Keynote Speech of Ms Teresa Cheng, SC

Secretary for Justice

"Why Arbitrate in Hong Kong" Webinar

31 March 2021 (Wednesday)

Dr Neoh, Distinguished speakers, Ladies and Gentlemen,

2. I am grateful to the Asian Academy of International Law for championing the series of "why Hong Kong" webinars. The first of these webinars, "Why Arbitrate in Hong Kong", brings together an array of distinguished speakers based in Hong Kong with unique perspective and experience and their insights coming from both the commercial and legal perspectives. I am honoured to have the opportunity to share with you some thoughts on the subject.

3. I commence by discussing the judiciary and its independence. According to the late Chief Justice of the United Kingdom, Lord Bingham, the meaning of "judicial independence" is "*independent in the sense that they (adjudicators) are free to decide on the legal and factual merits of a case as they see it, free of any extraneous influence or pressure, and impartial.*" In Hong Kong, the political structure laid down in the Basic Law fully reflects the principle of the rule of law and the essence of judicial independence. As former Chief Justice Geoffrey Ma notes, *"whenever there are discussions about the rule of law, the independence of the judiciary, and the role and responsibilities of judges in relation to these fundamental features, the foundation for such discussions must be to refer to the Basic Law. They are not in any way strange concepts that have been transplanted randomly to apply in Hong Kong: they are concepts required by, protected by and to be enforced under the very constitutional document that*

governs Hong Kong."[1]

4. As provided for in Article 8 of the Basic Law, Hong Kong practices common law. Under Articles 2 and 19, Hong Kong exercises independent judicial power, including that of final adjudication in accordance with the provisions of the Basic Law. Article 85 explicitly provides that *"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 the judicial functions.*" The appointment of judges by the Chief Executive is based on the recommendations of an independent statutory commission[2], the Judicial Officers' Recommendation Commission, with no political vetting involved in the process. The judges are chosen on the basis of their judicial and professional qualities and

[1] Speech by Chief Justice Geoffrey Ma at his farewell sitting (6 January 2021) at https://www.info.gov.hk/gia/general/202101/06/P2021010600683.htm.

[2] Article 88 of the Basic Law.

may be recruited from other common law jurisdictions[3]. Judicial independence is premised on the solid infrastructure that has been primarily laid down in the Basic Law – the security of tenure[4], the immunity of judges[5], the non-revolving door[6], and importantly the expressed provision in Article 85 cited above.

5. In the recent decision of ***Borrelli v Chan***[7], the Court dismissed an application for recusal of a judge based on the ground of apparent bias. The Court reiterated the test of apparent bias and quoted these passages from the Court of Final Appeal judgment in ***HKSAR v Md Emran Hossain***[8]: "*a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, in material and the prejudicial…… The*

[3] Article 92 of the Basic Law.
[4] Article 89 of the Basic Law guarantees the security of tenure for judges, and states that they can only be removed for inability to discharge his or her duties or for misbehavior.
[5] Article 85 of the Basic Law provides that members of the judiciary shall be immune from legal action in the performance of their judicial functions.
[6] 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.
[7] *Cosimo Borrelli v Allen Tak Yuen Chan* [2020] HKCFI 2382
[8] *HKSAR v Md Emran Hossain* (2016) 19 HKCFAR 679.

significance of the judicial oath, which in Hong Kong (like in other jurisdictions) imposes on judges a duty to 'safeguard the law and administer justice without fear or favour, self interest or deceit', is not to be overlooked: it is an important bulwark of judicial impartiality. It expresses the 'general rule of the common law… that judges must apply the law as they understand it to the facts of individual cases as they find them without fear or favour, affection or ill will, that is, without partiality or prejudice'. The fair-minded and informed observer will be aware of the oath and the judges will generally 'try to live up to the high standard which it imposes'."[9]

6. Our judges **do** live up to the high standard. The reasoned judgements are available to the public online, and the legal and factual basis upon which the conclusions were made are set out. The court proceedings comply with the legitimate need for transparency

[9] *Cosimo Borrelli v Allen Tak Yuen Chan* [2020] HKCFI 2382 at 14.

with due process observed, there is a well-established and fair appeal mechanism to ensure that errors at lower courts can be corrected - an important feature of a common law system. As Lord Sumption, a former Judge of the United Kingdom Supreme Court and a Non-Permanent Justice of the Hong Kong Court of Final Appeal noted in a recent statement published in The Times, "*The permanent judiciary of Hong Kong is completely committed to judicial independence and the rule of law. Successive chief justices have made this clear in public statements. These statements are not just lip service. They represent the convictions of experienced, courageous and independent-minded judges.*"[10]

7. Notwithstanding the well-established constitutional framework for resolving disputes before the courts in Hong Kong, alternative dispute resolution in the form of arbitration is one of

[10] Johnathan Sumption, "Britain should avoid undermining the Hong Kong judiciary", The Times (18 March 2021).

Hong Kong's core legal services. Arbitration has contributed to the manifestation of the rule of law by providing a mechanism by which commercial and investment disputes could be dealt with efficiently and in accordance with laws with necessary safeguards to ensure that the rule of natural justice is observed. For it to serve its purpose, the role of the judiciary at the seat or place of arbitration is important.

8. In today's discussion, I understand that three case studies would be provided in order to illustrate how one goes about choosing the seat of arbitration. The usual relevant factors include the arbitration laws, the availability of effective and enforceable interim measures and an arbitration-friendly community and judiciary that respects the parties' choices whilst ensuring propriety in the conduct of the arbitration itself. As the English Commercial Court said in ***Shagang South-Asia (Hong Kong) Trading Co. Ltd v Daewoo Logistics***, *"....whilst Hong Kong is no doubt geographically convenient, it is also a well-known and respected*

arbitration forum with a reputation for neutrality, not least because of its supervising courts."[11]

9. The courts in Hong Kong have all along been supportive of the use of arbitration, playing both a supervisory and enforcement role. This can be reflected in its case law.

Arbitrability

10. Whether a dispute can be arbitrated upon in a particular seat will greatly inform businesses of whether a particular place should be chosen as the seat of arbitration. For example, as you will see in the first case study, intellectual property disputes are arbitrable in Hong Kong as provided for under Part 11A of the Arbitration Ordinance[12].

[11] *Shagang South-Asia (Hong Kong) Trading Co. Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm) at 37.
[12] Arbitration Ordinance, Cap. 609.

11. The Hong Kong courts have also adjudicated on whether other types of disputes can be arbitrated upon, for example in the recent case of ***Fung Hing Chiu Cyril & Anor v Henry Wai & Co (A Firm)***[13], it is held that the court proceedings over lawyer-client fees should be stayed for arbitration. The Plaintiff in the case sought to argue that the arbitration agreement is unenforceable for, *inter alia*, being contrary to public policy, since the Court should have jurisdiction over its solicitors and to oversee their fees charged to a client. In ruling that the arbitration agreement is enforceable and staying the Court action so that arbitration can take place, the Court made the following observation:

"Without disputing that there is a public policy interest for the Court to exercise control and supervision over solicitors who are officers

[13] *Fung Hing Chiu Cyril & Anor v. Henry Wai & Co (A Firm) [2018] 3 HKC 375*

of the Court, it is relevant to bear in mind that there are also public policy interests in holding parties to a contract, entered into by their free will, to settle their disputes by arbitration. It is also undeniable that Hong Kong is promoted as an important international arbitration centre, and that the Courts here encourage parties' resolution of their disputes by arbitration – as can be evidenced by the object and principles of the [Arbitration] Ordinance…"[14]

Interim measures

12. Another important topic is the availability of interim measures. The grant or refusal of interim measures may sometimes, as a practical matter, be determinative of the dispute between the parties since it may not be worthwhile for a party to continue the action.

[14] *Fung Hing Chiu Cyril & Anor v Henry Wai & Co (A Firm)* [2018] 3 HKC 375 at 21.

13. Hong Kong and many other jurisdictions do provide that tribunals and courts can grant interim measures but it is noteworthy that jurisdictions outside Mainland China may not seek interim measures in aid of arbitration from Mainland courts. In this respect there is no question on the desirability of Hong Kong as a seat. As a result of Hong Kong's unique advantages under the innovative policy of "One Country, Two Systems", Hong Kong and the Mainland concluded the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR" in 2019, allowing parties to arbitral proceedings which are seated in Hong Kong and administered by one of the six arbitral institutions to apply to the Mainland courts for interim measures[15]. Hong Kong is the only jurisdiction outside the Mainland where this is possible.

[15] See https://www.doj.gov.hk/en/community_engagement/press/20190402_pr1.html. See also https://www.doj.gov.hk/en/community_engagement/press/pdf/list_of_institutions_e.pdf for a list of the six arbitral institutions.

14. Another arrangement arising out of this policy is the "Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR" signed on 27 November 2020[16]. The corresponding legislative amendment to fully implement this Supplemental Arrangement was passed earlier this month[17]. A party can now apply for preservation measures before or after the court's acceptance of an application to enforce an arbitral award, and additionally allows parties to make simultaneous applications to both the courts of the Mainland and HKSAR for enforcement of an arbitral award[18]. These groundbreaking arrangements will no doubt be explored in the discussion during the second case study.

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[16] See https://www.doj.gov.hk/en/community_engagement/press/20201127_pr1.html. The "Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR" amends the 1999 "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR".

[17] Corresponding legislative amendment was passed on 17 March 2021 to fully implement the Supplemental Arrangement.

[18] See https://www.info.gov.hk/gia/general/202011/27/P2020112700696.htm.

15. One of the most common types of interim measures is the issuance of anti-suit injunctions. In the case of ***X & Y v ZPRC And Another***[19], the Court of First Instance considered an application for two permanent anti-suit injunctions seeking to restrain court proceedings in Mainland China in favour of Hong Kong arbitration, while the Defendants argued that they had the right to invoke the jurisdiction of the Mainland Court to challenge the jurisdiction of the arbitral tribunal over the dispute. The Court, in granting interim injunctions[20], held that:

"…the fact that a foreign court has jurisdiction and may insist on its own jurisdiction is irrelevant to the court of the seat of the arbitration, when it deals with an arbitration provision governed by its own law. The very object and intent of the arbitration clause is that notwithstanding that another court may have jurisdiction, the

[19] *X & Y v ZPRC And Another* [2020] HKCFI 631.
[20] The Court chose not to grant the permanent injunctions as applied by the Plaintiff out of concern that it would have the effect of interfering with the arbitral process.

parties agree with one another to submit their differences to the chosen tribunal, and not any other court.”[21]

16. Questions and principles relating to corrections or addenda to arbitral awards have been considered and set out in cases such as ***Shandong Hongri v Petrochina***[22]. In the recent case of ***SC v OE1 and Anor***[23], the arbitral tribunal in a Hong Kong arbitration under UNCITRAL Arbitration Rules failed to address the relief claimed by the Defendant in its Award and subsequently issued an Addendum to the Award to address such relief. The Court had to consider the Plaintiff’s argument that the tribunal did not have power to make corrections to the award through the Addendum. While the Court held that the tribunal did not have the power to make the said corrections to the award under Article 33(1)(a) of the UNCITRAL

[21] *X & Y v. ZPRC And Another* [2020] HKCFI 631 at 66.
[22] *Shangdong Hongri Acron Chemical Joint Stock Co Ltd v Petrochina International (Hong Kong) Corporation Ltd*, CACV 31/2011, Judgment of 25 July 2011.
[23] *SC v OE1 and Anor* [2020] HKCFI 2065.

Model Law[24], the Court decided that the tribunal was entitled to make an additional award to deal with the issue under Article 33(3), and in doing so, the Court held:

"...there are equally good policy reasons for the Court to facilitate the arbitration process. One of the objectives of the [Arbitration] Ordinance is to limit the rights of parties to arbitration agreements to resort to the courts, and to ensure greater autonomy for their chosen tribunal. The powers of the Court under the Ordinance are to be exercised to support and assist the tribunal and to further the parties' choice of arbitration, so long as there is due process."[25]

17. On the question of due process, the Hong Kong courts would not hesitate to set aside an award if it found serious irregularity

[24] As adopted in section 69 of the Arbitration Ordinance
[25] *SC v OE1 and Anor* [2020] HKCFI 2065 at 53.

giving rise to substantial injustice in the arbitration process, although this is a high threshold to meet. As the Court notes in the case of ***P v M***[26], *"[t]he threshold is deliberately high, as one main intended effect of the [Arbitration] Ordinance is to reduce drastically the extent of intervention by the Court in the arbitral process."*[27] In this case, the Court did find serious irregularity giving rise to substantial injustice by the arbitrator not giving the Plaintiff the opportunity to present his case, noting that it was concerned in the *"[s]tructural integrity of the arbitration proceedings and not with the substantive merits of the dispute"*[28]. Notwithstanding this high threshold and the fact that the case was already remitted to the Arbitrator with the result of not curing the defect, the Court, in setting aside the relevant parts of the award, noted:

[26] *P v M* [2019] HKCFI 1864.
[27] *P v M* [2019] HKCFI 1864 at 54.
[28] *P v M* [2019] HKCFI 1864 at 58.

"I am naturally conscious of the previous statements of the Hong Kong Courts as to the extremely limited circumstances in which it would be felt necessary or appropriate to intervene in the arbitral process. The intended finality of arbitration is important, and the authorities identify the need for serious irregularities in the procedure for the court to be able to exercise a discretion to intervene. But it seems to me that it is just as important for the maintenance of integrity in the arbitration process for the Court to intervene in appropriate cases, as it is for the Court not to intervene when the high threshold for doing so has not been reached."[29]

Enforcement

18. It is important for courts to give effect to the result of an arbitration. The Court of Final Appeal held that it could grant alternative remedies in a common law enforcement action on an

[29] *P v M* [2019] HKCFI 1864 at 79.

award in the case of ***<u>Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd and Others</u>***[30]. In this case, the Plaintiff obtained an award rendered by a CIETAC tribunal ordering the defendant to perform the agreement to transfer shares to the Plaintiff, however this could not be enforced, given that the Defendant had already transferred the shares to a third party. The Plaintiff then started a common law action against the Defendant, and the Court of Final Appeal was tasked to consider, *inter alia*, the major issue of whether the Court had the power to grant relief which was beyond the terms of the award. The Court of Final Appeal found that there was a distinction between the mechanistic statutory procedure for enforcement and a common law action on an award, and that in a common law action, the Court has power to grant any relief it considers appropriate, as a result awarding damages to the Plaintiff for the Defendant's breach of the implied promise to honour the arbitration award.

[30] *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd and Others [2020] HKCFA 32.*

Hong Kong Courts and Chinese State Owned Enterprises

19. Before I conclude, I wish to utilise this opportunity to assure the international audience that insofar as Chinese State-owned enterprises are concerned, they are like any other commercial enterprise and generally do not enjoy any form of immunity in their commercial transactions. While the Court held in ***Hua Tian Long*** that the Central People's Government ("CPG") may claim Crown immunity in the Courts of Hong Kong[31], in the case of ***TNB Fuel Services v China National Coal Group***[32], the Court, when considering a letter from the Hong Kong and Macao Affairs Office[33] on the issue, opined that *"…the Letter in fact states that the respondent [a Chinese state-owned enterprise] has* ***no*** *special status or interest, and is* ***not*** *to be deemed as part of the CPG. In my view, the Letter signally defeats the respondent's assertion of Crown*

[31] *Hua Tian Long* [2010] 3 HKC 557 at 88, 90.
[32] *TNB Fuel Services SDN BHD v China National Coal Group Corp* [2017] 3 HKC 588.
[33] Hong Kong and Macao Affairs Office of the State Council of the People's Republic of China.

immunity."[34]

Conclusion

20. Ladies and Gentlemen, the points I have highlighted are but some of the ones you would consider when deciding on the seat of the arbitration. I believe that I now have to pass the floor to the panelists, and I look forward to the most insightful and stimulating conversations to come. Thank you very much.

[34] *TNB Fuel Services SDN BHD v China National Coal Group Corp* [2017] 3 HKC 588 at 23.