

**THE HON. TF BATHURST
CHIEF JUSTICE OF NSW**

**“THE IMPORTANCE OF DEVELOPING
CONVERGENT COMMERCIAL LAW SYSTEMS,
PROCEDURALLY AND SUBSTANTIVELY”**

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Introduction

1. The last ten to twenty years has seen an exponential increase in international trade and investment in the Asia Pacific region. In 1990-1991, Australian exports to ASEAN nations were worth \$8 billion and our two-way trade with China was worth \$3.2 billion. By 2011-2012, those figures were more than \$32 billion and \$125 billion respectively,¹ and China was Australia’s largest trading partner.² With increased trade and investment, there has also been an increased integration of Australian firms into other countries’ economies.
2. These figure are a microcosm of the total trade that takes place between countries in the Asia Pacific region. Nevertheless, they serve to indicate the exponential growth that has taken place between countries in the area. These trends seem likely to continue into the foreseeable future. The negotiations towards the Pacific Agreement on Closer Economic

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¹ DFAT, “Australia’s Trade Performance 1990-91 to 2010-11” available at <http://www.dfat.gov.au/publications/stats-pubs/australias-trade-performance-1990-91-2010-11.pdf>; DFAT, “Australia’s Trade with East Asia” (2012) available at

<http://www.dfat.gov.au/publications/stats-pubs/Australia-trade-with-east-asia-2012.pdf>.

² DFAT, “Australia’s Trade Performance 1990-91 to 2010-11” available at <http://www.dfat.gov.au/publications/stats-pubs/australias-trade-performance-1990-91-2010-11.pdf>.

Relations, or PACER Plus, and the Trans Pacific Partnership free trade agreement provide two examples of continuing investment and trade integration in the Asia Pacific Region.

3. Trade does not occur in a vacuum. For cross-border trade and commercial arrangements to work successfully, it is vital that such activity is conducted within a well understood legal framework
4. The economic and political benefits of international trade and investment are well known and need not be repeated here. Rather, this paper will consider the role of legal systems in international commercial activity. Unfortunately, the increasing internationalization of commerce and the ability of business to conduct operations smoothly across national borders stands in sharp contrast to the complexity, difficulties and risk that attend the resolution of cross-border disputes which inevitably arise. Efforts to promote convergence of commercial legal systems provide an important mechanism by which to reduce these legally related transactional costs. By convergence, I am referring to the harmonisation of substantive legal principle and civil procedure amongst nations states, to increasing uniformity in conflict of law rules, and to development of similarity and shared approaches to dispute resolution amongst judicial systems.
5. In that context, I will restrict myself primarily to discussing the issues that arise in cross-border contractual disputes, this being the paradigmatic commercial cross-border dispute. Inevitably, I will also bring a primarily Australian perspective to discussion of these issues. All countries in our region however, share the issues discussed in this paper to a greater or lesser extent.

I: Cross-border Dispute Resolution: Costs and Complexity

6. It is trite to say that commercial enterprises trading in a foreign country face a number of possible legal issues, ranging from simple contractual disputes and recovery of debt issues, through to issues of insolvency and

financing in more complex international transactions. In making commercial decisions, parties engaging in foreign trade and investment commonly look to what is sometimes colloquially called “sovereign risk”, although it is probably more accurate to call it “country risk”. Country risk encompasses the risks involved in a particular country’s business environment, including those stemming from its legal system. Legally related country risk can, of course, deter parties from engaging in commercial activity in the relevant country, or provide an incentive to attempt to avoid submission to the legal system of that state by adopting de-localised dispute resolution procedures, particularly through arbitration.

7. In the states that we represent the country risk associated with our legal systems is not likely to stem from the risk of arbitrary or unlawful actions taken by reference to domestic law, such as for example seizure of assets. Nor is it likely to be associated with an unreasonable burden, for want of a better term, being put on business by the relevant legal system.
8. There are of course exceptions. One that immediately springs to mind are taxation benefits caused by what is generally described as transfer pricing, the object being to isolate profits in a particularly favourable taxation location. Any attempt to prevent this impacts on corporations concerned, and will be a factor influencing the decision where to invest. Similarly, domestic restraints on foreign investment and control of assets influences such decisions. However, these issues are well beyond the scope of this paper. What I wish to deal with are legal risks, real or perceived, arising out of differing systems of domestic private law.
9. The legal risks identified by commercial parties operating in countries in our region are likely to arise from differences in substantive and procedural law between our countries, a suspicion by foreign commercial parties that legal decisions will be influenced by parochial attitudes, and a lack understanding of one another’s legal systems, including amongst the judiciary. These issues can give rise to acute difficulties in bilateral

disputes, creating transactional costs that impede mutually beneficial economic relationships. As my predecessor James Spigelman has put it:

“one of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment by imposing additional and distinctive burdens including:

- uncertainty about the ability to enforce legal rights;
- additional layers of complexity;
- additional costs of enforcement;
- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;...”³

10. While it is beyond the scope of this paper to discuss all of the difficulties arising in cross-border disputes from differences in our legal systems, it is necessary to outline a few of the more significant problems to understand the benefits and challenges of convergence.

11. Uncertainty arises at a number of stages of the dispute resolution process, particularly in relation to what I will call “conflict of laws” issues. To consider the matters sequentially, first, there are often disputes about the appropriate venue in which to hear the proceedings. In many if not most cross-border disputes, absent a choice of venue clause, there will often be a legitimate claim by both parties to the dispute that the courts of their respective countries are more appropriate to hear the claim.

12. Most countries have “long-arm jurisdiction”. Australia is no exception in this regard. For example, the NSW Supreme Court’s rules provide for jurisdiction based on extra-territorial service, where an element of the proceedings are connected with NSW.⁴ Further, it is common in all states in Australia for applications to be made to have proceedings validly

³ The Hon. JJ Spigelman AC, “Cross Border Issues for Commercial Courts: An Overview” (Second Judicial Seminar on Commercial Litigation, Hong Kong, 2010).

⁴ Uniform Civil Procedure Rules 2005 (NSW), Pt 11.

instituted and served in the state transferred to what is said to be a more appropriate venue. Australia, of course, is by no means unique in this respect.

13. The availability of more than one jurisdiction naturally leads to transactional costs related to venue disputes. Indeed the intensity of such disputes obviously suggests that parties to cross-border disputes view the matter of where their proceedings will be conducted as one of significant importance. Obvious reasons for parties to pursue disputes as to venue include the potential ability to benefit from substantive legal principles particular to one jurisdiction, or the possibility of obtaining greater damages in one country rather than the other. Less concrete reasons may relate to the perceived judicial attitude in one legal system rather than another. What is certain is that such disputes are, in former Chief Justice Spigelman's words, "always, in all circumstances, a waste of money".⁵

14. The absence of a uniform *forum non conveniens* test creates uncertainty about the circumstances in which courts will decline to exercise their jurisdiction, and a risk that more than one court will decide it is appropriate for it to determine aspects of the dispute. Jurisdictional disputes have of course always been a feature of cross-border disputes but they have in recent years taken on a new level complexity and intensity. There has been an increase in recent times in applications for what are described as anti-suit injunctions; that is, actions restraining a party from instituting proceedings in a foreign state, and for that matter in anti-anti-suit injunctions, seeking to restrain a party from seeking an anti-suit injunction in a foreign state. One can hardly imagine litigation more attractive to lawyers but less productive of real commercial benefit.

15. Even if there is no dispute as to venue, issues arise in relation to choice of law. In many cross-border commercial transactions, parties will have expressly chosen the law which is to govern their contract. Uncertainties

⁵ The Hon. JJ Spigelman AC, "Transaction costs and International Litigation" (2006) 80 *Australian Law Journal* 438 at 442.

will arise in these circumstances as to the limitations that may exist on the parties' choice as to governing law and the circumstances where choice may be overridden by the mandatory laws of the forum. In Australia, courts generally uphold the parties' choice of law and will displace it only if a domestic statute expressly indicates an intent to displace the foreign law.⁶ There are however areas of uncertainty. One significant example is whether a party who has chosen a foreign law as the governing law of their contract will nonetheless be subject to the consumer protection provisions in the *Competition and Consumer Act* and Australian Consumer Law.⁷ The uncertainty in this regard obviously presents a substantial risk to parties whose cross-border dispute is heard in Australia. Similar uncertainties as to the extent of parties' exposure to domestic law exist in other countries in our region.

16. Where the proper law of the contract is the law of another jurisdiction, issues also arise as to the application of foreign law by domestic courts. The common law position on this, which has traditionally applied in NSW, is that the content of foreign law is a question of fact, not law. This means that the foreign law must be pleaded and proved by a party, and that the court must receive evidence of what the law is rather than taking judicial notice of it. That process is cumbersome, difficult and expensive, often requiring expert evidence. It can also, unsurprisingly lead to mistakes and anomalous results.⁸ Clearly this is another source of increased costs and uncertainty in cross-border litigation.

17. One way in which courts can address this issue is through the adoption of Memoranda of Understanding with foreign courts, allowing for mutual referrals on question of foreign law. Currently the Supreme Court of NSW has such Memoranda in place with New York courts and the Supreme

⁶ Richard Garnett, "The Dominance of Uniformity of Outcome in Australian Choice of Law: Is it time to relax the grip?" (2013) 37(2) *Australian Bar Review* 192 at 196.

⁷ *Ibid*; Davies, Bell & Brereton *Nygh's Conflict of Laws In Australia* (8th ed, 2010) LexisNexis at [19.47]-[19.48].

⁸ See The Hon PLG Brereton AM RFD "Proof of Foreign Law: Problems and Initiatives" (Address to Sydney University Law School Symposium: the Future of Private International Law, May 2011) at 4-8.

Court of Singapore. Such agreements go some way to streamlining the process of application of foreign law, although as referrals are subject to the consent of both parties to the proceedings they do not resolve the issue altogether.

18. Finally, there is the difficulty and divergent approaches to obtaining enforcement of foreign judgments, particularly money judgments. This is one area in which litigation compares particularly unfavourably to arbitration. Approaches to enforcement differ markedly throughout the Asia Pacific region. In Australia, we have the *Foreign Judgments Act* 1991, which enables the enforcement of money judgments from certain prescribed jurisdictions, through statutory registration of a foreign debt. If the foreign judgment is not that of a prescribed nation, then strict common law tests are applied in order to provide for enforcement or recognition. In some other jurisdictions the common law requirement that a new action for debt must be brought has been codified in statute and made subject to defences that appear more expansive than those that exist currently under common law. In others, there is no statutory mechanism for enforcement, leading the court to “examine the merits of the judgment creditor’s claim afresh”.⁹ This diversity of procedural and substantive rules naturally creates difficulty and uncertainty, and where re-litigation of substantive issues is allowed for, adds significant transactional costs to cross-border disputes.

19. In addition to the above “conflict of laws” issues, complexities arise because of significant differences in underlying rules of law and of civil procedure between countries. Parties and their legal advisers involved in litigation in foreign countries often face a great deal of uncertainty arising from lack of familiarity with basic elements of the legal system, including issues of civil procedure such as service, pleadings and joinder of parties, all of which increase costs.

⁹ The Hon. JJ Spigelman AC, “Transaction costs and International Litigation” at 450.

20. There is also a perceived risk of parochialism of the legal system where the case is being heard, which leads parties to be wary of localized dispute resolution. By parochialism I am not suggesting that a foreign court will *impermissibly* favour the local litigant. However there are circumstances where the protection of local parties is arguably legitimate. One example arises in cross-border insolvencies, where there is a tendency by courts to engage in ring-fencing so as to protect assets and therefore creditors in their jurisdiction. Such ring-fencing is for example required in certain circumstances in Australia, pursuant to the *Insurance Act 1973* and the *Banking Act 1959*.¹⁰ The desirability of this practice is open to genuine debate and relies largely on the theoretical approach taken to cross-border insolvency; namely whether an approach of “universalism” or “territorialism” is adopted.¹¹ However, such practices clearly pose a risk to foreign parties involved in litigation in that jurisdiction. Even if parochialism is unlikely to be present however, that does not prevent suspicion by foreign parties, particularly in circumstances where there is a lack of understanding by the foreign litigant of local laws and procedures.
21. The result of these uncertainties and complexities is that cross-border litigation is expensive, time consuming and unpredictable, placing a burden on international commercial life and encouraging parties to seek de-localised dispute resolution. The fact that many of these issues arise from differing standards and approaches between legal systems and a lack of mutual understanding is an indication of the importance that convergence of commercial legal systems holds for international trade and investment.

II: The Role of Arbitration

¹⁰ John Martin, ‘Cross border insolvency of bank and insurance companies’ (2009) September-November *Commercial Law Quarterly* 21 at 26.

¹¹ For examples of these differing approaches, contrast the decisions of the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 and the House of Lords in *Re HIH Casualty & General Insurance Ltd* [2008] UKHL with that of the English Supreme Court in *Rubin v Eurofinance SA and New Cap Reinsurance Corporation v A E Grant* [2012] UKSC 46.

22. The easy response to these difficulties, of course, is to leave international commercial dispute resolution to private arbitration. By private arbitration, I mean arbitration arising out of contractual agreements between the parties whereby they agree to submit their disputes to non-judicial bodies, adopting their own choice of law rules and either leaving the procedure to the arbitrators or adopting the rules of procedure of an internationally recognized arbitral body, such as the International Chamber of Commerce.
23. The benefits of arbitration in cross-border disputes are numerous. Those most frequently cited are flexibility, party autonomy as to the arbitrator and choice of law, confidentiality, greater speed and lower cost, certainty as to the quality and skill of the decision maker, control over process, and better enforcement, through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹² Some of these benefits may be debatable, however as former Chief Justice Spigelman has put it, what is pertinent is that the “unpredictability of the judicial process in many nations constitutes one of the incentives for persons in cross-border legal relationships to avoid formal court processes”.¹³
24. What is important to consider in the context of this paper is what role arbitration plays in legal convergence, and whether legal convergence in court systems remains important in light of the availability of arbitration.
25. There are arguments that of itself, international arbitration will lead to convergence in the law, both procedural and substantive. This is presumably because even though arbitrators generally apply the domestic law of a particular nation, because the dispute resolution is de-localised they will bring a more cosmopolitan view to the interpretation and application of domestic legal systems. The cynics would say this is likely to lead to muddled reasoning, the optimists to convergence. There is also an argument that beyond domestic legal systems, arbitration is creating a

¹² United Nations, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1959) 330 UNTS 38.

¹³ The Hon. JJ Spigelman AC, “Law and International Commerce: Between the Parochial and the Cosmopolitan” (Address to NSW Bar Association, 2010) at 3.

body of transnational legal principles, much of which stems from soft law instruments and model rules created by supranational bodies such as UNCITRAL and UNIDROIT. There is much debate over whether this body of legal principles has created, or will create, a new transnational *lex mercatoria* existing above municipal law.

26. In some limited respects arbitration may well act as a pressure encouraging convergence of domestic legal systems. The commercial importance of arbitration and the incentive to act as a seat of arbitral disputes has no doubt played a role in the adoption by countries of laws of internationally consistent laws that support international arbitration. Chief amongst them is the adoption by many countries of the New York Convention, which allows for easy and certain enforcement of arbitral awards, in stark contrast to the difficulties in judicial disputes. Many countries have also passed legislation that facilitates the conduct of arbitrations in other ways. Australia for example has enacted the UNCITRAL Model Law on International Commercial Arbitration through the *International Arbitration Act 1974*. NSW, along with most other Australian States, has also enacted uniform legislation which applies the Model Law to domestic arbitrations.¹⁴ The Model Law has also been a basis for arbitration legislation in other countries in our region, including Malaysia, Singapore and Hong Kong.¹⁵

27. Similar pressures have also likely influenced many countries, including in our region, to reform their structures to ensure commercial courts are sufficiently skilled and efficient to provide the supervision, enforcement and collateral assistance vital to successful arbitrations. In Australia, the establishment of commercial lists in many courts and in some cases of separate arbitration lists provides one example. This type of convergence is significant, and is an important element in ensuring that arbitrations are successful.

¹⁴ *Commercial Arbitration Act 2010* (NSW)

¹⁵ Doug Jones, *Commercial Arbitration in Australia* (2nd ed, 2013) Thomson Reuters at [1.310].

28. However, there are fundamental problems with viewing arbitration as a tool of convergence in commercial law systems in a broader sense. In the common law world at least, legal decision-making relies on precedent. Arbitral awards have no precedential value in the strict sense. Further, in my own experience of arbitration, I have witnessed only one occasion where the reasons for a previous arbitral award were cited as an aid to determining the question in hand. That is notwithstanding the fact that many arbitrators are distinguished retired judges or eminent scholars. The reason for this is simple. Arbitral awards and the reasons for those awards are generally private. That is in fact one of the attractions of arbitration for many commercial parties.

29. In fact 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,¹⁶ and the UNCITRAL Model Law on Cross-Border Insolvency.

III: The Importance of Commercial Courts and of Legal Convergence

30. The question must be asked though, is legal convergence, either of substance or procedure, necessary given the availability and important role of arbitration in cross-border disputes? In my view, it is. There is a temptation by national courts to vacate the field of international commercial dispute resolution; to say, if you want to come to our court you

¹⁶ *The United Nations Convention on Contracts for the International Sale of Goods* (done at Vienna, 11 April 1980).

take it and the law as you find it – if you don't like it arbitrate. That is not a desirable approach.

31. Notwithstanding the popularity of international arbitration, a significant number of parties will continue to become engaged in cross-border litigation into the foreseeable future. This may be because some commercial parties will continue to prefer to submit their disputes to judicial resolution, notwithstanding the difficulties and costs. It is also because arbitrations can and do go wrong, requiring effective supervision by the courts. Courts in the region are, I think, moving to a more uniform approach to the circumstances in which they will interfere in this regard. Courts will therefore continue to have an important role to play in cross-border disputes. In those circumstances, measures to develop convergent commercial law systems have an important role to play in reducing the prohibitive transactional costs currently experienced by parties. Indeed, each of the complexities and risks outlined in Part I of this paper would be ameliorated by a degree of convergence between jurisdictions in our region

32. More broadly, measures to reduce transactional costs of the nature I have discussed would make courts a more suitable avenue for dispute resolution and therefore a more competitive alternative to international arbitration. Arbitration has become increasingly popular in part because of the failings of commercial court systems. I am a strong supporter of commercial arbitration; yet it must also be recognized that significant reliance on de-localised private or semi-private legal dispute resolution has certain disadvantages.

33. First, and with no disrespect meant to arbitrators, the transparency and institutional impartiality of a court adjudication is generally missing in an arbitration. That is not to say that arbitrators will not endeavour to bring an impartial view to the question in dispute, but there cannot be the same kind of confidence that exists in a well-established and regarded court system. I leave corrupt or incompetent judicial systems to one side as

clearly a different calculus arises in that regard. Now some may say, that may be true, but it is the parties' choice to submit to a lower level of institutional impartiality by selecting arbitration. In my view that is not a satisfactory response. Currently parties may choose to arbitrate despite misgivings in this regard because the benefits of flexibility and ease of enforcement relative to court proceedings outweigh the detriments.

34. Second, arbitration's lack of transparency and precedential value inhibits the development of commercial law, which is crucial to supporting the growing volume and complexity of international trade and investment. As Justice Allsop, as his Honour then was, has put it, "the development of commercial law...is assisted by good commercial courts retaining a real role in the development of the jurisprudence of commercial law."¹⁷

35. As mentioned above, if courts have a greater role in international dispute resolution, there is also more likely to be convergence in developments in substantive principle, particularly if efforts are made to increase dialogue between judges and therefore understanding of one another's legal systems. This process can already be seen to a degree in common law countries in our region. Singapore, Australia, Malaysia, New Zealand and Hong Kong all have common law systems with English heritage. In courts in those countries, there is a level of deference to and respect for one another's decisions, stemming from common history and shared understanding of one another's legal systems, which assists in harmonization in the development of legal principle.¹⁸ In Australia, courts are regularly referred to decisions of these jurisdictions and, quite unlike the position some twenty years ago, assistance is derived from them to the

¹⁷ The Hon. Justice James Allsop, "International Commercial Law, Maritime Law and Dispute Resolution: the place of Australia, New Zealand and the Asia Pacific Region in the coming years" (2006 FS Dethridge Memorial Address) at 15.

¹⁸ For example see *Ng Giap Hon v Westcomb Securities Pte Ltd and Others* [2009] SGCA 19 (29 April 2009), in which the Singaporean Court of Appeal was guided by development in other common law jurisdictions including Australia in declining to recognise an implied duty of good faith in contract in Singapore.

same extent as from the traditional sources of overseas guidance, namely judgments of courts of the United Kingdom and United States.

36. In my view this type of increased convergence through judicial decision making, including in relation to interpretation of international instruments would bring far greater benefits in terms of commercial certainty than courts interpreting such instruments purely by reference to their own domestic framework and certainly better than arbitrators interpreting in private with no reference point as to approaches in other decisions on similar questions.

37. Another benefit of a convergence process of this nature is that it increases the courts' intellectual toolkit in resolving disputes, allowing us to draw upon the strengths of other courts in our region in particular areas. Such a process is only possible when there is a degree of mutual understanding between commercial legal systems, making looking to foreign jurisdictions practicable. Again, the guidance which common law courts draw from one another is an apt example. There is no doubt for example that United Kingdom jurisprudence, and jurisprudence of regional common law courts, is a valuable resource to Australian judges. I am not suggesting that there will be ever be that degree of convergence between common and civil law systems in the Asia Pacific region; however even a more modest degree of convergence will facilitate reference being made to one another's legal systems, thereby increasing the intellectual resources available to the judiciaries in our region.

38. As is no doubt clear therefore, in my view courts have an important role to play in international commercial dispute resolution and in the development and maintenance of a strong system of transnational commercial law. Convergence is key to supporting and strengthening the role of courts in this regard and to reducing the difficulties and costs currently experienced by parties to cross-border commercial disputes.

IV: Methods of Legal Convergence

39. So much for the benefits of legal convergence. The next critical question is, how do we get there? What degree of convergence is desirable and practical and what are the possibilities, methods and impediments to achieving it?
40. What I have discussed thus far occurs in the context of commercial dispute resolution and transnational law, and proposals for positive steps towards convergence must be understood in that context. It is no doubt impracticable to strive for uniformity in all areas of the law. In fact that is a proposition that largely goes without saying. Not only would complete harmonisation be impossible, it is also undesirable. All courts in our region have spent many years developing their own legal systems and adapting the law to suit the particular needs of their countries. Any attempt to achieve uniformity between our systems would fail and in doing so would lead to perhaps increased national differentiation and parochialism.
41. So, in contemplating measures to improve convergence, we must be realistic. What we should recognize is that convergence, if it is to occur, will probably occur incrementally. Further it is likely only to occur in areas where there is a genuine transnational interest.
42. So, how do we do it? First, measures to improve mutual understanding can act as an organic pressure towards convergence. It is important for both the courts and the commercial legal community to try to gain an understanding of other systems of law. It is surprising for example how many choice of law clauses in contracts are negotiated without any consideration of their implications. What happens is there is generally a knee jerk reaction by parties, who feel that their own domestic law is preferable, without really considering the different principles that might apply under the law of a foreign jurisdiction.
43. A greater understanding and an appreciation of different legal concepts would not only benefit commercial parties and their advisors in contractual

negotiations and render disputes involving foreign law less bewildering, but would also facilitate greater cooperation between courts and enable judges to make decisions on issues such as venue disputes with a greater understanding of what will occur if they accept or decline jurisdiction. With an improved understanding there would also perhaps be a tendency to adopt as part of domestic law desirable principles from other jurisdictions, leading to a degree of harmonisation of substantive law. One advantage of arbitration, notwithstanding its lack of precedential value, is that it exposes lawyers – whether as arbitrators or advisers – to different systems of law, which experience they carry back into their domestic environment.

44. However we should not restrict ourselves to this modest approach to convergence. There are areas of what I will call procedural law – and I use that term in the broadest sense to include conflict of laws issues – that could in my opinion be the subject of positive steps towards convergence. A simple example, although not an easy one, would be in relation to procedural rules relating to the enforcement of judgments. It is not too ambitious to think that like-minded countries could develop uniform procedures for the enforcement of money judgments and streamline that process, removing much of the complexity and difficulty that currently exists in this area. If it can be achieved in arbitration, there is no reason why it should not be in the judicial field. This is not to say that doing so would be easy; the diversity of models that currently exists in our region is a clear indication that it would not be. However, other examples of regional models, perhaps most successfully the EU's 2007 *Lugano Convention*,¹⁹ indicate that such harmonisation is possible if political will is present.

45. Another relatively simple area in which positive measures could be taken is in relation to methods of dealing with choice of venue disputes. As I discussed in Part I, one problem which arises in international commercial litigation is that it is quite possible that courts of individual contracting states will apply different *forum non conveniens* tests. That has a flow on

¹⁹ *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* (signed in Lugano on 30 October 2007, entered into force 1 May 2011).

effect as to recognition of foreign judgments, where the courts where the judgment is sought to be enforced believe that the judgment was delivered in an improper forum. Some work has been done to attempt to achieve a greater degree of uniformity in this regard. In particular, in 2005 the Hague Conference on Private International Law concluded the *Convention on Choice of Court Agreements*, which provides that the courts of a state designated in an exclusive choice of court agreement shall have and exercise jurisdiction in relation to disputes to which the agreement applies, and that courts other than the chosen court shall suspend proceedings in relation to such disputes, except in very limited circumstances. Unfortunately, for reasons that I do not understand, Mexico is the only country to have ratified the Convention, in the eight year of its operation, and it is thus not yet in force.

46. Another area where harmonisation would be desirable is in relation to choice of law rules. There have been some subtle developments in this area. At the very least most countries now recognize that express choice of law clauses should be respected except in the most exceptional circumstances. Apart from that there is significant divergence, even between countries whose underlying legal systems are very similar. More work could be done to adopt desirable choice of law provisions from foreign jurisdictions and to work towards uniformity. A good example of a beneficial practical choice of law rule is Article 146 of the *General Principles of Civil Law* of the People's Republic of China, which permits a Chinese court, in a dispute between foreign nationals of the same country, to apply the law of that country to resolve the dispute. To my knowledge that provision does not exist anywhere else. Perhaps it should.

47. Increasing legal convergence in our region in relation to these matters would I think lead to improved confidence in our respective legal systems by foreign parties. There is also then the question of codification of substantive legal principle. There have been some successful initiatives in this area, largely brought about by the development of international conventions or model laws, which have then been adopted into domestic

legal systems. One example is the considerable work that has been undertaken over the last 20 years in the intellectual property field, particularly surrounding the Trade-Related Intellectual Property Rights (TRIPs) agreement. The need to achieve TRIPs compliance has led to significant reforms of domestic intellectual property legislation in many countries in our region during this period.²⁰

48. However, in considering convergence in substantive legal principle in our region it is important to remember that while the development of transnational legal principle through bodies such as UNCITRAL and UNIDROIT has an important role to play, there are limits to the uniformity that will be achieved. I think it would be unrealistic for example to expect in our lifetime any form of unified contractual code, either globally or in our region, notwithstanding the availability of international instruments such as the UNIDROIT Principles of International Commercial Contracts 2010. The difficulties encountered by the English and Scottish Law Commissions in the 1960's, in unsuccessfully trying to codify the general law of contracts and achieve some measure of harmonisation between the two jurisdictions, should give some indication of the obstacles involved in such a project.

49. A more radical possibility, which may lead to greater convergence in the long run, and give courts a more active role in disputes concerning international commerce would be the establishment of an international commercial tribunal in our region, the members of which would be sitting judges. Such a tribunal could apply those transnational principles of international commercial law that exist, supplemented by the domestic law chosen by the parties. It could also develop its own procedure, for example based on the UNIDROIT Principles of Transnational Civil Procedure, which to a degree harmonise dispute resolution procedures in civil and common law jurisdictions. As Justice Allsop has put it, these principles "form a bridge between two very different legal cultures and

²⁰ See discussion in M. Blakeney, "Intellectual Property Law Reform in the Asia Pacific Region" (1996) 7 *Australian Journal of Corporate Law* 23.

provide a common and fair basis for hearing international disputes. Importantly, they provide a procedural foundation that can give confidence to parties in litigation who come from different legal cultures”.²¹

50. That type of tribunal or court would enter into an area currently left to a large extent to the arbitral system, and it does seem to me that the system would have considerable advantages. There is, I think, still some mistrust by parties from all countries of the judiciaries of other countries. That may well be overcome if there was an international commercial tribunal staffed by sitting judges, say for example one from each of the states a party to the contractual dispute and a third judge. The system would provide a de-localised and transparent system that was effectively neutral of the parties to the dispute. Importantly such a tribunal would have the tendency to promote a distinct body of jurisprudence, based on the application of both transnational legal principle, and domestic law approached from an internationalised viewpoint. Such jurisprudence could be looked to by domestic court systems and may well provide guidance and an incentive to increase convergence in those systems.

51. Now, this is no doubt a lofty goal and the difficulties in establishing such a system should not be underestimated. To start with, in many countries, there would be significant constitutional impediments to judges sitting on such tribunals. There are other problems. There would for example be no appeal process, although this does not seem to have proved an impediment to international arbitration. More importantly, questions would arise as to whether and on what terms domestic courts would enforce judgments of a tribunal of this nature.

52. There are also a number of administrative matters that would need to be considered. For example funding would have to be found – no small matter. There would also need to be consideration given to the remuneration of judges sitting on such a court. Remuneration could be

²¹ The Hon. Justice James Allsop, “Is there a Place for Regional Dispute Resolution Structures? - Maritime Law as a Case Study” (2010) at 11.

direct, or as I would envisage more appropriate, via way of recompense to the relevant state for the portion of the judge's time take up with carrying out work on the international tribunal. No doubt there would be many other problems, but these give some indication of the work that would be necessary to establish such a body.

53. Nonetheless it is a concept that I think may be well worth exploring. A transparent judicial process is an important factor in the economic welfare of any state. An international commercial court, for use consensually by commercial parties, and dealing with a limited range of matters involving international commercial disputes would not impinge on the judicial sovereignty of any state and could well increase confidence of parties participating in international trade and investment. It would also in my view play an important role in the development of the law applicable to international commercial contracts and cross-border disputes and to the promotion of convergence in commercial legal systems in our region.

Conclusion

54. It is easy for courts, pre-occupied with the myriad legal issues which arise in their home jurisdictions, to say that the issues I have raised in this paper are more appropriately dealt with by the Executive than the Judiciary. They are, however, matters of importance, which can be overlooked.

55. Further, the courts, which have direct experience of the problems that can arise in the areas to which I have referred, can, I believe, make an important contribution to addressing these difficulties. Judges, by virtue of this experience, are well positioned to work amongst themselves to explore the ways in which such difficulties can be overcome. Courts, where possible, can implement procedural reforms, or provide information to governments to enable them to deal with the relevant issues.

56. Importantly, this approach will preserve the relevance of courts in our region in international commerce, and not relegate them to a role of

minimal supervision of the arbitral process. The perception that courts are working actively to minimise the problems to which I have referred can only enhance confidence in their ability to deal with cross-border disputes. In turn, this will provide greater assurance to persons and corporations that their legal rights will be protected when they engage in cross-border trade and investment.