SJ's speech at UNCITRAL-MOJ-KCAB 2nd Annual Conference 2013 (English only) (with photo)
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Following is a speech delivered by the Secretary for Justice, Mr Rimsky Yuen, SC, today (November 11) at the UNCITRAL-MOJ-KCAB 2nd Annual Conference 2013, jointly organised by the United Nations Commission on International Trade Law (UNCITRAL) Regional Centre for Asia and the Pacific, the Ministry of Justice of the Republic of Korea and the Korean Commercial Arbitration Board:

Arbitration Reform in the Asia Pacific Region: Opportunities and Challenges

Mr Hwang (Kyo-ahn) (Minister of Justice, Korea), distinguished guests, ladies and gentlemen,

First and foremost, may I express my utmost gratitude to the UNCITRAL Regional Centre for Asia and the Pacific, the Ministry of Justice and the Korean Commercial Arbitration Board for giving me the great honour to address such a distinguished audience.

As you all know, the theme of this conference is "Arbitration Reform in the Asia Pacific Region: Opportunities and Challenges". For reasons which I will elaborate, this theme is most apposite at this time and in this region. Whilst the issues pertinent to this theme are numerous, I will make use of this opportunity to share with you some of my thoughts on the opportunities and challenges in the context of international arbitration in the Asia Pacific region. Given the UNCITRAL context of this conference and given my capacity as Hong Kong's Secretary for Justice, I would make some references to Hong Kong's experience with the UNCITRAL Model Law as illustrations of how we can deal with issues arising from such opportunities and challenges.

Setting the Scene

Let me begin by setting the scene. As pointed out by many dispute resolution experts (Note 1) and confirmed by relevant studies, the economic development in the Asia Pacific region in the past few decades is driving international arbitration in the region towards a golden age. I have previously echoed such a view (Note 2). For the present purpose, I only wish to highlight the following:

(1) First, economic data support such a view. For instance, Asia's share of the world's GDP has increased from 23.39 per cent in 1990 to 34.32 per cent in 2012 (Note 3). The total amount of foreign direct investment inflow into Asia has also dramatically increased from US$24,601 million in 1990 to US$418,915 million in 2012 (Note 4). Such an economic trend, together with the impact of globalisation and regional integration, has led to a much higher demand for international arbitration services. As noted by leading English judges, disputes are inherent in business transactions, and businessmen accept resolution of disputes as an integral part of commerce (Note 5).

(2) Second, the survey entitled "International Arbitration Survey 2013: Corporate Choices in International Arbitration" jointly conducted by PricewaterhouseCoopers and Queen Mary, University of London in April this year, revealed that 52 per cent of the corporate counsel who responded to the survey regarded arbitration as the most preferred dispute resolution mechanism, and 73 per cent of them either agreed or strongly agreed that arbitration is a means suitable for resolving international disputes (Note 6). This survey result, amongst others, is a good indicator of the popularity of international arbitration.

Accordingly, it is apposite (as I said earlier) to consider the opportunities and challenges arising from such an encouraging development of international arbitration in the region.

Opportunities and Challenges

Opportunities and challenges are twins. Where there are opportunities, there are challenges, and vice versa. I shall therefore deal with some of the key opportunities and challenges in the same breath, but under several headings.

Business Opportunities

The encouraging development of international arbitration in the region would naturally mean more business opportunities to the arbitration practitioners. The challenge is how best to make use of the golden opportunity to enhance arbitration practice and to promote international arbitration in the region.

Each jurisdiction and each arbitration body has its own strategy, and it is not for me to tell people how they should promote their practice. However, in my capacity as a policymaker, I would like to highlight two points.

First, government support is important in providing assistance to the promotion of international arbitration. Take the case of Hong Kong as an example. The Hong Kong Government takes a keen interest in assisting our arbitration community to promote their services as part of our firm and clear policy to promote Hong Kong as a centre for international legal and dispute resolution services in the Asia Pacific region.

Second, positioning, in the sense of how to position oneself in the region, is also important. Again using Hong Kong as an illustration, we believe we are best placed to handle arbitration involving disputes with Mainland China parties. Notwithstanding the resumption of sovereignty by the People's Republic of China in 1997, Hong Kong remains a common law jurisdiction under the "One Country, Two Systems"

principle and is the only common law jurisdiction in the Greater China region. With our strong English law tradition, independent but pro-arbitration judiciary, legislative framework based on the 2006 version of the UNCITRAL Model Law as well as our extensive enforcement network based on the New York Convention, Hong Kong is an ideal neutral venue for conducting international arbitration in respect of disputes involving parties from Mainland China.

Specialisation

A corollary of practice development is specialisation. This truism has manifested itself in different professions. Take the legal profession as an example. When legal services are still at their early stage, lawyers tend to be generalists rather than specialists. However, when the demand for legal services increases and the needs become more sophisticated, the process of specialisation would kick in. The same process would take place in the development of international arbitration in the region. In other words, in front of us is the chance to prepare ourselves for the process of specialisation, be it commodities arbitration, investment arbitration, intellectual property arbitration or otherwise.

The challenge is how to facilitate a smooth and sustainable process of specialisation. I do not think there is any universal answer to this question. Rather, the answer depends on the attributes and strength of individual jurisdiction and arbitration bodies. For instance, there is every reason to believe that Malaysia is well placed to specialise in international arbitration concerning Islamic finance.

Arbitration Culture

Faced with the encouraging development in the region, there is every opportunity for the Asia Pacific region to develop an international arbitration culture so as to

facilitate the sustainable development of international arbitration in the region. The challenges, however, are huge. There is considerable volume of literature in this aspect, and I have briefly outlined my thoughts in my speech delivered on October 21 at the 2013 Hong Kong Arbitration Week.

For the present purpose, may I just make these observations. The Asia Pacific region is a region of tremendous diversities, whether in terms of culture, language, religion, history, economic development, legal system and legal infrastructure. The challenge is how to develop common norms, build convergence and encourage interchange so as to foster an international arbitration culture which can achieve at least three aims, namely:

(1) to promote the key objectives of international arbitration, including party autonomy, flexibility and cost-effectiveness of the arbitral process, confidentiality, finality and effective enforcement of the arbitral award;

(2) to ensure that the end users would receive high-quality arbitration services, without imposing unnecessary regulatory control; and

(3) to ensure that the international arbitration culture would be updated and international so as to cater for the ever changing needs of the international business community, and at the same time embrace regional or cultural differences.

In this regard, harmonisation is important and the UNCITRAL Model Law and the New York Convention can be used as a common platform for fostering an international arbitration culture within the region. So far, only a few jurisdictions in the Asia Pacific region, namely, Hong Kong, Australia, New Zealand and Brunei, have adopted the 2006 amended version of the UNCITRAL Model Law. It is hoped that as time goes by, more jurisdictions in the region will see fit to join in and, with greater participation by the

jurisdictions in the region, we can together develop the requisite jurisprudence and culture.

Legislative Changes

Also relevant to the adoption of the UNCITRAL Model Law is legislative reform for the purpose of developing international arbitration in the region. Arbitration, be it domestic or international, is not conducted in a vacuum, but against the legislative backdrop of the relevant jurisdiction. Appropriate and timely law reform is thus highly important in ensuring that a jurisdiction's legislative framework for arbitration would remain up to date and attractive to the business community (Note 7). In this regard, allow me to briefly share with you Hong Kong's experience in introducing legislative reform for the promotion of arbitration.

Hong Kong's first arbitration legislation, the Arbitration Ordinance (Cap. 341), was enacted in 1963. This legislation pre-dated the UNCITRAL Model Law by more than a decade and was based on the English counterpart. As soon as Hong Kong's Law Reform Commission was established in 1982, the first report published was on arbitration. This led to the Arbitration (Amendment) Ordinance 1982, which represented Hong Kong's first step away from the English arbitration model (Note 8).

In 1985, our Law Reform Commission started to consider whether the then newly introduced UNCITRAL Model Law should be adopted. Consequential upon its report issued in 1987 recommending the adoption of the Model Law for international arbitration, the Arbitration (Amendment) Ordinance 1996 was enacted to implement the recommendation. As a result, Hong Kong became one of the earliest jurisdictions in Asia to adopt the UNCITRAL Model Law for international arbitration, although domestic arbitration was then dealt with under a different regime.

The next development took place in 2010, when the current version of the Arbitration Ordinance (Cap. 609) was enacted. This new Arbitration Ordinance, which came into effect in June 2011, unified the regimes for international and domestic arbitration by adopting the 2006 version of the UNCITRAL Model Law. As noted earlier, Hong Kong is one of the few jurisdictions in the Asia Pacific region which took the lead to adopt the 2006 version of the UNCITRAL Model Law as the basis of our legislative framework for arbitration.

In addition, our Department of Justice stays in touch with the arbitration community with a view to ascertaining how best the legislative framework can be further improved. The latest example is the further amendment to the Arbitration Ordinance (Cap. 609) made this year concerning emergency arbitrators and emergency relief.

In short, unless we constantly keep an eye on the development of arbitration and the needs of the international business community, our arbitration legislation will not be able to meet the challenges arising from the evolution of international arbitration both within the region and at the international level.

Training and Research

To ensure a sustainable development of international arbitration in the region, it is necessary to maintain confidence amongst the end users. Quality of service is one of the key factors. Arbitrators and other arbitration practitioners, irrespective of their experience and background, must be provided with appropriate continuous training so as to enable them to stay at the forefront of the industry. In this regard, arbitration institutions in each jurisdiction have an important role to play. Besides, apart from holding international conferences similar to this one which would greatly help to facilitate exchange of views and sharing of experience, I would venture to suggest joint

training programmes, so that arbitrators from different jurisdictions can not only learn from the trainers, but also from each other and exchange views on how best to tackle procedural or other issues that would arise during arbitration proceedings.

Research should also be encouraged, especially research on issues relevant to the region. Given the cultural diversity of the jurisdictions within the region, topics concerning how such cultural differences would impact on conduct of international arbitration deserve attention.

Competition

The last area I would like to touch on is competition. With the growing interest in international arbitration in the region, competition is inevitable. This, admittedly, is another challenge. People are already pondering on questions such as how many international arbitration centres the region can accommodate, and what adverse impact (if any) would emerge as a result of competition within and beyond the region.

I firmly believe that competition is not necessarily a bad thing. Viewed positively, competition can be constructive and beneficial. In the context of international arbitration in the Asia Pacific region and in view of the encouraging economic development, I believe there is much room for healthy competition amongst different arbitration institutions and different jurisdictions, with each of them offering their respective expertise and the services that they are in the best position to provide. The key, I believe, is to foster a shared vision within the region that we, together, can push the awareness and use of international arbitration in the region to a new height and can provide top-quality services to the international business community, so that international arbitration is both a form of effective dispute resolution service as well as a means to enhance access to justice in the international order.

Conclusion

On this note, may I wish this conference every success. May I also congratulate the Ministry of Justice, the Korean Commercial Arbitration Board and the UNCITRAL Regional Centre for Asia and the Pacific for their initiatives and contribution to the promotion of international arbitration in the region. One final remark is this. I sincerely look forward to seeing more exchange and co-operation between the Korean arbitration community and that of Hong Kong, whether through the Hong Kong International Arbitration Centre or on a government-to-government level.

Thank you.

Note 1: See, e.g.: (a) the speech delivered by Dr Julian D M Lew, QC, entitled "Increasing Influence of Asia in International Arbitration" on October 15, 2012, at the 2012 Hong Kong Arbitration Week; (b) the speech delivered by Sundaresh Menon, SC (then Attorney General, and now Chief Justice, of Singapore), at the 2012 ICCA Congress entitled "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)".

Note 2: See my speech delivered on June 28, 2013, at the APRAG Conference 2013 "International Arbitration in Asia-Pacific Region in the Next Ten Years - Opportunities and Challenges".

Note 3: "GDP" refers to gross domestic product based on purchasing power parity, and the figures are based on those shown in the International Monetary Fund, World Economic Outlook Database (October 2013).

Note 4: Source: UNCTAD STAT.

Note 5: This observation was first made by Lord Donaldson of Lymington in his Sultan Azlan Shah Law Lecture delivered in

1992, and quoted by Lord Bingham in his 2001 Sultan Azlan Shah Lecture entitled "The Law as the Handmaid of Commerce", which is collected in Tom Bingham, "Lives of the Law: Selected Essays and Speeches 2000-2010" (Oxford University Press), p. 283. The same point was then repeated by Lord Bingham in his well-known work "The Rule of Law" (Allen Lane, an imprint of Penguin Books) (2010), p. 85.

Note 6: See the speech "The Trends of International Arbitration" made by Christopher To at the APRAG Conference 2013 (2nd para.).

Note 7: See also the discussion in: Jawad Ahmad and Andre Yeap, SC, "Section 2: Overviews: Arbitration in Asia", "The Asia-Pacific Arbitration Review 2014" (2013, GAR).

Note 8: See: R Morgan, "Hong Kong Arbitration: A Decade of Progress But Where to Next?", Hong Kong Lawyer (October 1999).

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