

Speech by SJ at Business of Intellectual Property Asia Forum 2020 Concurrent Breakout Session (English only)

Following is the video speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the Business of Intellectual Property (IP) Asia Forum 2020 Concurrent Breakout Session: Hong Kong's unique role in IP creation, protection and enforcement as well as dispute resolution in GBA and beyond held online today (December 4):

Distinguished guests, ladies and gentleman,

Introduction

2020 is a challenging year in light of the pandemic but it is also an opportunity for innovation and technology to show the unique role it can play in these times. Indeed, this is the first virtual session talking about the unique role of Hong Kong in IP creation, protection and enforcement as well as dispute resolution in the Guangdong-Hong Kong-Macao Greater Bay Area (GBA) and beyond. With a strong legal foundation and being the only common law jurisdiction in China, Hong Kong has a unique role to play in the creation and protection of IP rights and to provide a framework for dispute resolution. I am sure we will learn a lot from our distinguished panellists in this insightful session.

At the 2019 thematic breakout session, I emphasised on the resilience of Hong Kong, notwithstanding the turmoil that we experienced. In June 2020, the National Security Law was passed, promulgated and came into effect in Hong Kong, bringing stability and order back to our society. It enhances certainty and predictability, thereby encouraging business activities. Contrary to the ill-informed comments, let me assure you that the National Security Law reinforces and implements the policy of "one country, two systems", explicitly contains provisions that protect human rights and uphold principles of rule of law, and in no way affects the judicial independence of Hong Kong. As the Chief Justice stated in a statement on July 2, 2020, "in the handling or determination of any legal dispute, only the law and legal principle will be considered". This is also echoed in the Court of First Instance's judgement of *Tong Ying Kit v HKSAR*, where Judges (Anderson) Chow and (Alex) Lee remarked:

"(t)here is no proper or sufficient basis to contend that, in relation to cases concerning offences under the National Security Law, the Chief Executive or the Government is in a position 'to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists', or that the liberty of any member of the Judiciary in Hong Kong 'in adjudicating

individual disputes and in upholding the law and values of the constitution' is, or will be, interfered with by the Chief Executive exercising her power under Article 44 ... It must be borne in mind that a judge is bound by the Judicial Oath taken by him upon his appointment, which requires him to, inter alia, discharge his judicial duties in full accordance with the law and without fear or favour."

Hong Kong's Legal Framework on Intellectual Property

According to the World Intellectual Property Organization (WIPO), in 2019, "the international patent filings via WIPO's Patent Cooperation Treaty (PCT) System exceeded by around 3.3 million, representing a 5.2% growth over 2017 figures". Asia-based applicants accounted for more than half of all PCT applications. WIPO also notes that "Mainland China has become the biggest user of the PCT System that helps incentivise and spread innovation". In the Mainland alone, applications filed increased from 276 in 1999 to 58,990 in 2019, a 200-fold increase in 20 years.

Since IP increasingly finds itself in the centre of global competition, policy making for the protection, creation, exploitation and enforcement of IP rights have now become critically important around the world. In this connection, Hong Kong has a robust legislative framework for the protection of all forms of IP rights. Our local laws fully comply with the international regime and standard, including the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights and a number of WIPO treaties.

As the infringement of IP rights is one of the major concerns across many industries, we recognise that an efficient and effective IP dispute resolution infrastructure, including arbitration, mediation and litigation, is essential for IP protection and enforcement. The arbitrability of IP disputes has been confirmed in the Arbitration Ordinance. The "Mediate First" Pledge also encourages amicable settlement before resorting to adversarial processes.

For litigation, an IP Specialist List in the Court of First Instance of the High Court was established in May last year. Interlocutory applications and trials for IP disputes will now be listed before the judge in charge of the IP List or other designated judges.

On June 19 this year, the Trade Marks (Amendment) Ordinance 2020 (the Amendment Ordinance) came into force, providing a basis in Hong Kong law for the implementation of an international registration system of trade marks under the "Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks". This Amendment Ordinance marks a legislative milestone and following up on that, further preparatory work to implement the system is being carried out. This includes formulating and enacting the detailed procedural rules for such implementation and setting up the necessary information technology system, and drawing up detailed workflows for processing various cases under the international registration system. We plan to implement the international registration system in the Hong Kong Special Administrative Region (HKSAR) in 2022 or 2023 at the

earliest.

Co-operation with the Mainland

One cannot overstate the importance of IP creation and protection in the context of the GBA. In the "14th Five-Year Plan for National Economic and Social Development and the Long-Range Objectives Through the Year 2035", China has attached unprecedented importance to science and technology innovation, taking innovation as the primary driving force of development. This latest plan proposed for the first time to develop the GBA into an international hub for scientific and technological innovation, on par with Beijing and Shanghai. The 2019 Outline Development Plan for the GBA has also pledged strong support for the establishment of Hong Kong as an Asia-Pacific centre for international legal and dispute resolution services.

Hong Kong has concluded eight arrangements with the Mainland in civil and commercial matters, including two arrangements signed last year and the supplemental arrangement on mutual recognition and enforcement of arbitral awards signed last week.

Of particular relevance is the "Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR", concluded on January 18, 2019, between the HKSAR Government and the Supreme People's Court of the PRC. This Arrangement makes reference to the Judgments Project of the Hague Conference on Private International Law, and seeks to establish a bilateral mechanism for the reciprocal recognition and enforcement of judgments in civil and commercial matters. The Arrangement also covers judgments involving intellectual property rights, which goes beyond the scope of the Hague Judgments Convention. The Arrangement will reduce the need for re-litigation of the same disputes in both places and offer better protection to the parties' interests and will be implemented by local legislation in Hong Kong.

On October 1, 2019, the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR" came into effect, making Hong Kong the first and only jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitral proceedings administered by eligible arbitral institutions would be able to apply to the Mainland courts for interim measures. The availability of interim measures are particularly important in IP related disputes.

Last Friday, the "Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR" was signed. It amends the 1999 "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR" in four aspects, namely: (i) expressly including the term "recognition" when referring to enforcement of arbitral awards; (ii) providing that a party may apply for preservation measures before or after the court's acceptance of an application to enforce an arbitral award for greater certainty; (iii) aligning the scope of arbitral awards with the prevalent approach of "seat of arbitration"; and (iv) removing the current restriction and allow parties to make simultaneous

applications to both the courts of the Mainland and HKSAR for enforcement of an arbitral award.

These arrangements have given us comparative advantage in the provision of legal and dispute resolution services when compared to other jurisdictions, and enhances Hong Kong as a seat of arbitration for Mainland-related disputes.

Initiatives in the GBA

I would now like to share with you some of our recent initiatives in the GBA which would bolster Hong Kong's unique role in the creation, protection and enforcement of IP rights.

The amendment to the Shenzhen Special Economic Zone Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone Regulations in August this year allows Hong Kong enterprises registered in the Qianhai Cooperation Zone to choose Hong Kong law as the applicable law in civil and commercial contracts, even in the absence of any foreign-related elements.

Building on such progress, we are now exploring the possibility of introducing an initiative to allow wholly owned Hong Kong enterprises (WOKEs) to adopt Hong Kong laws and choose for arbitration to be seated in Hong Kong. We hope that WOKEs registered in the GBA, in the absence of any foreign-related elements, may choose the law of Hong Kong as the applicable law when entering into civil and commercial contracts, and choose Hong Kong as the seat of arbitration. If implemented, this will attract more investment, via Hong Kong, into the nine GBA cities for production and of course benefit Hong Kong as well.

Importantly, we are grateful for the support of the Central People's Government in materialising a special policy for the GBA. Hong Kong and Macao legal practitioners are now able to obtain qualifications through a special examination to practise Mainland law regarding specified civil and commercial affairs in the nine Pearl River Delta municipalities in the GBA. The Department of Justice will be working with the Ministry of Justice to devise a training course in this respect later this month.

I believe that these initiatives would not only create more business opportunities for Hong Kong's legal and dispute resolution services sector, but it will also facilitate cross-border co-operation in the area of the rule of law as well as international legal and dispute resolution services, thereby promoting collaborative development of the GBA.

Online Dispute Resolution and LawTech

Lastly, I would like to share with you some recent developments on online dispute resolution (ODR) in Hong Kong.

On November 20, 2020, the APEC Economic Leaders adopted a declaration, which, among others, encouraged "the use of digital technology to resolve cross-border business-to-business disputes". In April this year, Hong Kong has officially opted into this APEC ODR Framework.

In line with this Framework and in anticipation of an upsurge of disputes arising from or relating to COVID-19, the Government introduced the "COVID-19 ODR Scheme", operated independently by eBRAM Centre, to provide the general public and businesses, speedy and cost-effective means to resolve low value disputes through negotiation, mediation and arbitration.

Further, the Department of Justice Project Office for Collaboration with UNCITRAL has officially opened in the Hong Kong Legal Hub on November 2 this year to work on the greater use of technology in international trade, including in the field of ODR.

As noted in the 2020 Policy Address, we will actively explore the development of the Hong Kong Legal Cloud, a state-of-the-art online facility equipped with advanced information security technology, to provide secure, reliable and affordable data storage services for the local legal and dispute resolution sector.

Concluding remarks

Hong Kong has a unique role to play in all matters relating to intellectual property, including its creation, protection, enforcement, as well as dispute resolution processes, both in Hong Kong and in the GBA. With that, may I conclude by wishing you good health in this new normal, and I look forward to hearing from our distinguished panellists on this subject. Thank you very much.