Speech by SJ at 14th Annual Generations in Arbitration Conference (English only)
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Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the 14th Annual Generations in Arbitration Conference today (November 4):

Thank you very much. I am so pleased to be here to join you at the end of the session. I would like to perhaps start by answering the very question that was raised in the theme of this session, that is: Why Arbitration Evergreens Do Not Get Old? I think if you look at the participants and moderators, as well as looking at the subjects and the content of the discussions, you will gather from there that there is definitely a willingness to share, a dedication and hence excellence in the work that they are doing in the arbitration field, and I think the spirit of the Moot Alumni Association (MAA), which of course is one of the main organisers that has put this matter together. I understand from Sherlin (President of the MAA, Ms Sherlin Tung) that there are about 5,000 members from around the world, and I am so pleased that Vis East Moot has also been participating and helping to set up this alumni and growing the alumni in the sense that there are many moots that are held in Hong Kong. I am also very pleased to say that Vis East Moot is one of the bodies that is housed here in the Hong Kong Legal Hub, so we will continue to work very closely together in order to groom our young and evergreens.

I notice today the two sessions are very interesting. I unfortunately have to admit that I have not had a chance to watch and listen to it all on the live stream. However, I have picked up some of the points that have been made, and I am very impressed with the depth by which people are talking about it.

The first two sessions seem to me to be dealing with arbitration agreement. Of course, we all know that is absolutely fundamental.

That is why we are not just promoting dispute resolution here in Hong Kong but also deal making. When one does a deal, concludes a deal, one of the last things that people normally think about is what happens in dispute. That is why I have always liked to call the arbitration agreement as the "champagne clause". That is the clause you add in before you open your bottle of champagne to celebrate the conclusion of the deal.

When doing this "champagne clause" or arbitration agreement, I think probably I would be right in saying that there is three main ways. One is the simple way, where you just put arbitration in Hong Kong and leave it at that. The other may be the way by which you identify the institution, and when you do that, the easiest is to put in the model arbitration clause because all the validity arguments would have been well thought out.

There is a third, which is always very interesting for lawyers, that is when it is "homemade". When it is "homemade", you might come into the questions that you are looking at the asymmetry question and the applicable law question, which could create a problem when you actually have a dispute to deal with. It is very advisable I think for one to ask the litigation department of your law firm when you are closing a deal to get them to advise you on how you are going to conclude your arbitration clause. Because it is only then you will be able to make sure that the validity issues are not going to be a problem at the end of the day, when you do have a claim that you wish to pursue.

I wish just perhaps to share with you some examples that I myself have come across in my previous life as a private practitioner as an arbitrator, and illustrate the importance of getting the arbitration agreement right. There was a case where parties have agreed to do an arbitration, and the clause was broadly put in. It is in fact under the IATA (International Air Transport Association) arrangement involving a national airline with another airline, and they have not identified the place of the arbitration. So as one of the arbitrators,

we wrote to the parties and say, “Can you please identify where you want to be seated?” They came back and named a city in Mainland China, and we know, for those of us who are involved in Mainland arbitrations would know, that ad hoc arbitrations in the Mainland is not acceptable, it is not valid. After a lot of discussions, understanding why they chose that particular city in Mainland China is because of the location of all the witnesses, all the documents and everything else, we have to go and explain the important difference between a legal seat as opposed to a place, and ultimately they chose Hong Kong as the legal seat. And of course the hearing was conducted in the Mainland. That was one example of not thinking enough could be a problem.

The second example I would like to give relating to how the arbitral tribunal approaches the matter is a case whereby the seat is a Hong Kong seat. Its arbitration clearly seated in Hong Kong, and then the clause says English law to apply. That usually means only the substantive law. It was a maritime dispute. The claimant’s arbitrator was appointed and the respondent did not respond. Therefore, understanding or presuming that under English Arbitration Act, this claimant’s arbitrator could become the sole arbitrator. That particular arbitrator then converted himself to be the sole arbitrator, conducted the arbitration, finished the hearing and rendered an award. When that award was sought to be enforced, it was not enforced because it is a Hong Kong seat and the Hong Kong Arbitration Ordinance applied, and we don’t have a similar provision as the English Arbitration Act. So understanding the applicable law, not just by the parties but also the arbitrator, becomes quite important.

The other case that came to mind is the famous *Karaha Bodas [v Pertamina]* case, whereby they put the seat of the arbitration in Switzerland but then they have a very long applicable law clause which again gave rise to a number of questions about how it was going to be applied, whether it’s a procedural law and the supervisory jurisdiction. These types of cases illustrate that when it

is overly simple without identifying the seat or perhaps overly complicated when you try and write your own provisions, it could give rise to interesting discussions by resourceful lawyers. So I think the discussions today no doubt will help us all focus on the importance of the arbitration agreement.

And I will here also say a word about online dispute resolution (ODR) which is becoming the norm everywhere in the world. What you need to do is still to identify the seat, even though everything is done online internationally on the internet, it is important to actually have a locale for the arbitration in order for the New York Convention to work. One would have thought that would not give rise to any legitimacy issue relating to the arbitration agreement but I think as cases develop we will be able to see.

Another suggestion, if I may, Sherlin, is perhaps for MAA to consider setting up some drafting workshops for your members to share experience on how to draft an arbitration agreement, or perhaps put it in a broader term, dispute resolution clauses, because that will be quite useful in real life.

The second two sessions I notice is on hot-tubbing and conflicts of interests, the focus I understand through what I have seen is primarily on experts. I would like to use the phrase "witness conferencing" as opposed to hot-tubbing for obvious reasons. And again, witness conferencing is an extremely useful tool as you have seen in the demonstration in trying to narrow the issues and help the arbitrator to come to his or her decision.

My first experience, again I think by sharing experience that might be interesting to you, came maybe about 30 years ago when people didn't really have the terms witness conferencing or hot-tubbing. And it arose inadvertently in this way. It was a case involving an Asian party and a Western party. And it involved PRC law as the applicable law and one of things we as tribunal would have to do was to decide on the meaning of certain provisions of the

PRC law. Both sides had called experts on the PRC law to tell us what it was. And these experts were the top in their area at that time, and of course even more so now, who were giving the expert evidence.

During one of tea break sessions, the two counsel came into our room and said they had a suggestion. What was that? They said they felt a little bit difficult if they had to cross-examine the experts because these were very learned, very knowledgeable, and genuine difference as opposed to conflicts of interests, taking-side type of experts. So they suggested to the tribunal to ask the questions instead of them. We happily agreed to do that. While with the two experts, one sitting on the claimant side, the other on the respondent side, the tribunal took on the questions that have been suggested to us and in fact we had our own questions. And we started to ask them in the way that you have seen in what we now call a witness conferencing. At that stage, we found that it was extremely useful because it helped us to immediately narrow the issues as you no doubt would have discussed and appreciated in dealing with expert witnesses. Particularly useful in my experience in legal experts and also in technical experts as well.

Another experience I would like to share with you and you may wish to explore a little bit more is that to use witness conferencing for factual witnesses. I have had that experience and it turned out to be extremely useful. The factual issues involved in the case of course could be complicated. What I have done because of the timing that we have to meet in terms of finishing the hearing and a number of other matters, the parties agreed to let us do witness conferencing by factual witnesses. So we have two or three witnesses on the claimant that covered a number of issues, and on the other side roughly about nine or ten factual witnesses. What we did was we sat them altogether, ten or eleven people sitting in front of the tribunal. And we, as you have seen in the demonstration, the tribunal asked the questions. And you would be amazed at how little differences on fact there actually were between the parties, because

after some questioning and clarification on why the witness statement stated this or other, it became quite clear that ultimately it turned on looking at the same fact but perhaps interpreting it differently because of the way they looked at the meaning of the contract. So that exercise enabled me to think that perhaps that could also be extended to factual witnesses, so that some of the time in trying to ascertain the facts through cross-examination may actually be reduced.

But of course all these should be done only with, I would say, more with consent of the parties, because in particular with factual witnesses, these are still generally new. As counsel they would like to be in control, they would like to cross-examine. But as arbitrator, we would want to ask the questions we want to ask, because we want to hear exactly what it is that would help us in making the decision. So the practice of setting up a set of procedures by which witness conferencing is to be conducted is extremely important. And it is very useful to start to work that are way in advance. Always, in my own experience, start with questions from the tribunal, followed by questions on both sides, in order to cover questions that we as tribunal members may have overlooked. But that is a very important procedure so that everybody knows the rules, and would not complain about not given a chance to ask questions and so on and so forth.

The concept of conflicts that was discussed of course is also very interesting. It led me to think about the double-hatting question that is often talked about. Question of whether one should be arbitrator as well as counsel, in particular in investment cases where the same issue or generally the same issue arises, or if you argue about it, will you as arbitrator be deciding in favour of the way you are going to argue, etc.

I think arbitrator and counsel probably is less of a concern. But I posed a question of arbitrator and expert, because there are some who would give expert evidence as well as sitting as arbitrator on

perhaps sometimes the same issue. I think with expert, my humble view is that it could be a little bit more difficult. Because as expert, as you have heard the Chartered Institute of Arbitrators Protocol [for the Use of Party-Appointed Expert Witnesses in International Arbitration] and indeed many experiences that you have, the expert is to give the honest independent opinion on a particular point of law. When one does that, one does it on the basis of an honest opinion. Unlike counsel, where you sometimes are asked to argue a matter, and perhaps to put it in a way, even though your honest opinion may not be entirely syncing with that. So I think when it comes to conflicts of interests, it would be interesting to explore a little bit along those lines. Again a very interesting subject.

Whilst here mentioning double-hatting, I can also mention to you that tomorrow we have a session on sports dispute resolution. Sports dispute resolution under the CAS (Court of Arbitration for Sport) rule is exactly where they would not allow the arbitrator to act also as counsel in the CAS cases. So you see there are different rules and different sectors of arbitration.

To finally finish, if I may say a few words about Hong Kong as well. We have the arbitration agreement discussions. And insofar as that is concerned, I think Hong Kong is a very good place to choose as a seat because we have arbitration-friendly laws. We will be able to uphold the arbitration agreement, as I give the example, "arbitration in Hong Kong" would be a valid arbitration provision under the Hong Kong laws and would not give rise to any problems. Hong Kong has a very good legal framework for that. Recently, we also have the third party funding that is in place that will allow parties, to enable them to seek third party funding in order to allow access to justice as well as efficient disposal of the matter.

The third matter to mention, I would like to call it a very important step in arbitration, and that is in Hong Kong we have reached an arrangement with the Mainland, whereby an arbitration seated in Hong Kong and administered by one of the designated

arbitral institutions, the parties to these arbitrations can apply to the Mainland courts for interim measures. And we at the moment are the first jurisdiction outside of the Mainland to be able to do that. That is a very important attraction for matters conducted here that may involve Mainland interests.

Another matter again sometimes often overlooked, so forgive me for repeating the obvious to some of you, is that our awards in Hong Kong are not only enforceable overseas under the New York Convention, but also enforceable in the Mainland under an arrangement that has been signed back in 1999. So the awards in Hong Kong is fully enforceable literally anywhere in the world.

Lastly, looking a little forward, we in Hong Kong are very much in support of lawtech and strongly support the development of ODR in order to support dispute resolution, negotiation, mediation, arbitration, so as to assist not just the major parties, but also small and medium-sized enterprises.

I look forward to seeing you all continuously online in this Legal Week, and I thank the organisers again for inviting me. Thank you very much for organising an excellent session this afternoon, that no doubt has continue to keep the arbitration evergreens, keeping them not getting old. Thank you very much.

Ends/Wednesday, November 4, 2020