

Speech of Ms. Teresa Cheng, SC

Secretary for Justice

The Fifth Qianhai Legal Intelligence Forum

7 November 2020 (Saturday)

Mr Huang (Moderator and Vice President of Shenzhen Intermediate People’s Court, Mr Huang Zhijian), ladies and gentlemen,

2. Greetings from Hong Kong. It gives me great pleasure to join you this morning at the fifth iteration of this forum being held both physically and online which is very much the new normal.

3. The theme of this session is “the impact of the global epidemic on international commercial disputes and countermeasures”, and I am pleased to share with you the Hong Kong experience in this respect. This is a timely and most

relevant topic, as the pandemic has transformed the globe in less than a year. As the pandemic seems to be here to stay, we must all be vigilant but also innovative and plan to live and work in the new normal. It is imperative for commerce, in particular international commerce, to also continue in this new normal.

Impact of the global epidemic on international commercial disputes

4. In Hong Kong, since 31 December 2019, we have had 5348 confirmed cases in COVID-19, with 5118 discharged, 95 remain in hospital or pending hospitalisation, and 106 deaths¹.

5. The impact the pandemic has on businesses is, to say the least, unprecedented and catastrophic. Businesses struggle to stay afloat, with the International Monetary Fund forecasting a global recession in 2020 in light of the severe economic and trade impact brought about by the pandemic², and projecting a 5.4 per cent

¹ As of 4 November 2020 – see www.chp.gov.hk/files/pdf/local_situation_covid19_en.pdf.

² See World Economic Forum, “COVID-19 crash: How China’s economy may offer a glimpse of the

global growth in 2021, some 6.5 percentage points lower than in the pre-COVID projections of January 2020³. Following the widespread disruption to the global supply chain, international business relations will likely end up in conflicts with increasing non-performance of contracts.

6. However, the global pandemic has also had a profound impact on the resolution of such disputes. For example, Hong Kong courts have been forced to close during the General Adjourned Period from 28 January 2020 to 3 May 2020⁴, with court proceedings being fully resumed from 15 September⁵. Even with the opening of the courts, the closure due to the pandemic has meant a drastic increase on the backlog of cases that are yet to be handled by the courts, which contributes to the time being required to settle a case in the courts.

future” (31 March 2020), available at www.weforum.org/agenda/2020/03/covid19-economy-china-health-coronavirus-economics-global/.

³ See International Monetary Fund, World Economic Outlook Update, June 2020, at www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020.

⁴ See the Statement of the Chief Justice at www.info.gov.hk/gia/general/202003/25/P2020032500594.htm and the “archive of information disseminated during the General Adjourned Period from 29 January to 3 May 2020” at www.judiciary.hk/en/court_services_facilities/gap_archive.html.

⁵ www.judiciary.hk/en/court_services_facilities/general_adjourned_period.html.

7. During this time, the Judiciary has been actively considering other alternative modes of hearing submissions by telephone, by video-conferencing, and by generally making use of technology⁶. Indeed, improvements have been made to the Judiciary's use of technology as a result of the pandemic.

8. It is the Hong Kong Government's duty to maintain public health. On 8 January of this year, the Hong Kong SAR made legislative amendments to its Prevention and Control of Disease Ordinance⁷ and subsidiary legislation, which provides the legal basis for adopting emergency measures for the effective prevention and control of the COVID-19 pandemic in Hong Kong in a timely manner. In the adoption of these emergency measures, the Hong Kong SAR Government is constantly considering the need to maintain public health whilst balancing certain fundamental rights, applying these measures with proportionality in mind.

⁶ See www.judiciary.hk/en/court_services_facilities/gap_remote_hearing.html.

⁷ Prevention and Control of Disease Ordinance, Cap. 599.

9. The imposition of quarantine measures, and the need for travellers arriving in Hong Kong to be subject to a 14-day quarantine, also meant that other dispute settlement options such as mediation and arbitration were impacted. Arbitrators, mediators, legal representatives and expert witnesses have had to think twice on whether to come to Hong Kong for hearings, since they would be subject to at least two weeks of quarantine when they arrive in Hong Kong. This is not counting the quarantine requirements in place when they return to their home countries.

10. Similarly, Hong Kong practitioners have also had to consider their involvement in the proceedings in the Mainland and overseas, since they were subject to the same 14-day quarantine period once they come back to Hong Kong. No doubt mediation and arbitration proceedings in Hong Kong and around the world have suffered, being subject to long delays as disputing parties decide how to take their cases forward in light of the restrictions brought about by the pandemic.

Countermeasures

11. Having considered some of the impacts by the pandemic on international commercial disputes, I now turn to some of the countermeasures that the Hong Kong Government has deployed to manage this impact. I will focus only on the legal and dispute resolution sector.

Exemption from compulsory quarantine arrangement

12. As previously mentioned, the imposition of the 14-day quarantine requirement on travellers to Hong Kong was one of the factors that stifled dispute resolution and legal services from being provided during the pandemic. In this respect, the Hong Kong Government has allowed certain categories of persons to apply for exemption from the compulsory quarantine arrangement if the persons travelling is necessary for the purposes of the provision of professional services in the interest of Hong Kong's economic development.

13. From 29 April, these persons include arbitrators, mediators and lawyers who are acting as legal representatives in certain arbitration or mediation proceedings or in litigation proceedings in court. They may be exempted when returning to Hong Kong after the provision of said services in the Mainland, Macao or Taiwan, or when they travel from the Mainland, Macao or Taiwan to provide the said services in Hong Kong.

14. On 15 June, as a result of feedback from stakeholders, the Hong Kong Government also allowed legal practitioners providing necessary legal services that require on-site physical presence in an important and large-scale commercial transaction on the Hong Kong Stock Exchange to apply for exemption when travelling to Hong Kong from the Mainland, Macao or Taiwan to provide such services, or after returning to Hong Kong from the same areas.

15. I must emphasise at this juncture that applications for the

exemption from compulsory quarantine are dealt with by the Hong Kong Government by having due regard to the need to balance public health factors. After all, public health measures such as social distancing, boundary control help keep Hong Kong safe from the pandemic.

COVID-19 ODR Scheme

16. The outbreak of COVID-19 brought various inevitable changes to our way of life including our travel patterns. It has also brought to the forefront the use of technology in the legal sector, in particular the use of online dispute resolution (ODR) in resolving international commercial disputes.

17. In anticipation of an upsurge of disputes arising from or relating to COVID-19, the Department of Justice of Hong Kong has engaged eBRAM International Online Dispute Resolution Centre (eBRAM Centre) to provide ODR services under a dedicated COVID-19 ODR Scheme. The eBRAM Centre is a

newly set up but innovative institution in the provision of dispute resolution services through an online platform, utilising innovative technologies to facilitate dispute resolution.

18. The COVID-19 ODR 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 provide for a cost-effective and fast process in which parties can resolve disputes without resorting to the courts.

19. The main advantage of the COVID-19 ODR Scheme in resolving disputes under this new normal created by the pandemic is that the process is entirely online. The difficulties in dispute resolution processes brought about by the pandemic, including the backlog of courts and the compulsory quarantine requirements being a barrier to arbitration and mediation being

conducted, would not have such a significant impact to disputes that are settled under the COVID-19 ODR Scheme.

20. While the COVID-19 ODR Scheme is subject to certain preconditions and limitations, the mechanism is already in place to be customised and tailored according to the parties' needs. This ODR mechanism and multi-tiered conciliatory mode of framework is best for international commercial dispute settlement, and is indeed in line with the development under the APEC Collaborative Framework on ODR.

21. I would encourage companies, including those in the Mainland and especially Qianhai, to look at what the eBRAM Centre can do to customise this multi-tiered dispute resolution mechanism to suit their needs.

22. I say Qianhai especially because I note the passage of the *“Regulations of the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone of the Shenzhen Special*

Economic Zone” by the Shenzhen Municipal people’s Congress in late August this year. This Regulation allows some 11,000 wholly-owned Hong Kong enterprises (WOKEs) registered in Qianhai to choose Hong Kong law by agreement in civil and commercial contracts in the absence of foreign elements. With the passage of this Regulation, WOKEs may turn to ODR platforms such as the one administered by eBRAM to resolve their disputes more easily, efficiently and effectively.

Concluding remarks

23. Every cloud has a silver lining. The pandemic has indeed changed our way of life and how we work. However, I believe that with the use of technology, we will be able to reach out to more people than ever before. Recently, events organised by the Department of Justice, such as the Conference in Celebration of the 40th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Hong Kong Legal Week, the Launch of “Vision 2030 for Rule of Law”,

and the opening of the Hong Kong Legal Hub, have all been held as a hybrid event online, overcoming physical limitations and geographical separation so as to reach a wide range of audiences from around the world. This makes us all re-think how we can adopt to the new normal, and use tools such as technology to in fact bring us closer together.

24. With that, I hope to express my best wishes to the discussions today, and wish everyone good health. Thank you.