Perspectives on Harmonizing Transnational Commercial Law

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Introduction

Mr Chairman, distinguished speakers and delegates, good afternoon. I am indeed honoured to be invited to join this distinguished panel of speakers. Today, as we gather to commemorate the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG), and hearing the speeches from this learned panel, I cannot be but struck by how far the grand project of harmonizing transnational commercial law has come. Yet, it cannot be gainsaid that the destination remains some distance away.

The case for harmonization

It is indeed self-evident that the existence of diverse legal systems increases the transaction costs of cross-border businesses.[1] Today the sheer volume and scale of cross-border trade and investment flows[2] has rendered the paradigm of operating in jurisdictional legal silos obsolete. As Singapore's Chief Justice said in his speech at the thirty-fifth anniversary of CISG in Singapore on 23 April 2015: "… the world has experienced an unprecedented period of technological innovation, trade liberalisation and economic integration. This led to a phenomenal increase in the volume and frequency with which capital, goods, people and ideas flowed across national boundaries."[3]

While the harmonization debate nevertheless remains ongoing,[4] the case for the harmonization of transnational commercial law is stronger than ever.

The Asia-Pacific region

This is particularly the case for the Asia-Pacific region, which can be fairly described as a "morass of civil, common, and socialist legal traditions laid over with highly specific

[1]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: United Nations, 2011) 53 at 57, online: UNCITRAL http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf

[2]See J. H. Dalhuisen, "Globalization and the Transnationalization of Commercial and Financial Law" [2014] 67 *Rutgers Uni. L. R.* 1 at 2.

[3]Sundaresh Menon, "Roadmaps for the Transnational Convergence of Commercial law: Lessons Learnt from the CISG" delivered at the thirty-fifth anniversary of the Convention on Contracts for the International Sale of Goods (Singapore)—unpublished ("Roadmaps").

[4]For an overview, see Silvia Faizo, *The Harmonization of International Commercial Law* (The Netherlands: Kluwer Law International, 2007) at 16. C.f. Martin Boodman, "The Myth of Harmonization of Laws" (1991) 39 Am. J. Comp. L. 699; Paul B. Stephan, "The Futility of Unification and Harmonization in International Commercial Law" (1999), online: http://papers.ssrn.com/paper.taf?abstract_id=169209.

national and customary distinctions implemented across multiple strata, from federal governments and city-states to municipalities and urban communities."[5] Unlike the European Union ("EU"), the Asia-Pacific region does not have the option of effecting harmonization of commercial laws from a top-down approach. The considerable heterogeneity among Asian legal systems, while certainly insufficient to keep investors away, will make it more costly and difficult for businesses to operate in this region.

One would have thought that CISG, which was drawn up with the participation of no fewer than 62 States and to which 83 States are parties today, would have fulfilled the crying need for a uniform contract law for cross-border sale of goods, which undoubtedly forms a significant proportion of trade. But surprisingly the experience in Singapore is that its use is sparse and its visibility is not high.

The Singapore courts have only had five reported cases that refer to CISG since we ratified CISG and enacted the Sale of Goods (United Nations Convention) Act (Cap 238A, 2013 Rev Ed) to bring it into force. Furthermore, none of these five cases involve the direct application of CISG. Two of the cases involve applications to set aside arbitral awards on the ground that, inter alia, the tribunal failed to apply CISG as the governing law.[6] The remaining three cases referred to CISG as a reflection of the prevalent position adopted in transnational commercial law.[7]

The reasons for the relatively low prominence of CISG in Singapore are not clear. One reason could be that CISG features more often in the arena of arbitration rather than litigation. Or perhaps legal advisers and their clients tend to prefer legal systems or instruments with which they are familiar. My personal view, drawn from my time in private practice and as a commercial judge, is that perhaps the most important stakeholders—men of commerce and their legal advisers—who are already overburdened with the multiplicity of legal systems in their cross-border transactions do not want yet another legal regime plastered on their deal. They may perceive a lack of precedent on CISG which adds to the uncertainty. This of course ignores the CISG database maintained by Pace University,[8] which is certainly remarkable, but as pointed out in the home page of the database, the cases that end up in arbitration are often not reported. The impedance of a build-up of a body of case law or jurisprudence is thus significantly impacted.

If these are indeed the reasons, then the answer is obvious. More must be done to secure the "buy-in" of legal practitioners and their clients. The programme of conferences, meetings and workshops held by UNCITRAL and the Centre for Transnational Law to raise awareness of CISG go a long way. Legal practitioners must be convinced that the infrastructure supporting the use of CISG is suitably developed before they would have the confidence to recommend it to their clients. There should also be greater collaboration with law schools around the world to ensure that young, aspiring law students are exposed to CISG. Our efforts should be focused on training and familiarizing the future generation of lawyers on CISG. For example, the two law schools in Singapore each have specialist centres dedicated to the field of transnational commercial law.[9] The gradual transition

[5]Roadmaps, *supra,* note 3 at para 25.

[6]*Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 and *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114.

[7]*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029; *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 195.

[8]Online: http://www.cisg.law.pace.edu/.

[9]The National University of Singapore, School of Law, operates the Centre for Law & Business, while the Singapore Management University, School of Law, operates the Centre for Cross-Border Commercial Law in Asia.

towards a more harmonized commercial law would, by no small measure, require our law students to be conversant with international instruments like CISG.

In Singapore, in looking to the future, the Ministry of Law, the Judiciary and the legal fraternity see a tremendous potential which spells a bright new chapter for the development of the *lex mercatoria* and along with it, conventions like CISG, in Asia.

It has been estimated that Asia already accounted for 30 per cent of world trade in 2010 and this figure will reach 35 per cent by 2020.[10] The Asian Development Bank suggests that by 2050, Asia could account for half of global GDP, trade and investment.[11] These are not fanciful projections. China has publicly announced and is committed to reviving the ancient maritime Silk Road[12] which linked it to Europe through the South China Sea and the Indian Ocean. Inter-government engagement has already begun to develop joint infrastructure projects and free trade agreements which will reconnect the ties between Asia, the Middle-East and Africa along this historic trade route. The very recently constituted Asian Infrastructure Investment Bank had a tremendous start with some 50 countries signing on as founder members, and another seven waiting for approval from their domestic legislatures.[13] President Joko Widodo of Indonesia, another significant burgeoning economy, has also unveiled plans to position his country as the centrepiece of a global maritime axis.[14] These are but just some examples of Asia's economic aspirations and the tremendous opportunities still to be realized in this part of the world.[15]

In light of this tremendous economic growth in Asia, significantly more must be done to reduce the considerable heterogeneity among Asian legal systems. I am told ASEAN—the Association of South-East Asian Nations—is on track to form a common market by the end of 2015, and greater legal harmonization in the area of commercial law would be a natural corollary. Since 2007, ASEAN member States have been examining various modalities for harmonizing trade laws, one of which is the more widespread use of CISG.

One of Singapore's key initiatives to promote the transnational convergence of commercial laws in Asia is the establishment of the Asian Business Law Institute ("ABLI"). ABLI is a permanent research facility that focuses on the comparative study of business laws in the region. It will serve two major functions. The first is to undertake original academic research into the commercial laws and policies of Asia; this will no doubt include studies on how the usage of transnational conventions like CISG can be increased in the region. The second is to operate as the nerve-centre for collaboration between judges, academics, practitioners and policymakers in Asia. If meaningful strides towards convergence are to be made, then stakeholders from the full spectrum of Asia's legal systems will have to be engaged. ABLI will not only serve as a centralized forum for these various stakeholders to exchange ideas, information and proposals, it will be the driving force to strive for convergence among certain business laws in Asia, especially in relation to issues

[10]See online at https://www.bcgperspectives.com/content/articles/financial_institutions_globalization_profiting_from_asias_rise_new_global_trade_flows/.

[11]Asia 2050: Realizing the Asian Century (Asian Development Bank, 2011), available online: http://www.adb.org/publications/asia-2050-realizing-asian-century.

[12]Paul Carsten and Ben Blanchard, "China to establish $40 billion Silk Road infrastructure fund", Reuters (8 November 2014).

[13]See online at online at http://www.ibtimes.com/fifty-countries-sign-china-led-asian-infrastructure-investment-bank-diplomatic-1987459.

[14] Vibhanshu Shekhar and Joseph Chinyong Liow, "Indonesia as a Maritime Power: Jokowi's Vision, Strategies, and Obstacles Ahead" (November 2014) available online at http://www.brookings.edu/research/articles/2014/11/indonesia-maritime-liow-shekhar.

[15] Working Group on Examining the Modalities for the Harmonisation of the Trade Laws of ASEAN Member States, formed under the auspices of the ASEAN Law Ministers Meeting and the ASEAN Senior Law Officials Meeting.

such as corporate governance, intellectual property, tax and data protection, just to name a few. It will also operate as a common point of contact for other research agencies and international organizations like UNCITRAL. Ultimately, the aim is for ABLI to provide the thought-leadership necessary to complement Asia's economic success.

The path to harmonization

Conceptually, harmonization can occur on three different levels.[16] The first involves harmonization at the recognition and enforcement level. To a large extent, harmonization at this level has been achieved in the context of international arbitration pursuant to the 1958 New York Convention and the UNCITRAL Model Law. The Hague Convention on Choice of Court Agreements aims to do the same for court-based disputes in both civil and commercial matters, and has the potential to be as game-changing as the 1958 New York Convention. Singapore became a signatory this year, along with the European Union, Mexico and the United States. To the end-users of litigation, being able to reap the benefits of a favourable judgment is typically the final goal. The costs of uncertainty which arise out of the current private international law regime that governs the enforceability of foreign judgments simply do not add up for complex business that operate on a global or regional scale. Harmonization should logically begin on this front.

The second level pertains to harmonization of the dispute resolution process. By this I am referring to the creation of specialist courts that are custom-built to deal with international commercial disputes and which operate in tandem with national courts. These courts would not only possess the attendant coercive powers of national courts, they would be particularly attuned to the needs and realities of international business. Despite the success of international commercial arbitration, such international commercial courts are necessary in order to create legitimacy in the context of transnational commercial dispute resolution. They also provide an avenue for the advancement of the rule of law as a normative ideal in global commerce.

In this context, Singapore launched the Singapore International Commercial Court ("SICC") at the beginning of this year. SICC operates as a branch of the Singapore High Court and deals with international and commercial cases where parties have consented to SICC having jurisdiction, be it before or after their dispute, and cases which are transferred from the Singapore High Court to SICC. Some of the key features of SICC are as follows: (i) the availability of foreign counsel representation; (ii) simplified rules of discovery; (iii) the option to dis-apply the Singapore Evidence Act, which contains rules such as the rules against hearsay evidence, the rule in *Browne v Dunn*[17] and the rule of direct evidence; (iv) the option of confidentiality; (v) the court can adopt procedure best suited to the case at hand; and (vi) less cumbersome methods of proving foreign law. SICC currently comprises 14 judges from the Singapore Bench and 12 eminent international judges and jurists from both common law and civil traditions,[18] of which I name two: the first is the Honourable Dr Irmgard Griss, formerly of the Austrian Supreme Court, and the second is the Honourable Dominique Hascher from the French Supreme Judicial Court. This diversity

[16]Sundaresh Menon, "The Somewhat Uncommon Law of Commerce" [2014] 26 *Sing. Ac. L. J.* 23 at [60]–[64].

[17](1893) 6 R 67 (HL).

[18]As at 29 June 2015, the international judges are Justice Carolyn Berger (United States), Justice Patricia Bergin (Australia), Justice Roger Giles (Australia), Justice Irmgard Griss (Austria), Justice Dominique Hascher (France), Justice Dyson Heydon (Australia), Justice Sir Vivian Ramsey (United Kingdom), Justice Anselmo Reyes (Hong Kong), Justice Sir Bernard Rix (United Kingdom), Justice Yasuhei Taniguchi (Japan), Justice Simon Thorley (United Kingdom), and Justice Sir Henry Bernard Edder (United Kingdom).

is specifically intended to enhance the international character of SICC and strengthen its ability to handle matters that originate from civil law systems. It also provides the platform for the cross-pollination of ideas, procedures and jurisprudence from both common and civil law jurisdictions. As SICC will develop jurisprudence that is consanguine with Singapore's domestic jurisprudence, it is well positioned to contribute to the development and harmonization of substantive commercial laws and practices. Eventually, the goal is the creation of a community of commercial courts, including the English Commercial Court, the Dubai International Financial Centre Courts and the New South Wales Supreme Court Commercial Division, which consistently engages and learns from one another, resulting in the adoption of best practices and the development of a consistent jurisprudence of international commercial law.

The third level of harmonization is of course the harmonization of substantive commercial law itself. CISG is a prime example of harmonization on this front. Standard form contracts such as the International Federation of Consulting Engineers ("FIDIC") forms typically used in the construction industry also promote transnational harmonization on a substantive level. However, achieving uniformity solely on a textual level would only generate the veneer of harmonization. The perennial obstacle to uniformity has always been the interpretation of these uniform texts.

This is where national courts have a pivotal role to play. As a starting point, national courts should attempt to achieve the harmonization of commercial laws and avoid divergence where this detracts from the international business environment. They will have to be less insular in their outlook and more open to discussions and debates with courts in other jurisdictions. The Singapore judiciary regularly examines jurisprudence from other jurisdictions for normative examples of best practices, especially in relation to interpreting international conventions such as the New York Convention or internationally used standard form contracts such as the FIDIC forms. For example, the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*[19] consciously adopted a narrow construction of the public policy ground under the UNCITRAL Model Law after reviewing the general consensus of judicial and expert opinion internationally, limiting it to those violations of fundamental notions and principles of justice that would shock the conscience. In the event that a harmonized approach cannot be taken, there is great benefit to be had for all stakeholders if courts were to elucidate the reasons for the divergence.

I qualify the endeavour of achieving harmonization of international commercial law with one caveat. While harmonization may represent an economic boon, nation States are more than mere trading entities and may justifiably prioritize other areas of public policy over economic benefits. Differences are acceptable when they are the result of domestic imperatives, considered government policy or structural differences across jurisdictions. For example, the Singapore Court of Appeal had the opportunity to revisit the contextual approach towards contractual interpretation in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*.[20] The court noted that adopting a contextual approach would result in a convergence with civil law doctrine and the approach adopted by transnational conventions such as CISG. While such harmonization of commercial laws is to be welcomed on a conceptual level, it must be assessed at the practical level of implementation, specifically, how it sits with Singapore's laws on the admissibility of evidence and the litigation process in general.[21] There was concern that the unqualified combination of liberal civil law doctrines on admissibility of extrinsic evidence with the common law pretrial discovery process might result

[19][2007] 1 SLR(R) 597.

[20][2013] 4 SLR 195.

[21]Ibid. at [38].

in an overwhelming amount of material being brought before the court. The court eventually concluded that the migration towards the civil law approach of contractual interpretation had to be a controlled one and imposed certain requirements on parties seeking to rely on the contextual approach.[22] In other words, harmonization must be steered in a precise and measured manner, with due regard given to its compatibility with local circumstances.

Conclusion

It remains to be seen whether international commercial law will eventually coalesce into a free-standing body of law applicable in and of itself, or in the famous words of the arbitral tribunal reported in the then English House of Lords case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*,[23] "those transnational general principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business." I would venture to say that some of the key elements for a successful *lex mercatoria* include consistency, predictability, and developed and clear substantive notions of fairness, justice and equity.

What is certain is that the creation of such law can no longer be considered the monopoly of nation States. Harmonization can ultimately only be achieved through the collective effort of various vital actors, such as academics, judges, practitioners and politicians, and the tireless work of organizations like UNCITRAL. This makes dialogues such as the one today indispensable and I look forward to the rest of the colloquium. Thank you.

[22]Ibid. at [73].

[23][2010] UKSC 46.