Speech by The Honourable Chief Justice Geoffrey Ma at the Hong Kong Forum: 60th Anniversary of the New York Convention 20 September 2018, Conrad Hotel Hong Kong

1. I am much honoured and it gives me great pleasure to make some Opening Remarks in this Forum to celebrate the 60th Anniversary of the New York Convention.[1] The Convention was adopted by diplomatic conference on 10 June 1958 and came into force a year later on 7 June 1959.

2. Briefly put, the greatest achievement of the Convention has been, spanning every continent, to effect with relative ease the recognition and enforcement of arbitration agreements and arbitral awards. There are now 159 Contracting States to the New York Convention. The Convention applies to Hong Kong: it has applied since

[1] The full title is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

21 January 1977. In June 1997 (prior to the resumption of the exercise of sovereignty over Hong Kong) the Secretary General of the United Nations was notified by both the People's Republic of China and the United Kingdom of the continued application of the Convention to Hong Kong.

3. In a week's time, I shall be attending a commercial law conference at which I shall be speaking on arbitration. It will take place at the Daniel Patrick Moynihan Courthouse of the Southern District of New York. On 24 July this year, a reception was held there also to celebrate 60 years of the New York Convention. The words of one of the speakers, Nancy Thevenin, the General Counsel to ICC USA were most apt:-

> "There is an elegance to the fact that this sparsely worded document has been one of the mightiest tools

employed by the international business community to foster trade and investment worldwide."

4. The United Nations Commission on International Trade Law (UNCITRAL), which was established after the New York Convention came into effect, regards the Convention as one of the most important UN treaties in the area of international trade law and the cornerstone of the international arbitration system. This was echoed by Resolution 62/65 adopted by the General Assembly of the UN on 6 December 2007.

5. So why has this "sparsely worded" Convention been so influential and why is it being celebrated all over the world this year? Obviously, in the area of the enforcement of awards, the impact of the Convention has been immense but, before

dealing with this important facet, there are two points which ought to be highlighted.

6. First, the Convention does not operate in isolation. Even though in practice it can be seen very much as a self-contained, autonomous instrument, it is intended to operate in tandem with other applicable treaties or conventions. Article VII(1) ensures that the Convention is to be read and applied consistently with other multilateral or bilateral agreements. The main objective in terms of applicability is to give precedence to whichever instrument is the most favourable to recognition and enforcement. Not many international conventions are quite so forward-looking nor magnanimous.

7. Secondly, notwithstanding that the Convention is intended to be applied in a uniform – and therefore consistent – manner by Contracting States, it allows each State

the freedom to determine its own procedures in the implementation and application of its terms. The leeway given to States is not confined to matters of procedure. In relation to one of the possible defences to enforcement proceedings on an award subject to the New York Convention, namely the public policy defence,[2] the relevant "public policy" is that of the State or territory in which the enforcement proceedings are brought, rather than some broad, vague concept; accordingly in Hong Kong, the relevant public policy is that of Hong Kong.[3]

8. The underlying theme of the Convention, reflected now in the legislation and policies of most jurisdictions, is the recognition that arbitration represents the primary alternative dispute resolution institution to the courts. This is based on the notion that if parties to a contract (usually a commercial

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[2] Where the "recognition or enforcement of the award would be contrary to the public policy" of the place of enforcement (Article V(2)(b)).

[3] See *Hebei Import and Export Corporation v Polytek Engineering Co. Ltd.* (1999) 2 HKCFAR 111, at 139C-D.

contract) have agreed a means of resolving disputes arising thereunder, they should – for better or worse – be left to their choice of forum.[4] The policy here is commonly referred to as "party autonomy".

9. It is sometimes said that the New York Convention represents an attempt to curb judicial intervention in arbitration proceedings. This observation is true to the extent that, compared with the ability (and willingness) in the past for courts to intervene, the Convention does restrict the ability of the courts to interfere with the arbitral process. However, I think it would be an exaggeration and a distortion to suggest that the role of the courts has now been relegated merely to one of "serving" the arbitral process or of "supporting" it. There are hints of this when I hear questions along the lines of whether

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[4] In the applicable legislation in Hong Kong, the Arbitration Ordinance Cap. 609, s 3 sets out the objects and principles of the statute. Section 3(2)(a) states "that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved."

the courts of any given jurisdiction are "arbitration friendly" or whether they can be trusted to "support arbitration".

10. The truth is that the courts are a fundamental part of the arbitral process. Their role has been described in the following way in a leading textbook: "The role of the courts is confined to occasions where it is obvious that either the arbitral process needs assistance or that there has been, or is likely to be, an obvious denial of justice." [5]

11. The references just made to the rendering of assistance to arbitral proceedings and in particular to justice are amply demonstrated by the New York Convention. Once an arbitration gets underway, two crucial stages are reached: the determination of the dispute culminating in an award and, on

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[5] *Arbitration in Hong Kong: A Practical Guide* (4th edition) (Sweet and Maxwell) in the Chapter "Ways to Resolve a Dispute" at para. 4.148 (David Bateson and Edmund Wan).

the assumption that the award results in liability being established, the enforcement of that award. As far as the determination aspect is concerned, this is left to the arbitral panel and the courts have little involvement here. However, the courts are very much involved in the enforcement part. The New York Convention provides a relatively simple means for the enforcement of arbitration awards. This is to be contrasted with the position before the Convention came into effect when recognition and enforcement of foreign arbitral awards was possible under the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.[6] Under the Convention, the intention is that enforcement will be permitted with relative ease in Contracting States unless (and this is an important proviso) one of a limited number of situations exists enabling a party to resist

[6] In *Russell on Arbitration*, in the 16th edition of that well-known practitioner's textbook (1957, just prior to the Convention), the authors described the 1923 Protocol as "obscure" (at Pg. 281).

enforcement. I have already earlier mentioned one such ground, being that it would be against public policy to enforce the award. The grounds to enable the enforcement of an award to be resisted are limited, but they are all situations in which it is universally recognized, at least recognized by the Contracting States, that justice requires intervention. This is where the courts come into the picture. The responsibility thrust on the courts here is not to be lightly assumed or discharged.

12. And justice is the key. There is no question of the courts acting as some sort of "rubber stamp", albeit that the starting point must be to enforce arbitral awards unless one of the stated objections is made out. Even where one of the objections is established, this does not mean that the court will automatically refuse to enforce the award. The court will closely analyse the situation from a justice and fairness point of view. In the *Hebei* case, to which reference has already been

made, the Court of Final Appeal in Hong Kong made references to concepts such as estoppel and *bona fides*.[7] In a recent case again determined by the CFA,[8] reference was made to the need to have regard to the overall justice of the case and to avoid a rigid, mechanistic approach.[9] Thus, the New York Convention, while obviously recognizing the importance of arbitration and the role it plays in promoting international trade, equally acknowledges the critical role played by the courts in this context.

13. The harmonizing effect of the Convention was perhaps something that could not have been anticipated 60 years ago. Far from being outdated or overtaken by newer instruments, the New York Convention forms the basis of the arbitration legislation of many jurisdictions. The UNCITRAL

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7 At 137A-C, 138F-G.

8 *Astro Nusantara International BV v PT Ayunda Prima Mitra* (2018) 21 HKCFAR 118.

9 At paras. 53, 71.

Model Law borrows many of its core concepts from the Convention. In Hong Kong, the enforcement provisions of the Convention provide the template for the enforcement of all awards other than Convention awards.[10]

14. It is right that the achievements of the authors and contributors to the New York Convention in 1958 should today be acknowledged. But the ethos of the Convention should not be forgotten either as we look ahead to improve the system of alternative dispute resolution. In what can be described as the preamble to the Convention (in what is called the Final Act), the wish was expressed that the United Nations would take steps to encourage further study of measures to increase the effectiveness of institutions in the settlement of private law disputes. As we have seen in the development of in particular

[10] Including awards from the Mainland, Macao and from other jurisdictions: see Part 10 of the Arbitration Ordinance.

institutions such as mediation, this ethos is ultimately the legacy of the New York Convention.

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