

Arbitration in the next 50 years

Remarks by Anthony Neoh, SC

1. This part of the proceedings allows us to write the history of the next 50 years. This is a rare indulgence. As history is a continuum, let us first take stock of the legacy bequeathed to us by the last 50 years of history:
 - (i) Commercial arbitrations have started as long as international trade began, this would be at least three to four millenia ago, by market organisers, merchant guilds and sundry organisations. In Imperial times, China had a system of merchant guilds from each province operating in many internal ports (usually along the grand canals and rivers, like the Yangtze), where there is arbitration, with the main enforcement tool being ostracization, “cold shouldered”, from commerce until satisfaction. This was very effective then. Not effective nowadays, however, with widespread and multi-market, global international commerce.
 - (ii) The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards solved this problem for the world. This Convention now has 169 Contracting States. This Convention provides an important, and one might say, an indispensable legacy for the future. It sets basic standards for international arbitration, if awards are to be recognised and enforced. These basic standards recognise on the one hand the autonomy given to parties who have contracted for arbitration as the method of resolution of disputes between them and on the other sets due process standards for the conduct of arbitrations, and finally, reserve to the enforcing state, public policy reasons for enforcing awards. These are defined in narrow scope: a matter which in the enforcing jurisdiction cannot be referred to arbitration or a matter against the public policy of the enforcing state. The World has been enriched by the jurisprudence of the many Contracting States and this jurisprudence made by found in the UNCITRAL website.

- (iii) Due process standards were further defined by the UNCITRAL Arbitration Rules (1976, revised in 2010 and 2013, and continually being reviewed by WG Group III - HK organisations are much involved in this work).

The Model Law on International Arbitration (1985) provided guidance to jurisdictions on how they might exercise supervision over arbitrations while respecting the autonomy of the parties. 85 Jurisdictions have adopted the Model Law, including Hong Kong.

- (iv) This international effort spearheaded by UNCITRAL created a rich soil for the burgeoning of international arbitration. With the continuing contribution of UNCITRAL and international legal practitioner bodies such as the International Bar Association and the Chartered Institute, a rich legacy has been bequeathed to the world of arbitration. The Queen Mary College 2021 reported that 90% of their respondents regard international arbitration as their preferred method of dispute resolution.

2. So, arbitration has inherited a very rich and valuable legacy bequeathed to it by the last 50 years. So, what of the next 50 years. The world today is beset with geopolitical problems largely the due to differences in ideologies and material differences between the developed and developing worlds. The gap between the haves and have nots have widened. Technology while solving some of these problems, may also be adding to this melange of issues. Let us look at each of these issues and how they might affect arbitration in the next 50 years:

- (i) Technology: Technology has already changed the modalities of commercial transactions from face to face contact (caveat emptor is no longer applicable).
 - a. Electronic commerce proliferates and contracts are written in Code and not ordinary language. Crypto assets such as Bitcoins, or stable coins, or NFTs are being purveyed in the markets. Digital financial markets with digital money are being formed. All of these require new substantive law, some of which have not yet been created in either

common law or civil law jurisdictions. There is a fertile area of C-B and B to B disputes.

- b. The content of investment disputes will also differ. At present, those disputes are terrestrial. Soon, these disputes will go into outer space because of the advance of technology. That is why we are seeing a proliferation of commercial space companies. The basic international treaty that regulates the exploration of outer space is the Outer Space Treaty of 1966, 112 countries participate, but the Treaty does not regulate lunar and asteroid mining or for that matter, any commercial activity. We have a vacuum which will challenge future public and private disputes.
- c. Artificial intelligence is being developed at high speed, for example, Google's GPT-4 (soon to come on stream - Beta version out with some developers) is a language model which can learn any language and create logic driven conclusions while learning from human feedback. Artificial intelligence is being used in dispute resolution in court litigation and arbitration as both analytical as well as predictive tools. AI is in current use to analyse both legal and factual questions in a dispute (whether public or private). AI is used in probability models to predict outcomes when cases are tried by jurors with different social and economic groups or how single or multiple members of judicial benches or arbitration tribunals would deal with any particular issues.
- d. It is not unimaginable that a legal adjudicatory engine will be developed to at least deal with the first step of adjudication - for example a dispute could be submitted for AI adjudication, which will provide a set of written reasons for conclusion, which are appealable to a human panel. If the parties would go through the expense of an appeal- then there is the option of human intervention.
- e. Large web-based commercial organisations such as Taobao and Jindong, are using very similar methodologies, where the first step is machine

based dispute resolution and if that does not work for the parties, the dispute is submitted to on-line dispute resolution by the courts. We can foresee more of this sort of dispute resolution methodology coming on stream, as a means of making dispute resolution more inclusive and less expensive.

- f. As electronic commerce becomes more prevalent even on a B to B basis, we can see on-line dispute resolution following a path which uses a mixture of AI and human intervention. Just how this will play out will depend on how each jurisdiction reacts to the possibilities visible in the horizon to them. As on-line dispute resolution assisted by AI can be much less expensive than full scale human arbitration panels, it may prove a boon for small and medium enterprises and become more popular.
 - g. I can also foresee that if the Hague Convention of Recognition and Enforcement of Foreign Judgments acquires traction, there might be more interaction between arbitration and the courts, with part of the Court's work being outsourced to arbitration for the sake of speed. There is also a wider role for mediation mixed in with litigation and arbitration. Commercial Courts dealing with cross border disputes will need to be creative to meet the challenges of the future.
- (ii) Geopolitics: So far, the world of arbitration have not been much or at least not clearly affected by geopolitics. But it is beginning to rear its ugly head. Unilateral sanctions now proliferate and sanctioned companies and individuals are finding it hard to find legal representation or even fora. I have one case where a NY seated arbitration will not accept an arbitrator sanctioned by the US. Also consider the chances of a sanctioned Russian company with a an Award against a US company, of getting recognition and enforcement in a US Court, although both countries are Contracting Parties to the New York Convention. There is a possibly a chance that the "ordre public" exception of non-enforcement would be more widely used in the future.

- (iii) All said, there is a silver lining for HK. It is a Model Law jurisdiction which is well understood by the international commercial community. With the wide spectrum of juridical agreements between the HKSAR and the People's Supreme Court, there are untold opportunities for the expansion of legal and arbitration work in light of China's future development and the international connections which this development entails. Hong Kong is home to one of AALCO's International Arbitration Centres, it also slated to join RCEP possibly in Q3 2023. The Central Government is planning to site the International Mediation Centre in Hong Kong. All of these promises tantalising opportunities for Hong Kong.