

Convergence across National Boundaries

In Commercial Law

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Introduction

The subject of my remarks today is legal convergence. In the study of comparative law, there is more than one way in which the term 'convergence' can be used. Professor Margit Cohn has distinguished between two processes of convergence which may operate in parallel but are analytically distinct.¹ One type of convergence involves the conscious adoption of foreign legal constructs in a domestic system. The other type of convergence can be described as 'functional convergence'. That term describes how different systems may independently move toward the same or similar end points, with little or no evidence of purposeful transplantation.

The first type of convergence is often coupled with terms like transplantation, borrowing, cross-pollination and cross-fertilisation. This type of convergence has attracted the most attention in the comparative law discipline, and it is the focus of my address. However, the distinction between these two types of processes draws attention to the facts that convergence is not limited to harmonisation and uniformity of laws. Change in the laws of any country can be a complex function of history, culture, economy, social conditions, and the nature and distribution of power within that country.

Moreover, it is not always safe to assume that laws that are similar on their face operate in a similar way in practice. Apparently similar laws may differ significantly between countries in their interpretation, administration and enforcement. As one academic comparativist has said:

¹ Margit Cohn, 'Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural-Institutional Context' (2015) 64 *International and Comparative Law Quarterly* 65, 94–101.

At best, [the standardisation of law] may reduce the uncertainty about the contents of the applicable law. It is not a guarantee for uniform interpretation and enforcement of set standards.²

By way of example, Professor Peter Yu has pointed out that 'the main differences between intellectual property regimes in Asia are not in the laws themselves, but in the area of enforcement', a problem he attributes to weak enforcement mechanisms built into the TRIPS Agreement. Enforcement, he argues, also depends upon the existence of an enabling environment with 'a consciousness of legal rights, a respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system, sufficiently developed basic infrastructure, established business practices and a critical mass of local stakeholders.' Given as he says the varying levels of economic development and organisation, political practices and structures of government in Asia, it is understandable why the levels of intellectual property enforcement across the region vary significantly.³

A proactive approach to convergence therefore requires not only the identification of desirable similarities in the content of national laws, but anticipation of possible differences in their interpretation and application, and the societal and institutional contexts in which they will operate.

Differences between countries in the administration of similar laws can be linked to a longstanding debate between comparative law theorists about the phenomenon of migration or transplantation of legal concepts and rules from one society to another. Montesquieu in his *Spirit of the Laws* in 1748 saw the societal setting of national laws as an obstacle: '[l]aws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.'⁴

Harmonisation which involves more than mere convergence can be particularly difficult to achieve. In 2012, the Australian Government instigated a public consultation on reforming Australian contract law with an emphasis on possible codification. The

² Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) *The American Journal of Comparative Law* 97–130, 99.

³ Peter K Yu, 'Clusters and Links in Asian Intellectual Property Law' (2014) *Social Science Research Network*, 2, 5.

⁴ Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Anne M Cohler, Basia Carolyn Miller and Harold Samuel Stone trans, Cambridge University Press, 1989) 8–9 [trans of *De L'Esprit des Laws*, Book 7, Chapter 3 (first published 1748)].

Commonwealth Attorney-General of the day, the Hon Nicola Roxon, suggested that Australian businesses could gain from better contract law compatibility with our trading partners in the Asian region.⁵ The proposal was not welcomed by everyone. Chief Justice Bathurst of the Supreme Court of New South Wales argued that Australia's major trading partners themselves have diverse systems of contract law. Harmonisation with one country would inevitably undermine harmonisation with others.⁶ That, of course, reflects a difficulty that may arise in a variety of areas of the law in which there is diversity between countries in the region. It is a difficulty that must be considered in determining whether convergence amounting to harmonisation or some lesser degree of compatibility between national commercial laws should be pursued. Chief Justice Bathurst also said that it was far from obvious that harmonisation of substantive legal principles would substantially reduce the current transactional costs of international contracting. He pointed out, with respect, quite correctly, that:

A legal system is more than substantive rules of law. Trading partners such as China differ markedly from Australia in terms of their legal history, institutions, and procedural rules, not to mention language. It should not be assumed that aligning Australian and Chinese law in areas such as the availability of a hardship defence, or the requirement for consideration, would meaningfully harmonise two systems of laws with such different contexts and historical roots, ensure consistent interpretations of a contract in a given factual context, or make China's legal system understandable or navigable to Australian businesses.⁷

What can be said of harmonisation can also be said of convergence generally.

Obviously, some areas of commercial law attract sensitivities that are real impediments to convergence. There are what the late Professor Otto Kahn-Freund called 'degrees of transferability'. Some areas of the law are closer than others to concentrations of societal power. Kahn-Freund said:

⁵ Nicola Roxon, 'Time for the great contract law reform', *The Australian* (Australia) 23 March 2012.

⁶ The Hon TH Bathurst, Submission No 55 to Attorney-General's Department, *Review of Australian Contract Law* (2012) 11.

⁷ *Ibid.*

Anyone contemplating the use of foreign legislation for law-making in his country must ask himself: how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which we do not share? How far would it be accepted and how far rejected by the organised groups which, in the political sense, are part of our constitution?⁸

This is of particular significance in the field of regulatory laws which involve executive power and which may affect substantial commercial interests. Loud and forceful special pleading is not unusual where competition law reform is being considered. The same phenomenon may be observed in the field of intellectual property law.

One area obviously worthy of consideration is convergence in contract law. The examples I have already given from within Australia and the United Kingdom may not be encouraging but that does not mean that convergence cannot be pursued at some level. One mechanism that can be deployed is encouragement of the enhanced use of international conventions and standards for uniformity in commercial laws — in particular the United Nations Convention on Contracts for the International Sale of Goods (1980).⁹

Resources and mechanisms of convergence — an overview

There are many resources and institutional mechanisms for encouraging and implementing convergence. International conventions and free trade agreements provide an important framework for developing convergent business laws to give effect to them. In addition, there are many bodies of learning and experience and instruments based on them which can be drawn on as resources to assist in cooperative convergence.

A variety of institutional mechanisms involving interactions between policy-makers, practitioners, regulators and members of the judiciary can also support convergence.

Let me offer some brief observations on some of those resources and mechanisms.

⁸ O Kahn-Freund, 'Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 12.

⁹ See eg the discussion in GF Bell, 'Harmonisation of Contract Law in Asia — Harmonising Regionally or Adopting Global Harmonisation — The Example of the CISG' (2005) *Singapore Journal of Legal Studies* 362.

Academic scholarship

There is a substantial body of comparative law writing on the transferability of laws reflecting a spectrum of views. There is also a body of scholarship and empirical research on the extent to which societies in the Asian region have accepted the transplantation of legal ideas. That material has obvious relevance to the selection of convergence projects which are most pressing and most likely to succeed. University based centres specialising in Asian legal and business studies in our region have a very important part to play in the development of convergence projects.

Empirical research on the behaviour and perspectives of the private sector is essential as well as their direct input into the convergence process. An interesting example of such empirical research was published last year in the *International and Comparative Law Quarterly*. It concerned what the author called domestic compliance with 'global law'. It focussed on competition law in Vietnam and fragmentation in compliance across different business networks according to the knowledge systems available to them.¹⁰ The report suggests the viability of convergence in particular areas of commercial law is not to be judged from the perspective only of law-makers and what the author, Professor John Gillespie, referred to as 'regulatory elites'. That is a particular example and no doubt examples could be multiplied.

Convergence instruments

There exists a large array of international instruments which are designed, with varying degrees of prescription, to guide the development of national commercial laws and international commercial practice generally.

Legal standards and principles may be treated together. They are created by a variety of bodies to provide common frameworks within which commercial law and practice on particular topics may be encouraged to develop. They occupy a spectrum from statements of general objectives to much more detailed proposals of commercial law in particular areas. There are many examples. They include large topics such as competition law and substantial but more narrowly focused topics such as corporate governance, insurance, securities

¹⁰ J. Gillespie, 'Localising Global Competition Law in Vietnam: A Bottom Up Perspective' (2015) 64 *International and Comparative Law Quarterly* 935.

markets, and capital adequacy requirements for banks. They emanate from the United Nations and its agencies and other governmental and non-governmental international bodies including associations of regulators and professional organisations.

Relevantly to the Asia-Pacific region, APEC in 1999 endorsed the 'APEC Principles to Enhance Competition and Regulatory Reform'. They are probably best categorised as a statement of legal standards. They recognise the importance of leaving room for different approaches to implementation. They include very broadly stated objectives of non-discrimination, comprehensiveness, transparency, accountability and implementation.

Examples of more narrowly framed standards can be seen in the products of the International Organisation of Securities Commissions including its 'Statement of Objectives and Principles of Securities Regulation' and its 'Statement of Standards for the Custody of Collective Investment Schemes Assets'. As a general proposition the scope of topics covered by what may generically be called 'legal standards' is enormous.

Statements of Principle which go beyond the aspirational and normative, include the UNIDROIT Principles of International Commercial Contracts which has a preamble, seven chapters and 120 articles ranging from the general to the more particular, the Principles of European Contract Law, the American Law Institute/UNIDROIT Principles of Transnational Civil Procedure, the American Law Institute and International Solvency Institute's Global Principles for Cooperation on International Insolvency Cases and the World Bank's Principles and Guidelines for Effective Insolvency and Creditor's Rights Systems.

Convergence is concerned not only with laws expressly affecting international commercial transactions and disputes, but also with the operation of laws affecting domestic commercial transactions and disputes. Coherence between those laws is to be desired if only because of the difficulty in today's world of drawing bright lines between the local and the global.

The use of standard forms of transactional document for international commercial transactions and their application into appropriate domestic transactions is likely, as mentioned earlier, to have a significant practical effect on convergence in commercial law and practice generally.

Mechanisms for convergence

Having identified some of the legal resources that support convergence, I will now turn to some of the institutional mechanisms.

Human beings often make progress in cooperative endeavours through informal mechanisms without a prescriptive or product driven agenda. Regular meetings of the various actors in the formulation, administration, interpretation and practice of commercial law at an informal level can build confidence across national boundaries, enhance receptivity to ideas emanating from other jurisdictions and identify important areas of difference in principle and practice.

There is also something to be said for the development of a technical, multi-jurisdictional harmonisation committee which could give consideration to draft texts of legislation, including delegated legislation and rules of court, and common form transactional terms with a view to implementation of convergence or harmonisation proposals. In Australia, the Council of Chief Justices of Australia and New Zealand has been well-served over many years by a Harmonisation Committee designed to advance harmonisation of rules and practices within the various Australian jurisdictions.

Reference has been made earlier to the extent to which the utility of similarities in content between legal rules in different countries may be undermined by differences in interpretation and application. One means of mitigating that difficulty might be the adoption of a principle of interpretive comity between national judiciaries in relation to common form domestic statutes or procedural rules. There is nothing particularly controversial about that proposition where it applies to statutes giving effect to, and using terminology derived from international conventions or model laws. A convergence project might be directed to the extent to which there is a need for such a principle and if so how it could be expressed and implemented, whether in statute or as a principle of judge-made law.

The creation of new judicial institutions for the purpose of dealing with international commercial disputes has the potential for enhancing convergence of commercial law to the extent that it depends upon the development of the common law or the judicial interpretation of common form or similar statutes. The durability of such bodies will depend upon an extended confidence building process based upon their reputation for independence, the

quality of their decisions and their efficiency. Examples in recent times are the Dubai International Financial Centre Courts of First Instance and Appeal, the Qatar International Court and Dispute Resolution Centre and, most recently, the Abu Dhabi Global Market Courts. Singapore has created an International Commercial Court as a Division of its High Court. The long term might see the creation of a transnational regional or sub-regional court given judicial power under the domestic law of a number of institutions. It could be an evolution of the Singapore Court or it might be free-standing. Even if the constitutional arrangements of some countries, such as Australia, would impede the conferring of judicial power on such a body, its judgments, if given effect as a judgment of one or more countries in the region, could be enforced under foreign judgments legislation or analogously to the enforcement of arbitral awards.

The indispensability of the judiciary

The courts have a central role to play in convergence of the substantive and procedural commercial law although they are by no means the only relevant actors. Their effectiveness in contributing to convergence will depend upon the extent to which they are engaged in the hearing and determination of commercial disputes both national and international. As Chief Justice Bathurst said in an address delivered in Singapore in 2013, making a comparison between arbitral and judicial adjudication:

the lack of transparency in arbitration may act as a counterweight to legal convergence in the development of transnational commercial law. If courts of different countries heard international commercial disputes with greater frequency than currently, there may well be greater reference to one another's systems than currently exists, because foreign decisions would be available to domestic courts. This would in my view lead to a degree of convergence at least in fields not heavily impacted by domestic statute. At the very least there would likely be greater harmonization in the interpretation of international codes that have been adopted into domestic law, such as the UN Convention on Contracts for the International Sale of Goods, and the UNCITRAL Model Law on Cross-Border Insolvency.¹¹

¹¹ Chief Justice Bathurst, 'The Importance of Developing Convergent Commercial Law Systems Procedurally and Substantively' (Paper delivered at the 15th Conference of Chief Justices of Asia and the Pacific, Singapore, October 2013) 11.

There is a point to be made about the distinction between judicial decisions and consensual commercial dispute resolution, particularly commercial arbitration. Arbitration is well-accepted in the commercial world and by the courts of many countries in our region. It offers parties to disputes well-known advantages. Nevertheless, it is questionable how far it contributes to the development and convergence of commercial laws. Militating against its influence is the absence of any doctrine of precedent in relation to arbitral decisions and the often confidential nature of the process.

Lord Neuberger in a speech delivered at the Chartered Institute of Arbitrators Centenary Conference in Hong Kong in March last year, quite persuasively characterised the arbitral process as consistent with the rule of law. I respectfully agree. It provides a fair, consensual mechanism which respects party autonomy for the efficient resolution of disputes and is supported by International Conventions and the domestic laws of many nations. However, as Lord Neuberger also said:

One of the disadvantages of an increase in awards and a concomitant decrease in judgments, particularly in the common law world, is that the law does not develop, that it becomes ossified. The sting from this criticism can easily be drawn if excellent awards by excellent arbitrators are published.¹²

If, contrary to present practice, all arbitral awards were published in full and a comity-based convention analogous to *stare decisis* evolved, there would still be a difference in kind between such decision-making and the decision-making of the courts. That is because judicial adjudication serves larger purposes than the efficiencies and economic benefits and party autonomy served by the arbitral process.¹³ True it is focussed on the determination of particular disputes between particular parties. But it necessarily involves the public interpretation and application of laws, be they statutory or the judge-made common law which can affect a whole polity. The courts are not just one item on a list of dispute resolution service providers. They have an institutional responsibility to maintain the public face of the rule of law. In so doing they facilitate the flow of information about legal

¹² Lord Neuberger, 'Arbitration and the Rule of Law' (Paper presented at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015) 12.

¹³ O Fiss, 'Against Settlement' (1984) 93 *The Yale Law Journal* 1073, 1085.

questions and their resolution within their home jurisdictions and into other national jurisdictions. In so doing they create opportunities for convergence.

The Courts themselves, of course, must ensure that they are effective actors in the administration of business law by trying to minimise inefficiencies and maximise efficiencies in their processes and to reduce transaction costs. In connection with transnational disputes, there is a common interest in cooperative action to reduce or eliminate disputes as to venue and to provide effective assistance to each other in relation to the enforcement of judgments and cooperation in relation to interlocutory relief. The *Hague (Choice of Courts) Agreement Convention* is a useful instrument in the way of enhancing party autonomy in the selection of a court to determine any dispute arising out of the contract and to ensure that its judgments will be recognised and enforced by the courts of other countries which are parties to the Convention and that their courts will recognise the exclusive jurisdiction of the court designated in the contract.

Conclusion

The convergence endeavour accords with the spirit and realities of our time. What Montesquieu wrote in 1748 reflected an 18th century view of the Nation State and the place of law within it and a different world of trade, commerce, communication and the movement of peoples. Kahn-Freund posed the question in 1974:

Would Montesquieu have written about cultural diversities the way he did, had he been able to anticipate that everywhere people read the same kind of newspaper every morning, look at the same kind of television pictures every night, and worship the same kind of film stars and football teams everywhere.¹⁴

That rhetorical question is itself temporally bound. Written in 1974, it pre-dated the age of the internet and e-commerce and the explosive growth of international conventions, model laws, statements of standards and principles and standard commercial instruments reflected in the domestic law and practice of many different nations and affecting the way in which business is done across national borders.

¹⁴ O Kahn-Freund, 'Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 9.

The statistics of our region speak for themselves. The huge area of the Earth which we call the Asian region with its various sub-groupings is neither an island nor archipelago. It is part of a global market-place. The development, where practical, of convergent commercial laws, is an imperative for more effective participation in that market place.