

Speech by SJ at 2023 Hong Kong Summit on Commercial Dispute Resolution in China (English only) (with photo)

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Following is the speech by the Secretary for Justice, Mr Paul Lam, SC, at the 2023 Hong Kong Summit on Commercial Dispute Resolution in China today (October 14):

Mr Guo (Chairperson of Beijing Arbitration Commission/ Beijing International Arbitration Center, Mr Guo Wei), distinguished guests, ladies and gentlemen,

Good afternoon. I am very honoured to be given the chance to speak today at the 2023 Hong Kong Summit on Commercial Dispute Resolution in China. I would like to begin by extending my heartfelt gratitude to the Beijing Arbitration Commission (BAC) for the successful organisation of this Summit.

In today's event, distinguished speakers and experts of different fields have shared their views on the development of dispute resolution in China and conducted sector specific discussions, including energy, investment, finance, construction and intellectual property rights. It has provided an invaluable platform for legal practitioners of the Mainland and Hong Kong to engage in insightful discussions on the evolving landscape of commercial dispute resolution in our country.

#### The Belt and Road Initiative and the Rule of Law

This year marks the 10th anniversary of the Belt and Road Initiative. The third Belt and Road Forum for International Cooperation will be held in Beijing next week with the theme "High-quality Belt and Road Cooperation: Together for Common Development and Prosperity". As mentioned in the white paper entitled "The Belt and Road Initiative: A Key Pillar of the Global Community of Shared Future" released by the State Council of People's Republic of China on October 10, which was last Tuesday, "The ultimate goal of the BRI (Belt and Road Initiative) is to help build a global community of shared future. As an important public good for improving global governance, the initiative provides a platform for turning the vision into reality."

The rule of law is essential to development and prosperity. Target 3 in Goal 16 of the Sustainable Development Goals (SDGs) set by the United Nations in 2015 is to: "Promote the rule of law at the national and international levels and ensure access to

justice for all." The United Nations General Assembly has recognised, in target 16.3 of the SDGs, that the rule of law is not only about criminal law and transitional justice, but also about mature rule-based commerce as a stabilising factor, and one which can mobilise resources for development, including due process and a strong judicial and legal infrastructure.

In the context of BRI, President Xi Jinping stated in a letter to the China Forum on International Legal Cooperation in Guangzhou back in 2019 that promoting the joint construction of the Belt and Road requires the protection of the rule of law, and he expressed the hope that everyone will actively promote the development and improvement of relevant legal systems, so that the rule of law can better play in the process of jointly building the "Belt and Road" effect.

The Summit today is most timely as resolving commercial disputes in a fair, efficient and peaceful manner plays an important part in maintaining and promoting the rule of law, in particular, in the context of BRI.

#### Hong Kong's unique role in the Belt and Road Initiative

Hong Kong has always played a unique role in the BRI. At the eighth Belt and Road Summit held in Hong Kong last month, the Vice-Premier Ding Xuexiang specifically mentioned that Hong Kong has leveraged its own advantages, particularly in legal services, to actively participate in the joint construction of the Belt and Road and continues to strengthen co-operation with the Belt and Road countries in various fields. He reiterated that the Central People's Government supports Hong Kong to maintain our common law system and to consolidate its status as a centre for international legal and dispute resolution services in the Asia-Pacific region, thereby playing a more important role in jointly building the Belt and Road.

I wish to refer to some statistics, facts and figures, which are, and should be indisputable, to explain why I am confident that Hong Kong shall remain and thrive as one of the top places for international commercial arbitrations and dispute resolutions.

In 2022, there were a total of 515 new cases submitted to the Hong Kong International Arbitration Centre. Of these new cases, 344 were arbitrations, which is the highest number received in over a decade. It is worth mentioning that over 50 per cent of the arbitrations concerned contracts entered into after 2020. It is noteworthy

that the Hong Kong National Security Law (NSL) was enacted on June 30, 2020. These statistics have demonstrated that Hong Kong continues to be an attractive place for commercial dispute resolution, particularly by arbitration, notwithstanding the enactment of the NSL.

It is not difficult to understand why this is so if one considers some significant developments regarding arbitration in Hong Kong in recent years.

#### Hong Kong's recent development on arbitration

Since the return of Hong Kong to our motherland, Hong Kong has signed nine arrangements on mutual legal assistance in civil and commercial matters with the Mainland, three of which are related to arbitration.

One of these arrangements is the Interim Measures Arrangement (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) signed in April 2019. Following the implementation of the Interim Measures Arrangement in October 2019, Hong Kong has become the first and only common law jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitral proceedings administered by designated arbitral institutions would be able to apply to the Mainland courts for interim measures. These interim measures include preservation of assets and evidence, which are of great practical importance to maintain the status quo pending the final disposal of the arbitral proceedings.

Currently, 100 applications have been processed, while 70 decisions were made by the Mainland courts involving over RMB25 billion worth of assets. Under these decisions, more than RMB15.7 billion worth of assets were preserved.

On the other hand, in June 2022, the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration (ORFSA)) (Amendment) Ordinance 2022 came into effect, which permits lawyers and clients to enter into outcome related fee structure agreements for arbitration. The new regime allows a broad range of fee options, including conditional fee agreements, damages-based agreements and hybrid damages-based agreements. The introduction of such new regime enables Hong Kong to keep up with the latest practice in international arbitration so as to maintain Hong Kong's competitiveness as a centre for international dispute resolution services. Along with the third party funding regime for arbitration,

Hong Kong now provides multiple funding options which enable flexible fee arrangements in arbitrations. As of September 2023, 87 arbitration cases were conducted with third party funding and four was conducted with the newly introduced ORFSA regime.

To maintain and promote Hong Kong's status as an international legal dispute resolution centre, it is necessary to make it convenient for people from overseas or from the Mainland to take part in arbitrations in Hong Kong in different capacities. The Pilot Scheme on Facilitation for Persons Participating in Arbitral Proceedings in Hong Kong launched in June 2020 allowed visa-free nationals who are arbitrators, lawyers, experts and parties to arbitration to come to Hong Kong to participate in arbitral proceedings without the need to obtain any employment visa. Since March 1 this year, the Pilot Scheme has been expanded to cover all visitors, including those who would require a visit visa or entry permit to enter Hong Kong and also residents of the Mainland, Macao and Taiwan.

Lastly, it is crucial to remember that the courts in Hong Kong have always been very supportive of the use of arbitration; and hence adopted a very pro-arbitration approach. The Hong Kong judiciary respects parties' autonomy in their choice of dispute resolution mechanism and only intervenes in limited circumstances to ensure the propriety and fairness of the process.

This pro-arbitration approach has been reaffirmed in a very important recent Hong Kong Court of Final Appeal's judgment in C v D decided on June 30, 2023. The contract provided that if the dispute could not be resolved amicably within 60 days of the request for negotiation, the dispute should be referred by either Party "for settlement exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre (HKIAC) in accordance with the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules" then in force. Invoking that clause, the respondent referred the dispute to arbitration at the HKIAC before a tribunal of three arbitrators. The appellant in that case objected to the arbitration going ahead on the ground that the pre-arbitration procedures had not been complied with, but the tribunal found that those procedures had been duly observed and went on to hold the appellant liable for breach of contract, reserving the question of damages for the next phase. The appellant then brought proceedings to set aside the tribunal's partial award, contending that the arbitrators were wrong to decide that the pre-arbitration requirements had been complied with. The issue was, therefore, whether the Court has power to review and

set aside that decision. The answer would depend on the proper application of section 81 of the Arbitration Ordinance which incorporates Article 34 of the UNCITRAL Model Law.

It was held that there is a presumption that the issue of non-compliance with a precondition to arbitration is a question of admissibility, rather than jurisdiction. In other words, absent contrary evidence, the issue should be decided by the arbitral tribunal, rather than by the court. Upon proper construction of the arbitration agreement in that case, the court held that both the main contractual dispute and the dispute as to the fulfillment of the pre-arbitration condition fell within the parties' contemplation and intended submission to arbitration. As a result, the court would not intervene in that case.

Among the 120 jurisdictions with arbitration legislation based on the UNCITRAL Model Law, this is the first case decided by the final appellate court in a Model Law jurisdiction. This judgment reaffirms the pro-arbitration nature of Hong Kong's arbitration regime by respecting party autonomy, and limiting court interference in arbitration proceedings, and satisfying the objective of arbitration as a "one stop shop" to achieve efficient dispute resolution.

## Conclusion

Looking ahead, there is no doubt that the rule of law will play an indispensable role in BRI for the ultimate purpose of building a global community of shared future. And, in this respect, Hong Kong shall continue to capitalise on its unique status and distinctive advantages under the principle of "one country, two systems", and strengthen its position as a leading centre for international legal and dispute resolution services in the Asia-Pacific region.

On this note, may I once again express my gratitude to BAC for holding this Summit. May I also thank all the distinguished speakers and all the participants for sharing your valuable insights and expertise. Thank you very much.

Ends/Saturday, October 14, 2023