

# **Convergence of Commercial Laws — Fence Lines and Fields**

## **Doing Business Across Asia — Legal Convergence in an Asian Century Conference**

Chief Justice Robert French AC  
22 January 2016, Singapore

### **Introduction**

My thanks to the Singapore Academy of Law and to its President, Chief Justice Menon, for convening this conference and inviting me to speak at it. Yesterday saw the launch of the Asian Business Law Institute ('the Institute') which it is hoped will become an agent of change in the development of business law and practice in the Asian region. Its acceptance by countries other than Singapore reflects an expectation that it will be a body whose work will engage with the region. The inclusive vision of Chief Justice Menon and his colleagues in the Singapore Academy of Law is directed to that end.

The creation of the Institute responds to what has been described as the emergence of a new transnational commercial law and its adoption by national systems. Professor Ross Cranston who so described it proposed four explanations of the phenomenon.<sup>1</sup> They are not mutually exclusive. The first was globalisation supporting a new *lex mercatoria* and the emergence of international conventions, uniform principles and model laws. The second, a rule of law theory, proposed that economic development requires a legal system which, in substantive content and judicial administration, protects contractual and property rights. The third theory invoked market forces sensitive to whether a country is perceived as pro-creditor or pro-debtor according to the extent to which it has adopted standards, codes and principles of transnational commercial law. Fourth was an explanation reflecting legal transplant theory, namely that where conventions, model laws and standards are adopted in a particular

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<sup>1</sup> Ross Cranston, 'Theorizing Transnational Commercial Law' (2007) 42 *Texas International Law Journal* 597, 599–600.

country it is because they fit with domestic legal institutions including the legal profession and because the necessary political will is present.

The Institute will have to take account of the forces for and against convergence and where it is to be located in the spectrum of bodies that participate in the development of commercial law. It will have to consider, for any activity it undertakes, the prospects of success in the Asian region or a significant part of it, and the extent to which it will yield practical benefits. This address is directed to some of the matters relevant to those strategies in light of the functions of the Institute.

## **The functions of the Institute**

The functions of the Institute are set out in its Mission Statement, which was adopted by the Board of Governors at its inaugural meeting. In brief summary it requires the Institute:

- To evaluate and stimulate the development of Asian law, legal policy and practice, and in particular make proposals for the further convergence of business law among Asian countries;
- To study Asian approaches regarding business laws and practice in drafting legal instruments, restatements of law or model rules;
- To conduct and facilitate Pan-Asian research, in particular to draft, evaluate or improve principles and rules which are common to Asian legal systems;
- To provide a forum, for discussion and cooperation, between the business community and the legal fraternity including, inter alia, judges, lawyers, academics and other legal professionals who take an active interest in Asian business law development.

That statement must be understood by reference to the key terms 'Asian', 'convergence' and 'business law'.

## **Asia**

Depending on whose list you read, Asia embraces 48 countries, from Russia in the west, to the Philippines in the east, with different histories, cultures and constitutional and

political systems. The United Nations has identified five sub-regions designated Central Asia, Eastern Asia, Southern Asia, South Eastern Asia and Western Asia.<sup>2</sup> The term 'Asia' itself seems to be a western construct — covering everything in the eastern land mass of Eurasia, separated from Europe by the Ural Mountains.<sup>3</sup> It is an under-statement to say that there is a degree of diversity in legal traditions across the countries that make up Asia. Moreover, different legal traditions co-exist within some of them.

## Convergence

The second key word is 'convergence'. In this context it should be preceded by the word 'cooperative'. That qualification recognises the need, as Chief Justice Menon has already done,<sup>4</sup> for dialogue among those whose support is necessary for any convergence project and those likely to be affected by it. It is a dialogue that must engage law-makers, the judiciary and the legal profession, business networks and associations, academics and government officials with responsibility across a range of areas relevant to business law and practice.

In its ordinary meaning 'convergence' refers to a tendency of things to come together at a point. In its application to biological systems it denotes the tendency of distinct organisms to evolve similar structures and physiological characteristics under similar environmental conditions. Some might see in that application an analogy which suggests that regional convergence, at least in commercial law, is a kind of inevitable evolution driven by the homogenising forces of globalisation. The analogy applies to convergence to the extent it is driven by external forces. However, like most analogies it is imperfect and should be treated with some caution.

Convergence denotes movement along a spectrum of similarity which includes, but 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

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<sup>2</sup> United Nations Statistics Division (2013) 'Composition of Macro Geographical (Continental) Regions, Geographical Sub-Regions, and Selected Economic and Other Groupings' cited in Peter K Yu, 'Clusters and Links in Asian Intellectual Property Law' (2014) Social Science Research Network, 2; <http://ssrn.com/abstract=2492954>, 2.

<sup>3</sup> David Llewlyn, *Invisible Gold in Asia — Creating Wealth through Intellectual Property* (Marshall Cavendish Business, 2010) cited in Peter K Yu, above n 2, 2.

<sup>4</sup> Sundaresh Menon, 'Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence' (2013) *Singapore Journal of Legal Studies* 231, 251.

distribution of power within that country. Moreover, apparently similar laws may differ significantly between countries in their interpretation, administration and enforcement. As one academic comparativist has said:

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.<sup>5</sup>

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.<sup>6</sup> 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.'<sup>7</sup> 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.<sup>8</sup>

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:

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<sup>5</sup> Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) *The American Journal of Comparative Law* 97–130, 99.

<sup>6</sup> Peter K Yu, above n 2, 5.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

Laws 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.<sup>9</sup>

That statement reflects what has been called 'culturist' scepticism. It persists with varying degrees of intensity.<sup>10</sup>

Against that scepticism is the optimism of another tribe sometimes called the 'transferists' or 'essentialists'.<sup>11</sup> A leading exponent of the optimistic approach, Professor Alan Watson, wrote in his 1974 book, *Legal Transplants: An Approach to Comparative Law*, that the transplantation of legal rules is socially easy even where they come from one system to a very different kind of system.<sup>12</sup> Speaking of harmonisation of contract law between England and Scotland, a project some might think more challenging than convergence in the Asian region and still a work not in progress, he said:

It is scholarly law reformers who are deeply troubled by historical factors and habits of thought. Commercial lawyers and business men in Scotland and England do not in general perceive differences in habits of thought, but only — and often with irritation — differences in rules.<sup>13</sup>

'Harmonisation' is a word denoting a particular species of convergence. It has a rosy tinge which suggests that if everybody would just be sensible, we could all get onto the same page. But the pathway to that happy place is not always easy or passable. In 2012, the Australian Government instigated a public consultation on reforming Australian contract law with an emphasis on possible codification. The 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.<sup>14</sup> The proposal was not met with universal enthusiasm. It seems to have fallen off the radar. Chief Justice Bathurst of the

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<sup>9</sup> 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)].

<sup>10</sup> See eg, P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, 120.

<sup>11</sup> The debate surrounding these terms is discussed in Basil C Bitas, 'Comparative Theory, Judges and Legal Transplantation: A Practical Lesson from Singapore and its Relevance to Transnational Convergence' (2014) 26 *Singapore Academy of Law Journal* 50–67, 52 et ff.

<sup>12</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974) 96.

<sup>13</sup> Ibid 96–97.

<sup>14</sup> Nicola Roxon, 'Time for the great contract law reform', *The Australian* (Australia) 23 March 2012.

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.<sup>15</sup> 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.<sup>16</sup>

That observation reflects a degree of realistic culturist scepticism. As with most things in life, both sceptics and optimists have viewpoints worthy of serious consideration. There is, however, something to be said for the view that the prospects for convergence in any area of the law and practice depend significantly on the will and persuasive powers of those who pursue it. That being said, the removal of dissimilarity and the installation of similarity in the content of legal rules cannot be the beginning and ending of the convergence process. Nor is it the only way of advancing practical convergence. In the field of contract, for example, it may be that standard forms or contract terms will be of equal or greater significance than the black letter law. Ewan McKendrick has suggested, in the context of English and Scottish contract law, that:

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<sup>15</sup> The Hon TH Bathurst, Submission No 55 to Attorney-General's Department, *Review of Australian Contract Law* (2012) 11.

<sup>16</sup> *Ibid.*

a plausible argument can be made to the effect that harmonisation is more likely to take place as a result of the increasing use of standard terms in commercial contracts than it is through harmonisation of black-letter rules of law.<sup>17</sup>

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

Returning to the optimists, Professor Watson's approach to the transferability of legal rules derives some support from the history of our region. As Professor Andrew Harding, the Director of the Centre for Asian Legal Studies at the National University of Singapore, has pointed out South East Asia is the repository of an abundance of legal traditions encompassing all the world's major legal world views and systems.<sup>18</sup> The region, with which this conference is concerned of course, extends well beyond South East Asia but Professor Harding's generalisation seems at least plausible for a larger part of it. Assuming that to be right, the historical record of legal transplantation is cause for cautious optimism about the prospects for guided convergence in commercial law. Cautious does not mean timid.

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:

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?<sup>19</sup>

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. The Institute, in

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<sup>17</sup> Ewan McKendrick, 'Harmonisation of European Contract Law: The State We Are In' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart Publishing, Oregon, 2006) 15-16.

<sup>18</sup> Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in David Nelken and Johannes Feest (eds) *Adapting Legal Cultures* (Hart Publishing Oregon, 2001) 199, 213.

<sup>19</sup> O Kahn-Freund, 'Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 12.

selecting convergence projects, will have to have regard to the degree to which such considerations may affect their practical utility. Professor Harding made the point in his published research concerning legal transplantation in South East Asia, when he contrasted divergence in the field of public law with convergence in the field of private or commercial law.<sup>20</sup> Those considerations should not be a counsel of timidity. Indeed a degree of thoughtful boldness may be useful in establishing a distinctive profile for the Institute. One challenging area is the intersection of commercial law and practice and human rights in the region.

On 16 June 2011, the Human Rights Council of the United Nations endorsed a Statement of Guiding Principles on Business and Human Rights. The Principles are directed to the duty of States to protect against human rights abuses within their territories by third parties, including business enterprises.<sup>21</sup> Operational principles affecting general regulatory and policy functions include the propositions that States should:

- enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights;
- ensure that other laws and policies concerning the creation and ongoing operation of business enterprises such as corporate law, do not constrain but enable business respect for human rights.<sup>22</sup>

The potential interaction between those operational principles and transnational convergence in commercial law is obvious enough. There is evidence of a substantial degree of support for the Guidelines in the international business community and considerable interest in their development and implementation in our region.

By way of example, in October last year the ASEAN Corporate Social Responsibility Network arranged an ASEAN Responsible Business Forum in Kuala Lumpur which brought together 250 representatives of government, companies, trade unions and civil society. The final component of the Forum was a Workshop on the Guiding Principles co-organised by the

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<sup>20</sup> Andrew Harding, above n 18, 213.

<sup>21</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), Foundation Principle A1.

<sup>22</sup> Ibid 4.

ASEAN Corporate Social Responsibility Network and the Singapore Management University with support from the Swedish Government, the Asia-Europe Foundation, the European Union and the British Institute of International and Comparative Law.

Those events are the tip of a global iceberg. The level of current interest in the region suggests that it would be useful to undertake at least a scoping project to determine opportunities for convergence in commercial laws in so far as they may be related to human rights issues. While some might say that the differing perspectives of polities on the topic make it more difficult than most, the difficulty is just one species of a genus of difficulties which face convergence projects generally. It does not mean that convergence is unattainable. It just means that it has to be planned and calibrated to achieve the best outcome in the circumstances.

Another 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 within the region 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). Professor Gary Bell of the National University of Singapore has argued for that option instead of pursuing the dream of harmonisation.<sup>23</sup>

## **Business law — the subject area**

I have referred to two key terms 'Asia' and 'convergence'. The third key term in the Mission Statement is 'business law'. The subject of business law includes its content, its institutional administration and its practice. It includes bodies of transactional law which may be statutory or judge-made or a combination of both, such as the law relating to contracts, property and maritime law. It covers regulatory laws with transactional applications dealing with topics such as corporations, securities, financial services, foreign investment, competition, insolvency, employment and taxation. It extends to sectoral regulation in such areas as media, telecommunications, electricity, water and other natural resources. And, of enduring relevance for convergence in commerce is the panoply of laws

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<sup>23</sup> 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.

dealing with the various species of intellectual property. The subject matter also necessarily picks up criminal law dealing with topics such as corruption and money laundering and the various criminal offences generated by regulatory laws.

Many business laws presently in existence in the region involve the application of common or overlapping concepts. Particular examples are competition and intellectual property laws, albeit there are significant differences in the enforcement and application of these laws. Some laws give effect to International Conventions or reflect the terms of Model Laws. Others may have a shared ancestry with colonial laws or reflect transnational legal borrowings.

## **Resources and mechanisms of convergence — an overview**

There are 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. They include:

- Academic scholarship and empirical research.
- International legal standards setting out objectives and guidelines for national laws in particular subject areas.
- International statements of principles.
- Model laws, including Codes.
- Statements reflecting regional or sub-regional consensus about particular areas of business law.
- Common form transactional documents and terms.

Institutional mechanisms which can support convergence include:

- Regular meetings, jointly or severally, of judges, the legal professions, regulators, legislative drafters, policy advisers and business associations.

- Judicial assistance and cooperation arrangements.
- The adoption of a principle of interpretative comity between national judiciaries in relation to business laws.
- A multi-jurisdictional harmonisation committee to make specific proposals which could be considered by national jurisdictions.
- International commercial courts or tribunals.

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

### *Academic scholarship*

There is a substantial body of comparative law writing on the transferability of laws with a spectrum of views from sceptical culturists to optimistic transferists. 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. By way of example, the Centre for International Law at the National University of Singapore has undertaken in recent times, an extended project under the title 'ASEAN Integration Through Law' and contemplates a number of publications as products of that project.

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.<sup>24</sup> 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

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<sup>24</sup> J. Gillespie, 'Localising Global Competition Law in Vietnam: A Bottom Up Perspective' (2015) 64 *International and Comparative Law Quarterly* 935.

Gillespie, referred to as 'regulatory elites'. That is a particular example and no doubt examples could be multiplied.

Academic scholarship may be drawn on by the Institute as an existing resource. It may be commissioned by the Institute or undertaken as a joint venture with another body. That approach applies also to the next group of legal resources which I treat together, namely legal standards, statements of principles, model laws, restatements, and common form documents.

### *Convergence instruments*

As pointed out in the Introduction, 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 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.

Professor Katharina Pistor of the Columbia Law School has pointed to the utility of non-binding general standards which enable a variety of responses by legislatures. She has written:

Rather than harmonizing highly-specified rules, the standards aim only at establishing the principles for such rules. This means that there is no attempt to force a single set of rules—the perfect law—upon sovereign lawmakers around the world. In principle, countries can therefore choose not to adopt these standards and are free to modify them where appropriate.<sup>25</sup>

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<sup>25</sup> Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 *The American Journal of Comparative Law* 97, 102.

Relevantly to our 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. ASEAN in 2007 committed itself to establishing an ASEAN Economic Community. One aspect of its associated goals was the implementation of a competition policy, by each of the member states, by 2015. Guidelines on competition policy were promulgated.

More narrowly focussed examples of 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.

More detailed 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. Those instruments, standards, principles and common form documents, may be drawn upon by the Institute with a view to identifying areas in which

convergence may be encouraged consistently with them or, alternatively, with a view to developing similar instruments appropriate to the Asian region or part of it. An up-to-date data base will constitute a resource able to be drawn upon by the Institute in its work and be of value to the public.

I have included in the list of potential legal resources statements reflecting regional or sub-regional consensus about particular areas of commercial law analogous to the Restatements produced by the American Law Institute ('ALI') from time to time. A number of those Restatements are directed to the harmonisation of the common law within the United States. In a region which covers diverse common law and civil law jurisdictions, the scope for documents analogous to ALI Restatements may be limited. On the other hand, they may serve as compilations of common principles, judge-made and statutory, in existence within the region or parts of it and as pointers to areas of difference which might be resolved in particular ways. The ALI Restatements of course are not simply instruments of harmonisation. They are the valuable products of the best academic scholarship and judicial and practitioner wisdom and experience in the subject areas with which they deal. They are able to provide authoritative and influential guidance to law-makers, judges and practitioners. They result from a structured, consultative drafting process culminating in adoption at General Meetings of the ALI. That process can provide a model for consideration by the Institute in relation to instruments which it may produce. I have spoken of legal resources for convergence. Can I now mention mechanisms.

## **Mechanisms for convergence**

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. The Institute should be aware of the existence, subject matter and frequency of such exchanges in the region so that where there are meetings which are relevant to its work, it can consider supporting or becoming involved in them. The organisation or sponsorship of such meetings within areas relevant to its work would be well within its remit. Such meetings provide a stronger foundation between members of the

judiciary, build confidence and provide a stronger foundation for judicial assistance and co-operation arrangements in commercial litigation with transnational elements. Those arrangements are useful ends in themselves, but also important to the convergence of practice and procedure within the region.

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. It was chaired for many years by former Justice Kevin Lindgren, who is now the President of the Australian Academy of Law and is present at this conference. The Harmonisation Committee could be asked, from time to time, to undertake work by any group of jurisdictions within the Asian region.

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. Such developments are speculative but they can inform part of a larger vision served by the work of the Institute.

### **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.<sup>26</sup>

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

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<sup>26</sup> Chief Justice Bathurst, 'The Importance of Developing Convergent Commercial Law Systems Procedurally and Substantively' (Paper delivered at 15th Conference of Chief Justices of Asia and the Pacific, Singapore, October 2013) 11.

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.<sup>27</sup>

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.<sup>28</sup> 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 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

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<sup>27</sup> Lord Neuberger, 'Arbitration and the Rule of Law' (Paper presented at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015) 12.

<sup>28</sup> O Fiss, 'Against Settlement' (1984) 93 *The Yale Law Journal* 1073, 1085.

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.<sup>29</sup>

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.

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. To make the business law and practice of the region or any part of it more coherent and less costly is a large and worthy objective. The Institute will not be the only body that contributes to that process but it is particularly well positioned to be a significant part of it.

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<sup>29</sup> O Kahn-Freund, 'Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 9.