instead of reverting to the arbitral tribunal or making a new submission to arbitration in accordance with an acknowledged and agreed arbitration clause, it should pay the incidental costs on an indemnity basis, unless special circumstances exist. The fact that it may have an arguable case would not constitute special circumstances.”

In the case of *Hong Kong Golden Source Ltd. v New Elegant Investment Ltd*⁸, Chow J reiterated that it is the legislature's intent for arbitral awards to be *“readily enforceable in Hong Kong and refusal to enforce should be an exception rather than the rule”*. He noted that the discretion the court has to refuse enforcement is a residuary one, and the required threshold to resist enforcement is a very high one. Where enforcement is resisted on the ground that it would be contrary to public policy, it should be borne in mind that the HKSAR public policy itself leans towards the enforcement of foreign arbitral awards, and that the concept of *“contrary to public policy”* should be given a narrow construction, and it must be shown that there is a *“substantial injustice*

⁷ [2009] 3 HKLRD 389.

⁸ See The Asia-Pacific Arbitration Review 2016 – Hong Kong by Kathryn Sanger and Yvonne Shek, Clifford Chance, <http://globalarbitrationreview.com/benchmarking/the-asia-pacific-arbitration-review-2016/1036906/hong-kong>.

arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant" before the HKSAR courts would consider refusing enforcement of a foreign arbitral award.

In the more recent decision of *TNB Fuel Services Sdn Bhd v China National Coal Group Corporation*⁹, the HKSAR courts rejected a claim of crown immunity by a PRC State Owned Enterprise ("SOE") and upheld the enforcement of an arbitral award by a foreign company¹⁰ against the assets of the PRC SOE located in Hong Kong. In the decision, Mimmie Chan J decided that the PRC SOE could not assert crown immunity to escape enforcement of the award because it is neither part of nor controlled by the Chinese government to the extent required to assert such a defense. This decision makes clear that it will only be in very exceptional circumstances that PRC SOE will be able to assert immunity in the HKSAR in relation to their commercial dealing.

At this juncture, allow me to say a few words on the rule of law situation in the HKSAR. The rule of law has long been a cornerstone of our legal system. Nevertheless, following some recent events concerning certain political movements in the HKSAR in the past few years, certain people in the local or international community (including certain media reports) have sought to raise queries over the independence of our judiciary. I would like to take this opportunity to make it crystal clear that there is absolutely (and I stress "absolutely") no sign of deterioration of the rule of law or judicial independence in the HKSAR.

⁹ See "*Hong Kong Court Upholds Execution Against PRC State Owned Enterprise, Rejecting Claim of State Immunity*", Arbitration Notes, Herbert Smith Freehills, 12 June 2017, <http://hsfnotes.com/arbitration/2017/06/12/hong-kong-court-upholds-execution-against-prc-state-owned-enterprise-rejecting-claim-of-crown-immunity/http://globalarbitrationreview.com/benchmarking/the-asia-pacific-arbitration-review-2016/1036906/hong-kong>.

Article 2 of the Basic Law provides that the HKSAR enjoys independent judicial power, including that of final adjudication. The same guarantee for independent judicial power (including that of final adjudication) is repeated in Article 19 as well as Article 85 of the Basic Law. The repetitions reflect the importance attached to the concept of judicial independence by the drafters of the Basic Law.

In a speech delivered by Lord Neuberger, the former President of the UK Supreme Court and one of the Non-Permanent Judge of our Court of Final Appeal on 13 September 2017 (that is last month) put it beyond doubt that the HKSAR Judiciary is truly and completely independent. The following part of his speech is definitely worth noting:

“... .. I have read suggestions that at least when it comes to some decisions, the Hong Kong judges are not independent in that they are somehow leant on by the authorities in Beijing, or they are not impartial, in that they are somehow anxious to please the authorities in Beijing. I can say from my own direct experience as a judge who has sat in the Court of Final Appeal on a part time basis since 2010 that there is absolutely nothing in such suggestions.” (para. 21)

Concluding Remarks

Ladies and gentlemen, the HKSAR continues to be an active player in international arbitration arena. The firm commitment of the government, the courts, the international arbitral institutions in the HKSAR, and the arbitration community at large all support the HKSAR in its continuous and sustainable development as an important international dispute resolution centre in the region.

The HKSAR is very keen to work with other jurisdictions to explore how arbitration and other dispute resolution mechanisms can be further enhanced so as to better cater for the different needs of the end-users of dispute resolution mechanism, achieve the ultimate goal of resolving disputes in a fair, just and effective manner, enhance investors' confidence and facilitating the implementation of the Belt and Road Initiative. I invite the legal and arbitration communities of the RAIF members' home countries and the HKSAR to explore issues of common interests and join hands in seizing the immense opportunities that are ahead of us.

On this note, it remains for me to wish this conference every success. And, for those of you who come from other jurisdictions, I hope you can find time to enjoy your stay in this dynamic city.

Thank you.