

Welcome Remarks of Ms. Teresa Cheng, SC

Secretary for Justice

China Arbitration Week 2020

Critical Corporate & Dispute Issues In-house Counsel From

Chinese-ASEAN Businesses Face

& How We Deal With Them

20 September 2020 (Sunday)

Good afternoon Mr. Wang Chengjie, [Vice Chairman and Secretary-General of the China International Economic and Trade Arbitration Commission (CIETAC)], Mr. Reza Topobroto, [Secretary General of Asia Pacific Corporate Counsel Alliance (APCCA)], Distinguished Guests, Ladies and Gentlemen,

1. It is my great pleasure and honour to join you this afternoon at this online seminar as part of the China Arbitration Week.

China-ASEAN relationship

2. The Chinese-ASEAN relationship has never been closer. The 2002 “Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the PRC”, which provides a base for the establishment of the China-ASEAN Free Trade Area, and for subsequent agreements relating to investment, trade in goods and trade in services to be signed. This Framework Agreement was upgraded by a Protocol in 2015, which provided for improvements to, amongst others, Rules of Origin provisions, and trade in services and goods.

3. Today, China has been ASEAN’s largest trading partner since 2009 while ASEAN became China’s largest trading partner for the first time in the first three months of this year. During this period, ASEAN-China trade increased by 6 percent year-on-year to US\$140 billion and accounted for 15 percent of China’s total trade volume¹. As noted in the Chairman’s statement of the 22nd

¹ www.aseanbriefing.com/news/asean-overtakes-eu-become-chinas-top-trading-partner-q1-2020/

ASEAN-China Summit held in November last year, initiatives such as the ASEAN-China Free Trade Area goes to support the joint target of two-way trade of USD 1 trillion, and USD 150 billion in investments by this year².

Hong Kong-ASEAN relationship

4. The Hong Kong SAR, whilst part of China, is nonetheless a separate economy, and also enjoys close relations with ASEAN. ASEAN is the second largest trading partner of the Hong Kong SAR, with total trade amounting to HK\$1,018 billion in 2019, and with total services trade between the two sides being HK\$137 billion in 2018³. The Hong Kong SAR has also signed a Free Trade Agreement and an Investment Agreement in November 2017, with both agreements having entered into force since June 2019⁴.

² <https://asean.org/storage/2019/11/Chairmans-Statement-of-the-22nd-ASEAN-China-Summit-final.pdf> at para 5.

³ www.tid.gov.hk/english/ita/fta/hkasean/index.html

⁴ www.tid.gov.hk/english/ita/fta/hkasean/index.html

5. The relationship that ASEAN has with both China and the Hong Kong SAR highlights the fact that these two jurisdictions each brings different things to the table for doing business in ASEAN. In fact, Hong Kong's strengths as an international legal and dispute resolution services hub in the Asia-Pacific region has been recognized by the Central People's Government in both its "Outline of the 13th Five-Year Plan for the National Economic and Social Development" ⁵ in 2016, and the "Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area"⁶ in 2019.

6. There is every sign that the trade and investment between ASEAN and China will continue to grow. This means that businesses will be met with an abundance of opportunity. In-house counsel should be prepared for an ever-increasing workload relating to assessing legal compliance and risk, and perhaps also for avoiding and resolving business conflicts and

⁵ See Chapter 53, Section 1 of the "Outline of the 13th Five-Year Plan for the National Economic and Social Development" at www.ilo.org/dyn/natlex/docs/ELECTRONIC/103953/126605/F-1757587826/CHN103953%20Eng.pdf

⁶ See Chapter 3, Section 2 of the "Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area" at www.bayarea.gov.hk/filemanager/en/share/pdf/Outline_Development_Plan.pdf

disputes.

**1st Panel Discussion – Legal compliance and risk avoidance
in trade and investment**

7. This brings me to the topic of the first panel discussion this afternoon which relates to legal compliance and risk avoidance arising from China-ASEAN bilateral trade and investments, a relationship that is extremely important to the development of trade and investment in the region.

8. When considering compliance and risk issues that may arise in the context of trade and investment, one inevitably begins with identifying and evaluating factors including the risks relating to regional and international trade policies, financial regulatory framework, tax regimes, intellectual property rights protection as well as dispute resolution mechanisms available in that particular jurisdiction.

9. While these factors may be important, it is also pertinent to consider the legal system, culture, and tradition of the jurisdiction. This is where the China-ASEAN trade and investment relationship is so unique. The eleven countries that comprise this relationship is not monolithic – they all have different legal systems, cultures and traditions. For example, on a very broad level, countries such as Myanmar, Brunei and Singapore following the common law system, while Thailand, Cambodia, Vietnam and China following the civil law system⁷. However, within the “common law” countries or the “civil law” countries, there may be significant and substantial differences. This diversity in legal systems, cultures and traditions makes engaging in trade and investment in the China-ASEAN ecosystem a very exciting prospect.

10. It is precisely this diversity which poses challenges in any objective assessment of the legal, compliance and risk factors of a jurisdiction. It is also this diversity that explains why the

⁷ See, e.g. <https://unimelb.libguides.com/c.php?g=402982&p=4635158> on legal systems of ASEAN.

understanding of the meaning of fundamental concepts such as the rule of law is important in assessing the risks involved.

11. Notably, the ASEAN Charter stated that the purpose of ASEAN is to “*strengthen democracy, enhance good governance and the rule of law*”⁸. However, the diversity as contained in ASEAN countries means that such an understanding may not be completely the same. In 2016, the Human Rights Resource Centre conducted a study on the rule of law in ASEAN, and one of its conclusions is that while ASEAN states have taken steps, at varying levels, to uphold the rule of law, the rule of law “*remains essentially a contested concept amongst ASEAN States*”⁹.

12. In this respect, I take this opportunity to introduce the Vision 2030 initiative that the Hong Kong SAR Department of Justice is currently undertaking to building and maintaining a fair and rule-based society underpinned by the rule of law. The Vision

⁸ Preamble, ASEAN Charter

⁹ Human Rights Resource Centre, “An Update on the Rule of Law for Human Rights in ASEAN: The Path to Integration” (accessed at: <http://hrrca.org/wp-content/uploads/2016/06/Update-on-the-Rule-of-Law-for-Human-Rights.pdf>) at p. 43.

2030 initiative corresponds to Goal 16 of the United Nations 2030 Agenda for Sustainable Development, which is to provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

13. Vision 2030 is a ten year project which aims to advance the rule of law and achieve the United Nations sustainable development goals in related fields through four aspects: facilitating inclusive stakeholders' collaboration; encouraging academic and professional exchange and research; enhancing capacity building and dissemination of proper information; and organizing promotional activities and contributing to building a strong rule of law community within this region and beyond¹⁰.

14. We hope to work collaboratively with our counterparts in the Vision 2030 initiative aiming to enhance the rule of law in the region, and thereby contributing to sustainable trade and

¹⁰ AJLS Panel Paper on "Vision 2030 for Rule of law", CB(4)513/19-20(01), April 2020 at paragraph 6.

investment.

Dispute resolution and avoidance options

15. Yet, in spite of these efforts spent on legal compliance and risk avoidance, there are bound to be conflicts and disputes and in-house counsel have a pivotal role to play in managing and providing advice on the effective resolution of disputes.

16. While there are dispute resolution mechanisms provided under the Framework Agreement for disputes between China and the ASEAN States, businesses under the China-ASEAN ecosystem also needs to consider their dispute resolution options in relation to business to business disputes.

17. It is an objective truth that local court systems are not regarded as the best choice for resolving cross-border or international disputes. As such, in the China-ASEAN ecosystem, arbitration and mediation in a neutral dispute resolution forum

offers obvious advantages and attractions for both sides.

18. Hong Kong SAR is a prime venue for international deal making and dispute resolution services. Hong Kong ranked first worldwide in IPO Equity Funds Raised four times in the past five years, raising more than 40 billion US dollars in 2019. Further, the Hong Kong SAR has been among the top five preferred seats for arbitration globally since 2015¹¹. Importantly, one of the co-organisers, CIETAC Hong Kong, has an office here, giving Hong Kong an edge over other places.

19. In the context of China-ASEAN disputes, importantly, Hong Kong SAR seated arbitrations enjoy the benefit of applying for interim measures that may be granted by arbitral tribunals, the Hong Kong courts, as well as the Mainland Courts. Under the one country two systems policy, on 2 April 2019, the Supreme People's Court of the People's Republic of China and the Department of Justice of Hong Kong SAR signed the

¹¹ According to the International Arbitration Surveys conducted by Queen Mary University of London.

"Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region" (the "Arrangement"). Under this Arrangement, parties to a Hong Kong SAR seated arbitration administered by one of the six arbitration institutions¹² in the Hong Kong SAR (which includes CIETAC Hong Kong Arbitration Center) may apply to a court in the Mainland for interim measures. Hong Kong SAR is the first and now still the only jurisdiction, as an arbitration seat outside of the Mainland, where arbitral parties are allowed to make application for interlocutory assistance before a Mainland Court.

20. One of the six Hong Kong arbitral institutions that enjoys the benefit of permitting parties to their cases apply to the Mainland court for interim measures is eBRAM International

¹² The six arbitral institutions are:

- (1) Hong Kong International Arbitration Centre;
- (2) China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center;
- (3) International Court of Arbitration of the International Chamber of Commerce - Asia Office;
- (4) Hong Kong Maritime Arbitration Group;
- (5) South China International Arbitration Center (HK); and
- (6) eBRAM International Online Dispute Resolution Centre.

Online Dispute Resolution Centre (eBRAM Centre), a newly set up, but innovative institution in the provision of dispute resolution services through an online platform.

21. Recently, in anticipation of an upsurge of disputes arising from or relating to COVID-19, the Department of Justice has engaged eBRAM Centre to provide Online Dispute Resolution (“ODR”) services under a dedicated Covid-19 ODR Scheme. The Scheme adopts a multi-tiered dispute resolution mechanism where the parties will first attempt to negotiate their disputes in 3 days, followed by mediation in 3 days, and if that does not result in settlement, arbitration is conducted in 7 days for a final and binding award. This mechanism aims to preserve relationship, reduce costs and enhance harmony. These objectives may be exactly what businesses wish to achieve if they have a dispute and hence they may be interested in looking at what the eBRAM Centre can do to customize this multi-tiered dispute resolution mechanism to suit their needs. This ODR mechanism and multi-tiered conciliatory mode of framework is best for cross-border

dispute settlement, and is indeed in line with the development under the APEC Collaborative Framework on ODR.

Concluding remarks

22. Before I conclude, I must reassure you all that Hong Kong's judicial independence remains intact. Contrary to innuendos in some unfair and inaccurate statements in some media, Hong Kong's judges are free to decide their cases in accordance with law and evidence and indeed they are bound to do so under the judicial oath. Judicial independence is premised on the solid infrastructure that has been laid down in the Basic Law - the appointment process¹³ (that is done without political vetting), the security of tenure¹⁴, the immunity¹⁵, the non-revolving door¹⁶, and importantly the expressed provision in Article 85 of the Basic Law that guarantees judicial independence,

¹³ See Articles 88 and 92 of the Basic Law.

¹⁴ See Article 89 of the Basic Law.

¹⁵ See Article 85 of the Basic Law.

¹⁶ Upon appointment, judges at the District Court level and above are precluded from returning to practice in Hong Kong as a barrister or solicitor. This "non-revolving door" system prevents perceived conflicts of interest and enhances the independence of the judiciary.

free from any interference¹⁷. The accessibility of reasoned judgments ensure that the public will be able to understand the reasons for a ruling and where such reasons are defective in law, for the parties to take the matter further by way of appeal.

23. Another matter that has attracted attention, and often mistakenly reported, is the National Security Law. There is nothing in that law that inhibits or affects the normal operation of commercial activities and businesses. In fact it expressly stipulates that legitimate rights of residents in Hong Kong SAR are protected¹⁸. It is targeted at activities that endanger national security and it is far-fetched and fanciful to suggest that commercial activities or the daily lives of residents in the Hong Kong SAR would be adversely affected. On the contrary, the law brings about stability and predictability, an environment conducive to economic development and much desired by businesses when planning investments and assessing risks.

¹⁷ Article 85 of the Basic Law reads:

“The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.”

¹⁸ See Articles 4 and 5 of the National Security Law.

24. To conclude, the Hong Kong SAR, as the only neutral venue, with similar Asian culture and is geographically within the region (and hence time zone), is uniquely placed to contribute to deal making and dispute avoidance and resolution in the context of China-ASEAN transactions.

25. Finally, may I wish you all insightful and fruitful exchanges today. Thank you very much.