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TRANSNATIONAL COMMERCIAL LAW: REALITIES, CHALLENGES AND A CALL FOR MEANINGFUL CONVERGENCE

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I. WELCOME AND INTRODUCTION

As the Chief Justice of the host nation for the 26th LAWASIA Conference and the 15th Biennial Conference of Chief Justices of Asia and the Pacific, it is my privilege on behalf of all my fellow citizens to welcome such a distinguished and well-represented audience to Singapore. I wish, in particular, to extend a warm welcome and a hand of friendship to my counterparts, the Chief Justices and senior members of the judiciaries of more than 40 jurisdictions. I also wish to welcome the close to 300 delegates from more than 25 countries who have come to our island nation for the LAWASIA Conference.

I believe a significant element of the draw of this conference and indeed others of this nature is in the new reality which confronts us in the international legal community: the increasingly multi-jurisdictional nature of legal practice makes dialogue amongst stakeholders in the regional and even the global sphere *indispensable*. In these times, the chosen theme of this conference, "Beyond The Law; Beyond the Call of Duty; Beyond Boundaries" is apposite. While law was once the quintessential jurisdiction-bound profession, the proliferation of cross-border trade and investment has made operating in jurisdictional silos unworkable for the modern commercial lawyer and for that matter for the judiciaries of today. In this increasingly interconnected world fuelled by the exponential growth of trade and capital links over the course of the past three decades,[1] it is no longer tenable for lawyers to get by with a purely national focus. The complexion of legal practice has changed irreversibly. Lawyers today are expected to be able to advise on transnational deals,

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1 See U.K., Department for International Development, "Global Context—How Has World Trade and Investment Developed, What's Next?" (2011), online: The U.K. Government <http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/43309/11-722-global-context-world-trade-and-investment.pdf> [*DFID Report*].

provide foreign investors with perspectives on domestic laws and legal systems and also to resolve commercial disputes of an international nature in court proceedings as well as before international arbitral tribunals applying either domestic, foreign or even international law. In arbitration, it is almost inevitable for lawyers to encounter tribunals and opposing counsel from jurisdictions other than their own. Undoubtedly, some might look back on those halcyon days when the air was fresher, life was simpler and legal practice, mainly domestic. But I have to say that as much as nostalgia may be a salve to the wistful, it cannot and will not deter the march of globalisation.

One of the most powerful forces for globalisation has been international trade. We have come a long way since the conclusion of the *General Agreement on Tariffs and Trade*,[2] which eventually led to the establishment of the World Trade Organization ("WTO"). Ask the leader of any modern economy today for his or her wish-list, and an increase in trade will doubtless be there and rank very high, if not indeed at the very top of that list. While free trade exposes domestic industries to foreign competition, in the long run it leads to the stable development of those industries in which a state enjoys a comparative advantage. At the same time, it keeps economies nimble. For these and many other well-rehearsed reasons, the volume of trade has increased exponentially. In less than three decades, from 1980 to 2008, trade volumes quadrupled.[3] Paralleling that growth in volume has been the growth of trade in highly specialised and highly valued parts which are shipped onwards for incorporation into finished products.

But an increase in trade is not desired only in the boom times; it is even more sought after when the economic climate is poor. In the aftermath of the 2008 global financial crisis, access to foreign markets was seen as one of the best ways to bolster economic recovery and growth without significant trade-offs, especially as compared to other measures such as drawing on public finances to stimulate the economy. By way of example, the European Union ("E.U.") reported that the contribution of trade to gross domestic product in 2012 cut the depth of the E.U. recession by a factor of four.[4] Trade had evidently helped to compensate for the decrease in domestic demand.[5]

Because of its manifest benefits and all-weather desirability, world trade has grown; and though it has grown a little more slowly post-2008, it will continue to grow. The most important international instrument on trade has been *GATT*, which is the foundational wide-ranging multilateral agreement on the subject. However, after the easy gains in the early stages of tariff reductions realised in successive rounds of multilateral negotiations at the WTO from the 1940s through to the 1990s, states have found the going tougher at the advanced stages of trade liberalisation. Reducing tariffs was the relatively easy part. As tariffs became less of an influence on trade flows, the non-tariff barriers and regulatory differences between states emerged as more important issues of trade policy—and also more difficult issues for states to

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2 30 October 1947, 55 U.N.T.S. 187 (entered into force 1 January 1948) [*GATT*].

3 See *DFID Report*, *supra* note 1.

4 See European Commission, *Trade, Growth and Jobs: Commission Contribution to the European Council* ([Brussels]: EC, 2013), online: EC <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151052.pdf>.

5 *Ibid*.

grapple with. Improving on the WTO system has proven to be a difficult process with different states wanting different things. But, this has not prevented states and regional blocs from going ahead to open up trade on a bilateral or plurilateral basis through free trade agreements ("FTAs").

From 2008 to 2013, more than 80 FTAs were signed and 12 more announced to the WTO.[6] This reflects a marked increase compared to the preceding five-year periods.[7] In particular, the world's biggest economies, the U.S., China and the E.U. have been increasing their trade links by entering into FTAs,[8] and we can expect that this trend will continue. We have also seen a significant increase in the number of bilateral investment treaties ("BITs"). Astonishingly, there are more than 3,000 such treaties today.[9] There has moreover been a convergence between the formerly separate international trade and investment law regimes. Modern FTAs commonly include investment chapters that bear a strong resemblance to BITs.

Against this backdrop, it may be seen that the private commercial world is moving in tandem or more likely even faster than state-actors in establishing transnational trade links. Already, multinational companies ("MNCs") "organize production, marketing and distribution [channels] on a global, or at least, a regional basis",[10] and MNCs are largely responsible for the emergence of the international trade in highly specialised parts and components to which I referred earlier.[11] Their national subsidiaries often form an integral part of an extensive managerial hierarchy which follows the overall policy of the MNC in question.[12] These national subsidiaries may therefore be seen as forming unified systems that operate across jurisdictional boundaries.[13] They combine research and development, engineering, production, assembly and marketing functions across national boundaries. An aircraft is no longer wholly manufactured in one country. It is the product of hundreds of goods and services originating in many different countries. An iPhone is designed in California and assembled in China with important parts built in many other countries.[14]

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6 See Maya Rostowska, "World Rapidly Becoming a 'Noodle Bowl' of Free Trade Agreements" *Public Service Europe* (5 June 2013).

7 63 FTAs were concluded in the 2003 to 2007 period and 43 between 1998 and 2002.

8 The E.U. has 28 FTAs in force and the U.S. has 20, with plans to negotiate more. China, which currently has just 7 FTAs in force, is also actively negotiating more agreements. China's Premier Li Keqiang has suggested that China would "welcome" the creation of an FTA with the E.U., its largest trading partner. In his words, "[i]f China and the EU could set up a regional FTA, the impact on both sides and worldwide would be far-reaching and profound": see Ding Qingfen & Li Jiabao, "Premier Promotes Creation of FTA with EU" *China Daily* (29 June 2013), online: China Daily Information Co. <http://www.chinadaily.com.cn/business/2013-06/29/content_16685693.htm>.

9 See United Nations Conference on Trade and Development, "World Investment Report 2012: Overview" at 19, online: United Nations Conference on Trade and Development <http://unctad.org/en/PublicationsLibrary/wir2012overview_en.pdf> [UNCTAD].

10 See Silvia Fazio, *The Harmonization of International Commercial Law* (Alphen aan den Rijn: Kluwer Law International, 2007) at 2.

11 See the main text following note 3 above.

12 *Supra* note 10.

13 *Ibid.*

14 See Yuqing Xing & Neal Detert, "How the iPhone Widens the United States Trade Deficit with the People's Republic of China" (2010) ADBI Working Paper Series 257 at 3, "How iPhones are Produced", online: Asian Development Bank Institute <http://www.adbi.org/files/2010.12.14.wp257.iphone.widens.us.trade.deficit.prc.pdf>.

In the past decade, the collective centre of gravity of these systems has shifted towards the Asia-Pacific region. A *New York Times* article reported that the number of non-Asian MNCs with one or more board members living and working in Asia has increased from 19% in 2008,[15] to 30% in 2011 and is expected to increase further to 45.3% by 2016.[16]

These figures speak to the focal shift of non-Asian MNCs towards Asia. But just as, if not even more, impressive is the rise of home-grown Asia-Pacific MNCs. *Fortune's* "Global 500" list of Asia-Pacific MNCs has grown from 145 in 2009[17] to 179 in 2012, an increase of almost 25% in just three years after the global financial crisis.[18] What is even more notable is that four of the top ten companies in the world are Asian.[19] We can safely conclude therefore that globalisation today is characterised by more evenly balanced East-West capital flows.[20]

The effects of globalisation and increasing international trade, as well as the rise of Asia have created interesting challenges for the legal infrastructure. I turn to consider a tale of two legal regimes, both of great significance to international business, but which differ somewhat in their success at supporting it.

II. Harmony and Disharmony—A Tale of Two Regimes

A. *BITs: A Study in the Inconsistency of Interpretative Approaches*

The first regime is investment arbitration. BITs have emerged as a tool of tremendous importance for the governance of foreign investment relationships between the foreign investor, usually a private entity, and the host state of the investment. The main provisions typically cover four areas: the admission, treatment, expropriation and settlement of disputes. Historically, BITs developed to provide inter-state norms for the protection of foreign investors, superseding what was known as the Hull Rule. The Hull Rule had been put forward by certain developed nations and it rested on the notion that compensation for the expropriation of properties owned by foreign investors had to be "prompt, adequate, and effective."[21] This was rejected by developing countries which preferred a regime that allowed them to pay what they deemed

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15 See Bettina Wassener, "Companies Shift Top Offices to Asia, Seeking to Crack Markets" *The New York Times* (20 June 2012), online: The New York Times Company <http://www.nytimes.com/2012/06/21/business/global/companies-shift-top-offices-to-asia-seeking-to-crack-markets.html?_r=0>.

16 *Ibid*.

17 Author's own calculations from "The List", *Fortune Magazine* 160:2 (20 July 2009), online: Cable News Network <http://money.cnn.com/magazines/fortune/global500/2009/full_list/>.

18 "The List", *Fortune Magazine* 166:2 (23 July 2012), online: Cable News Network <http://money.cnn.com/magazines/fortune/global500/2012/asia/>.

19 *Ibid*.

20 See "Looking Beyond the Obvious: Globalization Continues, But It is Different", online: Ernst & Young Global Limited <http://www.ey.com/GL/en/Issues/Driving-growth/Globalization—Looking-beyond-the-obvious—Globalization-continues-but-it-is-different>.

21 See Andrew T. Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 Va. J. Int'l L. 639 at 645, online: Berkeley Law Scholarship Repository <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1903&context=facpubs>.

appropriate for expropriation.[22] In the absence of an accepted international norm such as the Hull Rule, BITs grew in importance as the primary mode of regulating state and foreign investor relationships.

One of the hallmarks of a BIT is that it allows the investor to initiate arbitral proceedings against the host state directly where a dispute has arisen, usually under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") but increasingly under other arbitral rules which the parties might have chosen. A particular problem that has arisen with the proliferation of BITs is the inconsistency in their interpretation by arbitrators. There were few disputes over BITs prior to 1995. However, from 2000 onwards, the number of cases has increased exponentially. By 2005, BITs were the subject of more than 60 arbitrations.[23] And, it soon became evident that tribunals had difficulties agreeing on the proper interpretation of BIT provisions even where the provisions were largely similar or even identical, in the case of proceedings brought under the same treaty but between different parties.

Among the most famous of the cases which exemplified this problem are *Lauder v. The Czech Republic*[24] and *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*[25] (collectively, "the *Lauder* arbitrations"). Lauder, an American financier, sought to create the first private television station in the Czech Republic. He consulted the Czech Media Council which took the view that he should enter into a joint venture with a local partner so as to avoid vesting ownership of the station in a foreigner. Lauder's investment vehicle, CNTS, therefore entered into a joint venture with a local partner, CET 21. CET 21 was issued a broadcasting licence subject to the condition that CET 21 would be the licence holder but CNTS would operate the station. All went well at first. Four years later, however, the Czech Parliament amended its media laws to narrow the definition of the term "broadcaster" to encompass only the licence holder. As a result, the joint venture's split ownership structure with CET 21 being the license holder and CNTS operating the station was no longer tenable. Following this, the Media Council reversed its position on the propriety of the joint venture, taking the view that CNTS was acting illegally in operating a television broadcasting station without a licence. This led to the dissolution of the joint venture.

Lauder initiated arbitral proceedings under the *Treaty between the United States of America and the Czech and Slovak Federal Republic concerning the Reciprocal Encouragement and Protection of Investment*,[26] and this was heard by a London tribunal. His investment vehicle, on the other hand, initiated proceedings under the *Agreement on Encouragement and Reciprocal Protection of Investments between the*

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22 See Kelley Connolly, "Say What You Mean: Improved Drafting Resources As A Means For Increasing The Consistency Of Interpretation of Bilateral Investment Treaties" (2007) 40 Vand. J. Transnat'l L. 1579 at 1585, 1586.

23 *Ibid*.

24 (2001) 9 ICSID Rep. 205 (United Nations Commission on International Trade Law), online: Investment Treaty Arbitration <http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> [*Lauder 1*].

25 [Partial Award] (2001) 9 ICSID Rep. 121 (United Nations Commission on International Trade Law), online: Investment Treaty Arbitration <http://italaw.com/sites/default/files/case-documents/ita0178.pdf> [*Lauder 2*].

26 22 October 1991 (entered into force 19 December 1992).

Kingdom of the Netherlands and the Czech and Slovak Federal Republic,[27] which was heard by a Stockholm tribunal. The two tribunals came to diametrically opposed conclusions on the same facts.

On the issue of expropriation, the Stockholm tribunal found that there had been expropriation, whereas the London tribunal found otherwise.[28] The London tribunal took the view that Lauder's property rights were "fully maintained" until the contractual relationship between the joint venture partners came to an end.[29] This was so even if the nature of that relationship changed as a result of the amendments to the Czech Republic's media laws.[30] The tribunal further held that even if Lauder had been deprived of his property rights, there was no expropriation because Lauder's loss of property rights did not benefit the Czech Republic.[31] The Stockholm tribunal on the other hand reasoned that the Media Council had effectively "coerced" Lauder's local partner to destroy the commercial value of the investment.[32] In particular, the Media Council's reversal of its position on the joint venture's split ownership structure eradicated a previously exclusive commercial relationship.[33]

On the issue of fair and equitable treatment, the London tribunal found that because the Media Council had not given any specific undertaking at the outset as to the enforcement of media laws, the Czech Republic did not breach its fair and equitable treatment obligation by enforcing the amended media laws.[34] The Stockholm tribunal came to the opposite conclusion. It found that the Media Council intentionally undermined the investment and that the Czech Republic violated its obligation to provide fair and equitable treatment by the renunciation of the prior arrangements that had been made between the joint venture parties and the Media Council.[35]

The tribunals also disagreed on other points. The decisions led counsel for the Czech Republic to comment that the result "brings the law into disrepute, it brings arbitration into disrepute [and] the whole thing is highly regrettable".[36]

The *Lauder* arbitrations episode is not the only case of inconsistency in investment arbitration jurisprudence. There are others such as the equally famous cases of *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*,[37] and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*.[38] SGS, a Swiss company, alleged that Pakistan was in breach of contract for failing to pay for its customs-classification services. SGS brought a claim under the *Agreement between*

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27 29 April 1991, 2242 U.N.T.S. 205 (entered into force 1 October 1992).

28 See *Lauder 2*, *supra* note 25 at paras. 591-609 and *Lauder 1*, *supra* note 24 at paras. 196-204 respectively.

29 *Lauder 1*, *ibid.* at para. 202.

30 *Ibid.*

31 *Ibid*. at para. 203.

32 See *e.g.*, *Lauder 2*, *supra* note 25 at paras. 539, 591.

33 See *e.g.*, *ibid*. at paras. 551, 568-570.

34 *Lauder 1*, *supra* note 24 at paras. 292-304.

35 *Lauder 2*, *supra* note 25 at para. 611.

36 See Matthew Rushton, "Clifford Chance Entangled in Bitter Lauder Arbitrations" *Legal Business* (October 2001) 108 at 108, quoting Jeremy Carver.

37 (2003) 18 ICSID Rev. 307 (International Centre for Settlement of Investment Disputes), online: International Centre for Settlement of Investment Disputes <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC622_En&caseId=C205> [*SGS 1*].

38 (2004) ICSID Case No. ARB/02/6 (International Centre for Settlement of Investment Disputes), online: International Centre for Settlement of Investment Disputes <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC657_En&caseId=C6> [*SGS 2*].

the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments ("Switzerland-Pakistan BIT")[39] and the ICSID tribunal had to consider whether Pakistan's alleged breach of contract could be regarded as a breach of the treaty within the meaning of an 'umbrella clause' in the Switzerland-Pakistan BIT. That clause provided that "[each Sovereign] shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the Investors [from the other Sovereign]."[40] The tribunal concluded that the contractual claim could not be elevated to a treaty claim.[41] In contrast, in a similar dispute between SGS and the Philippines where SGS alleged that the Philippines had failed to pay for import supervision services, a different ICSID tribunal concluded that the contractual claim could be elevated to a treaty claim under a similar 'umbrella clause' in the *Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments*[42].[43]

Such inconsistent arbitral decisions threaten to undermine the legitimacy of the investment arbitration regime. Both parties, the foreign investor and the state, are left uncertain as to their rights and obligations under the relevant BIT. The ramifications of this are great if one considers the sums at stake. Foreign direct investment in 2011 was US$1.5 trillion[44] and is expected to reach US$1.8 trillion this year.[45] Each individual dispute such as the *Lauder* arbitrations could also involve hundreds of millions of dollars.[46]

Apart from the value of the investments at stake, the ramifications of such inconsistencies on developing countries are also of concern. One commentator has suggested that developing countries are particularly affected by inconsistencies in the interpretation of BITs.[47] Developing countries often have less bargaining power with the result that BIT negotiations start, and sometimes end, with the model agreements developed by the hitherto predominantly capital-exporting countries, *i.e.* the more developed countries. As a consequence, developing countries often find themselves saddled with BIT terms and structures that might seem more favourable to their more developed counterparts. Their woes are then compounded in a variety of ways.

First, investors who are the potential claimants have tended, on the whole, to come from developed rather than developing countries. When claims are brought against developing countries, they commonly have less home-grown expertise to deal with them hence compounding the ill-effects of the uncertainty which attends the interpretation of these treaties. Moreover, the leading arbitrators in the field come from a fairly small group with few, if any, from the developing world. I may also mention the disparity between the trade law regime as compared to the investment law regime in terms of the recognition of public policy considerations as an exception to a state's obligations. Under the trade law regime where developed countries are often

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39 11 July 1995.
40 *Ibid.*, art. 11.
41 See *SGS 1*, *supra* note 37 at para. 166.
42 31 March 1997, art. X(2).
43 See *SGS 2*, *supra* note 38 at paras. 130-135.
44 See UNCTAD, *supra* note 9 at vi.
45 *Ibid*.
46 See *Lauder 2*, *supra* note 25.
47 Connolly, *supra* note 22 at 1589, 1590.

defendants, they may avail themselves of an exception to their obligations through pleading public policy considerations. For example, art. XX of *GATT* is replicated in most FTAs and it provides for such an exception. In contrast, under the investment law regime where developing countries are more often in the defendant seat, most BITs do not feature similarly generous public policy exceptions.[48] For these and other reasons, there are some signs of discontent and disillusionment such as the denunciation of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*,[49] in 2007 by Bolivia,[50] in 2009 by Ecuador,[51] and in 2012 by Venezuela[52] for example.

The inconsistencies in investment arbitration jurisprudence are but one of a number of issues affecting this important area of trade law and arbitration,[53] and it has not only negatively impacted transnational businesses, it has also alienated some stakeholders. The investment arbitration experience underscores the importance of harmonising a key area of international commercial law and the perils of failing to do so.

B. *International Commercial Arbitration: A Work in Progress*

The second regime that bears consideration is one of the more developed regimes where international commercial law is concerned. I am referring to international commercial arbitration between private parties. The following was once said of international arbitration: "[f]ostered by the demands of an expanding international commerce, by the businessman's traditional distrust of foreign adjudication, and by numerous court decisions upholding its awards, international arbitration is distinctly

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[48] See also Jürgen Kurtz, "A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment" (2002) 23 U. Pa. J. Int'l Econ. L. 713, online: University of Pennsylvania <https://www.law.upenn.edu/journals/jil/articles/volume23/issue4/Kurtz23U.Pa.J.Int'lEcon.L.713(2002).pdf> for a discussion on the lack of an equivalent of art. XX of the *GATT*, *supra* note 2, in the detailed investment provisions in chapter 11 of the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, 32 I.L.M. 289 (entered into force 1 January 1994).

[49] 18 March 1965, 4 I.L.M. 52 (entered into force 14 October 1966), online: The World Bank <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf>.

[50] "Bolivia Submits a Notice under Article 71 of the ICSID Convention", online: International Centre for Settlement of Investment Disputes <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>.

[51] "Ecuador Submits a Notice under Article 71 of the ICSID Convention", online: International Centre for Settlement of Investment Disputes <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>.

[52] "Venezuela Submits a Notice under Article 71 of the ICSID Convention", online: International Centre for Settlement of Investment Disputes <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>.

[53] See generally Sundaresh Menon, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)" (The Opening Speech delivered at the Opening Plenary Session of the ICCA Congress 2012) [unpublished], online: International Council for Commercial Arbitration <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf>.

in vogue."[54] This assessment was made more than three decades ago in the 1980 edition of the American Bar Association's journal, *The Business Lawyer*. That which was "in vogue" three decades ago is now an everyday mode of dispute resolution provided for in simple contracts ranging from the sale of goods to complex cross-border financial instruments involving private entities and sometimes states. What began life in the indigenous legal systems of the European jurisdictions of the 19th century has been propelled to the forefront of modern commercial dispute resolution. In terms of the legal framework, the conclusion of various international instruments, such as the *Protocol on Arbitration Clauses in Commercial Matters*,[55] the *Convention on the Execution of Foreign Arbitral Awards*,[56] the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,[57] and the *United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration*,[58] has provided an internationally accepted standard for the conduct and support of arbitration.

The *1923 Geneva Protocol* and *1927 Geneva Convention* were concluded under the aegis of the League of Nations. In a time when arbitration was seen to compete with the jurisdiction of the courts,[59] the Protocol recognised the validity of arbitration agreements which took disputes out of the hands of the national courts.[60] The Convention, which complemented the Protocol, provided for recognition of the binding effect of arbitral awards and the conditions for their enforcement amongst the parties to the Convention.[61]

These international instruments were eventually superseded by the *New York Convention* and the *Model Law*. The *New York Convention* which provides for the recognition and enforcement of arbitral awards has been a huge success and currently has 149 state parties. The widespread subscription by states to the standards of the *New York Convention* provides comfort to commercial parties that the fruits of the arbitral process will not merely be a paper vindication of their rights.

As for the *Model Law*, it prescribes the process for all stages of the arbitration from the formation of the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. Article 16(1) of the *Model Law* adopts two important principles, the first of which is '*Kompetenz-Kompetenz*'. This is an important principle which delineates the role of the court and the arbitral tribunal by declaring that the arbitral tribunal has competence to decide whether it has competence and in so doing consider objections with regard to the validity of the arbitration agreement. The second principle is 'separability' which means that an arbitration clause shall

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54 See Francis J. Higgins & William G. Brown, "Pitfalls in International Commercial Arbitration" (1980) 35 Bus. Law. 1035 at 1035.

55 24 September 1923, 27 L.N.T.S. 158 (entered into force 28 July 1924) [*1923 Geneva Protocol*].

56 26 September 1927, 92 L.N.T.S. 301 (entered into force 25 July 1929) [*1927 Geneva Convention*].

57 10 June 1958, 330 U.N.T.S. 3 (entered into force 7 June 1959) [*New York Convention*].

58 G.A. Res. 40/72, UN G.A.O.R., 40th Sess., Supp. No. 17, Annex I, UN Doc. A/40/17 (1985), 24 I.L.M. 1302, as amended by G.A. Res. 61/33, UN GAOR, 61st Sess., Supp. No. 17, UN Doc. A/61/17 (2006) [*Model Law*].

59 Andrew Tweeddale & Keren Tweeddale, "*Scott v Avery* Clauses: O'er Judges' Fingers, Who Straight Dream on Fees" (2011) 77 The International Journal of Arbitration, Mediation and Dispute Management 423.

60 See *1923 Geneva Protocol*, *supra* note 55, art. 1.

61 See *1927 Geneva Convention*, *supra* note 56, art. 1.

be treated as an agreement independent of the other terms of the contract. In other words, even if the arbitral tribunal decides that the contract is null and void, it does not mean that the arbitration clause, which confers jurisdiction on the tribunal over the dispute, is invalid. The combined effect of these principles consolidates for the tribunal its jurisdiction over the arbitration, subject of course to court oversight in the prescribed circumstances, as set out in arts. 16(3), 34 and 36.

The *Model Law* has been enacted by more than 60 countries including many of the major economies of the world such as the U.S., Japan, Germany and India.[62] Although China has not enacted the *Model Law*, Hong Kong and Singapore, which "rank amongst the top ten countries or territories through which foreign investment into China is channelled", as well as Macau, have enacted the *Model Law*.[63] The widespread adoption of the *New York Convention* and the *Model Law* has led to the consolidation of an impressive body of *adjectival* law on international arbitration so that there are clear and internationally accepted enforcement procedures and arbitration processes.

But beyond the adjectival or procedural law, what can be said of a substantive law of arbitration? Commenting on the Second Reading before the House of Lords on the *Arbitration Bill*,[64] Lord Wilberforce with impressive prescience suggested that arbitration would go on to develop as a freestanding system with its own *substantive law*. Although arbitration is an alternative dispute resolution mechanism grounded in party autonomy and therefore embraces the *diversity* of choices that the parties may make, paradoxically, this has not stifled and perhaps will not stifle the emergence of a coherent body of law. It is an established principle of international arbitral law that arbitrants are free to agree on the law governing their dispute and this necessarily includes the freedom to elect *principles of international commercial law* as the governing law. This is recognised in the *Model Law*,[65] national arbitration statutes of various jurisdictions,[66] and arbitral rules of major institutions.[67]

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62 See "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> for the list of countries and territories which have enacted the *Model Law*.

63 See Jingzhou Tao, *Arbitration Law and Practice in China*, 2nd ed. (Alphen aan den Rijn: Kluwer Law International, 2008) at xxi.

64 U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 568, col. 760 at 778 (18 January 1996) (Lord Wilberforce), cited in *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43 at para. 18.

65 The freedom to apply *substantive rules of transnational law*, as opposed to merely the laws of a particular jurisdiction, is embraced in art. 28 of the *Model Law*, *supra* note 58, which provides that "the arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute": see also Emmanuel Gaillard & John Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at 802.

66 The French art. 1496 N.C. proc. civ.; the Dutch Civil Procedure Code, *Wetboek van Burgerlijke Rechtsvordering*, art. 1054(1); the Swiss Federal Statute on Private International Law, *Loi fédérale sur le droit international privé*, art. 187. In addition, s. 46(1)(b) of the English *Arbitration Act 1996*, (U.K.), 1996, c. 23 provides that if the parties so agree, the arbitral tribunal shall decide the dispute "in accordance with such other considerations as are agreed by them or determined by the tribunal." This is broad enough to cover substantive rules of transnational law: see Gaillard & Savage, *ibid*.

67 Article 21 of the *Rules of Arbitration of the International Chamber of Commerce*, art. 14.2 of the *LCIA Arbitration Rules*, and art. 27 of the *SIAC Rules 2013*, 5th ed., allow the arbitrator to apply the "*rules of*

This perhaps portends the development of a freestanding body of substantive international commercial law. Indeed, there is a growing body of *lex arbitralis materialis* containing transnational substantive rules which arbitrators can draw upon or refer to in deciding disputes.[68] Arbitrators already increasingly refer to and rely on other arbitral awards as precedents in their decision-making process.[69] This coming of age of the international arbitral system was recognised by the *Cour de cassation* in the famous case of *Hilmarton v. Omnium de Traitement et de Valorisation*.[70] Hilmarton, an English corporation, sought payment of a commission from OTV, a French corporation, for obtaining a contract in Algeria. Hilmarton failed in arbitral proceedings in Switzerland but managed to set aside the award in the Swiss courts. Nonetheless, OTV sought to enforce the award in France. The French court was therefore faced with the question of whether to recognise an award which had been set aside in its country of origin. The *Cour de cassation* held that the award in question was "an international award which was not integrated into the Swiss… legal order, such that its existence continued in spite of its being set aside".[71] Therefore, it was held to be internationally enforceable under the *New York Convention*[72] even if it had been annulled for non-compliance with the domestic laws of the arbitral seat.[73] This decision has generated a flurry of comments including wry observations such as: "[i]f an award is set aside in the country of origin, a party still can try its luck in France."[74]

Nonetheless, *Hilmarton* is not lightly to be dismissed as an aberration. In *Egypt v. Chromalloy Aero Services*,[75] the Paris Court of Appeal dealt with a similar issue. There, the court had to decide whether to enforce an award rendered in Egypt ordering the Egyptian government to compensate Chromalloy for terminating its military procurement contract even though the award had been set aside by an Egyptian court. The Paris Court of Appeal applied *Hilmarton* and enforced the award. It is noteworthy that the U.S. District Court for the District of Columbia also enforced the award, albeit on the ground that the arbitration agreement excluded judicial review and the Egyptian court therefore should not have set aside the award.[76]

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law" as chosen by the parties to be applicable to the substance of the dispute [emphasis added]. This is similar to art. 28 of the *Model Law*, *supra* note 58, which is broad enough to cover substantive rules of transnational law.

68 See Loukas Mistelis, "Unidroit Principles Applied as "Most Appropriate Rules of Law" in a Swedish Arbitral Award" (2003) 8 Rev. D.U. 631.

69 See Gaillard & Savage, *supra* note 65 at 187, 188.

70 Cass. civ. 1re, 23 March 1994, Bull civ. 1994.I.79, No. 104, as reported in (1995) 20 Y.B. Comm. Arb. 663 [*Hilmarton*].

71 As cited in Emmanuel Gaillard, "The Enforcement of Awards Set Aside in the Country of Origin" (1999) 14 ICSID Rev. 16 at 22, 23, online: ICSID Review <http://icsidreview.oxfordjournals.org/content/14/1/16.full.pdf>.

72 The court considered art. V as well as art. VII which permitted recourse to French law under which annulment of an award by the courts in the country of origin is not a ground for refusal of enforcement.

73 *Supra* note 70.

74 See Albert Jan van den Berg's comments in (1994) 19 Y.B. Com. Arb. 592, cited in Eric A. Schwartz, "A Comment on *Chromalloy*—Hilmarton, à l'américaine" (1997) 14(2) J. Int'l Arb. 125.

75 C.A. Paris, 14 January 1997, [1997] Rev. Arb. 395, as reported in (1997) 22 Y.B. Comm. Arb. 691.

76 See in this regard Radu Lelutiu, "Managing Requests for Enforcement of Vacated Awards under the New York Convention" (2003) 14 Am. Rev. Int'l Arb. 345.

More recently, in *Société PT Putrabali Adyamulia v. Société Rena Holding*,[77] the *Cour de cassation* explained the approach it took in *Hilmarton*. PT Putrabali Adyamulia, an Indonesian company, sold goods to a French company, Rena Holdings ("Rena"), and the goods were lost in a shipwreck. Rena succeeded in arbitration proceedings in London but the award was challenged and partially vacated by the English High Court. The original tribunal then rendered a new award which conformed to the court's ruling. Rena, however, sought to enforce the original award in France. The *Cour de cassation* enforced the original award and explained the doctrinal basis for its approach in the following way: first, the impact of a national court's decision to annul an award is confined to its own jurisdiction; second, the enforcement court decides whether to enforce based on its own rules; third, under art. V(1)(e) of the *New York Convention*, the annulment of an award at the seat of arbitration "may" be grounds for the refusal to enforce—it is therefore not mandatory for the court to refuse to enforce an annulled award; fourth, in the circumstances, the courts of jurisdictions which are parties to the Convention are free to enforce an award even though it may have been set aside at the seat of arbitration. The basis for choosing to do so is the court's characterisation of such awards as belonging to an autonomous international legal order that is distinct from the domestic legal order. The question of whether the French jurisprudence in this area is doctrinally correct or not is not the point of my address today. Rather it is to illustrate the existence of a respectable body of judicial thought which holds that the system of arbitration stands as part of a transnational system of justice distinct from any domestic system.

That international commercial law is coalescing into a freestanding body of law should not be thought to be unusual or untenable. This development is likely in time to extend beyond the adjectival or procedural law into the realm of substantive law. The nature of international commercial law is such that it does not depend on recognition by any national legal system for legitimacy. It is, after all, the reflection of rules chosen by commercial parties over time to order their relationships. It therefore finds legitimacy in the fact that it is a body of law that the international commercial community has chosen for itself.

International commercial law as embodied in international arbitral jurisprudence is undoubtedly subject to the *ad hoc* oversight of national courts insofar as awards are subject to review. But, the *ad hoc* nature of such oversight may from time to time lead to conflicting results. An example would be *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan*,[78] and *Gouvernement du Pakistan—Ministere des Affaires Religieuses v. Société Dallah Real Estate and Tourism Holding Company*[79] (collectively "the *Dallah* cases"). Dallah Real Estate and Tourism Holding Co, ("Dallah") had entered into an agreement with a trust created by the Pakistani government for the provision of housing to pilgrims in Saudi Arabia. That agreement contained an International Chamber of Commerce ("ICC") arbitration clause. A dispute arose and the trust was not renewed by the Government. Dallah therefore commenced arbitration proceedings against Pakistan in Paris. The tribunal rendered an award in Dallah's favour.

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77 Cass. civ. 1re, 29 June 2007, [2007] Rev. Arb. 507.

78 [2011] 1 A.C. 763 (S.C.) [*Dallah 1*].

79 C.A. Paris, 17 February 2011 (Case No. 09/28533) [*Dallah 2*].

Dallah sought to enforce the award in England and France. The English court[80] refused on the ground that there was a lack of evidence that Pakistan had intended to be bound by the agreement as it had created the Trust, a separate legal entity, for the purpose of entering into the agreement.[81] The Paris Court of Appeal[82] took a different view and held that Pakistan's direct involvement in negotiations and in giving instructions to Dallah on how to carry out the agreement demonstrated that it was the true party to the transaction. It is interesting that both courts set out to apply identical principles under French law but reached diametrically opposed results.

A similar issue arose in another recent decision, this from the Victoria Court of Appeal in *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC*.[83] In that case, IMC Aviation Solutions Pty Ltd ("IMC") and Altain Khuder LLC ("Altain") entered into a mining operations agreement. A dispute arose and in arbitration proceedings, the tribunal ordered IMC's sister company, IMCS, to pay Altain a sum of money on behalf of IMC. IMCS was not party to the original agreement. The award was verified by a Mongolian court.

Altain sought to enforce the award in Victoria against both IMC and IMCS and obtained a provisional order for enforcement. In dismissing IMCS's application to set aside the order, Justice Croft held that the award creditor is not required to prove as a threshold issue that the foreign arbitral award is binding on the award debtor and had been made pursuant to an agreement to which the award debtor is party.[84]

On appeal, the Court of Appeal overturned Justice Croft's decision and held that the award creditor must establish, amongst other criteria, that the award creditor and debtor are parties to the arbitration agreement before it can find even a *prima facie* basis to enforce the award.[85] Typically, the evidentiary onus will be discharged where the award and agreement show that the award debtor is a party. However, in unusual cases such as that case, where IMCS was not named in the arbitration agreement, the judgment creditor needed to adduce additional evidence.

It is the introduction of a *prima facie* threshold which has invited comment and scrutiny in international arbitration circles.[86] *IMC (C.A.)* as well as the *Dallah* cases have left commentators concerned by what some might view as an excessive extent of intervention by the national courts in those cases.[87] These cases are examples of lingering contentious issues in a highly developed and generally consistent area of international commercial law. These issues translate into uncertainty in the resolution of commercial disputes and the enforcement of the awards emanating from the resolution of those disputes. As I shall explain later,[88] uncertainties in the legal

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80 *Dallah 1*, *supra* note 78 at para. 40.

81 See Alexis Martinez, "Dallah, A Tale of Two Judicatures" (2011) 14 Int'l. Arb. L. Rev. N-4.

82 *Dallah 2*, *supra* note 79.

83 [2011] VSCA 248 [*IMC (C.A.)*].

84 See *Altain Khuder LLC v. IMC Mining Inc* [2011] VSC 1 at para. 60.

85 *IMC (C.A.)*, *supra* note 83 at paras 134-138.

86 See G. John Digby, "Is Australia Unfriendly to Arbitration?" (2012) 7 Construction Law International 38.

87 *Ibid.* See also Jacopo Crivellaro, "Conflicting Contrasts in Dallah v Government of Pakistan" (2011) 17 Colum. J. Eur. L. F. 51, online: The Columbia Journal of European Law <http://www.cjel.net/online/17_2-crivellaro/>.

88 See Part III.A below.

framework lead to higher transactional costs for commercial entities and therefore create inefficiencies for transnational businesses.

The investment arbitration and international commercial arbitration experiences demonstrate the varying successes the international legal infrastructure has had in supporting transnational businesses. They illustrate the positive impact that legal infrastructure can have on businesses where they transcend national idiosyncrasies to find a greater degree of harmonisation. In contrast, they also show how the legal infrastructure can detract from the business environment when it is mired in inconsistencies.

III. The Case for Harmonisation—Asia-Pacific and Beyond

A. *The Impetus for Harmonisation*

So, where do we go from here? While we can be assured that Asia will retain its attractiveness as a magnet for investment at least for the next several decades, we should look towards improving our legal infrastructure to fully capitalise on the ascent of this region. Unlike the E.U., where the harmonisation of commercial laws may be effected by a top-down approach, there is no such option in the Asia-Pacific region. While it is possible to speak in terms of European law, it is difficult to speak in terms of an 'Asia-Pacific' or 'Asian' law. Even the Association of Southeast Asian Nations ("ASEAN"), which is an established regional body, cannot claim a uniform commercial law. There is as yet no 'Southeast Asian' law, which perhaps is unsurprising given the lack of common colonial roots and hence the absence of a common legal tradition. So, we must start from the unquestionable premise that there remains considerable heterogeneity in Asia-Pacific law. This translates into some opacity and variability when investors view the Asia-Pacific as a whole. That, of course, is not going to keep investors away, but it is going to make it more difficult for businesses to operate in this region.

After all, "[l]aw is a fundamental instrument of all transnational economic integration."[89] The existence of different legal systems within a global or a regional area increases transaction costs in a number of ways. First, efforts have to be expended to obtain information about the relevant national regulations and to adapt the structure of transactions to conform to those regulations.[90] Next, the differences also lead to uncertainty as to the adherence of cross-border transactions to the laws of domestic legal systems and their enforceability when disputes arise. Such uncertainty, in turn, generates the following types of transactional costs—(1) cost of legal disputes; (2) cost of setting incentives for pushing through legal claims; and (3) cost of securing compliance with the agreement.[91] Economists have suggested that such legal

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89 Helmut Wagner, "Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?" in *Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law Held on the Occasion of the Fortieth Session of the Commission* (Vienna: UN, 2011) 53 at 53, online: UNCITRAL <http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf>.

90 *Ibid.* at 53, 54.

91 *Ibid*. at 55.

uncertainty, which creates higher transaction costs, could lead to "lower investment, lower consumption and lower national income."[92]

Empirically, various studies have been carried out to demonstrate the link between legal uncertainty and a reduction in economic trade and growth. However, these studies tend to concentrate on growth differences resulting from legal uncertainty *within* a country rather than legal uncertainty in regional legal infrastructure.[93] Nonetheless, we might look to the experience of the member states of the Organisation for the Harmonization of Business Law in Africa ("OHADA") to get a sense of the impact of legal uncertainty in a regional legal infrastructure on trade and investment. The OHADA member states are predominantly Francophone African countries, all of which inherited anachronistic business rules from their colonial masters.[94] These rules were adopted in a hodgepodge fashion across the region so that even the legally trained had difficulty figuring out what the applicable laws were.[95] To address this problem, the OHADA was formed in 1993. The Organisation creates unified business codes which are adopted by its member states. The work of the Organisation enjoyed the support of the political leaders who observed that the legal and judicial insecurity of the past had made investing in their markets less desirable and this in turn was keeping foreign investors away. The common commercial codes which were adopted by the member states led to clarity and uniformity in their domestic legal systems and in the regional legal infrastructure. This, in turn, promoted greater foreign investment and cross-border trade.

The experience of the African nations is a real-life example of how legal uncertainty borne out of the heterogeneity of laws in a particular region can lead to a reduction in trade and investment. This is an example which validates to some extent the views of the economists. Although the context for the Asia-Pacific differs in that most Asia-Pacific states enjoy rich and established legal traditions in their own right, the OHADA experience demonstrates that the extent to which regional legal infrastructure is harmonised can have an important impact on trade and investment. It also shows that the harmonisation of commercial laws benefits not only the developed commercial jurisdictions but actually provides an opportunity for the commercially less developed jurisdictions to reap the benefits of an expanding region and thus to avoid being left behind. Hence, while the Asia-Pacific region can expect to remain the economic growth story of this century, I venture to say that we can optimise and reap even more gains regionally by improving, and harmonising where possible, our collective commercial legal infrastructure.

B. *Challenges of Harmonisation*

There are, of course, challenges in harmonisation. It is, for instance, not economically sensible to contemplate full harmonisation of commercial law. The benefits of eradicating legal uncertainty have to be balanced against the costs of doing so. As one economist has pointed out, full harmonisation of commercial law is not feasible

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92 *Ibid.*

93 *Ibid.*

94 See Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2013) at 186.

95 *Ibid.*

as it would lead to "substantial costs" in terms of "developing new bureaucracies or demolishing old structures".[96] The optimal level of legal uncertainty is therefore likely to be greater than zero.[97] After all, full harmonisation, even if it were achievable, could also give rise to undesirable externalising effects such as the reduction of competition. If commercial laws were fully harmonised, there would be no incentive for states to be creative in coming up with a more efficient legal infrastructure to distinguish themselves from other states.[98]

Moreover, full harmonisation may also be politically impossible in certain areas of law where states pull in different directions because of their national strategic interests. Intellectual property law, for instance, might well remain a polarising area where harmonisation is concerned. To give an example, states economically dependent on pharmaceutical companies may tend towards intellectual property laws which protect the interests of those companies. This might be in contrast to the imperatives of states which face increasing healthcare costs and which might therefore tend towards less industry-friendly intellectual property laws so as to keep healthcare affordable. Unlike the U.S., for instance, India disallows the practice of "evergreening" which is the extension of patent rights through patenting minor improvements.[99] So, there will be areas of law for which harmonisation is not politically attainable at least in the near term because different states want different things in the light of their different circumstances and national interests.

Furthermore, even where harmonisation is desirable and practicable, the exercise must be approached with sensitivity towards the national legal systems which will have to implement these laws. Harmonisation without due regard to the idiosyncrasies of national legal systems will produce superficially uniform laws, which leave fundamentally unchanged the undulating legal terrain that results from differences in the national legal systems underpinning these laws.

To take contractual interpretation as an example, the common law approach to contractual interpretation has shifted from the textual approach, which is to focus on the text of the agreement, to the contextual approach, which is to give greater regard to the circumstances surrounding the formation of the contract to ascertain parties' intentions. This shift in the U.K. is marked by Lord Hoffmann's decision in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*,[100] and in Singapore by Judge of Appeal, V.K. Rajah's decision for the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd*.[101] The contextual approach finds resonance in the civil law approach to contractual interpretation which is a more wide-ranging factual inquiry that is undertaken by civil law judges in the quest to ascertain the intention commonly held by the parties.

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96 Wagner, *supra* note 89 at 58. See also Michael P. Van Alstine, "The Costs of Legal Change" (2002) 49 U.C.L.A. L. Rev. 789, online: University of Maryland <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1224&context=fac_pubs>.

97 See Paul B. Stephan, "The Futility of Unification and Harmonization in International Commercial Law" (1999) 39 Va. J. Int'l L. 743, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=169209>.

98 *Ibid.*

99 See *Novartis AG v. Union of India* (Civil Appeal Nos. 2706-2716 of 2013, 2728 of 2013 and 2717-2727 of 2013) (S.C.), online: Supreme Court of India <http://supremecourtofindia.nic.in/outtoday/patent.pdf>.

100 [1998] 1 W.L.R. 896 (H.L.).

101 [2008] 3 S.L.R.(R.) 1029 [*Zurich Insurance*].

However, the difference between the civil law and the common law approach to evidence can make a difference in the application of seemingly similar approaches to contractual interpretation. Generally, the common law system through the discovery process admits far more documentary evidence than does the civil law system which does not have a formal process of discovery and which imposes a higher threshold before requiring production or admission of documents.[102] The extensiveness of the permitted recourse to extrinsic materials to ascertain parties' intentions in a common law trial is thus likely to entail an order of magnitude greater than that in a civil law trial. This would mean that even though the approaches to contractual interpretation are similar, the exercise in practice could be quite different as a result of differences in the legal systems.

The harmonisation of commercial law therefore needs to take into account differences in national legal systems. This is why, while espousing the contextual approach, the Singapore Court of Appeal, most recently in *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd*,[103] expressly considered the differences between the civil law system and the common law system when it refined that approach to suit our own circumstances. In acknowledgement of these differences, the court introduced controls to the admission of extrinsic evidence for the purpose of contractual interpretation.[104]

Let me pause here to summarise the principal points thus far. First, generally, the harmonisation of commercial law is desirable as it reduces transactional costs for cross-border businesses and encourages trade and investment. Second, for certain areas of law, the harmonisation of commercial law may not yet be attainable for some time at least where national imperatives diverge or where the costs of harmonisation outweigh the benefits. Third, where harmonisation is desirable, possible and practicable, it should be undertaken but any such exercise should take into account the idiosyncrasies of the domestic legal systems which have to implement the harmonised law.

IV. The Way Forward

What then is the way forward for us? In the Asia-Pacific region, ASEAN is already moving towards integration through the harmonisation of its regional legal infrastructure to become more attractive as a region to foreign investors and also to promote intra-ASEAN trade. ASEAN has made strides towards its vision for an ASEAN Economic Community in 2015 with more than 80% of the measures in the blueprint already implemented.[105] In his speech at the inaugural plenary on ASEAN Integration Through Law, Singapore's Minister for Foreign Affairs and Minister for Law,

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[102] See J.J. Spigelman A.C., "Contractual Interpretation: A Comparative Perspective" (Paper presented to the Third Judicial Seminar on Commercial Litigation, Sydney, 23 March 2011) at 43-46, (2011) 85 A.L.J. 412, online: Lawlink <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman230311.pdf/$file/Spigelman230311.pdf>.

[103] [2013] 4 S.L.R. 193.

[104] *Ibid*. at paras. 34-76. See also *Zurich Insurance, supra* note 101 at paras. 125, 128, 129, 132.

[105] See the remarks of the ASEAN Secretary-General, Le Luong Mingh as reported in Amy R. Remo, "ASEAN Region on Track for 2015 Integration" *Philippine Daily Inquirer* (7 July 2013), online: Inquirer Business <http://business.inquirer.net/130941/asean-region-on-track-for-2015-integration>.

Mr. Shanmugam, observed that "[t]hese efforts are important for ASEAN as the harmonisation of legal rules can help to remove uncertainty, reduce cost, generate greater business confidence, and ultimately advance ASEAN community-building goals."[106]

The ASEAN Integration Through Law Project which is spearheaded by the Centre for International Law at the National University of Singapore seeks to examine substantive as well as procedural legal principles of the various ASEAN countries to develop an authentic body of scholarship on ASEAN integration. It seeks to produce resources useful to policymakers such as authoritative texts on the various ASEAN 'rule-based regimes'. ASEAN's institutional efforts at harmonisation of its legal infrastructure coupled with the work of the ASEAN Integration Through Law Project reflect a combined effort to make ASEAN more attractive to foreign investors and this will be a boon to cross-border businesses.

For the rest of the Asia-Pacific region, I respectfully suggest that adopting a wait-and-see approach is no longer tenable in these times. The nature of transnational businesses, which are more nimble and proactive than bureaucracies, means that the regional legal infrastructure will already be playing catch-up even if states act now to harmonise their laws. But, where one of the more, if not *the most important* lifeline of a state's economy is cross-border trade, it is in the national interest of all states to deal with inconsistencies that undermine transnational businesses to the extent that this is possible. In these fast-moving times, with the exception of huge economies such as the U.S., China or the E.U., states and even regional blocs which do not respond quickly enough to these challenges may fall by the wayside. The flow of capital goes in both directions: inwards as well as outwards to other competitors with better legal infrastructures.

Given the new reality confronting the legal community, the Asia-Pacific region should take steps to examine the scope for harmonising its commercial laws. Drawing from the international arbitration experience, we could consider approaching harmonisation by first making consistent the laws on enforcement, then the laws of the dispute resolution processes and then finally, substantive commercial laws. First, the harmonisation of the rules of enforcement is of the greatest practical importance as it secures, for end-users of the civil justice process, the vindication of rights throughout the region. In the absence of this, the harmonisation of commercial law to make consistent the content of rights and processes would be meaningless as those rights would still be territorially-bound. Practically speaking, the enforcement regime is also one of the easiest areas to start with as it would not require sieving through the web of a host of different substantive laws.

The *Convention on Choice of Court Agreements*,[107] has the promotion of international trade and investment through enhanced judicial cooperation as one of its stated goals.[108] It seeks to realise that goal through the harmonisation of rules on the recognition and enforcement of foreign judgments in civil matters. One of the

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[106] Ng Jing Yng, "Rule of Law Key for ASEAN's Progress, says Shanmugam" *Today* (5 July 2012), online: Today Online <http://www.todayonline.com/world/asia/rule-law-key-aseans-progress-says-shanmugam>.

[107] 30 June 2005, (2005) 44 I.L.M. 1294, online: The Hague Conference on Private International Law <http://www.hcch.net/index_en.php?act=conventions.text&cid=98> [*Hague Convention*].

[108] *Ibid*. para. 2 of the Preamble.

major features of the Convention is its provision that where the disputing parties have chosen a particular court of another state to resolve their dispute, state parties are to recognise and enforce a judgment given by that court, save in certain exceptional circumstances.[109] Those of us familiar with arbitration will recognise the parallels with the *New York Convention*. Already, two major jurisdictions, the U.S. and the E.U., have signed the convention, pending ratification.[110] The *Hague Convention* might present a ready platform for the Asia-Pacific states to harmonise a key area of law, namely the enforcement of judgments.

Second, we could move towards the harmonisation of the dispute resolution process. While the processes for dispute resolution in national courts are very much rooted in the respective legal traditions of each jurisdiction and would not be easily displaced, the processes for the resolution of *commercial disputes* could be harmonised without unduly unsettling existing court procedures and practices. This could be done through the creation of commercial courts which could develop streamlined rules of procedure and harmonised rules for the taking of evidence to promote the more efficient resolution of disputes. The establishment of a network of these courts in the Asia-Pacific region with consistent procedures and practices could create confidence in the dispute resolution processes of this region.

Third, states could then consider the harmonisation of substantive law. In this regard, one possibility would be to build on the work already done by international organisations such as the International Institute for the Unification of Private Law, more commonly known as UNIDROIT. UNIDROIT, which has a track record of producing widely-accepted conventions such as the *Convention relating to a Uniform Law on the International Sale of Goods*[111] has embarked on many other projects including the drafting of the *UNIDROIT Principles of International Commercial Contracts 2010*.[112] It is the work of organisations such as UNIDROIT as well as UNCITRAL, which has drafted various model laws including the *Model Law*, which we can build on. Closer to home, we could also look to the work of the ASEAN Integration Through Law Project, which I have spoken about earlier, as well as the Asian Law Institute which has more than 50 member institutions, including the leading Asian law schools,[113] and publishes the *Asian Journal of Comparative Law*.

In tandem with these efforts, international commercial courts can play an important role in developing a consistent body of international commercial law. I should digress briefly to mention the Singapore International Commercial Court, an idea that I floated at the Opening of this Legal Year and which has been under study.[114] The detailed proposals will soon be taken to consultation. Singapore has played

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[109] *Ibid.*, arts. 8, 9.

[110] Another jurisdiction is Mexico.

[111] 1 July 1964, 834 U.N.T.S. 107 (entered into force 1 January 1988).

[112] Online: International Institute for the Unification of Private Law <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

[113] This includes the National University of Singapore's Law Faculty and the Singapore Management University's School of Law. More information is available at the Asian Law Institute's website, online: Asian Law Institute <http://law.nus.edu.sg/asli/index.aspx>.

[114] Sundaresh Menon, "Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2013 and Welcome Reference for the Chief Justice" (Speech delivered at the Opening of Legal Year 2013, Singapore, 4 January 2013) at para. 33 [unpublished], online: Singapore Academy of Law <http://www.sal.org.sg/Lists/Speeches/Attachments/112/CJ%20OLY%20Welcome%20Reference.pdf>.

host to a substantial and increasing volume of international disputes work in recent times. Much of this is reflected in the success of the Singapore International Arbitration Centre. The Singapore International Commercial Court would be an additional avenue for parties to resolve international commercial disputes before a group of some of the most eminent judges. The judge hearing a dispute in the Singapore International Commercial Court will be assigned by the Chief Justice, thus avoiding any possible issues associated with party-appointments. The Minister for Law will speak in greater detail on this initiative in his speech tomorrow.[115]

Commercial courts specialise in deciding international commercial disputes and are therefore particularly well-suited to develop the jurisprudence of international commercial law. Such courts would include the Commercial Court of England and Wales, the Delaware Court of Chancery, the Commercial Court of the Supreme Court of Victoria, the planned Singapore International Commercial Court as well as the courts of commercial centres such as Hong Kong, Shanghai, New South Wales, Mumbai, New York, Qatar and Dubai.

The courts of the various commercial centres would benefit greatly from enhancing their connectivity and collaboration. Already, some of these courts are taking important steps to build up links with their counterparts. For instance, the Dubai International Financial Centre Court has entered into a Memorandum of Guidance with the Commercial Court of England and Wales to set out their understanding of the procedures for the enforcement of money judgments in the respective jurisdictions.[116] The Supreme Courts of Singapore and New South Wales have entered into a Memorandum of Understanding ("MOU") under which the Supreme Court of Singapore may refer a question of New South Wales law to the Supreme Court of New South Wales and vice versa.[117] The Supreme Court of New South Wales has since entered into a similar MOU with the New York state courts.[118] This is a method by which the courts can ensure that commercial parties are assured of the correct application of the foreign law which they have chosen to order their relationships. It is heartening to see such links already being established. This perhaps validates the underlying premise of my address this morning. After all, given the international nature of the disputes before each of our courts, the jurisprudence of each national court will have an impact on the collective jurisprudence of international commercial law. As I mentioned at the start of this speech, the courts can no longer operate in

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[115] The speech has since been delivered: see K. Shanmugam, "International Dispute Resolution: The Singapore Perspective in an Evolving Landscape" (A keynote speech delivered at the 26th LAWASIA Conference 2013, Singapore, 29 October 2013) [unpublished], online: Ministry of Law <http://www.mlaw.gov.sg/news/speeches/keynote-speech-by-Minister-at-LAWASIA-conference-2013.html>.

[116] "Memorandum of Guidance as to Enforcement between the DIFC Courts and the Commercial Court, Queen's Bench Division, England and Wales", online: Judiciary of England and Wales <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/uk-uae-protocol-with-logos.pdf>.

[117] "Memorandum Of Understanding Between The Supreme Court Of Singapore And The Supreme Court Of New South Wales On References Of Questions Of Law", art. 1, online: Supreme Court of New South Wales <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/33cfadb586532d46ca25779e00171f9a?OpenDocument>.

[118] "Memorandum of Understanding between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law", art. 1, online: Supreme Court of New South Wales <http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_internationaljudicialcooperation/SCO2_agreement_newyork.html>.

jurisdictional silos. It is desirable that the international commercial courts, together with courts in the major commercial centres, continue to establish links with their counterparts with a view to collectively developing international commercial law in a consistent manner that is supportive of transnational business.

Eventually, the efforts at harmonisation would yield deliverables such as:

(a) Conventions;
(b) Model laws;
(c) Industry standard contracts such as the *ISDA Master Agreements*[119] or uniform standards such the ICC's *International Commercial Terms*;[120] and
(d) Codifications or restatements of the laws of this region, perhaps drawing inspiration from the *Restatements of the Law* in the U.S., which are "formulations of common law and its statutory elements… and reflect the law as it presently stands or might plausibly be stated by a court";[121] or the *Uniform Commercial Code*[122] which harmonises the law of sales and other commercial transactions.

Any such efforts at harmonisation must begin with dialogue amongst stakeholders in the regional and international sphere. One way of bringing about such dialogue would be to hold a global conference on the harmonisation of international commercial law to be hosted in Asia. Such a conference would immediately benefit four main groups of potential participants:

(a) For the first group, the Asia-Pacific states, such a conference has the potential benefit of optimising our regional legal infrastructure to augment commercial gains;
(b) For the second group, the non-Asia-Pacific states, this conference would give them a one-stop platform from which to gain insights into the nature and development of Asia-Pacific commercial law which will eventually feed into the larger framework for the harmonisation of international commercial law globally;
(c) For the third group, the MNCs and other commercial interests, such a conference would give them not only insights into an exciting new development of direct relevance to them, it would also allow them to participate in a process that will hopefully lead to the development of legal infrastructure in a manner that is ultimately helpful to their businesses; and
(d) For the last group, the existing international organisations focused on harmonising international commercial law, such as UNIDROIT, UNCITRAL and the Hague Conference on Private International Law, a meaningful

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[119] Which consists of various agreements: see "ISDA Master Agreements and User Guides", online: ISDA <http://www.isda.org/publications/isdamasteragrmnt.aspx>.

[120] International Chamber of Commerce, *Incoterms® 2010: ICC Rules for the Use of Domestic and International Trade Terms* (Paris: ICC Publications, 2010).

[121] See The American Law Institute's characterisation of the *Restatements of the Law* it produces, "Projects: Overview", online: American Law Institute <http://www.ali.org/index.cfm?fuseaction=projects.main>.

[122] The American Law Institute & The Natl Conf. of Commissioners on Uniform State Laws, *Uniform Commercial Code: Official Text and Comments*, 2013-2014 ed. (St. Paul, MS: West Publishing Co., 2013).

partnership could develop to supplement their work as well as to benefit from it.

I respectfully suggest that LAWASIA can play a critically important role in this initiative. We can build on the good work of LAWASIA in establishing networks amongst so many Asia-Pacific jurisdictions to get such a dialogue underway. Certainly, all the members of LAWASIA would have much to contribute at a conference of this sort and, needless to say, much to gain.

The harmonisation of our legal infrastructure will ultimately help unlock the potential of our region and bring with it greater trade and investment opportunities. This can only benefit our nations and communities. Today, there are no spectators in the arena of globalisation; in her domain, everyone is a participant. States such as those within the ASEAN bloc, which have already made strides, will perhaps be the first to reap the fruits of their efforts. For the other states, I suggest the time to act is now.

I hope we will have many opportunities in the days to come to reflect and to share our thoughts on what we might be able to achieve through the harmonisation of our legal infrastructure for commercial laws, as we venture forward together "Beyond The Law, Beyond The Call of Duty and Beyond Boundaries". Thank you.