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LITIGATION CONFERENCE 2013

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Opening Address as delivered by Steven Chong S.C

The Attorney-General, Singapore

Singapore's Litigation Landscape: A Changing Constant

Justice Lee

Ladies and gentlemen

Introduction

1 Thank you for inviting me to deliver this morning's opening address. I am heartened to see such an encouraging attendance at the inaugural Litigation Conference 2013, the first of what I am sure will be many like conferences to come.

2 Today, you will hear from esteemed speakers on a variety of contemporary issues in litigation practice. First, developments in electronic or e-litigation. Second, challenges facing cross-border litigation. Third, latest developments in local jurisprudence by the Court of Appeal. Finally, the future of arbitration as against litigation. I propose to venture some general thoughts on each of these areas so as not to encroach upon the more detailed and erudite views that will be covered by the distinguished speakers.

Litigation in the Digital Age

3 Let me begin with technology and litigation in the digital age. In his Keynote Address yesterday, Lord Saville observed that the use of information technology, or "IT", has transformed both litigation and arbitration for the better. Just last month, we saw the introduction of 'eLitigation' in our courts, taking the use of technology in litigation to a whole new level. I can see at least two key challenges facing electronic

litigation. First, electronic information will continue to multiply exponentially and will become the stress point in litigation if we do not know how to manage it. We do not need a crystal ball to see that. For a profession accustomed to trusty tools as the pen and paper, there is a brave new world waiting. We might still be some way from achieving the fabled "paperless office", but whereas formerly there was one cabinet full of paper records, now there is the equivalent of one thousand full cabinets, contained in a device smaller than my palm. It is also remarkably easy to create clones of the same information, disseminate them instantaneously and modify any number or type of digital document. This is a sea change.

4 The IT revolution has also brought about an explosion of information storage. We are generating stored data at a runaway rate due in part to the permanence of electronic document storage. Consider that the first hard drive produced in 1956 stored 5 megabytes in data. A commercially available desktop drive today stores 3 terabytes. In the time span of less than one human lifetime, data storage has increased by a factor of more than half a million. Moving beyond the physical realm, there is also the 'cloud'. I am not referring to some weather or storm system. It is a way of storing information in a remote virtual pool rather than a hard drive. With cloud storage, we may access data from any location via internet access. Can this help us weather the information storm? Data security is a growing problem, to the point where we ignore the dangers of unauthorised access at our own peril.

5 Electronically stored data in the form of email, instant messages, voicemails, videos, photographs and the like – easily stored, easily transmitted, and just as easily destroyed – will become pivotal in many disputes. They form the digital footprint we leave when we interact with our digital environment. This brings me to my second point concerning electronic, or e-discovery.

6 Many lawyers, including myself, find discovery a perennial headache. With e-discovery, I think it escalates to a full-blown migraine. Discovery is one of the most expensive but a hugely important process flowing from litigation of any form; e-discovery, even more so. With information explosion, discovery will become

prohibitively expensive if we cannot overcome the problem of finding a needle in the ever-growing proverbial haystack. We need radically new approaches to e-discovery on all fronts, especially on search, retrieval and review. Otherwise we may run out of staff to analyse data before we run out of data to analyse. I was therefore not surprised to hear Lord Saville's remark in his Keynote Address that: "Apart from war, litigation is the most expensive form of dispute resolution."

7 The Americans are turning to the concept of computer-assisted review. This is technology that can automatically group and organise potentially relevant documents with limited human input. A finely tuned computer algorithm is used to predict how documents should be stored, sorted, ranked and classified, optimising review time and allowing lawyers to look at documents as a collective whole.

8 Some in the profession have expressed their reservations on how machines can predict the relevance of documents better than us. With any technology-assisted process, man arguably plays an even more important role than before. Ultimately the quality of a computer's output is as good as the quality of its input, which is in turn determined by the man who defines instructions fed to the computer.

9 The legal industry has traditionally been more conservative about adopting new technology. Quite often, we prefer to wait for precedents before buying in. I call on lawyers to keep an open mind on the emergence of new tools and technological processes. With the amount of information we face, lawyers need to rethink how search and review may be performed beyond the familiar page-by-page manual review.

10 This is not easy, and we might not get it right initially. For the smaller law firms and sole practitioners, the challenge is even greater because of the costs associated with the acquisition of technology. This is even more acute for litigants in person as it may effectively deny them access to justice, as alluded to by our Chief Justice yesterday in his Opening Address. For lawmakers and judges, the challenge lies in considering the implications of new tools, be it search and review techniques or other systems. The danger of technology overwhelming methodology is a real one. From time to time, we

might find it useful to remind ourselves that the most complex of technology is often founded upon the most simple of concepts.

Cross-Border Litigation: Practice, Trends and Strategy

11 I turn next to cross-border litigation. Technology has enabled international transactions to transcend national borders. In this regard, the Internet is instrumental. I can do no better than quote then-Chief Justice Spigelman of New South Wales, who was persuaded that the Internet is the silk road of today. At the Second Judicial Seminar on Commercial Litigation held in Hong Kong in 2010,[1] CJ Spigelman agreed with the observations of a law academic, who had earlier written:

> "The Silk Road linking the ancient world's civilisations wound through deserts and mountain passes, traversed by caravans laden with the world's treasures. The modern Silk Road winds its way through undersea fiber optic cables and satellite links, ferrying electrons brimming with information. This electronic Silk Road makes possible trade in services heretofore impossible in human history. Radiologists, accountants, engineers, lawyers, musicians, filmmakers, and reporters now offer their services to the world, without boarding a plane ... Like the ancient Silk Road, which transformed the lands that it connected, this new trade route promises to remake the world."

12 Yet, the world today is not truly borderless. Cross-border activity, and consequently litigation, may have increased exponentially in recent years. Notwithstanding, borders defining our nations remain significant in law. Legal systems have been and continue to be a source of uncertainty in cross-border trade and investment. I would like to highlight three features of cross-border litigation in particular. First, uncertainty over one's ability to enforce legal rights. Second,

[1] The Hon J. J. Spigelman, "Cross Border Issues For Commercial Courts: An Overview", address to the Second Judicial Seminar on Commercial Litigation, Hong Kong, 13 January 2010.

unfamiliarity with foreign legal processes. Third, increased scope for foreign jurisprudence to impact domestic laws.

13 Let me start with uncertainty over enforcement of legal rights. Where should one litigate? Can a foreign judgment be recognised and enforced locally? Regardless of the complexity of any transaction, what matters at the end of the day is whether the parties can enforce their rights. Forum selection affects enforcement of rights. Recognition of foreign judgments in turn begets forum selection. This is an evergreen aspect of cross-border litigation. Disputes over the most appropriate forum in which to determine a dispute have intensified across many jurisdictions. Recognition of foreign judgments also diverges considerably within the Asia-Pacific region.[2] The prospect of protracted and expensive litigation at both the front and back ends of litigation remains real and continues to be an obstacle in borderless transactions.

14 Uncertainty over enforcement spring in part from unfamiliarity with foreign legal processes. This is my second point. Familiarity of legal processes goes beyond pure knowledge of black letter law. The laws of a nation are a product of its economy, tradition, culture, institutions and history. They are part of a functional whole and must be understood in that context. Even among jurisdictions which legal systems are rooted within the same tradition, be it common law or civil law, differences in legal systems go deeper than variations in statute books or published judgments. I will talk more about the influence of foreign judgments on domestic law shortly.

15 What does this mean for litigants and litigators? Lawyers must recognise that influential players in the global market now look beyond intra-national advice. They expect comparative advice on the nuts and bolts of litigation, including its exit alternatives such as arbitration. They also expect such advice to be provided early on in the day and in a comprehensive manner.

[2] See also the Hon J. J. Spigelman, "Transaction Costs and International Litigation", address to the 16th Inter-Pacific Bar Association Conference, Sydney, 2 May 2006.

16 For the providers of legal services, the complexities inherent in cross-border litigation make for an extremely lucrative market. We are seeing an ever-growing number of lawyers concentrating on cross-border litigation and arbitration. In England, McLachlan observed that what was once a "dusty corner in legal scholarship" [3] has since morphed to become a quintessential discipline of law. But those truly well-versed in the multi-faceted aspects of cross-border litigation and arbitration remain a select few. The challenges are abound. It is more than being conversant in the language of a foreign country – language of course often presents itself as the foremost barrier. The greater task lies in discerning legal traditions and trends from text and context. This is a skill which would bestow upon one an insuperable advantage over another.

17 As lawyers of tomorrow, we have much to do. First, future specialists in cross-border litigation will need to know considerably more. In particular, a clear understanding of the intricacies of civil law systems is necessary if we wish to build expertise in comparative law. With the exception of Malaysia and Hong Kong, the legal systems of much of Asia are strongly rooted either in civil law or mixed systems with a civil law tradition. Myanmar's legal system, for example, uniquely combines both the civil law and common law systems. It is vital that we have a firm understanding of what makes one legal system differ from another because quite often, the procedural and substantive differences inherent in the different legal systems can provide better options and more effective remedies than the domestic court. I describe this as strategic forum selection. Others have described it as forum shopping. To that end, regionalising legal practice should help build expertise and foster a deeper understanding of what it means to practice within a civil law system. I also encourage our law scholars to continue contributing to local literature on comparative legal traditions, taking into account issues relating to legal history, national sovereignty and international relations. I put forward these ideas for discussion and consideration.

18 Second, future specialists in cross-border litigation should also be cognizant that the same group of global players I have spoken about – well travelled, well advised –

[3] C. McLachlan, "International Litigation and the Reworking of the Conflict of Laws" (2004) 120 LQR 580, at p 582.

will affect judicial, legislative and executive action wherever they choose to litigate. Let me explain. They will also do so in ways that domestic institutions do not necessarily anticipate. This is my third point. Cross-border litigation will increase the scope for foreign jurisprudence to impact domestic laws, since domestic courts will necessarily have to look abroad to ensure that their decisions are in line with international practice.

Latest Developments in Local Jurisprudence

19 In common with the apex courts of other jurisdictions, our courts have where appropriate embraced foreign jurisprudence in cases involving cross-border elements. However, it is not only in cases with cross-border elements that our courts have welcomed foreign jurisprudence. Significant developments in relation to the law and procedure relating to domestic appeals and reviews show that our courts are generally at ease citing the views of foreign courts. The sources of foreign decisions have also diversified. Whereas we have traditionally relied on English decisions, the growing influence of Australian, Malaysian, Canadian, Indian, Hong Kong, New Zealand, American, and even South African decisions cannot be underestimated.

20 I welcome the reliance by our courts on foreign jurisprudence. First, an indisputable strength of the common law tradition lies in cross pollination of legal ideas and principles. A foreign decision may not be a binding precedent, but it may be used in ways so varied. As Professor Saunders noted, "It may be used to assist to frame the question; to identify options or more generally to survey the field; to support a step in the argument; to suggest an answer; to test a hypothesis; to confirm a conclusion; or to explore the consequences of a particular result."[4]

21 Second, recourse to foreign jurisprudence is reflective of a global perspective. Insulating our legal system on the other hand will, like parochial measures, have adverse effects on a nation's wider economy. Choudhry has this to say: "To cite

[4] C. Saunders, "Comparative Constitutional Law in the Courts: Is there a Problem?" (2006) 59 Current Legal Problems 91, at pp 99-100.

comparative jurisprudence is to demonstrate an educated, cosmopolitan sensibility, as opposed to a narrow, inward-looking, and illiterate parochialism."[5] The manner in which our courts incorporate foreign jurisprudence into local laws is a reflection of its expertise and maturity. It demonstrates an ability to navigate the legal labyrinth of other systems, appraise foreign decisions within the context of Singapore's unique circumstances, before assimilating them into our laws without blind servility. It is this competence, coupled with robust judicial independence, the efficient administration of justice and the rule of law, which makes Singapore an attractive forum for cross-border litigation and international commercial arbitration.

22 When relying on foreign jurisprudence, there are two areas which litigators could do well not to lose sight of. First, it is important to understand the legal culture from which those decisions emanate. Second, it is all too easy to make assumptions on how other legal systems operate. The common law tradition places considerable emphasis on history, context and purpose. In this regard, lawyers should not forget, for example, that European Community laws continue to have a phenomenal impact on the development of English law, especially public law. Lawyers should be conscious of this trend when relying on UK decisions.

Litigation, Arbitration and Beyond

23 I come finally to arbitration. The future of litigation depends not only on litigation, but also its competitors, arbitration being the foremost alternative. Any discussion of the future of either must necessarily consider both.

24 Singapore has over the years cemented its position as one of the leading arbitral capitals of the world. The figures of the SIAC[6] CEO's Annual Report 2011 attest to growing confidence in our arbitral institutions.

[5] S. Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law" in *The Migration of Constitutional Ideas* (Cambridge University Press, 2007), at p 4.
[6] Singapore International Arbitration Centre.

25 Over the years, I have been active in litigation and arbitration as counsel, Judge and now Attorney-General. From my own experience, the advantages of arbitration cannot be ignored. This is especially so in the area of enforcement, which I have mentioned is a common point of contention in cross-border litigation. Arbitration allows parties to fashion their own solution and choose who would resolve their dispute, thereby giving parties greater control over the dispute resolution process. It further allows parties to take their disputes away from the prying eyes of the public. With these, existing commercial relationships post dispute may hopefully be preserved.

26 Where do I see litigation and arbitration heading? Two connected points to frame the discussion. First, the propensity for arbitration to incorporate characteristics of litigation. Scholars write about the "judicialisation" of arbitration. They point to the association of arbitration with procedural intricacy and formality, features native to litigation. They also observe that arbitral awards are more often subjected to judicial intervention today than before. Second, and ironically, the assimilation of some preferred features of arbitration into litigation. Case management, specialized judges with industry-specific knowledge immediately come to mind. Just as scholars debate about the "judicialisation" of arbitration, they too deliberate about the "arbitralisation" of litigation. This is a debate which has generated much interest.

27 Yet, at the heart of it all, the debate reinforces the symbiotic relationship between litigation and arbitration. And while the choice between arbitration and litigation may have become more complex than ever, the most important difference between the two, and therein lies the central value of arbitration, has never changed. It is neither speed, nor expertise, nor privacy, nor economy. It is the option of customisation. Lawyers when advising clients on the choice of dispute resolution must address their minds as to why one option is preferred over the other and customize a fitting solution for their clients. Both arbitration and litigation have their respective strengths and weaknesses. Clients need to know what these are so that they have the full advantage of the choices available, rather than run with a standard boilerplate clause only to realize after a dispute has arisen that the choice was ill-informed.

Concluding Remarks

28 Today's conference aims to provide a comprehensive overview, as well as a platform for discussion, of these major aspects of litigation which I have spoken about. Yesterday, we had the privilege and honour of hearing Lord Saville share his vast experience. The sessions today will further explore topical issues of litigation and arbitration with an emphasis on practice and procedure. I am confident that you will find the speakers engaging and what they have to say invigorating.

29 Thank you very much.

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