

**35th Anniversary of the Convention on Contracts for the
International Sale of Goods (“CISG”)**

**“Roadmaps for the Transnational Convergence of Commercial law:
Lessons Learnt from the CISG”**

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Introduction

1. Good afternoon, and thank you for inviting me to address you this afternoon. As we gather to commemorate the 35th Anniversary of the CISG,¹ we cannot help but be struck by the ingenuity of its conception, the soundness of its construction, and the prescience of its ideals. This is reflected in the fact that today 83 states are party to the Convention. In 2014 alone 3 states, all from Africa, have become members,² and they were preceded in the year before that by Bahrain and Brazil. The geographic distribution of these newest members paints a picture both of the changing face of international trade and the ongoing reception of the CISG. Over the last 35 years, the CISG has achieved the rare distinction of being both responsive to the needs of its time and

* I am very grateful to my colleague, Mr Jonathan Yap, Assistant Registrar of the Supreme Court of Singapore, for his assistance in the research and preparation of this paper

¹ Also referred to as “the Convention”

² For the full list of members, see

<http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>

predictive of the future. In that sense, perhaps more so than any other comparable international instrument, the Convention possesses the quality of being both historic and futuristic at the same time, and so it stands as a crucial bridge between the 'rebirth' of international commercial law after the cataclysms of the 20th century and its continued development in a globalising world.

2. What I propose to do this afternoon is to trace this history and pick out some of the lessons that the CISG experience can impart to the transnational convergence of commercial law. To borrow Marshall McLuhan's famous adage, "we drive into the future using only our rearview mirror"³ though I should like to think that if we turned on the search-lights we might get a sense of what lies ahead as well.

The Lex Mercatoria

3. The notion of law to support international trade is by no means a new one. It has its roots in ancient times,⁴ and has accrued enough intellectual and practical currency to be identified by its own title – the *lex mercatoria*.⁵ Despite its entry into common legal usage, the meaning

³ Marshall McLuhan, unsourced

⁴ R H Graveson, "The International Unification of Law", (1968) 16 Am J Comp L 4

⁵ Amongst many other appellations – see Filip de Ly, *International Business Law and Lex Mercatoria* (1992) at p 15

of 'lex mercatoria' has yet to be definitively settled. For now it is perhaps best understood as a compendium of several different meanings.⁶

4. From a more positivist perspective, it refers to the established framework of instruments on the basis of which international trade is conducted and the accompanying disputes are resolved. This might include the use of standard form contracts, the pervasive apparatus of international commercial arbitration, and the adoption of uniform laws like the CISG.⁷ Lex mercatoria can also be treated as describing an aggregated body of legal principles, which are common to major commercial jurisdictions such as the maxim *pacta sunt servanda*.⁸ At the more normative level, it describes an autonomous and internally uniform legal order of, by, and for commercial actors. The strongest advocates of this ideal conceive of the lex mercatoria as a self-contained system which exists without reference to any national legal authority.⁹

5. If one were to survey the current landscape of the lex mercatoria with these definitional ideas in mind, its topography may be characterised as

⁶ W Laurence Craig, William W Park & Jan Paulsson, *International Chamber of Commerce Arbitration* (2000, 3rd ed) at para 35.01; also Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International, 1999) pp 41–42

⁷ For a fuller list, see Ole Lando, "The Lex Mercatoria in International Commercial Arbitration" (1985) 24 ICLQ 747 at pp 748–752

⁸ A representative view can be found in Clive Schmitthoff, "The Unification of the Law of International Trade" (1968) JBL 105

⁹ See for example Berthold Goldman, "The Applicable Law: General Principles of Law: the Lex Mercatoria" in Lew, *Contemporary Problems in International Arbitration* (1986) 113, p 116

an uneven one. While there is no doubt that we can point to parts of the global legal order designed specifically to support the machinery of international commerce, the world remains principally organised according to municipal jurisdictions whose substantive and adjectival laws are only sporadically coordinated.

6. Yet the precise boundaries and contours of the *lex mercatoria* are still in the process of being shaped by global economic forces. Indeed this is one of the most crucial growth areas for both the legal sciences and the legal industry, especially in our part of the world. I suggest that Asia can be the frontier for what might be viewed as the 4th chapter in the story of the *lex mercatoria*, and we should begin to prepare ourselves in earnest for this monumental opportunity. Before we come to that I wish to first identify the historical patterns that emerge from the first three chapters,¹⁰ and how our present circumstances are situated within this broader narrative.

¹⁰ The triadic structure was adopted in the seminal work of Clive Schmitthoff, "International Business Law: A New Law Merchant" (1961) 2 *Current Law and Social Problems* 129 and has since become *de rigueur* – see for example Ralf Michaels, "The True *Lex Mercatoria*" (2007) 14(2) *Indiana Journal of Global Legal Studies* 447 at p 448

Chapter 1: The Middle Ages – Birth

7. The story of the *lex mercatoria* begins with the commercial renaissance of Europe¹¹ as it transitioned from the Dark Ages into the Middle Ages. In an era of agricultural productivity and increasing urbanisation, trade over both land and sea flourished across the commercial centres of Europe.¹² The opening of the East to commercial exchange gave European communities unprecedented access to spices and other novel commodities. It was during this period that a professional class of merchants emerged and began to organise their activities through markets and fairs.¹³ This has been described, in rather romantic terms, as a “cosmopolitan community of international merchants who travelled through the civilized world, from port to port and fair to fair.”¹⁴ With an ingenuity borne out of necessity, these merchants developed customs and rules to facilitate their dealings. Many legal devices which remain indispensable today, such as bills of exchange and letters of credit, are also traceable to the commercial activities of these medieval

¹¹ See generally R Lopez, *The Commercial Revolution of the Middle Ages, 950-1350* (1971) cited in Harold Berman and Colin Kaufman, “The Law of International Commercial Transactions (*Lex Mercatoria*)” (1978) 19 *Harv Intl L J* 221, n 2

¹² Bruce Benson, “The Spontaneous Evolution of Commercial Law” (1989) 55(3) *Southern Economic Journal* 644 at 646; see also Leon E Trakman, “The Evolution of the Law Merchant: Our Commercial Heritage” (1980) 12 *Journal Maritime Law and Commerce* 1.

¹³ Clive M Schmitthoff, *Commercial Law in a Changing Economic Climate* (Sweet & Maxwell, 1981, 2nd ed) at p 3.

¹⁴ Clive Schmitthoff, “The Unification of the Law of International Trade” (1968) *J Bus L* 105

merchants.¹⁵ In addition, sea-faring traders settled upon stable maritime customs which became codified in the major coastal cities as laws.¹⁶ The resulting patchwork of laws and customs¹⁷ was administered by a collection of specialist courts whose adjudicators were appointed from the merchant classes themselves.¹⁸

8. From this initial phase of development we can identify the conditions which catalysed the propagation of the *lex mercatoria*. First of all, there was strong demand for the generation of legal norms that would overcome the cultural diversities of Europe and enable the smooth and profitable flow of commodities. Second, merchants were for the first time readily able to travel in significant numbers to markets and fairs to trade with counterparts from other territories. Third, merchant courts were available to ensure that commercial norms could be effectively and somewhat uniformly applied and enforced by traders. We might therefore isolate market demand, agent mobility and adjudicatory infrastructure as key factors in the genesis of international commercial

¹⁵ Berman and Colin Kaufman, "The Law of International Commercial Transactions (*Lex Mercatoria*)" (1978) 19 Harv Intl L J 221, 225–226; see also n 9 at p 651

¹⁶ Harold Berman and Colin Kaufman, "The Law of International Commercial Transactions (*Lex Mercatoria*)" (1978) 19 Harv Intl L J 221, pp 224–225; Clive Schmitthoff, "The Unification of the Law of International Trade" (1968) J Bus L 105, p 106

¹⁷ Emily Kadens, "Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law" (2004) 5 Chi J Intl L 39, p 63

¹⁸ Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983) at 346. Merchant courts were characterised by speed and informality, and preferred commercial common sense to strict legal rules – see Leon E Trakman, *The Law Merchant: the Evolution of Commercial Law* (Fred B Rothman & Co, 1983) pp 11– 15; see also Schlesinger et al, *Comparative Law: Cases, Text, Materials* (Foundation Press, 1998, 6th Ed) at p 278

law during the Middle Ages. It is also worth noting that this first chapter of the *lex mercatoria*, while merchant-driven, was not wholly without juristic roots. The conceptual frameworks needed to fortify medieval trade practices were at least in part supplied by the revival of Roman law, which some regard as the precursor of the *lex mercatoria*.¹⁹ We will see later on that many of these basic elements recur in subsequent chapters of the *lex mercatoria*.

Chapter 2: The 17th to 19th Centuries – Nationalisation

9. As the span of cross-border trade lengthened, however, the continuity of the medieval *lex mercatoria* became challenged by growing complexity.²⁰ At the same time, its nature as a merchant-driven set of dictates that were developed in response to expediencies of trade and commerce meant that the medieval *lex mercatoria* had never been centrally codified.²¹ Instead, the *lex mercatoria* was gradually

¹⁹ See the analysis of Benvenuto Stracca's *De mercatura* (1553) in Charles Donahue Jr, "Medieval and Early Modern *Lex mercatoria*: An Attempt at the *probation diabolica*" (2005-2005) 5 *Chi J Intl L* 21 at pp 31–34; see also Thomas Edward Scrutton, "Roman Law Influence in Chancery, Church Courts, admiralty and Law Mercant" in *Select Essays in Anglo-American Legal History* (Wildy & Sons Limited, 1968 Reprint) Vol 1, 208, at pp 239–246; and on the influence of Roman law more generally see H Coing, "The Roman Law as *Ius Commune* on the Continent" (1973) 89 *LQR* 505

²⁰ Leon E Trakman, *The Law Merchant: the Evolution of Commercial Law* (Fred B Rothman & Co, 1983), at pp 19–20;

²¹ Charles Donahue Jr, "Medieval and Early Modern *Lex mercatoria*: An Attempt at the *probation diabolica*" (2005-2005) 5 *Chi J Intl L* 21 at 28; there were however compilations of maritime principles and jurisprudence such as the "Little Red Book of Bristol" – see Klaus Peter Berger, "The New Law Merchant and the Global Market Place in *The Practice of Transnational Law* (Kluwer Law International, 2001) (Berger ed) 1, at n 12

assimilated into sovereign legal systems, such as the common law in England.²² Thus began its second chapter.

10. The first inroads made by the royal courts of England into the law of merchants can be traced to the 1353 Statute of the Staples,²³ which recognised that foreign trade in products such as wool and leather would be subject to the law merchant. However, the Statute of Staples also provided that appeals could be taken to the royal courts, thereby asserting the hierarchical superiority of the courts over mercantile institutions. Eventually the competition this engendered between the common law courts and merchant courts resulted in the decline of the latter with English judges growing more robust in projecting their authority.²⁴ The cross-jurisdictional norms of the medieval *lex mercatoria* were thus localised and some might say subsumed by the common law. However, this was never expressly acknowledged until the 18th century, during a period of reform initiated by the ‘father of English commercial law’,²⁵ Lord Mansfield.²⁶ In *Pelly v Royal Exchange*, Lord Mansfield opined that “mercantile law... is the same all over the world... [for] from

²² For a historical overview of the law merchant in English law, see William S Holdsworth, *A History of English Law* (1903) Vol I, c. vii, pp 300 – 337

²³ 27 Edw III (1353)

²⁴ Lord Coke’s decision in *Vynior’s Case* 8 Co 80a and 81b is commonly held up as the landmark decision in which the law merchant was declared to be subject to royal justice. Landes and Posner have suggested that this might have been due to the fact that English judges were paid directly from litigants’ fees – see William M Landes and Richard A Posner, “Adjudication as a Private Good” (1979) *Journal of Legal Studies* 235, p 258

²⁵ *Lickbarrow v Mason* (1787) 2 TR 63, 73 *per* Buller J, who refers to Lord Mansfield as “the founder of commercial law of this country”

²⁶ See also *Pillans and Rose v van Mierop and Hopkins* [1765] 3 Burr 1663, E.R. 97, 1035

the same premises, the sound conclusions of reason and justice must universally be the same.”²⁷ Although expressed in terms of commonality across borders, in fact this was emblematic of the ascendance of English commercial law which, by drawing upon the *lex mercatoria*, came to eclipse it.²⁸ In continental Europe a parallel process of nationalisation also transpired, albeit through legislation rather than case law.²⁹ In France for example the *lex mercatoria* was successively incorporated into the general law by royal ordinances during the 17th century³⁰ and was eventually codified in the Napoleonic *Code de Commerce* in 1807.³¹ The *lex mercatoria* therefore survived in its 2nd chapter only as a constituent of municipal law.

Chapter 3: The 20th Century – The New Law Merchant

11. It was only in the 20th century that the *lex mercatoria* was revived as a body of law which could facilitate the growth of cross-border trade by virtue of its international character. As the world’s collective attention turned away from conflict and towards economic development, efforts

²⁷ *Pelly v Royal Exchange Assurance Co* (1757) 97 Eng Rep 342, 346

²⁸ Thomas Edward Scrutton, “General Survey of the History of the Law Merchant” in *Select Essays in Anglo-American Legal History* (Wildy & Sons Limited, 1968 Reprint) Vol 3, 7, p 15

²⁹ For an overview, see Leon E Trakman, *The Law Merchant: the Evolution of Commercial Law* (Fred B Rothman & Co, 1983) pp 24– 27;

³⁰ Clive Schmitthoff, “International Business Law: A New Law Merchant” (1961) 2 *Current Law and Social Problems* 129 at p 133

³¹ *Ibid*; an English translation of the Napoleonic Codes is available at < http://www.napoleon-series.org/research/government/c_code.html>

were undertaken at both the regional and international levels to forge a unified commercial law. In 1952, the Uniform Commercial Code (“UCC”)³² was published in the United States. Jointly produced by the American Law Institute and the National Conference of Commissioners, the UCC was intended to promote the modernisation and harmonisation of commercial law across the American states.³³ In 1957, the Treaty of Rome³⁴ was signed by the founding members of the European Economic Community, creating a common market to which municipal commercial laws would have to be approximated.³⁵ In the international sphere, a panoply of independent institutions began to advance the agenda of legal integration. Of these organisations, two were the most prominent, and both continue to stand in high esteem.

12. The first is the International Chamber of Commerce (“ICC”), which was founded by Western industrialists to promote both international trade and peaceful relations between nations. One of the ICC’s biggest successes has been the development of the Incoterms rules, which are aimed at defining the allocation of responsibilities between sellers and buyers in common sales contracts. The use of Incoterms is now a matter of wide currency in international trade. The other prominent

³² An updated version is available online at < <https://www.law.cornell.edu/ucc> >

³³ William Schnader, “The New Movement Toward Uniformity in Commercial Law: the UCC Marches On” (1958) 13 Bus Law 647

³⁴ Treaty Establishing the European Economic Community (25 March 1957; entry into force 1 January 1958)

³⁵ See Art 3(h)

institution is, of course, UNCITRAL.³⁶ UNCITRAL's express objectives are to "further the progressive harmonisation and unification of the law of international trade."³⁷ It has been responsible for a series of treaties and conventions which are almost constitutional to international commerce. Foremost amongst its achievements are the Model Law³⁸ and the CISG, which I will come to later.

13. Before we get to that, it is important to acknowledge that this third chapter of the *lex mercatoria* has been elevated by the work of academics such as Berthold Goldman and Clive Schmitthoff.³⁹ Indeed the very identification of what has been labelled the 'new *lex mercatoria*'⁴⁰ is a direct product of academic endeavour. We owe a great debt of gratitude to the scholars who have pioneered the multi-disciplinary and comparative techniques which have become foundational to the study of international commercial law. The new *lex mercatoria* now represents a substantial field of scholarship in which the

³⁶ The United Nations Commission on International Trade Law; for a succinct background, see Clive Schmitthoff, "The Unification of the Law of International Trade" (1968) JBL 105

³⁷ *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (United Nations, 2013), para 1

³⁸ Formally, the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration

³⁹ For an overview of their contributions, see Klaus Peter Berger, "The New Law Merchant and the Global Market Place" in *The Practice of Transnational Law* (Kluwer Law International, 2001) (Berger ed) 1, at pp 6 – 8 and Nikitas E Hatzimihail, "The Many Lives – and Faces – of *Lex Mercatoria*: History as Genealogy in International Business Law" (2008) 71(3) *Law and Contemporary Problems* 169

⁴⁰ See n 10; see also Aleksander Goldstaijn, "The New Law Merchant" (1961) JBL 12

normative arguments in favour of harmonisation, along with the intellectual tools required to achieve this, are well-traversed.

Historical Patterns

14. Let me now take a moment to pull together some of the threads from these three chapters. Even at the level of generality with which I have presented this historical overview, one can discern a remarkable connection between the *lex mercatoria* and the prevailing social order of the times. It is worth remembering that the *lex mercatoria* emerged during an age when European society was stratified horizontally into distinct classes without any unifying central authority.⁴¹ Merchants organised themselves into guilds because the conditions necessary for trade could not have been secured by any higher authority.⁴² These guilds became the main promulgators of the *lex mercatoria* during its 1st chapter. However, the underlying social structure began to change from the 16th century, which saw the decline of feudalism and the shift towards a capitalist order. In 1648, the Treaty of Westphalia gave rise to

⁴¹ Clive M Scmitthoff, *Commercial Law in a Changing Economic Climate* (Sweet & Maxwell, 1981, 2nd ed) at p 2

⁴² See Christopher R Drahozal, "Contracting Out of National Law: An Empirical Look at the New Law Merchant" (2004-2005) 80 Notre Dame L Rev 523 at p 528; also Sulun Gucer, "Lex Mercatoria in International Arbitration" (2009) Ankara Bar Review 40 at p 32

the concept of the nation-state,⁴³ and as traditional sources of authority migrated to this vertical power structure⁴⁴ the *lex mercatoria* also fell under the spell of nationalisation. Thus the mercantile courts ceded ground to national courts, and what had begun as a horizontal, merchant-led phenomenon started to transit to a vertical, state-led body of law. The close of the *lex mercatoria*'s 2nd chapter came during the industrial revolution, when European commercial law was consolidated in the form of continental codes and landmark English legislation and case law.⁴⁵ In this way the *lex mercatoria* became fossilised in the amber of legal history.

15. Already we can see how the status of the *lex mercatoria* has been yoked to changing political and economic forces. This pattern continues into contemporary history. The reanimation of *lex mercatoria* as 'new' *lex mercatoria* after the Second World War reflects the remaking of the international community after widespread devastation.⁴⁶ It is also a function of international economic liberalism and the revival of interest in

⁴³ See for example Simona Țuțuianu, *Towards Global Justice: Sovereignty in an Interdependent World* (Asser Press, 2013) at p 44, and David B Goldman, *Globalisation and the Western Legal Tradition* (Cambridge University Press, 2007) at pp 138–143

⁴⁴ For a fuller treatment of the rise and evolution of the nation-state, see Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983) at pp 196–207

⁴⁵ See n 41 at p 7

⁴⁶ Although an additional perspective is that a set of international norms were required to ensure that trade could continue despite the polarised politics of the Cold War (see L Yves Fortier CC, QC "The New, New *Lex mercatoria*, or, Back to the Future" (2001) *Arbitration International* 121, at p 123) and to deal with the energy crises of the 1960s and 1970s (see Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996) at pp 63 – 114)

cross-border trade. During this 3rd chapter, the *lex mercatoria* has not been the product of a singular source of international legal authority. Instead, it has been propagated in a polycentric fashion through various multilateral efforts coordinated by discrete institutions. The CISG belongs to this part of the narrative.⁴⁷

The CISG Experience

16. The endeavour to create a uniform law for the international sale of goods began from as early as the 1930s. Under the banner of the International Institute for the Unification of Private Law (“UNIDROIT”), the first draft law on international sales was produced by a small group of distinguished European scholars in about 1939. Its wider dissemination was interrupted by the Second World War, and it was not until 1951 that the project was revived. Two revised drafts were then produced and in 1964 a Diplomatic Conference convened in The Hague with 28 participating States adopted as international conventions the Convention on Uniform Law of International Sales (“ULIS”) and the Convention on Uniform Law on the Formation of Contracts for the

⁴⁷ For a comprehensive treatment of the CISG, see John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, 3rd Ed, 1999); the leading reference textbook is Schlectriem & Schwenzer: *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Schwenzer ed) (Oxford University Press, 3rd Ed, 2010)

International Sale of Goods (“ULF”), collectively “the Hague Conventions”.

17. However, neither of these conventions achieved any measure of success. In part this was because they had been perceived as the output of an insular European project.⁴⁸ More critically, however, the Hague Conventions were simply far too ambitious. For example, its members were required to apply convention rules to all international sale contracts, even those which did not involve parties from ratifying states.⁴⁹ The Conventions therefore set out to entirely displace rules of private international law, and in the process of doing so they also risked overthrowing the fundamental principle of party autonomy. Tellingly, some of the countries whose delegates were most involved in the drafting of the Hague Conventions – such as the United States and France – never ratified them. Essentially the Hague Conventions pushed for too much, too soon. Nevertheless, they served as the precedents upon which UNCITRAL began, in 1968, to produce a new text with better prospects for world-wide adoption.⁵⁰ That is what eventually took shape as the CISG, from the creation and content of which valuable lessons can be drawn.

⁴⁸ The Hague Conventions were only adopted by 11 countries, 9 of which were European

⁴⁹ ULIS Art 2

⁵⁰ See the introduction to *Report of the Working Group on the international sale of goods, first session, 5–16 January 1970 (A/CN.9/35)*

18. The first draft of the CISG was produced in 1978. It combined the Hague Conventions and introduced crucial modifications. First, the CISG limited the scope of its application by excluding consumer contracts⁵¹ and liability for death and personal injury,⁵² which are more often subject to municipal regulations. By doing so, the drafters of the CISG acknowledged that there are spheres of commercial law which are more properly the province of state legislatures. Further, the CISG only applies when both the seller and buyer have their places of business in contracting states or where the rules of private international law lead to the application of the law of a contracting state. The CISG was therefore designed to fit into rather than to displace the incumbent legal framework. It was also intentionally drafted to be easily applied.⁵³ The best example of this lies in the CISG's test for internationality, which simply looks to whether the seller and buyer have their places of business in different states.⁵⁴ The notion of a place of business, and the setting out of a clear methodology for its identification,⁵⁵ greatly reduces the risk of dispute over whether the CISG even applies. It is a

⁵¹ Art 2(a)

⁵² Art 5

⁵³ Kazuaki Sono, "The Vienna Sales Convention: History and Perspective" in *International Sale of Goods: Dubrovnik Lectures* (Sarcevic & Volken eds) (Oceana, 1986) 1 at p 6, makes the point that the CISG is free from dogma to facilitate understanding by businessmen

⁵⁴ Art 1

⁵⁵ Art 10(a) and (b)

formulation whose elegant simplicity has been honoured by its adoption in other international instruments, most notably the Model Law.⁵⁶

19. The consultation and drafting process for the CISG also had the benefit of lessons drawn from the Hague Conventions. As it was starting out on its work, UNCITRAL received feedback that some states regarded the Hague Conventions as lacking in clarity due to limited input from delegates of different legal backgrounds.⁵⁷ The UNCITRAL working group therefore included a diversity of delegates from 14 states under the chairmanship of Professor Jorge Barrera Graf of Mexico. Significantly, the two Cold War superpowers were brought together along with a broad constituency of states from Africa, Asia, Europe, South America and the Middle East.⁵⁸ No fewer than 62 states participated in the diplomatic conference which adopted the Convention, of which there were 22 western, 11 socialist and 29 'third world' nations.⁵⁹ The CISG can therefore justifiably claim to be a genuinely global convention.

⁵⁶ *Report of the Working Group On International Contract Practices on the Work of its Fifth Session* (A/CN.9/233, 28 March 1983) at pp 11–12

⁵⁷ The feedback was considered during the second and third sessions of the UNCITRAL Commission – see *Analysis of replies and comments by Governments on the Hague Convention of 1955: report of the Secretary-General* (A/CN.9/33)

⁵⁸ The 14 states were: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America – see *Report of the Working Group on the international sale of goods, first session, 5-16 January 1970* (A/CN.9/35) at 177

⁵⁹ Gyula Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods* (1983) 31 *Am J Comp L* 333, n 5

20. I should add, however, that while there was a conscientious effort to develop the CISG with the collective buy-in of the international community and to effect the compromises required to maximise its receptivity, the CISG should not be viewed as a watered-down piece of international legislation. It has not preferred popularity to substance, and has scrupulously sought to achieve strategic balance instead of settling for the lowest common denominator. On this point there is no better illustration than Article 7(1), which provides that in the interpretation of the Convention regard is to be had to its international character, the need to promote uniformity in its application and the observance of good faith in international trade. This, in many ways, is the signature provision of the CISG, not only because it enshrines a cornerstone principle of the *lex mercatoria* but also because it embodies the methodology and underlying pragmatism of the CISG. Good faith is a protean term susceptible to many variations of meaning in different jurisdictions. The UNCITRAL commission, in preparing the final draft of the CISG, decided that while good faith ought not to be limited just to contract formation it should equally not be elevated to a freestanding principle.⁶⁰ The middle approach adopted was to employ good faith as a principle of contractual interpretation, which calls attention to its primacy whilst leaving a margin

⁶⁰ *Report of the Working Group on the International Sale of Goods on the work of its ninth session* (Geneva, 19–30 September 1977) (A/CN.9/142) at [70]–[87]

of discretion to national courts when applying the CISG. This has since given rise to a significant body of jurisprudence as well as academic analysis on the interpretation of good faith, ensuring that it remains more open-textured rather than open-ended.⁶¹

21. The CISG's aim of striking a balance between the interests of commercial actors, national governments and the project of legal unification is also reflected in Art 6, which provides that parties may exclude or vary the application of the Convention. This article upholds the basic principle of party autonomy, and clearly signals that the CISG is intended to provide commercial actors with the *choice* of adopting an internationally uniform sales law rather than to coerce them into a mandatory regime. Art 6 is also expressly subject to Art 12 read with Art 96. Article 96 stipulates that a contracting state may make a declaration to disapply provisions permitting agreements to be made or modified in a form other than writing. This provision was included to accommodate the USSR, which applied very strict rules to the formality of foreign trade contracts.⁶² The Soviet practice did not, however, reflect the general preferences of the international traders. Art 96 therefore enabled the USSR to preserve its established practices by means of an official

⁶¹ See for example John O Honnold, *Unifrom Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, 3rd Ed, 1999) at pp 98–100

⁶² *Ibid* at p 137

declaration without imposing the same constraints on other jurisdictions. By means of such mechanisms the CISG devised working solutions to the challenges of a polarised world.⁶³

22. I wish to highlight a few other qualities which, in my view, conduce towards the continued success of the CISG. The first is that the CISG, being concerned only with contract formation and the rights and obligations of buyers and sellers, does not hold itself out to be comprehensive. Indeed, it acknowledges its own limitations while reserving space for the radial development of uniform law beyond those limits. Article 7(2) provides that where the Convention does not expressly address a matter, it should be resolved in accordance with the general principles upon which the Convention is based. Thus the CISG lobbies for the expansion of its own sphere of influence by means of analogous application, but it does so without insisting upon the point. Article 7(2) also states that in the absence of such general principles the matter should be resolved in conformity with the applicable law as determined by the rules of private international law.

⁶³ On the CISG's employment of reservations more generally see Filip De Ly, "Sources of International Sales Law: An Eclectic Model" in *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* (Singapore International Arbitration Centre, 2006) 28 at pp 35–37

23. This brings me to the second quality, which is that the CISG enlists national courts and arbitral tribunals in the task of finding and applying its general principles.⁶⁴ The elaboration and expansion of the Convention is therefore performed at the level of dispute resolution. As we have seen from commercial arbitration, this can be a highly productive arrangement for international legal instruments. The architecture of the New York Convention⁶⁵ and the UNCITRAL Model Law devolves important gatekeeping functions to national courts, and as I have argued elsewhere⁶⁶ this has been one of the crucial pillars to the success of international commercial arbitration. In a similar vein the CISG does not contemplate a centralised forum which is competent to finally determine disputed issues of law.⁶⁷ Instead it has been designed to vest critical interpretive and jurisprudential responsibilities with judges and arbitrators,⁶⁸ who must acknowledge the integral role they play in sustaining and advancing the transnational harmonisation of commercial law. This is part of the reason why Singapore has created its own international commercial court (“the SICC”), which will have the specialist procedures and expertise required to apply uniform

⁶⁴ Schwenger and Hachem, “The CISG – Successes and Pitfalls” (2009) 57 *American Journal of Comparative Law* 457, at pp 466 – 468

⁶⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958, entry into force 7 June 1959)

⁶⁶ Sundaresh Menon, “The Somewhat Uncommon Law of Commerce” (2014) 26 *SACJL* 23 at paras 58–59

⁶⁷ For a discussion on such a central authority, see Filip de Ly, “Uniform Interpretation: What is Being Done? Official Efforts” in Ferrari, *The 1980 Uniform Sales Law* (Sellier, 2003) from p 346

⁶⁸ See also Schlechtriem and Schwenger (eds), *Commentary on the International Sale of Goods* (Oxford University Press, 2005) at p 6

international laws like the CISG. It is also our intention that by bringing Singapore's judges together with leading jurists from both the common and civil law traditions, the SICC can develop a general jurisprudence which is cognisant of international trade practice and the *lex mercatoria*. The SICC joins a growing network of commercial courts with a similar internationalist outlook, including the London Commercial Court, the Delaware Court of Chancery and the Dubai International Financial Centre Court. As I will explain later this emerging breed of international commercial courts are well-positioned to make significant contributions to the 4th chapter of the *lex mercatoria*.

24. Before I turn to that, no assessment of the CISG's future prospects would be complete without mentioning the tremendous work of UNCITRAL, PACE University and the Center for Transnational Law in maintaining the Convention's visibility within the international legal fraternity. Online accessibility to case law, commentary, drafting materials and other auxiliary resources on the CISG is simply unparalleled. There is a wealth of material on the CISG, and it has been compiled and organised in a thoroughly user-friendly manner. In addition, UNCITRAL has zealously kept up a programme of conferences, meetings and workshops over the past 35 years to generate awareness and discourse on the Convention. The

infrastructure for the continued development of the CISG is certainly in place, and indeed can be viewed as a model to be emulated for other international instruments. Among the most meaningful of all the initiatives to promote the CISG must surely be the Willem C Vis International Commercial Arbitration Moot (“the Vis moot”). The annual competitions held in Vienna and Hong Kong⁶⁹ are amongst the most prestigious competitions on the mooting calendar and has introduced generations of aspiring law students to the workings of the CISG. As many of us will attest to, there is no better way to become intimately acquainted with a body of law than through the cut and thrust of public advocacy, and this is so even when one is using wooden swords. If we are to make the gradual transition towards a more harmonised commercial law then our law students must be exposed to international instruments like the CISG.⁷⁰

The 4th Chapter of the Lex Mercatoria

25. Let me turn now to the opening page of what might come to be the 4th chapter in the story of the lex mercatoria. We have already seen how the law merchant was shaped and re-made by seismic shifts in the

⁶⁹ Referred to as the Vis Moot (East)

⁷⁰ This echoes the exhortation made by the then Attorney-General of Singapore, Mr Chan Sek Keong, in his keynote address at the UNCITRAL-SIAC Conference in 2005 - *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* (Singapore International Arbitration Centre, 2006), p 6

global order, and this historical pattern is set to continue. Since the end of the Cold War, the world has experienced an unprecedented period of technological innovation, trade liberalisation and economic integration. This has led to a phenomenal increase in the volume and frequency with which capital, goods, people and ideas flowed across national boundaries. In the seminal definition of Roland Robertson, globalisation is “the compression of the world and the intensification of the consciousness of the world as a whole.”⁷¹ It has transformed not only the way we trade but the way we think and how we live.

Opposing Historical Forces

26. Yet globalisation has arrived on the back of a post-colonial world in which national self-determination has been elevated as a universal right, enshrined as it is in Article 1 of the United Nations Charter.⁷² The world remains organised according to the Westphalian ideology of sovereign nation-states even as national boundaries are superannuated by the forces of globalisation.⁷³ In a sense this is Duncan Kennedy’s

⁷¹ *Globalization: Social Theory and Global Culture* (SAGE, 1992), p 8

⁷² Chapter I, Article 1, Part 2 of the UN Charter states that the purposes of the United Nations are, *inter alia*, “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”

⁷³ On the impact of globalisation on the nation-state, see Silvia Fazio, *The Harmonization of International Commercial Law* (Kluwer Law International, 2007) at pp 4–9

fundamental contradiction⁷⁴ writ large – the freedom of each nation to achieve its own objectives is dependent on and yet perhaps incompatible with the international integration necessary to achieve it.⁷⁵ We find ourselves at an inflection point between historical movements in opposite directions.⁷⁶ Nation-states are wedded to the hard-won notion of inviolable sovereignty and yet must commit to an international compact to give such sovereignty practical meaning. This schism requires governments to constantly re-negotiate legal, economic and political terms between themselves and also with international actors. Such a process of adjustment has been described by *The Economist* as ‘gated globalisation’ – a more calibrated form of liberalisation in which “policymakers have become choosier about whom they trade with, how much access they grant foreign investors and banks, and what sort of capital they admit.”⁷⁷ Trade barriers have not been fully rebuilt, but states are now putting up gates to regulate the degree of their exposure to foreign influences. The result is an apparent deceleration of globalisation. We can see the shifting of gears across all indices,

⁷⁴ Duncan Kennedy, *The Structure of Blackstone’s Commentaries* (1979) 29 Buff L rev 209 at 211–212: “[t]he goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others... are necessary if we are to become persons at all – they provide us the stuff of ourselves and protect us in crucial ways against destruction... But at the same time that it forms and protects us, the universe of others... threatens us with annihilation and urges upon us forms of fusion...”

⁷⁵ A similar view is expressed in Clive Schmitthoff, “The Unification of the Law of International Trade” (1968) JBL 105 at p 105

⁷⁶ See also Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution”, delivered as the Opening Lecture for the DIFC Courts Lecture Series 2015

⁷⁷ “The gated globe”, *The Economist* (12 October 2013)

whether one looks at the cooling of capital markets⁷⁸ or the recent drop in the number of bilateral investment treaties (“BITs”).⁷⁹

The Shifting Centre of Gravity

27. To complicate this picture even further, the global economy is feeling its way towards this new equilibrium while its centre of gravity shifts away from the OECD⁸⁰ countries towards the East. It has been estimated that Asia already accounted for 30 percent of world trade in 2010, and this figure will reach 35 percent by 2020.⁸¹ The Asian Development Bank suggests that by 2050, Asia could account for half of global GDP, trade and investment.⁸² These are not predictions unsupported by concrete action. In an announcement that echoes the emergence of the *lex mercatoria* during the Middle Ages, China has publicly committed to reviving the ancient maritime silk road⁸³ which linked it to Europe through the South China Sea and the Indian Ocean. Inter-governmental engagement has already begun to develop joint

⁷⁸ See n 77 – “Global capital flows fell from \$11 trillion in 2007 to a third of that [in 2012]”

⁷⁹ 2014 saw the lowest number of BITs entered in recent years, as evidenced by statistics compiled at < <http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties> >

⁸⁰ Organisation for Economic Co-operation and Development; the list of OECD countries is set out at < <http://www.oecd.org/about/membersandpartners/> >

⁸¹ See online at

<https://www.bcgperspectives.com/content/articles/financial_institutions_globalization_profiting_from_asias_rise_new_global_trade_flows/>

⁸² *Asia 2050: Realizing the Asian Century* (Asian Development Bank, 2011), available online: < <http://www.adb.org/publications/asia-2050-realizing-asian-century> >

⁸³ Paul Carsten and Ben Blanchard, “China to establish \$40 billion Silk Road infrastructure fund”, *Reuters* (8 November 2014)

infrastructural projects and free trade agreements which will reconnect the ties between Asia, the Middle-East and Africa along this historic trade route. China is not alone in pushing for progress on this front. President Jokowi has also unveiled plans to position Indonesia as the centre-piece of a global maritime axis.⁸⁴ High-level talks between Indonesia and China have already yielded the possibility of unifying these two ambitious projects.⁸⁵ These are but two examples of Asia's economic aspirations and the tremendous opportunities still to be realised in this part of the world.

Implications for the Lex Mercatoria

28. The 4th chapter of the lex mercatoria will have to address the new global compact that will emerge from the potentialities I have outlined. While we must endeavour to create a global legal infrastructure which can fully support free economic exchange, this must be done with due recognition of legitimate domestic imperatives and a renewed appreciation of cultural differences. Having undergone a cycle of nationalisation and re-emerged as part of the international legal order, the lex mercatoria will now have to serve as a *modus vivendi* between

⁸⁴ Vibhanshu Shekhar and Joseph Chinyong Liow, "Indonesia as a Maritime Power: Jokowi's Vision, Strategies, and Obstacles Ahead" (November 2014) available online at

<<http://www.brookings.edu/research/articles/2014/11/indonesia-maritime-liow-shekhar>>

⁸⁵ CPF Luhulima, "Superimposition of China's 'silk road' and Indonesia's maritime fulcrum", *Jakarta Post* (13 December 2014)

these two modalities. In this regard the CISG's methodology of devolving the application of its general principles to national courts is well-suited to generate the required jurisprudence. Indeed at least one academic has argued that the CISG must be supported by a global jurisconsultorium, in which jurists and judges from around the globe can consult with one another on common issues of international sales law.⁸⁶

I suggest that international commercial courts will represent a particularly valuable voice in this ongoing discourse. Being anchored in a national jurisdiction on the one hand and immersed in the norms of international commerce on the other, they embody the very philosophy which is at the heart of the CISG. One might even regard courts like the SICC as uniquely positioned to be amongst the primary contributors to the *lex mercatoria's* 4th chapter. Yet such purpose-built commercial courts remain small in number, and the inexorable reality is that all national courts will have to come to terms with multi-jurisdictional disputes. In doing so, they must consult the decisions of other jurisdictions and seek to minimise divergence from the norms of international business. Where a harmonised approach cannot be taken,

⁸⁶ See Camilla Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium" (2005) 24 *Journal of Law and Commerce* 159, which credits the phrase to Vikki M Rogers and Albert H Kritzer, "A Uniform International Sales Law Terminology" in *Festschrift Fur Peter Schlechtriem ZUM 70* (Ingeborg Schwenzer & Gunter Hager eds, 2003) at pp 223–253; see also Camilla Andersen, "The Global Jurisconsultorium of the CISG Revisited" (2009) 13 *Vindobona Journal of International Commercial Law & Arbitration* 43

national courts should provide clear reasons explaining why this is so.⁸⁷

As has been the case for some time now, operating in jurisdictional silos is no longer a viable option.

29. I would like to go further to surmise that in the coming decades the development of the *lex mercatoria* will come to be increasingly engaged by two recurring themes. The first is that of creating legitimacy. By this I mean the fostering of general confidence in the propriety of cross-border commercial activities undertaken by both private actors and public bodies.⁸⁸ International trade must be firmly understood as an enterprise that subsists within a system of common rules. This requires at first instance the international recognition of an authoritative source of legal rules, both for dispute resolution and also to guide future conduct. Participants in global trade and commerce must then demonstrate a general attitude of rule-acceptance in their interactions with one another.⁸⁹ The intricate patterns of behavioural and business norms which emerge must, in turn, be susceptible to reliable enforcement. The

⁸⁷ For a fuller analysis of the changing role of national courts in relation to commercial litigation within a globalised world, see Sundaresh Menon, "Finance, Property and Business Litigation in a Changing World", delivered as the Keynote Address at the SAL-Chancery Bar Conference on 25 April 2013 and published in (2013) 11 (3) TJR 265, a publication of the Judicial Commission of New South Wales

⁸⁸ Karl M Meessen, *Economic Law in Globalizing Markets* (Kluwer Law International, 2004) makes a similar point regarding legitimacy in procedural terms, at ch 5

⁸⁹ This chimes with the 'internal aspect of rules' developed in HLA Hart, *The Concept of Law* (Oxford University Press, 2nd Ed, 1997) at pp 54–56

promulgation of such a multi-layered legal ordering⁹⁰ is going to be fundamental to the long-term sustainability of globalisation. If economic globalisation is to stay the course despite its occasional disharmony with domestic interests, then it must be governed not only by the invisible hand of the free market, but also by systemic qualities such as consistency and predictability, as well as more substantive notions of fairness, justice and equity. Only then would emerging economies⁹¹ and new private entrants⁹² be fully subscribed to the global market-place.

30. In serving as a source of legitimacy, national courts – including international commercial courts like the SICC – will have to take the lead over private arbitral mechanisms. In part this may stem from actual or perceived problems with arbitration;⁹³ but more importantly, it follows from the fact that national courts are already recognised as the final arbiters of legality in their home jurisdictions. Although arbitration has the advantage of neutrality, the private nature of the arbitral process as well as the fact that it lies outside of state authority do not predispose it

⁹⁰ A creditable attempt to do so might be found in JH Dalhuisen, “Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria” (2006) 24 Berkeley J Intl L 129

⁹¹ For a case study on the effect of international legal standards on emerging economies, see Silvia Fazio, *The Harmonization of International Commercial Law* (Kluwer Law International, 2007), ch 9

⁹² Particularly small and medium enterprises who do not have the resources to negotiate legal technicalities or navigate the intricacies of national law, and may thereby have to cede ground to multi-national companies.

⁹³ For the problems which attend to commercial arbitration, see Sundaresh Menon, “International Arbitration: The Coming of a New Age for Asia (and Elsewhere)” delivered at the ICCA Congress 2012; and for investment arbitration see Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence” [2013] SJLS 231 at pp 234–238

to having a sufficiently validating impact on commercial practice. National courts, on the other hand, serve as the guarantors of legal fitness even within the international commercial arbitration framework.⁹⁴ They derive their authority from being an inextricable component of state sovereignty,⁹⁵ which remains the basic building block of international relations. The openness of the process and the precedential value of court judgments also contribute to this. The involvement of national courts in the future development of the *lex mercatoria* and the regulation of international commercial practice can therefore confer an imprimatur which is beyond the reach of private arbitration institutions.

31. The second, connected theme is the necessity of imagination. Throughout its first three chapters the *lex mercatoria* has always lagged behind actual commercial practice. Indeed it has always been either a result of or a reaction to the prevailing economic conditions of the world. In the age of globalisation and rapid technological change, however, we can scarcely afford to be so passive. Where the necessary legal infrastructure is not in place, the scale and pace of the fall-out can be overwhelming. We have already seen this happen in the wake of the

⁹⁴ See also Sundaresh Menon, "The Somewhat Uncommon Law of Commerce" (2014) 26 SAclJ 23 at paras 55–59

⁹⁵ Cristian Gimenez Corte, "*Lex Mercatoria*, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement" (2012) 3(4) TLT 345 at p 368 analyses the source of a national legal system's legitimising power from the perspective of democratic republicanism

Lehman Brothers collapse in 2008, which had its root cause in poorly-regulated subprime lending in the United States and rapidly erupted into a global financial meltdown. Even today, countries all over the world are still feeling the economic after-shocks, and we are belatedly coming to realise the urgent need for coordinated legal oversight over global financial markets. One of the key lessons to be drawn from this episode is that we cannot wait for problems to arise before we start to search for solutions. The *lex mercatoria* could play an important role in this process of long-term rehabilitation. For example, trading in “Over the Counter” derivatives – which have been identified as one of the main culprits behind the financial crisis – was facilitated by the development of standard form contracts in the ISDA⁹⁶ Master Agreement. As such trades took place in the *terra incognita* beyond regulated markets, these standard form contracts represented the entire legal framework for a shadow industry. The validity and interpretation of those contracts have now become subjects of both general scrutiny and court litigation across multiple jurisdictions. When the dust settles, new legal norms will have to be created to give proper weight to the public interest in the regulation of privately traded derivatives.⁹⁷ Standard form contracts which have been blindly replicated may have to be redrafted to better manage the

⁹⁶ “The International Swaps and Derivatives Association” in full

⁹⁷ State-based regulation of the shadow banking industry has already been introduced, most notably the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub L 111-203) (US)

allocation of counter-party risk.⁹⁸ More importantly, such contracts may need to go beyond being standard in form towards setting standards in substance.⁹⁹ It is perhaps in this regard that the 4th chapter of the *lex mercatoria* may come to be most clearly distinguished from its last iteration.

32. At the same time, let us not lose sight of the other side of the coin.

Imagination will certainly be required if we are to avert another crisis; but it will also be necessary if we are to maximise opportunity. If as legal practitioners and scholars we can be first-movers and not just early-adopters then I believe there are tremendous gains to be had, especially in Asia. As the tide shifts away from the leading financial centres which were the source of the global financial crisis, Asia will come to have a louder voice in formulating the new terms of trade in international capital markets.¹⁰⁰ Already we have seen Asian jurisdictions take the lead in regulating asset prices by implementing property market controls and

⁹⁸ The ISDA has started to introduce amendments to the Master Agreement in response to the global financial crisis, most notably the *Amendment to the ISDA Master Agreement for use in relation to Section 2(a)(iii) and explanatory memorandum*, available online at the ISDA bookstore <<http://www.isda.org/publications/isdamasteragrmnt.aspx#amds>>

⁹⁹ Hugh Collins, "Flipping Wreck: *Lex Mercatoria* on the Shoals of *Ius Cogens*" in S Grundmann, K Riesenhuber & F Moslein (eds), *Contract Governance – Dimensions in Law and Interdisciplinary Research* (forthcoming), available online as a conference paper at <<http://www.lse.ac.uk/collections/law/projects/tlp/Collins%20flips%20conference%20paper.doc>> suggests that the *lex mercatoria* can develop into a normative framework which takes into account considerations of public policy

¹⁰⁰ Since the global financial crisis the Group of Seven major economies, which included only one Asian nation (Japan), has been replaced by the Group of Twenty ("G20"). Apart from Japan, the G20 includes China, India, Indonesia and South Korea. For an overview, see Gordon S Smith "G7 to G8 to G20: Evolution in Global Governance" (Centre for International Governance Innovation, 2011), available online at <<https://www.cigionline.org/sites/default/files/g20no6.pdf>>

reducing exposure to subprime mortgages.¹⁰¹ In addition to such prudential measures, the region is also taking positive steps towards securing its financial future. The Asian Infrastructure Investment Bank was announced late last year and has already gained significant momentum, with no fewer than 57 prospective founding members.¹⁰² In conjunction with such institutional responses, it is only natural that commercial practices and private law doctrines will also be open to improvement. One such example might be project finance,¹⁰³ which is a growing practice area in the region. As the network of Asian financiers, professionals and other industry stakeholders becomes denser and more sophisticated, we may expect that contractual precedents derived from Western jurisdictions could gradually give way to more localised norms. The playing-field for legal innovation has never been so wide. Prevailing commercial practices are being discredited in established financial centres and found unsuitable in emerging markets. This leaves behind a vacuum in which enterprising lawyers can diversify their roles, develop novel products, and devise fresh modes for the delivery of legal services. If we are willing to invest ourselves in forward-thinking then the

¹⁰¹ Singapore, Hong Kong, Korea and China have all imposed loan-to-value limits on mortgages – see Oh Hwa Se, “Loan-to-Value as Macro-Prudential Policy Tool: Experiences and Lessons of Asian Emerging Countries” (DSF Policy Paper Series, 2013), available online at <<http://www.dsf.nl/wp-content/uploads/2014/10/DSF-Policy-Paper-No-33-Loan-to-Value-as-Macro-Prudential-Policy-Tool.pdf>>

¹⁰² The list of prospective founding members is available online at <<http://www.aiibank.org/members.html>>

¹⁰³ Cally Jordan, “International Financial Standards and the Explanatory Force of the Lex Mercatoria” (Center for Transnational Legal Studies, 2012), available online at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1002&context=ctls_papers>, explains the current mechanics of project finance at pp 18–19 as an example of lex mercatoria

lex mercatoria may in its 4th chapter become a more intrinsic part of international trade and an active contributor to the rise of Asia.

Positive steps in the direction of convergence

33. In line with this spirit I would like to spotlight an initiative which we have been developing for some time and which we hope can make a lasting contribution to the development of business law in Asia. I have already mentioned that Asia is poised to become an even bigger engine for global economic growth in the coming decades. However, we must remain cognisant of the fact that there is considerable heterogeneity among Asian legal systems. 'Asian law', if we can even call it that, is a morass of civil, common, and socialist legal traditions laid over with highly specific national and customary distinctions implemented across multiple stratas, from federal governments and city-states to municipalities and urban communities. The complications of such a system can impede rapidly evolving Asian trade and economic integration efforts. While a unified 'Asian law' is beyond the realm of possibility in the near future, it is definitely possible to strive for a measure of convergence among certain business laws in Asia, especially in relation to such issues as the international sale of goods to take an obvious example. Such an exercise will, at the very least,

ensure that the runway for intra-Asian trade to take off and for the landing of foreign investment into Asia is smoothed to the extent possible.

34. To furnish a response to this situation I established a committee in 2014 under the auspices of the Singapore Academy of Law to look into what can be done to promote the transnational convergence of commercial laws in Asia. One of the key suggestions of the committee was the creation of a permanent research facility that can commit sustained effort to the study and stimulation of business law in the region. We might envisage that the institute can contribute in two ways.

35. The first is to undertake original academic research into the commercial laws and policies of Asia. Throughout the long history of the *lex mercatoria*, legal scholarship has been a constant factor nurturing its growth and development. In the Middle Ages scholars found in Greek and Roman writings the legal bedrock with which to shore up mercantile practice. After the Second World War, a generation of European and American scholars drew upon this rich heritage to harness the emerging economic order to a common conceptual framework. Their efforts made international instruments like the CISG possible. Since then, we have seen how the output of institutions like PACE University and the Center

for Transnational Law has been integral to sustaining its momentum. If similar progress is to be made in Asia then we will have to start accumulating the legal knowledge and intellectual capital required to support Asian trade and commerce, and in that regard a research institute would be a major boon.

36. The second way that such an institute might be of value is if it emerged as a nerve-centre for collaboration between judges, academics, practitioners and policy-makers in the region. If we are to make meaningful strides towards convergence, stakeholders from the full spectrum of Asia's legal systems will have to be engaged. We will need a centralised forum for these various stakeholders to exchange ideas, information and proposals, in addition to being a repository for their input. It can also represent a common point of contact for other research agencies and international organisations like UNCITRAL.

37. We might in this context wish to look to similar institutions for inspiration. The American Law Institute ranks as one of the leading lights in the field of legal harmonisation. It produced the Commercial Code of the United States and continues to publish immensely influential Restatements of the Law.¹⁰⁴ The recently created European Law

¹⁰⁴ The full catalogue is available online at
<http://www.ali.org/index.cfm?fuseaction=publications.categories&parent_node=1>

Institute is another example. The aims of the European Law Institute include the initiation, conduct and facilitation of research in the field of European legal development. With such high ambitions the European Law Institute is of a piece with the tradition of independent institutions at the forefront of legal harmonisation. In time to come, Singapore might contribute to these ranks as well.

Conclusion

38. I hope this brief prospectus conveys at least a flavour of the thinking behind the committee's suggestion of a permanent research facility. By mobilising the right resources, Singapore can play a part in complementing Asia's economic success. The CISG is part of this script as well, being the natural candidate for a common sales law in Asia, whether in its entirety or in modified form.¹⁰⁵ Significant headway has already been made following Japan's accession to the Convention in 2008. Tellingly, one of the major factors which impelled Japan to take this step was the rapid increase of its trade with China and other East Asian states like Korea and Singapore, all of whom are parties to the

¹⁰⁵ The CISG has a track record in facilitating the creation of regional uniform laws, such as the *Acte uniforme sur le droit commercial general* adopted by the Organisation for the Harmonisation of Business Law in Africa – see Schwenger and Hachem, "The CISG – A Story of Worldwide Success" in Jan Kleineman (ed), *CISG Part II Conference* (Iustus, 2009) 119 at p 123

Convention.¹⁰⁶ One would expect that the same forces will continue to drive the adoption and use of the CISG in Asia.

39. One grouping within Asia still to be persuaded by the CISG is, of course, ASEAN.¹⁰⁷ In the 1994 Report of the Sub-committee on Commercial Law, it was recommended that Singapore ratify the CISG and it was further suggested that if Singapore did adopt the Convention then other ASEAN countries may soon follow suit.¹⁰⁸ I suggest the time is now ripe for a re-evaluation. ASEAN is on track to form a common market by the end of 2015, and greater legal harmonisation in the area of commercial law would be a natural corollary to this. Since 2007, ASEAN member states have been examining various modalities for harmonising their trade laws, one of which is the more widespread use of the CISG.¹⁰⁹ Indeed, this is an area in which the traditional obstacles¹¹⁰ to closer ASEAN integration are most likely to be overcome. The distortions of special interests and political considerations are attenuated in the relatively abstracted and value-neutral field of commercial law. Moreover, the sale of goods is a

¹⁰⁶ Hiroo Sono, "Japan's Accession to the CISG: The Asia Factor" (2008) 20(1) *Pace International Law Review* 105 at pp 110–111

¹⁰⁷ The Association of Southeast Asian Nations

¹⁰⁸ Sub-committee on Commercial Law, *The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980): Should Singapore Ratify?* (Singapore Academy of Law, Law Reform Committee, 1994) at para 28

¹⁰⁹ Working Group on Examining the Modalities for the Harmonisation of the Trade Laws of ASEAN Member States, formed under the auspices of the ASEAN Law Ministers Meeting and the ASEAN Senior Law Officials Meeting

¹¹⁰ See n 50 at para 44

particular subset of commercial law which stands to benefit the most from uniformity, due to the frequency and fluidity of cross-border transactions.¹¹¹ With the ASEAN common market in place, the arguments in favour of harmonisation in this area will only get stronger. In this new climate the CISG may find itself catching a second wind in Southeast Asia.

40. I therefore have every confidence in the CISG's continued success, and hope that through our initiatives Singapore can help to secure its place in the 4th chapter of the lex mercatoria. Thank you.

¹¹¹ For an analysis of network effect theory to transnational commercial law, see Bryan Druzin, "Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities" (2009) 18 *Tulane J of Intl & Comp Law* 131