

THE SOMEWHAT UNCOMMON LAW OF COMMERCE*

The Honourable the Chief Justice Sundaresh MENON**
Chief Justice of the Republic of Singapore.

I. Introduction

1 It gives me great pleasure to be here at Lincoln's Inn to deliver this year's COMBAR lecture. As lawyers, we hold membership not just of our own legal systems; we belong also to a global fraternity, and it is in this spirit that I take up this evening's subject. It is a subject which is close to the hearts of both our legal communities, situated as we are in the financial centres of Europe on the one hand and South East Asia on the other. At the same time it is also in the sphere of commerce that the dualism between an international outlook and a domestic rootedness is perhaps at its most visceral. How we choose to structure and propagate our laws of commerce can have an impact on the calculus of economic actors and, consequently, on the behaviour of the markets they transact in.

2 In the age of globalisation this impact has been magnified in both scale and reach. So our subject this evening is not just theoretical – it also impinges on the business end of the law. This is where the law is converted into hard currency, into goods shifting across borders – and, of course, into more or less work for lawyers. To adopt the deliberately broad definition of the foremost thinker about commercial law, Professor Roy Goode, commercial law is that branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade.¹

3 In looking at this varied area of the law I do not propose to stray from its core source and subject, which is the law of contract. To borrow again from Professor Goode, whose elegant summation cannot be bettered – “commercial law draws for its sustenance on all the great streams of law that together make up the *corpus* of English jurisprudence, with the law of contract as its core, while equity acts now as its handmaiden, now as the keeper of its conscience”² Contract law is so foundational to commercial law simply because contracts are

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1 Ewan Mckendrick, *Goode on Commercial Law* (LexisNexis, 4th Ed, 2009) at p 8.

2 Roy M Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell, 1998) at pp 8–9.

essential to commerce. Without the certainty or, at least, the security provided by a contract, modern day commerce would not be possible. But how is the understanding of this security likely to differ as borders are crossed?

4 Though our laws and our legal systems share a common heritage – indeed, ours is the progeny of the English system – there are nonetheless divergences in the substance of commercial law between our jurisdictions. It is perhaps no longer surprising that the common law is not quite common after all. What is interesting about some of these divergences though, is their source. To a greater or lesser degree, the influence of European civil law has resulted in the development of new ideas in the English common law.

5 One would expect that such divergences might come at an economic cost. Heterogeneity in commercial law creates friction in the movement of goods and businesses across borders, and seems to swim against the tide of increasing economic integration which has been the story of the post-Cold War world.³

6 I propose this evening to draw out just a few illustrative divergences and then place them within context, so that we might critically evaluate whether this is a problem going forward. More specifically, we might ask whether this is a problem which needs a solution, and what such a solution might look like.

7 I will examine three specific areas of contract law where Singapore has diverged from England – the interpretation and implication of contract terms, remoteness of damage and the duty to act in good faith. In each of these areas, the Singapore courts have felt the tension between our own legal experience and the weight of English case law. As will become evident, there are important differences, but also interesting similarities between us.

II. Setting the context

8 I would like to preface the discussion with a brief survey of Singapore's current legal system. Since the passage of the Application of English Law Act⁴ in 1993, it has been clear that while English common law continues to have weight and influence in Singapore this is only so far as it is applicable to the circumstances of Singapore and subject to

3 One of the more prominent mainstream accounts being Thomas L Friedman, *The Lexus and the Olive Tree* (Harper Collins, 1999).

4 Cap 7A, 1994 Rev Ed.

such modifications as those circumstances may require.⁵ In the same year, Singapore abolished all appeals to the Privy Council⁶ and Parliament passed a legislative amendment to constitute a permanent Court of Appeal.⁷

9 From today's vantage point, I think it is fair to say that although the Singapore legal system continues to have an umbilical relationship with English law, we are growing up on our own terms.⁸ English law continues to carry persuasive weight and remains extensively cited in our courts;⁹ on the other hand, there are encouraging signs that our own case law is forming a critical mass.¹⁰ Indeed, the emergence of a distinctively *Singaporean* law of contract can be taken as a bellwether of our progress, this being an area of law where received English authorities were previously taken as cardinal.¹¹ The principal mode of this evening's lecture will consist of looking at what one of our leading textbooks terms as the autochthonous law of contract in Singapore.¹²

10 While Singapore law has been working through its adolescence, English commercial law has been increasingly shaped by the UK's membership in the European Union ("EU"). The Treaty of Rome which created the European Economic Community was conceived for the express purpose of achieving economic integration through the creation of a common market.¹³ This project reached a watershed with the creation of a monetary union by the Maastricht Treaty¹⁴ and has since been further galvanised by the entry into force of the Lisbon Treaty.¹⁵ Despite some recent troubles, the EU, as it stands today, is the pre-eminent model of regional integration in the global economic order. The work of European legislators has been buttressed by a monumental

5 Application of English Law Act (Cap 7A, 1994 Rev Ed) s 3.

6 Constitution of the Republic of Singapore (Amendment) Act 1993 (Act 17 of 1993).

7 Supreme Court of Judicature (Amendment) Act 1993 (Act 16 of 1993).

8 See, in this regard, G W Bartholomew, "The Singapore Legal System" in *Singapore: Society in Transition* (Riaz Hassan ed) (Oxford University Press, 1976) at pp 97–109.

9 See *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Singapore: Academy Publishing, 2012) at paras 02.076–02.077.

10 Yihan Goh & Paul Tan, "An Empirical Study on the Development of Singapore Law" (2011) 23 SAclJ 176 at 215.

11 Helena Chan, *An Introduction to the Singapore Legal System* (Malayan Law Journal, 1986) at pp 9–10. See also Andrew Phang Boon Leong, "Of 'Cut-off' Dates and Domination: Some Problematic Aspects of the General Reception of English Law in Singapore" (1986) 28 Mal LR 242 at pp 252–256.

12 See *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Singapore: Academy Publishing, 2012) at paras 02.073–02.080.

13 Treaty Establishing the European Economic Community (25 March 1957; entry into force 1 January 1958) Art 100A.

14 Treaty on European Union (7 February 1992; entry into force 1 November 1993).

15 Treaty of Lisbon (13 December 2007; entry into force 1 December 2009).

effort at legal harmonisation led by the European Court of Justice in such early landmark cases as *Costa v ENEL*¹⁶ and *Van Gend en Loos*¹⁷. Following the passage of the European Communities Act in 1972,¹⁸ and the decision of the House of Lords in the *Factortame* case of 1990,¹⁹ EU law is now part of the body of commercial law which English courts will have reference to. Under these conditions there can be little room for doubt that English commercial law will gradually take on a more European complexion²⁰ even as London continues to maintain its importance as the preferred venue for international litigation.²¹

11 The first shades of a similar process are also beginning to emerge in Singapore, with a discernible increase in the number of international litigants coming through our courts. Singapore is also at the forefront of the drive to create an ASEAN Economic Community in 2015, a substantial project that remains on track for completion. Just last month the Prime Minister of India pledged to sign a Free Trade Agreement on services and investment with the ASEAN *bloc*. This will deepen economic ties between ASEAN and India, and is expected to boost bilateral trade to US\$100bn within two years. The crest of economic expansion has been supported by legal change as well. Singapore is leading the ASEAN Integration through Law Project, which seeks to advance the community-building aims of ASEAN through the development of a collective framework of both substantive and procedural legal principles.²² This is an exciting project, and perhaps there will come a day when we can speak of a “Southeast Asian” commercial law in the way one might speak of European commercial law.

12 I do not mean to gaze into the crystal ball. It suffices for present purposes to say that as two separate but similar systems of law in very different parts of the world, Singapore and London are on parallel trajectories. This presents an opportunity for both comparison and commentary, which may yet have some resonance with the harmonisation of commercial law on a grander scale.

16 [1964] ECR 585.

17 [1963] ECR 1.

18 c 68 (UK).

19 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1991] AC 603, in particular [4], *per* Lord Bridge of Harwich.

20 For a more general and abstract analysis, see John Merryman, “On the Convergence (and Divergence) of the Civil Law and the Common Law” (1981) 17 *Stan J Int’l L* 357.

21 <<http://www.thelawyer.com/news/practice-areas/litigation-news/international-litigants-in-london-rise-by-a-third-in-three-years/3004520.article>> (accessed 25 November 2013).

22 Centre for International Law, National University of Singapore, *Integration through Law: The ASEAN Way in a Comparative Context – Mission Statement* (revised 25 April 2011) at pp 2–3.

III. The interpretation and implication of contract terms

A. Interpretation

13 The law on the interpretation and implication of contract terms in Singapore is set out in a trilogy of decisions from the Court of Appeal. The first case, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*²³ (“*Zurich Insurance*”), substantively adopted Lord Hoffmann’s celebrated restatement in *Investors’ Compensation Scheme v West Bromwich Building Society*²⁴ as the appropriate approach to contractual interpretation in Singapore. *Zurich Insurance* was a case which concerned the issue of whether fire damage was covered by the terms of an insurance policy, but to reach an answer our apex court had to map out a significant expanse of contract law. The principal result of this endeavour was an affirmation of the contextual approach to contractual interpretation. In the course of doing so the court also found that the parol evidence rule continued to persist in s 94 of the Evidence Act,²⁵ which states that no evidence of an oral agreement shall be admitted as between parties to any agreement which has been reduced into writing for the purpose of varying, adding to, or subtracting from its terms. *Zurich Insurance* also provides valuable guidance²⁶ on what extrinsic evidence may be admissible to aid in the contextual interpretation of the contract; specifically, it must be evidence which is relevant, reasonably available to all contracting parties and which relates to a clear and obvious context. One might view this as very much aligned with the prevailing approach to contractual interpretation in the wider Commonwealth, and also generally faithful to the English common law.

14 To that extent, *Zurich Insurance* serves as a useful example to show that where English law has moved in a direction which accords with *our judgment* of logic, fairness and commercial soundness we have converged even if we were to recognise that the original impetus for such a shift might not be of direct relevance to Singapore. In delivering the judgment of the court, V K Rajah JA noted²⁷ that the contextual approach might be perceived as a symptom of the “Europeanisation” of the English common law. Regardless of this characterisation, to which I shall return later in this lecture, there remains a happy coincidence between Singapore and English contract law on this issue. In *Zurich*

23 [2008] 3 SLR(R) 1029.

24 [1998] 1 WLR 896 at 912–913.

25 Cap 97, 1990 Rev Ed.

26 *Zurich Insurance (Singapore) Pte Ltd v B Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132].

27 *Zurich Insurance (Singapore) Pte Ltd v B Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [133].

Insurance Rajah JA attributed the success of the contextual approach to its accordance with ordinary commerce, and noted that when “faced with a wealth of text but a dearth of context, [the courts] have often attributed to contracting parties artificial objective intentions that are divorced from reality”.²⁸ I would echo these sentiments and add that ultimately, the collective shift towards contextualism has been motivated by the desire to do commercial justice by the contracting parties. Contracts are meant to embody agreements, not embalm them. The commercial realities which animated the entry into a contract ought not to be lost on account of the inert – and inevitably imprecise – words used to evidence it. At the same time, however, it is important that in the attempt to contextualise the written contract so as to ascertain the parties’ objective agreement, we do not upset the commercial certainty which written contracts are meant to engender. This is a point which, as we will see later, I have taken up in a recent decision.

B. Implication

15 In the second case, *Foo Jong Peng v Phua Kiah Mai*²⁹ (“*Foo Jong Peng*”), the Singapore Court of Appeal had occasion to examine the implication of contract terms. The case concerned the question of whether the rules of a Chinese clan association contained an implied term permitting the management committee to remove its members before the expiry of their term of office. The court was invited, in particular, to consider the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd*³⁰ (“*Belize*”), which arguably stood for the novel proposition that the implication of contract terms is simply an exercise in the interpretation of the contract as a whole. Lord Hoffmann, in giving the advice of the Privy Council, was characteristically bold in his exposition:³¹

... in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. ... There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

16 The common – but by no means the *only* – view is that by this reformulation of the doctrine of terms implied in fact, Lord Hoffmann effected, at one and the same time, the cannibalisation of implication by

28 *Zurich Insurance (Singapore) Pte Ltd v B Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [133].

29 [2012] 4 SLR 1267.

30 [2009] 1 WLR 1988.

31 *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [21].

interpretation and the replacement of the time-honoured “business efficacy” and “officious bystander” tests.³²

17 In so far as this appraisal of Lord Hoffmann’s advice is accurate, the Singapore Court of Appeal declined to follow *Belize*. Affirming the observations of the court in an earlier decision, the court held in *Foo Jong Peng* that such a reformulation would result in a lack of concrete rules as well as in practical uncertainty. Further, Andrew Phang JA’s judgment concluded that there were sound reasons underlying the received taxonomy of interpretation and implication, as well as the “officious bystander” and “business efficacy” tests.³³

In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a *specific form or conception of interpretation* which is *separate and distinct* from the *more general* process of interpretation (in particular, interpretation of the *express* terms of a particular document). Indeed, the process of the implication of terms *necessarily* involves a situation where it is precisely because the *express* term(s) are *missing* that the court is compelled to ascertain the presumed intention of the parties via the ‘business efficacy’ and the ‘officious bystander’ tests (both of which are premised on the concept of necessity). ... *although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional ‘business efficacy’ and ‘officious bystander’ tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore ...* [emphasis in original]

18 The touchstone for implication, in our view, remains that of necessity. The “business efficacy” and “officious bystander” tests provide specific guidance for the courts so that the actual process by which terms are implied into a contract will be restrained and purposeful. Indeed the call-and-response nature of these tests has proven to be effective in keeping the courts on a reasonably straight course through water that can be treacherous. The obvious danger with implication, being by its nature an exercise in filling in what parties had not addressed their minds to, is that the court might too easily rewrite the contract to its own preference. Lawyers are not generally noted for an awareness of their own limitations; and there is therefore an inevitable temptation to try to *supplement* or *improve* the contract, or to recast it in

32 See Paul S Davies, “Recent Developments in the Law of Implied Terms” [2010] LMCLQ 140; *Crema v Cenkos Securities plc* [2011] 1 WLR 2066 at [37]–[39]; and *Chantry Estates v Anderson* [2010] EWCA Civ 314 at [14]–[16], all cited at [77] of *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.

33 See *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [36].

accordance with the court's sense of the justice of the case, and in the process, lose sight of the actual bargain that was struck between the parties. This is especially dangerous because that bargain would have been struck at a time when parties would have been looking ahead and pricing the inherent uncertainties that this must entail. It is impossible for a court to factor this in meaningfully at the time it comes to examine the issue with the clarity of perfect hindsight. The uncertainty and unpredictability generated by this mismatch is wont to constitute a grave disservice to people of commerce if judges fail to keep such realities firmly in mind.

19 Indeed this was one of the points made in *The Moorcock*³⁴ itself, from which the “business efficacy” test derives. Bowen LJ said that the term implied should be that with “the minimum of efficacy”,³⁵ and Lord Esher MR thought that it should be the “least onerous” one possible.³⁶ Lord Hoffmann too prefaced his exposition in *Belize* with the general observation that the court has no power to improve upon the instrument which it is called upon to construe, and cannot introduce terms to make it fairer or more reasonable.³⁷ The Singapore courts have taken heed of this, and have approached implication conservatively. Where we have differed from Lord Hoffmann, however, is his view that the test for the term to be implied should be whether it spells out what the contract, read against the relevant background, would *reasonably* be understood to mean. There is a distinct difference between this and a test which looks to what the contract must *necessarily* be understood to mean. We are inclined to think that replacing necessity with reasonableness as the active ingredient in the implication of terms creates rather too strong a tonic for coping with deficiencies in contractual drafting when these eventually become evident.

20 There is a third view, however, which is also worth noting. This view proceeds from a different reading of the Privy Council's advice. In the English Court of Appeal's decision in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)*³⁸ (“*Mediterranean Salvage*”) Lord Clarke made the following observation:³⁹

[A]s I read Lord Hoffmann's analysis [in *Belize*], although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the

34 (1889) 14 PD 64.

35 *The Moorcock* (1889) 14 PD 64 at 71.

36 *The Moorcock* (1889) 14 PD 64 at 67.

37 See *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [16]; see also *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 at [8].

38 [2010] 1 All ER (Comm) 1.

39 *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2010] 1 All ER (Comm) 1 at [15].

often stated proposition that it must be necessary to imply the proposed term.

21 A similar view was also expressed by Arden LJ in *Eastleigh BC v Town Quay Developments Ltd*⁴⁰ and, outside of the courts, by Lord Grabiner QC in an article entitled “The Iterative Process of Contractual Interpretation”.⁴¹ More recently, the Singapore Court of Appeal too has commented that, when read closely, *Belize* may not in fact stand for a stark and dramatic departure from the classical position.

22 It might also be that, if put into practice, the *Belize* test would not result in much practical difference to the outcome of cases so long as it is *applied* in a stringent fashion. But the stated law should ideally offer clear and principled guidance for prospective cases, and on this basis the Singapore courts have preferred to retain the traditional emphasis on the criterion of necessity and its associated tests.

C. *Revisiting interpretation and implication in Sembcorp*

23 This brings me to the final and most recent case of the trilogy. In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*⁴² (“*Sembcorp*”) the Court of Appeal had the occasion to revisit both *Zurich Insurance* and *Foo Jong Peng*. To take these cases in reverse order, one of the observations I made in delivering the judgment of the court was that the gap between *Foo Jong Peng* and *Belize* could be bridged somewhat if one concludes that Lord Hoffmann was saying that the implication of terms is to be seen as part of the overall process of *construing the document as a whole*.⁴³ Construction is the composite process that ascertains the parties’ actual as well as their presumed intentions from the contract as a whole; it therefore encompasses *both* the interpretation of express terms and the implication of necessary terms where the express terms have run out.⁴⁴ Construction would also include a third process: rectification. Such a reading of Lord Hoffmann’s speech in *Belize* also draws support from the judgment of Lord Clarke in *Mediterranean Salvage* which I mentioned earlier. However, there remains a limit to which *Belize* can be reconciled with the law in Singapore. Indeed, in *Sembcorp* we affirmed *Foo Jong Peng* on the standard for the implication of terms being necessity, not reasonableness. It follows that the Singapore courts will also continue to apply the “business efficacy” and “officious bystander” tests, although we have further refined their operation.

40 [2010] 2 P & CR 2 at [32].

41 (2012) 28 LQR 41 at 58–61.

42 [2013] 4 SLR 193.

43 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [79].

44 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [31].

24 There has been much debate, both in academic writing and case law, as to the relationship between these two tests. There are various possible iterations – the two tests can be treated as intrinsically similar or different, conjunctive or disjunctive, and if the latter they could be inclusively or exclusively so. The Singapore courts have resolved the issue in favour of a “complementarity” characterisation. This was the conclusion reached by Andrew Phang JA in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd*⁴⁵ (“*Forefront Medical*”) after an extensive examination of the historical and judicial sources of these tests. It is a position perhaps best exemplified by the following seminal statement of Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd and Elton Cop Dyeing Co Ltd*:⁴⁶

A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, ‘What will happen in such a case,’ they would both have replied, ‘Of course, so and so will happen; we did not trouble to say that; it is too clear.’ Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

25 It is clear from this passage that the “officious bystander” yardstick serves as an elaboration of the “business efficacy” test. In *Sembcorp* the Singapore Court of Appeal affirmed and further particularised this characterisation of complementarity. I observed that the application of the “business efficacy” test serves to aid the court in *identifying* the lacuna in the contract which *must* be filled for it to be commercially workable.⁴⁷ Once such a gap has been properly identified, the “officious bystander” test then enables the court to define that term which can be said to reflect the parties’ presumed intentions *vis-à-vis that gap*.⁴⁸ In this way the “officious bystander” test serves as the practical mode by which the “business efficacy” test is implemented. I also noted, however, that not all contracts arise in the context of a business transaction; so that there could conceivably be normative standards other than commercial workability which may be preferred in distilling the parties’ presumed intentions.

26 *Sembcorp* demonstrates that, while preserving the received doctrines of the English common law, we have at the same time made a concerted effort to look behind them to see if their underlying forensic rationales remain alive and well. Where we can, we have introduced interpolations which appear to us to make these doctrines clearer and

45 [2006] 1 SLR(R) 927.

46 [1918] 1 KB 592 at 605.

47 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [84].

48 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [91].

more systematic for our purposes. This is evident from *Forefront Medical*, *Foo Jong Peng* and *Sembcorp*. In *Sembcorp*, for instance, we also distilled the law on the implication of contract terms in Singapore to a three-step process – first, to determine how the gap in the contract arose and to confirm that parties had not contemplated the matter or deliberately left that gap uncovered because they were unable to agree on how to address it; second, to ask whether it is necessary in the business or commercial sense to imply a term; and third, to consider the specific term to be implied by applying the “officious bystander” test.

27 Turning to contractual interpretation, in *Sembcorp* the Singapore Court of Appeal did take another look at the contextual approach to contractual interpretation. We noted that it might well reflect a migration towards the principles adopted in civil law jurisdictions.⁴⁹ Such jurisdictions have traditionally taken a permissive approach to the admissibility of extrinsic evidence. Article 1341 of the French Civil Code,⁵⁰ for example, allows contracts to be proven by “any means”. Evidence of pre-contractual negotiations, business practices and customs and subsequent conduct are all admissible. This, of course, is far more permissive than the position in most if not all common law jurisdictions.

28 While there is nothing inherently objectionable about a convergence with civil law doctrines, we foresaw serious problems arising at the practical level of implementation if insufficient cognisance was taken of how such civil law principles dovetailed with our legal system. In particular, the liberal admission of extrinsic evidence under the contextual approach to contractual interpretation had to be compatible with the Singapore Evidence Act. Further, any amendments to this area of the law had to take into account the differences between the adversarial litigation process of the common law and the inquisitorial process of civil law systems.

D. Statutory differences

29 The Evidence Act includes provisions that exclude evidence, among them ss 95 and 96. Section 95 excludes evidence for the purpose of explaining or amending a document which on its face is ambiguous or defective. The supplied illustration helps explain this:

*A agrees in writing to sell a horse to B for \$500 or \$600.
Evidence cannot be given to show which price was to be given.*

49 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [34].

50 Consolidated version of 2 June 2012 read with Art L110-3 of the French Commercial Code.

30 Section 96 excludes evidence given to show that the language of a document, which is plain and accurate in relation to existing facts, was not meant to apply to such facts. In *Sembcorp* we stressed that whilst the Evidence Act was compatible with the contextual approach, any accompanying liberalisation of the extrinsic evidence that is admissible must be limited by these sections of the same Act. To understand the import of these provisions, we undertook a historical examination of the thinking behind the Evidence Act as adapted from the Indian Evidence Act,⁵¹ which had been drafted by Sir James Fitzjames Stephen. In *Stephen's Digest*,⁵² Sir James offered valuable insight into the state of the 19th century English common law which was later meant to be captured in these two sections. We concluded upon an examination of the cases cited there that s 95 operates to exclude extrinsic evidence of the actual intentions of the parties save where there is latent ambiguity in the expression in the instrument.⁵³ We also concluded that s 96 did not operate to exclude the admission of extrinsic evidence of surrounding circumstances to aid in the interpretation of the instrument. Instead, it reflected the position that parol evidence of the drafter's *subjective* intentions would generally be inadmissible.⁵⁴

E. Litigation processes

31 We also voiced concerns regarding the cost and efficiency of litigation if the civil law rules on the admission of extrinsic evidence were adopted wholesale.⁵⁵ There is a legitimate fear that this can lead to parties being inundated by a barrage of documentation which, in an age where everything can be and frequently is digitally stored or recorded, threatens to stymie every step of the litigation process. We heeded the caution sounded by Spigelman CJ⁵⁶ against adopting an expansive approach to extrinsic evidence without the “control valves” which are in place within civil law jurisdictions including for instance the unavailability of general discovery.⁵⁷ Without such controls, a liberal admissibility regime is likely to generate more heat than light, and ultimately drive up both the time taken and the costs expended in litigating a dispute. In commercial terms this would not only be sub-optimal but also inequitable, being to the disadvantage of litigants

51 Evidence Act (Act No 1 of 1872) (India).

52 *A Digest of the Law of Evidence* (Harry Lushington Stephen & Lewis Frederick Sturge eds) (MacMillan & Co Ltd, 12th Ed, 1936).

53 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [53]–[59].

54 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [63]–[64].

55 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [68].

56 The Honourable James Jacob Spigelman (as he then was), “Contractual Interpretation: A Comparative Perspective” (2011) 85 ALJ 412 at pp 431–432.

57 See also Geoffrey C Hazard Jr, “Discovery and the Role of the Judge in Civil Law Jurisdictions” (1998) 73 Notre Dame L Rev 1017 at pp 1021–1022.

lacking the financial wherewithal to keep up with the demands of such a liberal regime.

32 With those concerns in mind, we held in *Sembcorp* that four procedural requirements would be imposed on parties seeking to rely on the contextual approach to support their construction of the contract:⁵⁸

- (a) They must plead with specificity each fact of the factual matrix which they wish to rely on;
- (b) It must be pleaded that those factual circumstances were known to all the relevant parties and how;
- (c) It must be pleaded what specific effect such facts will have on their contended construction; and
- (d) The obligation of parties to disclose evidence would be limited by the extent to which the evidence would be relevant to the foregoing.

The key point of these requirements is that parties should be clear about the specific aspects and purpose of the factual matrix which they intend to rely on. In other words, the contextual approach set out by the court in *Zurich Insurance* must be implemented with a procedural rigour which prevents the search for the parties' true agreement from descending into an evidential free-for-all.

F. *Interstitial revisionism*

33 The picture that, I hope, is becoming apparent is that the Singapore courts have begun to re-evaluate various areas of contract law according to our institutional setting and public policy needs. It is an aspect of this process of legal contextualisation that we have also cultivated a strong comparativist ethos which looks to the positions of other Commonwealth jurisdictions as well as to the historical sources of the English common law. In *Man Financial (S) Pte Ltd v Wong Bark Chuan David*,⁵⁹ we were keen to stress that:

... in an increasingly interconnected world, local courts ought to eschew legal parochialism and look beyond their shores for relevant precedents – particularly where controversial or ... potentially outmoded legal doctrines are concerned.

34 We think that this mode of legal development is in keeping with the incrementalism which is inherent in the common law system. At the

⁵⁸ *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [73].

⁵⁹ [2008] 1 SLR(R) 663 at [132].

same time, of course, in seminal cases the common law is capable of taking quantum leaps. Lord Hoffmann's visionary effort at recasting contractual construction as a unitary doctrine of interpretation may yet be regarded by the long arc of legal history as one of those instances. At present, however, and for my part at least, the Singapore courts are more profitably occupied with the interstitial refinement and adaptation of the rules and principles of the common law.

IV. Remoteness of damage

35 I turn to the law governing the remoteness of damages in contract. The classical law is of course as stated by Alderson B in *Hadley v Baxendale*,⁶⁰ the first limb of which states that the general damages arising from a breach of contract are those which parties would have reasonably contemplated to flow naturally from that breach at the time they made the contract. In other words, only reasonably foreseeable loss is recoverable. Under the second limb, where special circumstances had been communicated between the parties, damages may be awarded based on what parties ought to have contemplated would ordinarily flow from such circumstances.

36 In *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*⁶¹ the Singapore Court of Appeal affirmed that *Hadley v Baxendale* continued to represent the law in Singapore as well. Four months after our decision in *Roberston Quay*, however, the House of Lords departed from the rule in *Hadley v Baxendale* in *Transfield Shipping Inc v Mercator Shipping Inc*⁶² ("*The Achilles*"). In an extension of his views on contractual construction, Lord Hoffmann thought that the issue of remoteness of damage was also to be determined according to the objective intentions of the parties. As such, the key question to Lord Hoffmann was whether, on a true construction of the contract, the contract breaker had assumed responsibility for the type of loss in question. In his words:⁶³

... the question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background, and this, like all questions of interpretation, is a question of law.

60 (1854) 9 Exch 341 at 354.

61 [2008] 2 SLR(R) 623.

62 [2009] 1 AC 61.

63 *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [25].

37 In one of the more expansive statements of his views, Lord Hoffmann also went on to say that:⁶⁴

... the implication of a term as a matter of construction of the contract as a whole in its commercial context and the implication of the limits of damages liability seem to me to involve the application of essentially the same techniques of interpretation.

38 In the subsequent decision of the Singapore Court of Appeal in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*⁶⁵ (“*MFM Restaurants*”), we declined to follow Lord Hoffmann’s lead save to the extent that the concept of assumption of responsibility by the defendant was already incorporated within both limbs of *Hadley v Baxendale*. This view was recently reviewed and restated in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd*.⁶⁶ The case concerned the wastage of extensive advertising costs and expenses which the plaintiff had incurred in promoting a sports drink when a shipment supplied by the defendants was found to have changed colour and been contaminated with insects. We dismissed the plaintiff’s appeal on the basis that it had the unique business strategy of focusing exclusively on advertising as a means of building a popular brand out of a generic product – as I put it in delivering the judgment of the court, the plaintiff was endeavouring to create a silk purse out of a sow’s ears.⁶⁷ This exposed the plaintiff to risks which were not made known to the defendant. Indeed, the defendant was wholly ignorant of the plaintiff’s unorthodox business strategy – it did not know, for instance, that in relation to a contract which was worth approximately £6,000 in revenue to the defendant, the plaintiff had incurred an inordinate outlay of almost £400,000 in advertising and promotional costs. In such circumstances it was amply clear to us that the plaintiff’s losses were too remote to be recoverable.

39 In reaching this conclusion, we took the opportunity to stress that a clear conceptual distinction must be maintained between the interpretation of a contract to identify the specific nature of the obligation that has been undertaken on the one hand, and the question of the damages for breach of that obligation on the other. We considered that the latter issue must remain one that is to be resolved by reference to the *Hadley v Baxendale* test for remoteness of damage, which looks to the factual matrix in which the parties were situated at the time they entered into the contract. We thought that the conflation proposed by *The Achilleas* would not assist in this exercise, and indeed the perception that damages are a matter of interpretation might well detract from the need to be sensitive to the particular *facts* of each case.

64 *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [26].

65 [2011] 1 SLR 150.

66 [2013] 2 SLR 363.

67 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [53].

40 The concern arises because the assessment of remoteness ought not to be a simplistic and semantic exercise, where heads of liability are first identified and then the actual damages are assessed for fit with those categories. Often, heads of loss which seem to be of a certain type or nature emerge on a proper analysis to be of a quite different type. This is evident from several observations from the bench in *The Achilles* itself, with both Lord Rodger and Lord Walker noting that while a delay in the redelivery of a vessel might reasonably be expected to result in overruns and a loss of subsequent profitable charters, inordinate losses that were notionally of the same type but caused by volatile economic conditions or loss of contracts that were unusually profitable would be too remote to be recovered.⁶⁸ In keeping with these observations, the preferred approach, in our view, is to pay fine-grained attention to the actual loss incurred and to defendant's knowledge of the facts which led to that loss, and to ask whether a reasonable person in his shoes would have thought at the time of the contract that the loss that has materialised was sufficiently foreseeable.

41 Our study of *The Achilles* has perhaps revealed a difficulty with pressing unitary juridical devices into multiple modes of service – the danger that we might start to miss the trees for the forest. Interpretation has some bearing on both implication and the remoteness of damages in contract, but if we collapse these devices to a singular unit we begin to gloss over the different considerations which impelled each of them in the first place. Although the law might become easier to grasp and explain, its application will be less structured by second-order rules and principles, and as a result the outcomes of litigation will be more unpredictable. Being able to easily explain the law is insufficient recompense for the difficulties we might expect to encounter with such a unitary theory when tasked with giving *practical advice* to our clients who, by their nature, are generally much more interested in outcomes than in theories.

V. Duty of good faith

42 Finally, let me take a look at the implication of a duty of good faith into commercial contracts. The key difference between this area of the law of contract and those which we have already examined is that the doctrine of good faith is still a fledgling doctrine even in English law. In the Singapore Court of Appeal's decision in *Ng Giap Hon v Westcomb Securities Pte Ltd*⁶⁹ ("*Westcomb*"), it was held that a duty to act in good faith could not be implied as a term in law into an agency agreement.

68 See *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [60], [82], [83] and [86].

69 [2009] 3 SLR(R) 518.

Once again, an extensive survey of case law and academic commentary was undertaken and the conclusion drawn was that much about the duty of good faith remained to be settled. The court's conclusion is representative of the conservatism with which we treat nascent legal doctrines. We said:⁷⁰

In the circumstances, it is not surprising that the doctrine of good faith continues to be a fledgling one in the Commonwealth. Much clarification is required, even on a theoretical level. Needless to say, until the theoretical foundations as well as the structure of this doctrine are settled, it would be inadvisable (to say the least) to even attempt to apply it in the practical sphere. In the context of the present appeal, this is, in our view, the strongest reason as to why we cannot accede to the appellant's argument that this court should endorse an implied duty of good faith in the Singapore context. ... [citations omitted]

43 When examining the somewhat more open attitude of the English courts towards the duty of good faith, Andrew Phang JA noted that the receptiveness discernible in cases such as *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*⁷¹ "may be due in no small part to the fact that there are, civil law influences that have become relevant as a result of the UK's membership of the European Community".⁷² This is borne out by the following, telling passage from *Cheshire, Fifoot and Furmston's Law of Contract*:⁷³

Do the parties owe each other a duty to negotiate in good faith? Do the parties, once the contract is concluded, owe each other a duty to perform the contract in good faith? Until recently, English lawyers would not have asked themselves these questions or, if asked, would have dismissed them with a cursory 'of course not'. On being told that the German civil code imposed a duty to perform a contract in good faith or that the Italian civil code provides for a duty to negotiate in good faith, a thoughtful English lawyer might have responded by suggesting that the practical problems covered by these code positions were often covered in English law but in different ways. This may still be regarded as the orthodox position but the literature of English law has begun to consider much more carefully whether there might not be merit in explicitly recognising the advantages of imposing good faith duties on negotiation and performance. ...

44 Perhaps the clearest exposition of the transmission of good faith from the civil law jurisdictions into English law can be found in the very

70 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [32].

71 [1989] QB 433.

72 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [53].

73 Michael P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) at pp 32–33.

recent English High Court decision of *Yam Seng Pte Ltd v International Trade Corp Ltd*.⁷⁴ The learned judge offered the following account:⁷⁵

In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham LJ in the *Interfoto* case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems – including those of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation. For example, the Unfair Terms in Consumer Contracts Regulations 1999, which give effect to a European directive, contain a requirement of good faith. Several other examples of legislation implementing EU directives which use this concept are mentioned in *Chitty on Contracts*, 31st Ed, volume 1 at para 1-043. Attempts to harmonise the contract law of EU member states, such as the Principles of European Contract Law proposed by the Lando Commission and the European Commission's proposed Regulation for a Common European Sales Law on which consultation is currently taking place, also embody a general duty to act in accordance with good faith and fair dealing. There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase.

45 The same pressures are, needless to say, not applicable in Singapore. We are therefore more likely to fall back on the implication of terms in fact to look for a duty of good faith, even as the English courts seem poised to take up a more absolute position. This much was acknowledged by the Court of Appeal in *Westcomb*.⁷⁶ On the other hand, it is the position in Singapore law that the courts are likely to give effect to an express term to negotiate in good faith. In *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*,⁷⁷ the Singapore Court of Appeal held that an express term to negotiate the market rental value of specified premises in good faith was enforceable. V K Rajah JA, in delivering the judgment of the court, observed that such clauses are in the public interest as they promote the consensual disposition of potential disputes. Rajah JA also noted that good faith clauses are consistent with our *cultural values* of promoting consensus wherever possible.⁷⁸ While this pacifist streak of Singapore society is not always on display in our courts, it is nevertheless interesting to note that there are social drivers which may eventually propel our jurisprudence in the same direction as England's.

74 [2013] 1 Lloyd's Rep 526.

75 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 Lloyd's Rep 526 at [124].

76 See *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [61].

77 [2012] 4 SLR 738.

78 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40].

46 Perhaps the best summary of the status of good faith in Singapore contract law is that we have not foreclosed its recognition as a general duty even if we remain sceptical that such a development will materialise in the near future. Our courts have continued to track the progress of the doctrine throughout the Commonwealth although we are careful to note that it cannot migrate into our legal system without first undergoing a process of naturalisation.

VI. Evaluating the difference

47 As I approach the close of my lecture I would like to make good on my initial promise to evaluate whether the divergences which I have identified constitute a problem in search of a solution. There is, to begin with, a matter of perception to be considered. Some might find it peculiar that Singapore appears to have become a repository, and even a conservatory, of classical English law, whilst the English courts have become increasingly eclectic and perhaps even iconoclastic. This would of course be a misrepresentation – the common law has never been a static institution.⁷⁹

48 As should be clear from my examination of the cases, the overriding narrative of Singapore law has been that of fidelity to the pillars of the English common law without being hidebound by its dogma. We have adapted the law to our own circumstances, just as English jurisprudence has adapted to a more Euro-centric political and economic reality. We have also tried to clarify and at least as we see it, to improve upon English authorities, just as the English courts have always sought to bring greater internal coherence to its case law. In so doing, I would say that both jurisdictions are *exemplifying* the common law's ability to absorb and accommodate change. In an ever-shrinking world, we must recognise and indeed expect that the great canvas of the common law will be filled with the contributions of judges from all over the world. Yet it is as if we each take a screenshot of that canvas and then go away and work on it in our own studios so that the resulting works might sometimes look quite different while also quite familiar. Looking at the works of others might well cause us to rethink, if not revisit, the products of our own efforts.

49 This raises the question of the impact of legal divergences on economic integration. The grand project of the harmonisation of law has as many ardent defenders as passionate detractors,⁸⁰ and it is beyond

79 Indeed the influence of continental jurisprudence upon English contract law is nothing new, as can be gleaned from Michael P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 16th Ed, 2012) at p 22.

80 For a useful overview, see Martin Shapiro, "The Globalization of Law" (1993–1994) 1 Ind J Global Legal Stud 37. See also Martin Boodman, "The Myth of
(cont'd on the next page)

the ambition of this lecture to land a decisive blow for either corner. What is empirically verifiable is that the existence of different legal systems increases the transaction costs of cross-border business. Not only do investors have to expend resources on securing compliance with national regulations, they will also have to price in the additional risks which accompany the enforcement of cross-border contracts when disputes arise. It has been suggested that the uncertainty which exists between the boundaries of different legal systems lowers investment, consumption and overall economic performance.⁸¹ To the extent that the costs of implementing common commercial laws are outweighed by the benefits of reductions in transactional and regulatory barriers to entry, it cannot be gainsaid that harmonisation is a positive force. I wish, however, to make two observations.

50 The first is that, even as transnational trade has become an economic imperative, there remains room for considered difference in fundamental areas of commercial law. Such differences do not pose major problems so long as parties are well-advised and the law as a whole does not slide into parochialism. The doctrine of private international law performs an essential mediating function when disputes arise between commercial parties from different jurisdictions, and in this way a *modus vivendi* has been established so that the wheels of commerce do not stop turning when legal complications arise. The availability of international commercial arbitration has also removed some of the pressure created by the diversity of commercial laws, as parties are able to privately agree among themselves on a process run on a more or less common set of rules to govern the way they settle their differences, if not quite yet to regulate the substance of their transactions. We should not forget that outside of mandatory rules and terms implied in law, contracts remain modes of private law-ordering which allow parties to set their terms, and that commercial parties – with the assistance of their lawyers – are adaptable creatures.

51 The second is that some differences are *justified* when they are the result of domestic imperatives, considered government policy or structural differences across jurisdictions. As much as the harmonisation of commercial law will represent an economic boon, nation states are more than mere trading entities and may justifiably prioritise other

Harmonization of Laws” (1991) 39 Am J Comp L 699; Ralf Michaels & Nils Jansen, “Private Law beyond the State? Europeanization, Globalization, Privatization” (2006) 54 Am J Comp L 843; and Roy M Goode, “Contract and Commercial Law: the Logic and Limits of Harmonisation” in *Ius Commune Lectures on European Private Law*, Maastricht (2003).

81 Helmut Wagner, “Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?” delivered at the 40th annual session of the United Nations Commission on International Trade Law, available at <<http://www.uncitral.org/pdf/english/congress/WagnerH.pdf>> (accessed 25 November 2013) at p 1.

areas of public policy over economic liberalism. Indeed even where harmonisation is a dominant concern, it should be approached with sensitivity towards ensuring its practical implementation. Otherwise, the result of superficial harmony will be a persistent substantive disparity in outcomes. A point I raised earlier in the context of contractual interpretation illustrates this. In *Sembcorp* we were concerned that the unqualified combination of liberal civil law doctrines on the admissibility of extrinsic evidence with the common law pre-trial discovery process might result in an overwhelming amount of material being dredged up every time a matter comes to trial. We therefore concluded that the drift towards the civilian approach of contractual interpretation had to be accompanied by adjustments following a careful analysis of how this drift will be actualised in practice. In short, harmonisation will have to be piloted in a controlled fashion.

VII. Looking ahead

52 Subject to these observations, I remain bullish on the prospects of harmonisation going forward. Leaving aside the creation of common doctrines of commercial law, there are manifest opportunities for harmonisation on other levels. The international arbitration experience offers a loose narrative by which such harmonisation can be scripted – at least for its first two acts.

53 The opening act could be the harmonisation of recognition and enforcement, which makes the most direct practical impact for the end-users of commercial litigation. In arbitration, this was achieved by successive international instruments, beginning in 1923 with the Geneva Protocol on Arbitration Clauses,⁸² followed by the 1927 Geneva Convention,⁸³ the 1958 New York Convention⁸⁴ and in 1985 the United Nations Commission of International Trade Law (“UNCITRAL”) Model Law.⁸⁵ The Hague Convention on Choice of Court Agreements (“Hague Convention”) has the potential to do the same for foreign judgments in civil and commercial matters. Under the Hague Convention, parties may choose to resolve their dispute in the court of a state party whereupon proceedings in other member states will be suspended or dismissed.⁸⁶ The chosen court cannot decline to hear the case on the grounds of

82 24 September 1923; entry into force 28 July 1924.

83 Convention on the Execution of Foreign Arbitral Awards (26 September 1927; entry into force 25 July 1929).

84 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959).

85 Model Law on International Commercial Arbitration 1985 (UN Doc A/40/17) Annex I (21 June 1985).

86 Convention on Choice of Court Agreements (concluded 30 June 2005) Art 6.

forum non conveniens,⁸⁷ and the judgment of that court will be recognised and enforced in any other member of the Convention.⁸⁸ Two of the world's largest economies, the US and EU, have already signed the Convention, which will come into effect with the ratification of just one more state. I am cautiously optimistic that if and when this happens it will represent a watershed for the international recognition and enforcement of foreign judgments.⁸⁹

54 At the same time, we should expect that the application of the Hague Convention will be subject to some heterogeneity. Complete uniformity of *outcomes* in the enforcement of foreign judgments is a chimera, and indeed one of the concerns that is sometimes raised is that the Hague Convention has not left a sufficient margin of appreciation for member states to take account of domestic policy imperatives.⁹⁰ Nevertheless it must be conceded that the extent of divergence will be far less than it stands at present. Too much uncertainty attends to the current regime where the enforceability of foreign judgments turns entirely on the private international law of the enforcing state. The cost of such uncertainty simply fails to add up for sophisticated commercial parties. While the Hague Convention might not result consistently in the mutual enforcement of judgments within its member states, the hope is that it will nonetheless be a positive step towards promoting the use of litigation as a viable alternative means of transnational dispute resolution to international commercial arbitration.

55 Here, let me digress with a brief interlude into the role of national courts in relation to the recognition and enforcement of international arbitration awards. This is useful if only to make the point that even under the New York Convention and the Model Law, there can be undulations in the way those instruments are actually applied by enforcing courts, notwithstanding the fact that there are 149 contracting states to the New York Convention⁹¹ and 67 states that have enacted a version of the UNCITRAL Model Law.⁹²

87 Convention on Choice of Court Agreements (concluded 30 June 2005) Art 5.

88 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (concluded 1 February 1971) ch 2.

89 On a bilateral level, harmonisation can also be achieved by entering into a Memorandum of Guidance which sets out a clear understanding of the enforcement procedures for money judgments in each other's courts: see para 62 below.

90 See Mary Keyes, "Jurisdiction under the Hague Choice of Courts Convention; Its Likely Impact on Australian Practice" (2009) 5 *Journal of Private International Law* 181.

91 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (accessed 25 November 2013).

92 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (accessed 25 November 2013).

56 In a recent decision, *PT First Media TBK v Astro Nusantara International BV*⁹³ (“Astro”), the Singapore Court of Appeal had occasion to survey the international arbitration regime set up by these instruments. The key threshold issue before the court was whether the appellant was within its rights to try to resist the enforcement of an arbitration award on the ground that the tribunal lacked jurisdiction, having previously opted not to take any of the available avenues to actively challenge the same tribunal’s preliminary finding that it had jurisdiction. Our attention was therefore focused on the scope and content of a national court’s discretion to refuse the recognition and enforcement of an international arbitration award. We found that the Model Law, like the New York Convention, was designed to de-emphasise the importance of the seat of arbitration and to facilitate the uniform treatment of awards regardless of where they were sited. This, of course, is in line with the observations of the UK Supreme Court in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* (“Dallah”).⁹⁴ Equally, and subject to the operation of waiver and issue estoppel, we held that arbitrating parties would not be precluded from resisting the enforcement of an award even when they had previously eschewed the opportunity to raise an appeal or set it aside. In other words, parties have what can be aptly termed as a “choice of remedies”.

57 The necessary price of this system is that inconsistencies can arise at the stage of enforcement. In *Dallah* itself we saw that the UK Supreme Court refused to enforce a French award on the ground that there was insufficient evidence that Pakistan had intended to be bound by the arbitration agreement. The French Court of Appeal disagreed. It held that Pakistan’s conduct during the negotiation process clearly demonstrated that it was a party to the transaction and therefore subject to the arbitration agreement.

58 The reality is that the present international arbitration regime allows different *enforcement* outcomes to be reached within an otherwise uniform approach to the *enforceability* of awards. Indeed, this is part of the *design* of the international commercial arbitration regime. The harmonisation which is envisaged by the New York Convention and, by extension, the Model Law is that any of the contracting states can determine *for itself* whether any particular arbitral award should be recognised and enforced, but within a common framework setting out *a common set of grounds*. The fact that the passive remedy of resisting recognition and enforcement can be dispensed by any contracting state where enforcement is sought means that national courts can and must

93 [2014] 1 SLR 372.

94 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 at [28], *per* Lord Mance.

be fully engaged at this stage. They perform the vital function of quality control for arbitration. If the decisions of arbitrators are enforced unquestioningly, we run the risk of undermining the integrity of the system of international arbitration, which relies on the national courts to act as the final arbiters on the legal fitness of awards.

59 Given this scheme of the New York Convention and the Model Law, it is ultimately not helpful to speak in terms of whether a jurisdiction is pro- or anti-arbitration depending on how frequently or easily arbitral awards are enforced there. Such characterisations do not account for whether or not curial intervention on the grounds set out in the New York Convention or the Model Law is in fact justified in the circumstances. It is much more useful to look at the reasoning adopted by different courts. On a more general level it is also important that national courts are aware of how their counter-parts are carrying out their function as the gatekeepers of the system.

60 Let me return to the main discussion. If Act One concerns the harmonisation of the rules of enforcement, Act Two would be the harmonisation of the dispute resolution process. I do not mean to suggest that we disturb the way that litigation is conducted in national courts. Rather, I think that stream-lined procedures for the resolution of international commercial disputes can be developed alongside and *parallel* to the normal litigation process. The most practical way to do this would be through the creation of commercial courts with specialised rules of procedure which can be harmonised on a regional or even international level. The creation of a custom-built annex for commercial disputes can be achieved without remodelling the existing architecture of national court systems. Commercial parties will then have recourse to a fully constituted court, with all its attendant coercive facilities, which is also sensitive to the needs and realities of international business. *De facto* models of such courts already exist in the form of the London Commercial Court, the Delaware Court of Chancery and the Commercial Court of the Supreme Court of Victoria, just to name a few. International courts have also been set up in the Dubai International Financial Centre and in Qatar. Singapore is presently developing a framework for the establishment of the Singapore International Commercial Court (“SICC”), with a bench that will likely comprise some of our existing Supreme Court judges as well as eminent Singaporean and international commercial law jurists.

61 The premise of the SICC is that, as Asia’s economic growth continues, cross-border disputes will inevitably increase and demand will grow for a court-based dispute resolution mechanism to deal with cases which are not amenable to arbitration or might be better suited for a variety of reasons to litigation. We believe that Singapore can leverage upon its commercial position and the international standing of its

judiciary to meet this demand. We expect that the court will hear three categories of cases. The first is where parties have consented to use the SICC *after* their dispute has arisen. The second is where parties have agreed in a prior contract that the SICC will have jurisdiction over any disputes which arise between them. The third category will be cases within the jurisdiction of the Singapore High Court which are transferred to the SICC at the discretion of the Chief Justice. The precise mechanics of this court are still in the early stages of development and I look forward to making available a more detailed prospectus of the SICC soon.

62 As part of Act Two, I believe there is value to be had in developing deeper connections among these commercial courts and exploring further avenues not just for knowledge-sharing but also substantive collaboration. The first steps have already been taken. The Supreme Court of Singapore has entered into a Memorandum of Understanding (“MOU”) with the Supreme Court of New South Wales in 2010, under which we may refer questions of New South Wales law to the New South Wales Supreme Court and *vice versa*. This has been acknowledged as an innovative procedure and our New South Wales counterparts have since signed a similar MOU with the New York state courts. I mention these instruments as examples of how inter-curial collaboration can assure commercial parties of the correct application of foreign law regardless of the jurisdiction in which they choose to resolve their dispute. In the same vein, a Memorandum of Guidance was signed by the Dubai International Financial Centre courts and the London Commercial Court earlier this year which sets out the procedures for the enforcement of money judgments in the respective institutions. The introduction to this Memorandum of Guidance states that while its terms are not legally binding, the main object is to promote a mutual comprehension of both parties’ laws and judicial processes and to improve public perception and understanding.⁹⁵ This is a useful reminder that, apart from the confidence that inter-curial collaboration can engender, the sharing and circulation of information about the workings of other courts will also be of intrinsic value as litigation becomes increasingly international in nature.

63 In keeping with this, for some time now, the commercial judges of Sydney, Hong Kong and Singapore, three of the leading commercial and financial centres in Asia, have been meeting every other year to discuss cutting-edge issues in commercial litigation. We hosted the conference this year and were joined for the first time by judges from

95 Memorandum of Guidance as to Enforcement between the DIFC Courts and the Commercial Court, Queen’s Bench Division, England and Wales, available at <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/uk-uae-protocol-with-logos.pdf>> (accessed 25 November 2013) at paras 2 and 3.

the High Court of Mumbai as well as commercial judges from a number of other Asian jurisdictions and we hope by the next round to have commercial judges from Shanghai join us.

64 To my mind, strengthening the *community* of commercial courts might even present the surest route towards Act Three – a deeper harmonisation of substantive law. As these courts specialise in deciding international commercial disputes, they are particularly well-situated to develop a consistent jurisprudence of international commercial law. We might even envision a future where such a coherent *corpus* of case law has been propagated by commercial courts that it could be looked upon as a source of *lex mercatoria*. An international community of commercial courts will represent a practical solution to multinational businesses which require a reliable, neutral and legitimised mechanism for dispute resolution, and in so doing transform the anxiety over uncommon laws of commerce into an opportunity for further integration between law and commerce. The law has always been part of the infrastructure for international trade, but with some forward thinking by lawyers and legal institutions, it might aim to become part of the modern *superstructure* as well.

VIII. Conclusion

65 If any part of this script is to be translated into reality then we must begin with a dialogue among stakeholders in the regional and international spheres. Singapore has already been involved in discussions on further legal co-operation and harmonisation within ASEAN. The Centre for International Law at the National University of Singapore has been a leader in this initiative. The ASEAN Integration through Law project which I mentioned earlier has been one of its major research activities. It presently involves 77 investigators working on about 40 studies on ASEAN legal integration.⁹⁶ Among the key deliverables of this multilateral discourse will be a rich toolkit of models, options, methods and analyses which would then be at the disposal of policy makers, practitioners and academics.

66 We are also looking beyond the immediate region to a wider sphere. In my keynote address at the 26th LAWASIA Conference last month, I suggested the commissioning of an international conference to discuss the prospects of the harmonisation of commercial law among countries in Asia and the Pacific. Apart from galvanising what has hitherto been a decentralised discourse, such a conference would also yield tangible deliverables for a range of stakeholders including

96 See <<http://cil.nus.edu.sg/research-projects/cil-research-projects/asean/overview>> (accessed 25 November 2013).

commercial judges, lawyers, academics and in-house counsel. For the representatives of states from outside of the Asia-Pacific region, it will operate as a one-stop showcase of the nature and development of Asia-Pacific law. For multinational companies and other commercial interests, the conference will be an opportunity to actively participate in foundational discussions about the prospects of developing a legal infrastructure which will be of direct benefit to their businesses. Finally, international organisations such as the Hague Conference, the International Institute for the Unification of Private Law and UNCITRAL might take the conference as an opportunity to form meaningful partnerships to further augment their work. I also announced last week that the Singapore Academy of Law will convene the first of what I hope will be a regular series of such conferences, within the next 18 months.

67 We have already seen the source of the influences which propel our jurisprudence in new directions. For England, the traditions of European civil law will continue to exert a gravitational force. As the orbit of English law shifts, it will inevitably have a bearing on other jurisdictions, including Singapore. Thus far, our approach can perhaps be best described as adoption with adaptation. Indeed, we hope that the work of our courts will also percolate back into the groundwater of the common law perhaps causing some refinements here such that, through this process of exchange, we might yet find a common meeting ground. This describes the way the common law has developed historically, save that judges from more parts of the world now have an increasingly important contribution to make. However, the vision of harmonisation is wider than what we common lawyers have perhaps always taken for granted. The next frontier has already been scouted, and the great challenge ahead of us must be the recruitment of jurisdictions like China, Indochina, Indonesia, the Middle East and continental Europe to participate in a global conversation on a commercial law framework that strives to serve the transnational trading environment of this 21st century.