

# Speech by SJ at 4th IATC Conference (English only)

Following is the keynote speech by the Secretary for Justice, Mr Paul Lam, SC, at the 4th IATC Conference "Advocacy in Arbitration: Bridging Borders, Enhancing the Rule of Law" organised by the International Advocacy Training Council (IATC) today (April 9):

Distinguished guests, ladies and gentlemen,

Good morning. Thanks Russell (Executive Committee member and former Chairman of the IATC, Mr Justice Russell Coleman, SC). To begin with, I would like to thank the International Advocacy Training Council, the IATC, for organising the 4th IATC Conference in Hong Kong and for inviting me to deliver this speech.

The Department of Justice is indeed very honoured to be one of the supporting organisations of this Conference. As you all know, this Conference was originally scheduled to be held in Hong Kong back in 2020, but had to be postponed for about four years due to the COVID-19 pandemic. That's why I am particularly happy to see so many esteemed speakers and participants who have travelled far and near, such as from Africa and Malaysia and other jurisdictions, to join us in this Conference.

I understand that, as compared to the three previous conferences held in Kuala Lumpur in 2014, Belfast in 2016 and South Africa in 2018, at this Conference, the IATC has decided to take a broader approach and focus on advocacy skills rather than just advocacy training. Accordingly, the chosen theme of the Conference is "Advocacy in Arbitration: Bridging Borders, Enhancing the Rule of Law".

In Lord Bingham's seminal work, "The Rule of Law", one of the eight principles propounded concerns dispute resolution, and it reads, "Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve." One of the means that he mentioned expressly is arbitration. While arbitration is used to resolve domestic legal disputes, it seems very clear that arbitration plays a more important role than other means of dispute resolution in resolving cross-border or international commercial disputes for many reasons. Perhaps one of the most important practical reasons is that arbitral awards can be recognised and enforced in most countries around the world pursuant to the New York Convention. Whether international arbitrations can contribute to promoting the rule of law, both as a matter of perception and reality, is determined not merely by the outcome in individual cases but also the entire process leading to the outcome. And that is where the performance of advocates can and will make a real difference.

Many of you may know that, before my appointment as the Secretary for Justice in July 2022, I was in private practice as a barrister specialising

in civil and commercial matters for almost three decades. I still remember that, as a law student and a pupil barrister, I received education and training on the skills and ethics as an advocate appearing in court, but none at all focused on advocacy in arbitrations. Notwithstanding that, in the course of my private practice, I had acquired some limited experience of participating both as counsel and sometimes as arbitrator in some international arbitrations. I came to realise that acting as an advocate in arbitration can be materially different from acting as an advocate in litigation.

The first challenge faced by an advocate in arbitration is to get to know the arbitrators constituting the tribunal in question. In litigation, the traditional wisdom is that to know the judge is as important as, if not more important than, to know your case and your opponent. Turning to arbitration, in practice, one of the very important strategic decisions that an advocate will likely be asked to advise on is the choice of arbitrators. Naturally, in my old days, I would advise my client to choose an arbitrator in Hong Kong such as a fellow member of our legal profession, for example Mr Anthony Neoh, or a retired Hong Kong judge like Mr Geoffrey Ma, whom I know personally, for very good tactical reasons. The difficulty is that, in international arbitrations, the tribunal usually consists of three arbitrators; the second one will be appointed by your client's opponent and the third one will be appointed by an independent third party in the absence of any agreement between the parties. Sometimes, even though the arbitrator appointed has a common law background, he or she may come from a different common law jurisdiction whom you have never met or heard before. In addition, international arbitrations in Hong Kong very often involve parties coming from Mainland China, which is a civil law jurisdiction. Hence, in many cases, one of the arbitrators will come from a civil law jurisdiction, either from Mainland China or Continental Europe. It is not easy to get to know and gain the trust of an arbitrator who is a stranger coming from an entirely different type of legal system with very different cultural and legal background.

The first impression of the arbitral tribunal on the merits of your case is of utmost importance. It is most likely that its first impression will be formed after reading the parties' statement of claim and statement of defence, which are invariably much longer and more detailed than usual pleadings in litigation. This is one of the reasons why written advocacy in arbitration is extremely important. However, if the tribunal consists of arbitrators coming from different legal systems and cultural backgrounds, it can be quite challenging to pitch the language, style and even the degree of detail of the written submissions. Let me give an example. Assuming that one of the issues concerns constructive trust, one would need to be very skilful to ensure that the written submissions on this legal principle would not appear to be unnecessarily lengthy to an arbitrator with a common law background but, at the same time, not overly simplistic to an arbitrator coming from a civil law jurisdiction which does not have a legal concept identical to constructive trust.

The task can become even more challenging if the language used is not

English. While English is still the most often used language in international arbitrations in Hong Kong, Chinese is used more and more often. In some cases, written submissions even have to be prepared in Chinese. This can be very difficult as many legal principles and concepts under the common law cannot be easily translated into Chinese, or explained in the Chinese language.

As an advocate, it is of course important to know your own case, your client and your witnesses, whether factual or expert witnesses. One of the duties of an advocate is to assist your client and his witnesses to prepare their witness statements and, more importantly, to get prepared for cross-examination by the opposite party. My personal experience is that many witnesses coming from the Mainland are completely unfamiliar with the process of giving evidence under an adversarial system used in arbitration, and can become very nervous and uncomfortable upon learning that their credibility will be challenged vigorously in cross-examination. There is a distinct possibility that, when being cross-examined, they might appear to be too defensive, evasive and sometimes argumentative.

Cross-examination of your opponent's witnesses can also be challenging in international arbitration. It is much harder to judge the inherent probability of a witness's testimony if he or she comes from an entirely different social, cultural and business environment, which is highly likely to be the case in international arbitrations. Although such difficulty also exists in international commercial litigations, there are two factors which seem to make cross-examination in international arbitration more difficult than in litigation. First, in litigation, owing to the solemn atmosphere of a court room and the apparent authority displayed by the judge, witnesses tend to behave in a more composed manner; at least they will try to do so. In contrast, in arbitration, the atmosphere tends to be more casual and relaxed; witnesses are more prone to become more expressive and even aggressive when they feel offended or challenged by questions in cross-examination. Second, in litigation, although the court will exercise more proactive case management power nowadays, it is likely that the judge will still be reasonably flexible to allow counsel to have sufficient time to complete the cross-examination. In contrast, in arbitration, very often, a strict chess-clock approach is adopted, which means that an advocate must plan his or her cross-examination extremely cautiously to ensure that, irrespective of the responses of the witness which are highly unpredictable, he or she will achieve the objective of the cross-examination by the time the clock stops.

Oral examination of witnesses may become even more complicated due to other factors. First, the witness may speak in a different language other than the official language used for the arbitration. Speaking for myself, I always found cross-examination more effective if I do it in the same language spoken by the witness. But the precondition is that the advocate must be proficient in that language. I still remember the painful experience of cross-examining factual and expert witnesses in Putonghua, not Cantonese, which is the dialect that we speak in Hong Kong. The alternative is to conduct oral examination of witness with the help of an interpreter, though, apart from time-consuming, there may be concerns about the accuracy of the

interpretation, and in practice, the force of the question is very often lost in translation.

Another factor that might complicate the matter is the use of remote hearings. While remote hearings are sometimes used in litigation, it seems that they are used more often in arbitration. While remote hearings are convenient and can save time and costs, they tend to make an advocate's task even more difficult. It is much harder to observe and judge the demeanour of a witness via a screen instead of being face-to-face. Further, a witness giving evidence via video-link facilities in a distant place tend to act in an even more relaxed manner, sometimes too relaxed.

Another challenge faced by an advocate in arbitration is that arbitration is meant to be a one-stop and speedy means of dispute resolution. In particular, the court will only intervene and set aside an arbitral award on very limited grounds. The court does not sit on appeal against the tribunal's finding of fact or law. Generally speaking, it would only intervene if it is satisfied that the tribunal has made serious errors amounting to a denial of due process. In contrast, in litigation, although an appeal is not a rehearing properly-so-called, it is still possible to challenge the trial court's finding of fact or law; and in some circumstances, it may even be permissible to run a new point of law or adduce fresh evidence. The short point is that, in arbitration, there is almost no room for error as there will not be any realistic chance to remedy any such error. On the other hand, it is essential to assist the tribunal to ensure that it will deal with all live issues fairly and properly to avoid giving the opposite party any excuse to frustrate the objective of the one-stop process by attempting to challenge the award on procedural grounds such as it has failed to deal with an issue sufficiently or to give adequate reasons.

I have deliberately highlighted some of these challenges based on own experience without giving any answer for a few reasons. First, I am sure that all these and other potential challenges that an advocate may face in international arbitration have already been, or will be, discussed in a more thoughtful and insightful manner by other speakers in this Conference who are more knowledgeable and experienced than me. Second, the true reason why I mentioned all these things is to substantiate a single most important message that I wish to convey. That is I am very confident that Hong Kong can provide solutions to all these challenges. This is because Hong Kong provides an ideal place for international arbitrations; in particular, Hong Kong has an abundant supply of high-quality advocates, who may also act as arbitrators, while at the same time, there are ample opportunities for advocates coming from different jurisdictions to take part in international arbitrations either as an advocate or arbitrator. And Hong Kong is also an excellent place for capacity building in this respect.

One of the unique advantages of Hong Kong under the principle of "one country, two systems" is its common law system, and the high quality of legal service it offers. Hong Kong has always received very strong support from the Central People's Government in this respect. Notably, the National 14th Five-Year Plan, the Belt and Road Initiative and the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area (GBA) all explicitly endorse

Hong Kong's development into a centre for international legal and dispute resolution services in the Asia-Pacific region.

It is well known that Hong Kong is one of the most preferred seats of international arbitrations in the world. Since 2015, Hong Kong has been consistently voted the top five preferred seats for arbitration globally according to the International Arbitration Surveys conducted by Queen Mary University of London. Major arbitral institutions with presence in Hong Kong include our home-grown Hong Kong International Arbitration Centre (HKIAC), China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center (CIETAC-HK), Hong Kong Maritime Arbitration Group (HKMAG), International Court of Arbitration of the International Chamber of Commerce – Asia Office (ICC-ICA), South China International Arbitration Center (HK) (SCIA-HK), eBRAM International Online Dispute Resolution Centre, and Asian-African Legal Consultative Organization Hong Kong Regional Arbitration Centre (AALCO-HK).

I would like to use HKIAC, which has released the relevant statistics for 2023 very recently, as an example. In 2023, it received 281 arbitration filings, out of which 184 were administered by the HKIAC. The total amount in dispute across all arbitrations was HK\$92.8 billion, approximately US\$12.5 billion, and the average amount in dispute in administered arbitrations was HK\$467.6 million, approximately US\$60.1 million. Both numbers represent a record high for HKIAC. Arbitrations filed in 2023 continued to be predominantly international featuring parties from 63 jurisdictions; 75.1 per cent of all arbitrations and 89.7 per cent of administered arbitrations were international with at least one non-Hong Kong party.

The HKIAC maintains both a Panel and a List of Arbitrators. The registration of arbitrators on either the HKIAC's Panel or List of Arbitrators requires individuals to demonstrate that they meet certain criteria and have sufficient experience. There are now almost 1 000 persons on the Panel and List of Arbitrators of the HKIAC, coming from different jurisdictions with diversified backgrounds and expertise. In 2023, the HKIAC appointed 172 arbitrators; 59 were not previously appointed by the HKIAC in the last three years.

As expected, most of the advocates and arbitrators taking part in international arbitrations are lawyers qualified and practised in Hong Kong. Indeed, Hong Kong boasts an international and diversified pool of legal and dispute resolution talent. As of March 2024, we had over 1 600 practising barristers, over 11 000 practising solicitors and over 1 400 registered foreign lawyers from 32 different jurisdictions. There are over 920 Hong Kong solicitors' firms and over 70 registered foreign law firms. Many of these lawyers are experts experienced in international arbitrations.

What I wish to highlight is that many of the Hong Kong legal practitioners or advocates who take part in international arbitration possess unique characteristics and advantages that can hardly be found elsewhere. Such characteristics and advantages are of particular relevance and importance in arbitrations involving the Mainland where, for example, the parties are Mainland legal entities such as a state-owned enterprise, the

main witnesses are Mainland businessmen or some of the legal issues are related to the Mainland law. First, in terms of language proficiency, most Hong Kong legal practitioners can read and write both English and Chinese, as well as speak English, Cantonese and Putonghua. Second, they have first-hand knowledge and experience in, and are familiar with, both Western and Chinese cultures, both social and business. Moreover, while Hong Kong legal practitioners practise the common law, many of them have expertise and experience in handling issues involving Mainland elements. In particular, since 2020, the Central Authority has launched a pilot scheme permitting eligible Hong Kong and Macao legal practitioners to practise civil and commercial matters in nine Mainland cities in the GBA after passing the GBA Legal Professional Examination, and completed some practical training. Up to date, about 1 500 Hong Kong and Macao lawyers have passed the examination and about 360 have obtained the practice licence. Those who have passed the examination had obviously acquired a sufficient degree of knowledge about the Mainland law, in particular, its civil and commercial law. And many of them are indeed active participants in international arbitrations in Hong Kong.

While we are confident that Hong Kong has sufficient legal talent, we always welcome overseas professionals to take part in arbitrations in Hong Kong. Our Arbitration Ordinance places no restrictions on the nationalities or qualifications of arbitrators or legal representatives that clients may choose from. A Pilot Scheme was introduced to further facilitate the participation of non-Hong Kong residents in arbitral proceedings on a short-term basis by offering immigration convenience. It now enables all visitors to come and participate in arbitral proceedings in Hong Kong without any employment visa as arbitrators, counsel, and factual or expert witnesses. Since the inception of the Pilot Scheme until February 2024, visiting facilitation has been enjoyed by 84 arbitral participants, benefitting 27 arbitral proceedings in Hong Kong.

The facts that Hong Kong has a strong pool of advocates, and adopts an open policy welcoming advocates from other jurisdictions to come, also make Hong Kong an ideal place for capacity building. Advocacy training for law students and newly qualified lawyers is, without doubt, of crucial importance in order to maintain the quality of legal service in Hong Kong. In this respect, the HKATC (Hong Kong Advocacy Training Council) has been playing an indispensable role. The Department of Justice is a close partner and supporter of the HKATC. Since June 22, 2020, the HKATC has become a tenant of the Legal Hub at the West Wing of the Justice Place, which is where the Department of Justice is situated, thereby enjoying the use of those premises free of rental.

In addition, the Department of Justice has been co-operating with the HKATC in providing more practical training opportunities to less experienced solicitors and barristers in private practice. Since September 2021, the HKATC has been providing training, including lectures and mock trials, for young barristers and solicitors to enhance their advocacy skills. Attendees with good performance at the mock trials may then apply for participation in an assessment conducted by the Prosecutions Division of the Department of Justice. They will be arranged to undergo a two-week attachment at the Hong

Kong Magistrates' Courts. Upon completion of the attachment, the Department of Justice will decide on the attendees' suitability for inclusion in our Magistrates' Courts Fiat Counsel List. In fact, many young lawyers have already passed the assessment and were admitted to this list. In addition, the HKATC will organise advocacy seminars to our colleagues and other members of the legal profession. For example, very recently, on March 22, 2024, the HKATC organised a seminar entitled "How to make appeals appealing?", which was extremely well received. I would like to take this opportunity to express my gratitude to the HKATC.

Apart from providing advocacy training in Hong Kong, I note that the HKATC has provided such training overseas. While one may think that overseas jurisdictions interested in advocacy training would mainly be other common law jurisdictions, it is important to note that there is an increasing interest and demand in advocacy training in Mainland China. Speaking from my own experience, I had taken part in many legal forums or conferences on the Mainland in recent years. The most popular programme was invariably a mock arbitration in which Hong Kong barristers and solicitors would demonstrate cross-examination skills. Although the Mainland adopts an inquisitorial civil law system, there are indications that it is considering to incorporate essential features in the adversarial common law system in appropriate circumstances. For example, on January 18, 2024, the High People's Court of Guangdong Province published a set of guidelines concerning oral examination of witnesses from Hong Kong and Macao in commercial cases involving Hong Kong and Macao. They provide that the oral examination of a witness may be conducted by the parties rather than by the court, and shall consist of examination in chief, cross-examination and re-examination as in common law jurisdictions with some modifications. Furthermore, as a matter of fact, more and more Mainland lawyers take part in international arbitrations. Hence, it is most natural they would like to sharpen their advocacy skills.

On the other hand, under the Belt and Road Initiative, many countries along the Belt and Road have expressed keen interests in receiving trainings concerning international law and practice. These countries include developing countries in Central Asia and Africa for example. My impression is that many legal practitioners coming from those countries would be very interested to acquire advocacy skills.

In order to strengthen Hong Kong's status as an international legal service centre, and to promote Hong Kong as a centre for legal capacity building in the Asia-Pacific region, one of the new initiatives of the Department of Justice announced in the Policy Address of the Chief Executive last October is to establish an International Legal Talents Training Academy in Hong Kong.

As a first step, a dedicated office and an expert committee will be set up within 2024. The Academy will regularly organise practical training courses, seminars, international exchange programmes, etc, to promote exchanges among legal talent in different jurisdictions. We expect that the programmes to be organised by the Academy will cover a wide range of legal subjects, such as international arbitration and advocacy skills. We would definitely need legal practitioners and advocates from around the world who

have the expertise and experience in international law and practice to assist in the training programmes.

In this regard, we can see the potential of synergy between the work of the IATC and the Academy having regard to the IATC's outstanding record of offering advocacy training around the globe. We would look forward to exploring further co-operation and collaboration between the IATC, and the Academy under the Department of Justice.

As I said at the beginning, I am very pleased to see so many overseas participants attending this Conference. While you might have heard and read many things about Hong Kong, as one always says, "Seeing is believing." I am also very excited that, apart from this important Conference, other important international legal events are coming up. I shall give two examples. First, the biennial 26th International Council for Commercial Arbitration Congress (ICCA Congress) will be held in Hong Kong from May 5 to 8, 2024. As the largest biennial arbitration conference worldwide, it brings together experts in dispute resolution to discuss important issues and developments in international arbitration. The theme of the ICCA Congress 2024 is "International Arbitration: A Human Endeavour". Second, in late November this year, the 11th International Association of Prosecutors Regional Conference will be held in Hong Kong, with the theme "Effective prosecution service in the technological age". I look forward to seeing you all again in these upcoming events.

While we come from different jurisdictions, as advocates, I'm sure we share the same core value and we have the same common mission of promoting the rule of law, not just in our respective jurisdiction, but also in other jurisdictions. Hong Kong's success in the past and in the future depended and will depend very much on whether we can maintain and enhance our rule of law, both as a matter of perception and as a matter of reality. Now, there is no doubt that Hong Kong is facing a lot of challenges and issues, and many of them are attributed to factors beyond our control, for example, the complexity of geopolitical situation. As the Secretary for Justice, it is my duty and I have given my words that I will do my best to defend and promote rule of law in Hong Kong. But this is not a mission that can be accomplished by one single person, not even by all the judges and all the lawyers in Hong Kong. We require the trust and confidence, we require and need the support and assistance of friends from overseas who share the same common core value. And this is why I am very grateful that so many friends come to this Conference. And I think this is what friends are for, we have to help each other to make this world a better world, based on the rule of law.

Lastly, I would like to thank the IATC, the sponsors, supporting organisations and all speakers again for their contributions and efforts in holding this meaningful and successful Conference in Hong Kong. I wish you all very fruitful exchanges and discussions in the sessions to come; and for those of you coming from overseas, a most enjoyable stay in Hong Kong. I heard that many of you went to the Rugby Sevens; some had a good time in Lan Kwai Fong and Hong Kong Club. But if you still have a bit of time after the Conference, I would strongly advise you to go to some of our museums. We have great museums, the M+ contemporary arts museum, the Hong Kong Palace Museum,

the Hong Kong Museum of Art and the Hong Kong Museum of History. There are very special exhibitions going on showing important art pieces and national treasure in China that you cannot see easily elsewhere. And for Hong Kong, we have a lot of to offer other than hearing from Russell and me, and more than Lan Kwai Fong and Hong Kong Club. So thank you very much. I look forward to seeing you again. Thank you.