

UNCITRAL Congress
Modernising International Trade Law to Support
Innovation and Sustainable Development
2nd Session
Creative Law-making in the International Trade Law Context
Keynote Speech by the Hon Rimsky Yuen SC
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Distinguished Guests, Ladies and Gentlemen:

First of all, may I express my utmost gratitude to UNCITRAL for giving me this opportunity to open Session 2 on “Creative Law-making in the International Trade Law Context” and to address such a distinguished audience on this memorable occasion in celebration of the 50th anniversary of the establishment of UNCITRAL.

May I also take this opportunity, on behalf of the Department of Justice of the Hong Kong Special Administrative Region (“HKSAR”), to pay tribute to UNCITRAL for its huge contribution. Established 50 years ago as the core legal body of the United Nations system in the field of international trade law, UNCITRAL, through its law-making work in the adoption of legal instruments, has made immense contributions to the harmonisation of international trade law, as well as the sustainable development of the international trade landscape. It would be difficult to imagine how international trade would look like today if UNCITRAL had not been established 50 years ago, and had not produced all those legal instruments which have been making significant impact on international trade. The HKSAR is one of the jurisdictions which has derived substantial benefit from the work of UNCITRAL in various areas, including in the areas of international arbitration and electronic commerce. In particular, the adoption of the 2006 version of the Model Law on International Commercial Arbitration and the New York Convention as the basis of our arbitration

legislation, has been instrumental in consolidating the HKSAR's position as an international arbitration centre.

The theme of this 2nd session is "*Creative International Law-making in the International Trade Law Context*". I may have to start off with a confession. Lawyers, at least many of them and myself included, are not known for creativity. It is therefore not surprising that people generally do not marry "creativity" with law-making (whether domestic or international). Let me, however, attempt to outline a few personal thoughts, perhaps wild thoughts, from the legal policy perspective.

The first immediate question is why do we need to consider creativity in the context of international law-making. Inherent in the word "creative" is the connotation that a new approach is regarded as necessary to address an issue or to solve a problem. Flowing from this are three more questions, namely: (1) what are the issues that we facing; (2) whether the existing approach of international law-making is sufficiently effective to address these issues; (3) and if not, what new approaches may be explored. In addressing these questions, I think we may have to bear in mind three fundamental considerations.

The first consideration is the challenges brought about by advances in technology. I do not think I need to emphasise the speed at which technology has changed our life; nor do I need to highlight the scale of technological changes we are having, or how significant the impact has been on everyone of us. One word can summarise the situation --- "unprecedented" --- the speed is unprecedented, the scale is unprecedented and the impact is unprecedented. However, perhaps the most daunting challenge brought about by technological advances is the unpredictability of what lies ahead of us. On the other hand, international law-making takes time, as it requires consensus by the

international community, which is often not easy to forge. Besides, the unpredictability that I just alluded to adds to the difficulty, since unpredictability often gives rise to lacuna in the relevant legal instrument. The end result is that international law-making through traditional means may no longer sufficiently cope with the challenges that have been brought about by technological advances, and that there is an imminent need to review the *modus operandi* of international law-making.

The second consideration is the significant increase in human interactions. How quick and how much increase in human interactions are we going to experience depends on numerous factors including, the future pace of globalisation, international politics and geopolitics. However, one point is definitely clear: the increase in human interaction will definitely continue, and there is every reason to maintain the momentum, whether in the interest of sustainable development or otherwise. Further, the Belt and Road Initiative put forward by China, with emphasis on connectivity and people-to-people bonding, will give further impetus to human interactions among the 60-plus countries covered by the Belt and Road route and beyond in the years to come.

The third factor is the importance of the rule of law in the international context. Over the years, the concept of the rule of law has gained substantial popularity, whether in jurisdictions applying common law or civil law. However, more often than not discussions on the rule of law are made in the domestic context of individual jurisdiction. Whilst there have been discussions from time to time, perhaps the rule of law in the international context has not received the level of attention that it deserves. Modernisation and harmonisation of international trade law can and should facilitate better flow of international trade and thereby promote global economy. But that should not be the only objective. There should also be the objective of promoting the rule of law at an

international level, so that universally accepted elements of the rule of law, including certainty of law, equality, fairness, and respect for human dignity can be better and more robustly built into our system of international trade.

With these considerations in mind, the next question is what approaches should be explored in future international law-making in the international trade context. I do not profess to have the answer. What I am about to say is an attempt to provide a few thoughts so as to facilitate further discussions, whether at this congress or on some further occasions. Against this backdrop, I would venture to highlight the following key points.

First, at the risk of being unrealistically over-ambitious, I think there may be attraction in exploring the construction of an overall general framework for international trade law. There are, of course, already in existence various legal instruments which are general in nature. Nonetheless, there remains reasons to think that an overall review may not be inappropriate so that an over-arching general framework can be explored.

By way of illustration, one may argue that every transaction of international trade is ultimately contractual in nature, and every contract can be divided into four stages, namely, contract formation, contract implementation, dispute resolution and enforcement of adjudication. Accordingly, one possible approach is to see if an overall general framework, in the form of an appropriate legal instrument, can be devised to set out the guiding principles concerning each of these four stages and which are acceptable to the international community. Such a task will be a daunting one. However, drawing from experience derived from other fields, including the field of human rights and international arbitration where general principles acceptable to the international

community can be distilled, there is cause for optimism to believe that the same can be achieved in the context of international trade.

Second, under the overall general framework, consideration should be given to identify specific areas of international trade which warrant further international law-making, so that specific rules or guidelines can be tailored-made to suit specific needs. In this regard, not only can the relevant existing legal instruments provide a platform to start with, they may be the useful pieces of jigsaw puzzles that would fall into place once the overall framework is constructed.

Third, since there is no supranational tribunal to interpret and enforce such an overall general framework or the specific rules or guidelines created thereunder, there should be a more systematic and institutional mechanism to ensure consistency in interpretation and enforcement. The legal profession aside, understanding on the part of judges is highly relevant. Different interpretation of the same provision in an international legal instrument will be the very antithesis of harmonisation. In this regard, an experience that I can share is the UNCITRAL Asia Pacific Judicial Summit on enforcement of arbitral awards, which first started in 2015 (and which will be held again this October) as a result of joint efforts between the UNCITRAL Regional Centre for Asia and the Pacific and the Department of Justice of the HKSAR. Activities such as the Judicial Summit can facilitate sharing of experience among judges of different jurisdictions, and thereby enhance consistency notwithstanding differences in legal culture.

Irrespective of what approach to be adopted ultimately, one point is sure: international cooperation and collaboration is the key to achieving creative international law-making in the international trade law context. The HKSAR is

grateful for having opportunities to collaborate and cooperate with UNCITRAL. For instance, counsel from our Department have the privilege of participating, as members of the Chinese national delegation, in the work of Working Group III on Online Dispute Resolution, which have since resulted in the adoption of a set of “Technical Rules” last year. My colleague, Dr. James Ding, will provide further details during his presentation on Thursday. On my part, I would like to reiterate that the HKSAR stands ready and very much look forward to working with UNCITRAL in the future on its work on the modernisation and harmonisation of international trade law.

On this note, it remains for me to wish this Session and this Congress every success. Given the eminence and expertise of our panelists, I am sure you will find the discussions to follow stimulating and constructive.

Thank you.