

## **Hong Kong: A Centre for Professional Arbitration Services**

**Speech by Ms Elsie LEUNG Oi-sie, JP,  
Secretary for Justice of the Hong Kong Special Administrative Region,  
at the Seminar on “Hong Kong Arbitration Services”  
on 18 December 2001 (Tuesday) in Beijing**

Chairman YU Xiaosong, Deputy Executive Director Frederick LAM,  
Distinguished Guests, Ladies and Gentlemen,

It gives me great pleasure to come to Beijing to attend the Seminar on “Hong Kong Arbitration Services” jointly organized by China Council for the Promotion of International Trade, Hong Kong Trade Development Council and the Hong Kong International Arbitration Centre (HKIAC), with the Department of Justice of the HKSAR, Hong Kong Bar Association and Hong Kong Law Society as supporting organizations. In today’s seminar, we shall hear from the elites of legal and arbitration professions from both Hong Kong and the Mainland. For this, we have to thank the Office of the Government of the HKSAR in Beijing for their meticulous planning and our guests for their generous support. On behalf of the Hong Kong delegates, I would like to thank you all for your support.

### **The impact of China’s accession to the WTO on Hong Kong**

Last Tuesday, China finally became a Member of the World Trade Organization (WTO) after 15 years of protracted and difficult negotiation. From now on, China is resolutely set on the path of opening up to the outside world. It is prepared to lead its 1.3 billion nationals on the way to universal harmony in the world. The accession brings historical opportunities for our country. It will enable China to become the global base for manufacture and

production. It will brighten our market prospects and raise the living standard of our people. To comply with the mandatory requirement of the WTO, China will adopt an open, transparent and fair trade and investment policy. At the same time, China is also confronted with serious challenges. There will be changes in the flow of capital and investment, keen competition in the commodity and service sector and disputes arising from conflicting interests among Members. To address these challenges, China will have to make strategic adjustments in respect of its economy and structure. It will also have to expedite the modernization process. And our country is prepared to meet these challenges head on. We will amend the rules and regulations, provide training for judicial and legal professionals and improve the environment for the rule of law.

As a special administrative region of the People's Republic of China, the role of Hong Kong is not merely to exploit the opportunity offered by China's accession to enrich a small group of people. Of far more importance is to strengthen our competitiveness in the midst of the current economic slowdown. With the Mainland serving as our hinterland, we should grasp this golden opportunity to revitalize our various sectors and restructure our economy in order to climb out of the doldrums. We should work with our compatriots in the Mainland to strive for sustainable development of our country and the well-being of the people. We should also contribute to the making of our country a leader in a prosperous world economy. When we have achieved these objectives, we can then stand tall and take pride in being Chinese.

## **Professional arbitration services in Hong Kong**

In today's seminar, three arbitrators from HKIAC will address us on different aspects of arbitration. Mr Philip YANG will discuss the merits and disadvantages of international commercial arbitration, the way to draft arbitration agreement provisions, choices of arbitrators, arbitral institutions and venues of arbitration. Ms Teresa CHENG, SC, will focus on the *Arbitration Ordinance* of Hong Kong, the arbitration rules of the HKIAC, basic procedures and enforcement of awards. Mr Fred KAN will share with us his experience as an arbitrator. Mr WANG Shengchang, Vice Chairman of China International Economic and Trade Arbitration Commission, will brief us on the arbitration system and enforcement of awards in the Mainland. And we have to thank them for generously sharing with us their experience. I wish to stress that the arbitrators and legal professionals in Hong Kong will not engage in unhealthy competition with our counterparts in the Mainland. After all, there is a reservation clause in the accession provisions which provides that China will not open the legal service sector. For disputes involving Hong Kong and the Mainland, there are advantages if the arbitrators and lawyers of these two places can cooperate, whether the place of arbitration is Hong Kong or the Mainland. With such cooperation, clients will not need to travel between these two places. It will ensure better grasp of the key issues in the case. Undue procedural delay can also be avoided. Legal issues can also be thoroughly argued. Cooperation will facilitate interaction between the arbitrators and lawyers of these two places and enrich the legal knowledge of each other on the law of their counterparts. This will, in turn, raise the professional standard of our services to the international level.

Since the establishment of the HKIAC in 1985, Hong Kong has been building on its expertise and reputation as one of the leading arbitration centres in the Asia-Pacific region. Early this month, the HKIAC and the China International Economic and Trade Arbitration Commission (CIETAC) were appointed as the centres for resolving disputes over domain names of internet web sites. This is the first co-operation of its kind between the HKIAC and the CIETAC which has been duly recognised by the international community. We are exhilarated by the achievement. According to the statistics, disputes referred to the HKIAC fall into four major categories, namely commercial, construction, joint venture and shipping. Over the last nine years, the total number of cases received by the HKIAC has been ever-increasing, ranging from 195 cases in 1992 to 298 cases in 2000. This compares favourably with 21 and 81 cases respectively in London. In Singapore, the figures were 7 in 1992 and 67 in 1999 (the figure in 2000 is unavailable). The Mainland's principal arbitral body, the CIETAC, handled 543 cases in 2000.

Apart from the HKIAC, the SAR's arbitration services are also supported and assisted by the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators and the Hong Kong Mediation Council. These four arbitration bodies also handle many non-institutional (ad hoc) arbitration cases, making the arbitration services in Hong Kong more comprehensive, flexible and well received by the business sector.

### **Government's Support**

There has been strong government support, both before and after the reunification, to the provision of arbitration services in Hong Kong and in

promoting Hong Kong as an arbitration centre in the Asia-Pacific Region.

Examples include -

First, the Government made suggestions or agreed to resolve commercial disputes involving the Government by arbitration where appropriate. The Airport Core Project, Sewage Disposal Project and Container Port Project disputes are some of the examples.

Second, we keep in close contact with the arbitration service and the business sectors with a view to providing them with the best supporting services in the resolution of disputes. For instance, when the HKIAC was set up in 1985, the Hong Kong Government made available premises to the HKIAC. The SAR Government and the arbitration bodies in Hong Kong will continue to work together closely with each other in the development of arbitration laws, the provision of arbitration services and the promotion of these services;

Third, we have reviewed and updated the arbitration law from time to time with a view to laying down a clear and user-friendly legal framework for both international and domestic arbitrations. For instance, in 1982 radical amendments were made to the *Arbitration Ordinance* (Cap 341) to follow the *English Arbitration Act 1979*, with various improvements. In 1989, further amendments were made to the Ordinance so as to incorporate the *UNCITRAL Model Law for International Arbitrations* to govern both domestic commercial arbitrations and international commercial arbitrations. The UNCIRAL system establishes a liberal regime which promotes parties' autonomy and the primacy of the arbitral tribunals in the arbitration process. As a continuation of the exercise to update the arbitration law, the Ordinance was further amended in

1996 to streamline the arbitration process;

The latest development is that the SAR Government has already implemented arrangements for reciprocal enforcement of arbitral awards made in the Mainland and the HKSAR after the reunification. Since 1 July 1997, the *New York Convention*, being an international agreement, had ceased to apply to the enforcement of arbitral awards between the Mainland and the HKSAR. In June 1999, an arrangement was made with the Mainland authorities to put in place a mechanism by which awards made in the two jurisdictions would be mutually enforceable in court. The arrangement reflects the spirit and principles of the *New York Convention*. In January 2001, the *Arbitration Ordinance* was amended to give effect to it. The arrangement has been operated smoothly and well received by investors since its implementation. From 1 February 2000 to 31 October 2001, the HKSAR court received a total of 40 applications for enforcing Mainland awards in Hong Kong. Of these, 26 applications have been approved of by the court for execution. Some of the applications were settled while the proceedings in respect of some others are still underway. In June 2000, the Ordinance was further amended so that awards made in non-Convention states or territories (e.g. Albania, Brazil, Iraq, Newfoundland and the Macao SAR) are summarily enforceable in the Hong Kong courts.

The above examples show that the HKSAR Government has been supportive of promoting and reinforcing the professionalism of the arbitration service in Hong Kong and its recognition by the international community.

## **Attraction of Hong Kong as an arbitration centre**

Apart from the determination and support of the Government I have just outlined, Hong Kong has many attributes to support its effort to be a leading arbitration centre in the Asia-Pacific region. These include:

- a sound legal system, a clean government, an independent judiciary and the Rule of Law, which form the bedrock of Hong Kong community;
- Hong Kong's adoption of common law principles which are widely recognized and known by the business sector;
- a common language and shared cultural background with the Mainland, its skills at blending the mediation skills of the east and west, and no communication barriers between Hong Kong legal profession and their clients and counterparts in the Mainland;
- a wealth of English-speaking legal practitioners and arbitrators for international arbitration; as well as Chinese-speaking ones who have knowledge of China, market operation in the Mainland and China laws for disputes involving transactions in the Mainland;
- a world centre of expertise in commerce, finance, information technology, shipping and construction, with an enormous pool of experienced professionals, including lawyers, accountants, architects, bankers, engineers and insurance experts offering specialist advice and assistance in the resolution of disputes by arbitration;

- a convenient geographic location. It is convenient and no long journey is required for clients in the Mainland to attend arbitration in Hong Kong;
- a combination of superb infrastructure, first rate communications and transport systems and accommodation, as all may know;
- a well-established and successful HKIAC.

### **Suggestions of the SAR Government: Adoption of Hong Kong law and Choice of Hong Kong for Arbitration**

In view of these attributes, I believe that Hong Kong will provide a reassuring environment for investors. In his policy address delivered on 10 October this year, Mr TUNG Chee-hwa, the Chief Executive advocated the adoption of Hong Kong law as the applicable law for contractual disputes and the development of Hong Kong as an arbitration centre for dispute resolution. I outlined advantages of this for Hong Kong, the Mainland and foreign contracting parties in my speech in the Policy Address debate on 19 October this year. There is no intention to restrict the freedom of contract that foreign and Mainland parties have. All I am proposing is that the distinct advantages of Hong Kong should be fully made use of and the benefits of using legal services of Hong Kong in the manner suggested should be widely publicised. I notice that -

- China's accession to the WTO will create opportunities for various sectors of the SAR, including the arbitration service sector;
- although the Mainland's legal profession has grown rapidly in recent years,

there are still insufficient lawyers (only 5,000 odd lawyers out of 110,000 in the Mainland) to handle foreign-related business;

- development in opening up the Western Region of the Mainland will further generate demand for high quality legal services in the West;
- upon accession to the WTO, foreign-related disputes will constitute an important area of work in the adjudication work of the Mainland court;
- On the other hand, these foreign-related cases will bring a pressing new issue for the adjudication work of the Mainland courts; China's accession to the WTO will also place a higher demand on China's judicial work. Though the Mainland has attained substantial achievement in its judicial reform, it is still difficult to cultivate a large number of judges and law experts familiar with international practice within a short period of time;
- I also notice that China laws allow both parties to a foreign-related contract to choose the applicable laws and the institutions for arbitration. According to Article 145 of the Civil Procedure Law and Article 126 of the Contract Law of the People's Republic of China, with the exception of contracts to be fulfilled in the territory of the People's Republic of China on Chinese-foreign equity joint ventures, on Chinese-foreign contractual joint ventures and on Chinese-foreign cooperation in exploring and exploiting natural resources, parties to a majority of other foreign-related contracts may choose those laws of other countries and regions (including Hong Kong law) as applicable laws. Article 244, 246 and 257 of the Civil Procedure Law and Article 128 of the Contract Law stipulate that with the exception of the aforesaid contracts, parties to a dispute over a contract concluded with foreign element or over property rights and

interests involving foreign element may, through written agreement, choose the court of the place which has practical connections with the dispute to exercise jurisdiction. According to Article 15 of the Law on Chinese-Foreign Equity Joint Ventures and Article 25 of the Law on Chinese-Foreign Contractual Joint Ventures, disputes arising between the parties to an equity joint venture, which the board of directors has failed to settle through consultation, may be settled through arbitration by an arbitration agency of China or through arbitration by another arbitration agency (including the arbitration agency in Hong Kong) agreed upon by the parties. However, many investors still have the wrong impression that they may only choose the laws of the Mainland and the Mainland judicial and arbitral institutions to settle disputes.

In light of the aforesaid strengths of Hong Kong as an arbitration centre, I expect that most arbitration cases arising after China's accession to the WTO will be related to business, construction, joint ventures, intellectual property rights, information technology and shipping. In Hong Kong, the law concerning these sectors has long converged with the global standard and the arbitral institutions in Hong Kong are experienced in handling these kinds of cases. As such, the use of Hong Kong as an arbitration forum will help bolster the confidence of foreign businesses. It will remove any mistrust some might harbour about the law of China and worries about the strong local protectionism in certain parts of the Mainland. This will, in turn, help to enhance their confidence in investing in the Mainland. Moreover, referring cases to Hong Kong for arbitration will help to relieve the pressure on the courts and arbitral institutions in the Mainland during the early stage of China's accession .

## **Looking ahead**

The proposal to promote our arbitration services and to develop HKSAR as a dispute resolution centre in the Asia-Pacific region is well received in the Central Government initially, which is most encouraging. I must point out that while we expect support from the Central Government for our proposal, we will not seek any special treatment in breach of the WTO rules from the Central Government. After all, the Mainland and Hong Kong are two separate customs territories under the WTO regime. Any request for special treatment in breach of the WTO rules would defeat the purpose of accession to the WTO. In this respect, the Central Government has made its position very clear. On the one hand, she is a staunch supporter of the SAR Government. She encourages the legal profession of the SAR to promote its services in the Mainland. She also advocates negotiations for a mechanism for the mutual enforcement of court judgments. On the other hand, she makes it clear that preference of the contracting parties should be paramount. She also holds for strict observance of WTO obligations. We intend to promote Hong Kong's arbitration services through the following channels: the concerned departments of the SAR Government, our overseas economic and trade offices, and organizations such as the Trade Development Council. Promotional activities, including seminars like the one we are holding today, will be launched to bring a better understanding of Hong Kong's arbitration services amongst the businesses, the legal and arbitration professions. They will be encouraged to add a provision in their business contracts, stipulating for the application of Hong Kong laws in case of disputes and designating HKSAR as the place for arbitration. I make this proposal only to give the contracting parties one more alternative. I strongly believe that the proposal, once implemented, will bring

about a win-win situation for all three parties involved, namely the investors, the Mainland and our objective to promote Hong Kong as the financial and business centre in Asia. In the long run, it will also benefit the economic development of the whole country, including Hong Kong. And this is the common goal we should strive for.

I look forward to hearing the experts from both Hong Kong and the Mainland. Through these talks, we hope to share our respective views and experiences for our mutual benefit. I wish this seminar every success. Thank you.