Speech by SJ at Trends in Commercial Arbitration and Private International Law webinar (English only) (with photo)
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Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the Trends in Commercial Arbitration and Private International Law webinar co-organised by the Hague Academy of International Law (HAIL), the Asian Academy of International Law and the Department of Justice today (November 11):

Ladies and gentlemen, distinguished guests,

Introduction to the HAIL Course 2022 and the webinar

Good day to you all. I am very pleased to be here today to speak at this webinar with a focus on the trends in commercial arbitration and private international law, which is a prelude to the First Edition of the Hague Academy of International Law's Advanced Course to be held in Hong Kong Special Administrative Region (SAR) in 2022.

We have had to postpone the course twice due to the pandemic but we have kept the momentum through these webinars. Last year, I thanked Secretary-General Professor Thouvenin (Secretary-General of HAIL, Professor Jean-Marc Thouvenin) for agreeing to host the Advanced Course with us back in 2019 when we met face-to-face at the Hague and I must renew this gratitude and express our appreciation for your support and that of the Hague Academy Curatorium.

The pandemic and this new normal has posed a formidable challenge to us in bringing the full Hague Academy experience to Hong Kong, but I am sure that our dedication and determination in pursuit of excellence will eventually be realised and we will have the Hague Academy Advanced Course next year.

Introduction to the theme of the webinar

The theme of this webinar today - "Trends in Commercial Arbitration and Private International Law", as has been aptly chosen by the organisers, is a timely topic which I strongly believe will interest legal scholars and practitioners from different jurisdictions.

Recently, much discussion has been had at various forums on the use of ODR (online dispute resolution) in dealmaking and dispute resolution. This is inevitable given the pandemic and the new normal as well as the rising cost in doing business.

In fact, in the past year, we have witnessed the rapid and vibrant development of ODR, especially in the Asia-Pacific region. This has set the scene for cost-efficiency and greater inclusivity and sustainability in the dispute resolution process. It would be unsurprising that the advantages of ODR which have become apparent during COVID-19 will continue in the post-pandemic age.

(i) APEC and MSMEs

The Department of Justice has continuously fostered the development of ODR on various fronts, including to further explore, study and promote the use of ODR. Different projects and programmes have been launched in light of this initiative. For instance, the APEC ODR Collaborative Framework, spearheaded by the Economic Committee of Asia-Pacific Economic Cooperation (APEC), is an exemplary initiative to help businesses, especially micro, small and medium-sized enterprises (MSMEs), to overcome geographical and language barriers. Its main attraction is a one-stop shop for e-negotiation, e-mediation and e-arbitration, that aims to reduce time and cost for MSMEs.

In line with the APEC ODR Framework, and with the support from eBRAM Centre, Hong Kong SAR launched a COVID-19 ODR Scheme in June last year. The Scheme, which provides a structured online platform to its users, has since been serving as a fast and affordable tool for the public to resolve a rising number of local and cross-border disputes, including commercial disputes. Recently, a series of procedural rules have also been formulated for its ODR platform, which is tailor-made for the APEC ODR Framework.

(ii) iGLIP

The Department of Justice has set up the Inclusive Global Legal Innovation Platform on ODR, iGLIP on ODR, to facilitate studies on ODR-related issues in collaboration with UNCITRAL (United Nations Commission on International Trade Law). In fact, the first meeting of iGLIP was held in March this year to bring together experts from all corners of the world to exchange views on this topic. This marks a milestone for the Department which has been relentlessly exploring creative tools to

address new issues with an innovative spirit. The UNCITRAL Commission at its 54th Session in July also endorsed its Secretariat's suggestion to continue to collaborate with Hong Kong SAR on this area and to take part in iGLIP on ODR. We are now proceeding with the preparation to hold yet another iGLIP on ODR meeting by the end of this year to further this initiative (Note 1).

The topic of ODR was featured a lot in the Hong Kong Legal Week 2021. The UNCITRAL Judicial Summit, the ASEAN Workshop and the Rule of Law Signature Engagement Event all covered this topic. Through continuous exchange and close collaboration with the international ODR community, we have gathered useful information and innovative ideas that are conducive to the development of ODR in Hong Kong SAR as well as the continuation of the development of ODR in the regional and global arena.

Cryptocurrencies

In recent years, trading in cryptocurrencies in the virtual world has blossomed. Disputes arising from these cryptocurrency transactions have generated some novel and unique legal issues. In the context of resolving these crypto-related disputes in arbitration, two questions immediately come to mind: (1) if trading and circulation of the relevant cryptocurrency is prohibited in the relevant jurisdiction under its national law, can we still arbitrate crypto-related disputes in that jurisdiction? (2) if the relevant cryptocurrency exchange has failed to comply with the local regulations, will it affect the legality or arbitrability of those transactions conducted over the exchange?

In some jurisdictions such as Mainland China, where redemption, trading and circulation of virtual currencies are prohibited, there may be challenges to a crypto-related arbitral award. In 2018, an arbitral award compensating the claimant the US dollar equivalent of Bitcoin which was then converted into Renminbi was set aside by the Shenzhen Intermediate People's Court on the basis that awarding damages in US dollars in lieu of Bitcoin was contrary to the public interest (Note 2).

The rationale of the Shenzhen Court is that pursuant to certain Circular (Note 3) and Announcement (Note 4) of the PRC (People's Republic of China), Bitcoin does not have the same legal status as a fiat currency, and cannot and should not be circulated in the market as a currency. Any so-called "token" financing and trading platform shall not, among other things, engage in exchange business between fiat

currencies and tokens or between virtual currencies. Accordingly, the arbitral award which ordered damages in US dollars in lieu of the Bitcoin amounted to redemption and trading between Bitcoin and fiat currency in a disguised form, which violated the public interest in the PRC, namely order and stability of the financial market.

In Hong Kong SAR, arbitrability of these crypto-related disputes probably would not be an issue. Trading in cryptocurrencies and other virtual assets is not prohibited here in Hong Kong SAR. Under Article 112 of the Basic Law, the free flow of capital is protected. Article 115 of the Basic Law further provides that Hong Kong shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital. Additionally, Hong Kong has a sophisticated and internationalised financial market, internationally aligned regulatory regimes and strong rule of law. It is home to a large pool of financial and legal talents who are well-equipped to handle complicated issues arising from the ever evolving currency and financial market.

As to the regulatory regime for the cryptocurrency industry, the Hong Kong SAR Government has proposed a new licensing regime under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance for platforms which trade any type of crypto-assets, even if none are classified as securities. Under the new proposal, trading platforms which are registered in Hong Kong SAR under the Companies Ordinance will be required to comply with the SFC (Securities and Futures Commission) licence. In addition, it is proposed that these trading platforms in Hong Kong SAR can only provide services to professional investors taking into account the risks associated with cryptocurrencies. The new regime aims to ensure that the general public is well protected and at the same time, ensure the healthy and orderly development of the crypto market, thus maintaining the stability of the financial market.

Arbitration aside, in view of the fast-evolving cryptocurrency industry, it is perhaps opportune for the international community to look into their own regulations for the industry and to jointly devise a best practice or model regulation that lay down the fundamental requirements for cryptocurrency and its trading. While making their own regulations, each jurisdiction should, perhaps, consider whether and if so how to increase the circulation and covertibility of cyptocurrency. The international community should join hands to study more about these cryptocurrencies and take appropriate measures to ensure the stability of the international financial markets.

C v D

In today's webinar, the panellists will discuss the current trends in private international law and international commercial arbitration. In this regard, let me mention a recent Hong Kong decision of C v D (Note 5) in which an issue arose as to whether failure to comply with the pre-condition to arbitration, i.e. the requirement to attempt negotiations before arbitration, excludes the arbitral tribunal's jurisdiction or merely goes to admissibility of the claim.

In that case, the contract in issue stipulated that, if a dispute arose between the parties, "the parties should attempt in good faith promptly to resolve such dispute by negotiation". The contract went on to say that "Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution", and that if any dispute could not be resolved amicably within 60 business days of the date of a party's request in writing for such negotiation, such dispute should be referred to arbitration.

The Plaintiff in that case contended that as a result of the failure by either party to give written notice to have the dispute referred to the CEOs of the parties for resolution, the tribunal lacked jurisdiction. The Defendant, on the contrary, argued that as it had given written request to negotiate by a letter to the Chairman of the Board of Directors of the Plaintiff, the condition to arbitration was satisfied and in any event, the question of whether the condition precedent had been fulfilled was a question of admissibility rather than jurisdiction.

The Hong Kong Court of First Instance held that the non-compliance with the pre-condition to arbitration merely goes to admissibility of the claim. On the facts of the case, the court held that there was no indication that the parties intended compliance with the relevant provisions to be a matter of jurisdiction.

The concept of admissibility primarily takes it shape and is a matter frequently raised in investor-state arbitration whilst C v D is under appeal, this case nonetheless shows that this concept is getting broader discussion in the international commercial arbitration community, and we will wait and see the decision from the Court of Appeal.

Conclusion

Ladies and gentlemen, developments in commercial arbitration and private

international law has not ceased during the pandemic and thus it is imperative for practitioners to keep themselves abreast of the latest trends in this area. This webinar serves just that purpose.

I look forward to greeting Professor Arroyo (member of the Curatorium of HAIL Professor Diego P Fernández Arroyo), Professor Nishitani (member of the Curatorium of HAIL Professor Yuko Nishitani), Professor Thouvenin, and all of you in person in Hong Kong, hopefully at the Advanced Course in 2022, if not earlier. Thank you.

Note 1:
See www.doj.gov.hk/en/community_engagement/speeches/20210318_sj1.html and www.doj.gov.hk/en/community_engagement/speeches/pdf/sj20210318e1.pdf

Note 2: Or (2018) 粵 03 民特 719 號

Note 3: Circular of the People's Bank of China, the Ministry of Industry and Information Technology, the China Banking Regulatory Commission, the China Securities Regulatory Commission and the China Insurance Regulatory Commission on Preventing Risks from Bitcoin (Yin Fa [2013] No. 289)
Note 4: Announcement on Preventing Risks relating to Fundraising through Token Offerings, which also provides that any so-called "token" financing and trading platform shall not engage in exchange business between fiat currencies and tokens or between virtual currencies; trade tokens or virtual currencies or act as a central counterparty; or provide pricing, information agency or other services for tokens or virtual currencies.
Note 5: C v D [2021] HKCFI 1474; C v D [2021] 3 HKLRD 1

Ends/Thursday, November 11, 2021