

# DOING BUSINESS ACROSS ASIA: LEGAL CONVERGENCE IN AN ASIAN CENTURY

21 January 2016

Opening Address

*The Honourable the Chief Justice Sundaresh Menon*

## **Introduction**

1 Business today is conducted in an environment that is dramatically different from what we have, until recently, been accustomed to. Once upon a time, the marketplace referred to riotous fairs and bazaars in which merchants gathered to barter and trade. Today, we think of the marketplace as a metaphysical global interface for the exchange of goods and services, unbounded both in its reach and potential. Goods are moved around faster, communication is virtually instantaneous, and information is accessed globally. One consequence of this is that the commercial dealings of a single enterprise will frequently span the entire globe. Take Apple's iPhone for example: what we might regard as a quintessentially American product is in fact assembled in China with parts drawn

from at least four other countries in three different continents,<sup>1</sup> and the latest model, when launched, was made available in over 130 countries.<sup>2</sup> The world has never seemed so small; nor the commercial possibilities so vast.

2 The undercurrent that drives all this change is globalisation. While we might, from time to time, hanker after the good old days and mourn the “death of distance,”<sup>3</sup> we cannot avoid the new reality that this is a compressed world in which we are all neighbours whose future economic paths will increasingly depend on how we act collectively as a community.

3 The law is indispensable to business. Business actors transact in the shadow of the law and depend upon the legal system to uphold bargains and enforce agreements. But the transnationalisation of trade has made it imperative that the legal systems of the world adjust to this new reality so that regulatory arbitrage does not end up becoming an impediment to the growth of trade. It is against this backdrop that we have convened this conference: to serve as a

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<sup>1</sup> Yuqing Xing and Neal Detert, “How the iPhone Widens the United States Trade Deficit with the People’s Republic of China” (December 2010) Asian Development Bank Institute Paper Series 257 at 3.

<sup>2</sup> See Apple Press Info, “iPhone Available in 40 Additional Countries Beginning Friday, October 9” (28 September 2015), accessible at <<http://www.apple.com/pr/library/2015/09/28Apple-Announces-Record-iPhone-6s-iPhone-6s-Plus-Sales.html>>.

<sup>3</sup> Frances Cairncross, *The Death of Distance: How the Communications Revolution is Changing Our Lives* (United States: Harvard Business School Press, 1997).

platform for open and thought-provoking discussions on how we might, together, tackle some of the common challenges of the borderless transnational trading environment we are rapidly moving towards.

4 I am delighted to see such a strong and diverse audience here today. We have gathered in the endeavour to come to grips with the challenge of seeking to promote the convergence of business laws in Asia. This *is* a worthwhile undertaking because, at a time when so much of the framework supporting transnational commerce seeks to promote its seamless conduct, the legal fragmentation in our region appears somewhat out of kilter. The convergence project is a long-term one that will require focused and sustained attention and research. That is why we undertook the decision to launch the Asian Business Law Institute (“ABLI”) today as one of the critical outcomes of this conference. The ABLI will be a permanent research institution, which, at its heart, is concerned with stimulating the drive towards thoughtful legal convergence in the region. To set this in context, allow me briefly, to trace some of the thinking that has brought us to this point.

## **The genesis of the ABLI**

### ***The impetus for convergence***

5 The journey began just over two years ago in October 2013 when I had the privilege of delivering the keynote address at the 26th LAWASIA Conference held in Singapore. I entitled my address on that occasion: Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence.<sup>4</sup> I observed that Asia is home to an array of legal systems, with South-East Asia perhaps an illustrative microcosm of this, given the lack of a common colonial heritage and, hence, of a common legal tradition among its members.<sup>5</sup>

6 The considerable heterogeneity of laws which we experience in Asia presents a picture to the modern commercial enterprise that is far from inviting. In the cost-benefit calculus of such an enterprise, a region with fragmented business laws and regulations can pose much uncertainty and so add to the cost of and

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<sup>4</sup> See Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence” [2013] SJLS 231 (“*Transnational Commercial Law*”), accessible at <<http://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon--keynote-address-at-the-26th-lawasia-conference-2013>>.

<sup>5</sup> See, for example, Balbir Bhasin, *Doing Business in the ASEAN Countries* (Business Expert Press LLC, 2010) at pp 177–178; Tamio Nakamura, *East Asian Regionalism from an Asian Perspective: Current Features and a Vision for the Future* (Routledge, 2009) at p 135; and Andrew Harding, “Global Doctrine and Local Knowledge: Law in South East Asia” (2002) 51 ICLQ 35 at p 43.

consequently chill the appetite for growth and expansion. Higher transaction costs arise in multiple ways – first, there is the cost of familiarisation and this rises with the degree of divergence; second, there is the cost of adapting business and transactional structures when doing business across different jurisdictions; and third, there is the enhanced cost of resolving cross-border disputes when they arise, as they inevitably will.

7 Recent survey findings validate the hypothesis that a fragmented Asia is holding business back. State Street reported in 2013 that 51% of 200 industry executives who had been surveyed considered Asia’s diverse regulatory requirements as “a serious or very serious challenge for their business”, with many doubting their ability to assure compliance.<sup>6</sup> In the same year, a PricewaterhouseCoopers study found that inconsistent regulations and regimes across the Asia-Pacific had scored an unwanted hat-trick by being cited, for the third year in a row, as “the single biggest barrier” to corporate growth in the region.<sup>7</sup> And PwC’s findings the following year in 2014 revealed that, in terms of

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<sup>6</sup> See the 2013 survey report commissioned by State Street titled “Navigating for Growth”, accessible at <<http://www.statestreet.com/ideas/articles/navigating-for-growth.html>> at p 9.

<sup>7</sup> See the 2013 survey report by PricewaterhouseCoopers titled “Towards Resilience and Growth: Asia-Pacific Business in Transition”, accessible at <[www.pwccn.com/.../635165040042633175\\_apec\\_survey\\_report\\_2013](http://www.pwccn.com/.../635165040042633175_apec_survey_report_2013)> at p 20.

infrastructural bottlenecks, those of a “regulatory and legal” nature had the greatest direct impact on the growth of businesses in this region.<sup>8</sup>

8 The converse of this can be seen in a positive, “real-life example” of how legal convergence can enhance the economic attractiveness of a region.<sup>9</sup> This comes to us from Africa, which, much like Asia, has a fragmented legal landscape because of a diverse colonial past.<sup>10</sup> Recognising that this was not conducive for transnational business, several predominantly Francophone states in Central and Western Africa came together in 1993 to form the Organisation for the Harmonization of Business Law in Africa, or “OHADA” for short. OHADA was set up to modernise and harmonise business laws to increase foreign trade and investment. In the two decades since its inception, it has made significant strides towards this goal.<sup>11</sup> Today, several Uniform Acts promulgated by OHADA are in force and cover a wide range of commercial areas.<sup>12</sup> Furthermore, these

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<sup>8</sup> See the 2014 survey report by PricewaterhouseCoopers titled “New Vision for Asia Pacific: Connectivity Creating New Platforms for Growth”, accessible at < <http://www.pwc.com/us/en/apec-ceo-summit/2014.html>> at p 12.

<sup>9</sup> See *Transnational Commercial Law* at p 245.

<sup>10</sup> Babatunde Fagbayibo, “Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?” (2009) 42(3) CILSA 309.

<sup>11</sup> See, for example, Renaud Beauchard, “OHADA Nears the Twenty-Year Mark: An Assessment” in Hassane Cisse *et al*, *The World Bank Legal Review Vol 4: Legal Innovation and Empowerment for Development* (2013) at pp 323–334.

<sup>12</sup> The Uniform Acts cover the three broad areas of: (a) commercial relationships and related transactions; (b) the establishment and operation of corporate entities; and (c) the  
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legislative instruments are interpreted by the supranational Common Court of Justice and Arbitration, creating greater certainty in their application. With this transnational legal infrastructure in place, the OHADA states now enjoy the benefit of having judgments rendered and enforced in a predictable and transparent manner across borders;<sup>13</sup> this, in turn, has promoted trade and investment. To be clear, I am not raising OHADA as an example that Asia should necessarily seek to emulate. There are different paths to convergence and a regime structured like OHADA is just one among them. The conditions in Asia are different and we must find what best suits our needs. Nevertheless, the lesson from Africa remains that a legally fragmented region has much to gain commercially from smoothing out the laws of its constituent states.

### ***A blueprint for convergence***

9 In this context, I suggested that there was sufficient evidence, and indeed incentive, for us in Asia to strive towards the meaningful convergence of our business laws. This shifted the focus away from debating *whether* convergence

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settlement of disputes and regulation of commercial defaults: see Marc Frilet, "Legal Innovation for Development: The OHADA Experience" in Hassane Cisse *et al*, *The World Bank Legal Review Vol 4: Legal Innovation and Empowerment for Development* (2013) at p 337.

<sup>13</sup> Paulin Houanye and Sibao Shen, "Investment Protection in the Framework of the Treaty of Harmonizing Business Law in Africa (OHADA)" (2013) 4(1) *Beijing Law Review* 1 at p 3.

was a good thing to imagining *how* it could actually be realised. I therefore announced, soon after the LAWASIA Conference – at a dinner to celebrate the Singapore Academy of Law’s (“SAL”) 25th Anniversary – that the SAL would initiate efforts to host an international conference to promote dialogue among international stakeholders on this important topic.<sup>14</sup> Today, the SAL delivers on that promise and I am deeply grateful to the Steering Committee which has worked extremely hard to bring us to this point.

10 I would also like to touch on two other lectures I delivered, one in the UK and the other in the US in late 2013 and in 2014 respectively.<sup>15</sup> In these lectures, I outlined how we might approach convergence by way of a three-act script.

11 The opening act centres on the convergence of laws on the recognition and enforcement of court judgments. I had proposed that this was a logical place to begin because, practically speaking, it does not require us to work our way

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<sup>14</sup> This address was delivered on 1 November 2013 and it is accessible at <[http://www.sal.org.sg/Lists/Speeches/DispForm.aspx?ID=117&Source=http%3A%2F%2Fwww.sal.org.sg%2Fcontent%2FPR\\_speeches.aspx](http://www.sal.org.sg/Lists/Speeches/DispForm.aspx?ID=117&Source=http%3A%2F%2Fwww.sal.org.sg%2Fcontent%2FPR_speeches.aspx)> (see, especially, para 16).

<sup>15</sup> See, respectively, Sundaresh Menon, “The Somewhat Uncommon Law of Commerce” (2014) 26 SAclJ 23 (“*Somewhat Uncommon Law of Commerce*”) (presented at the Commercial Bar Association Annual Lecture 2013 on 14 November 2013) and Sundaresh Menon, “The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions” (2014) 108 Am Soc’y Int’l L Proc 219 (“*Transnational Protection of Private Rights*”) (presented at the Charles N Brower Lecture on International Dispute Resolution on 10 April 2014).



through a sea of different substantive laws before some consensus can be reached. More importantly, convergence on this level is also necessary because there is nothing more frustrating to the ends of transnational commerce than for a business actor to obtain a judgment in one jurisdiction and then find that it is in fact only a paper judgment in others.<sup>16</sup> Certainty in enforcement of judgments will enable businesses to have greater confidence to invest and trade freely.

12 The pursuit of convergence on this front was given a significant boost by the Hague Convention on Choice of Court Agreements which came into force on 1st October last year. The Hague Convention stands as “the litigation counterpart”<sup>17</sup> to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention has been instrumental in enabling international arbitration to play a critical role in supporting transnational commerce because, in general, commercial parties who resolve their disputes through arbitration can expect that an arbitral award will be enforceable in all major commercial centres of the world. If this is any indication of what The Hague

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<sup>16</sup> *Somewhat Uncommon Law of Commerce* at para 54.

<sup>17</sup> Ronald A Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at p 3.

Convention might aspire to, then it certainly has the potential to be a “game changer” in the international dispute resolution landscape.<sup>18</sup>

13 This leads me to the second act, which has to do with the convergence of our commercial dispute resolution processes and, in particular, our court-based mechanisms. What I envisage by this is that we should come to view transnational commercial disputes as constituting a special breed of cases which can be dealt with separately from the general run of court matters, according to procedures specifically tailored to commercial best practices. The most practical way of doing this would be by creating specialist commercial courts which can tap on the existing court infrastructure and yet, as a custom-built annex, not interfere with the normal litigation process. Such courts already exist in the form of the London Commercial Court, the Delaware Court of Chancery, the Commercial Court of the Supreme Court of Victoria, and, since January last year, the Singapore International Commercial Court. If we can establish a constellation of such commercial courts in Asia, then that would promote efforts to build an integrated system for resolving transnational commercial disputes in a transparent, trustworthy and commercially sensible manner.

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<sup>18</sup> *Transnational Protection of Private Rights* at p 235.

14 Finally, the third act concerns the convergence of our substantive business laws. Imagine a closely connected band of commercial courts in the region; each a crucial node in a network plugged into the life of transnational commerce and whose decisions could, with time, coalesce into a larger, freestanding body of regional commercial jurisprudence. We are not there yet, but the signs are encouraging that there is movement in the right direction. There are now more opportunities for cross-border judicial collaboration and knowledge-sharing such as the judicial seminar on commercial litigation involving the courts of New South Wales, Hong Kong, Singapore and, more recently, Mumbai and Shanghai.<sup>19</sup> There is also an increasing number of judiciary-led efforts to establish more formal court-to-court protocols through entry into various memoranda of understanding and guidance.<sup>20</sup> For example, early last year, Singapore and the Dubai International Financial Centre Courts entered into two such agreements – one was a memorandum of understanding regarding references of question of law while the other was a memorandum of guidance on the enforcement of judgments.<sup>21</sup> Just last month, Singapore and New York also entered into a

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<sup>19</sup> See *Transnational Protection of Private Rights* at p 240; see also Sundaresh Menon, “Towards a Transnational System of Dispute Resolution” (*Towards a Transnational System of Dispute Resolution*) delivered at the DIFC Courts Lecture Series 2015, accessible at <https://www.supremecourt.gov.sg/default.aspx?pgid=5741&printFriendly=true>.

<sup>20</sup> See *Towards a Transnational System of Dispute Resolution* at para 67, especially the examples cited in note 148.

memorandum of understanding to refer questions of law. Equally vital as these judiciary-led initiatives are the ground-up initiatives mooted by organisations dedicated to the idea of convergence. These include UNCITRAL, which developed the widely-adopted Convention on Contracts for the International Sale of Goods (or the “CISG” as it is more commonly known),<sup>22</sup> and the American Law Institute (“ALI”), which has played a critical role in the promulgation of the Uniform Commercial Code (“UCC”). As a budding institute geared towards convergence, the ABLI can no doubt draw inspiration from the track record of these established institutions as it seeks to make its mark in Asia.

15 But it is apt, here, to touch on the *scope* for convergence. A world with an identical legal framework that applies in every space would neither be realistic nor even desirable. Laws reflect political, social and economic realities and these realities are not evenly flat even in an otherwise flattening world.<sup>23</sup> But the convergence project aims to iron out unnecessary or undesirable divergences

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<sup>21</sup> See the DIFC Courts Press Release, “Dubai and Singapore Commercial Courts Discuss Closer Collaboration” (16 August 2015), accessible at <<http://difccourts.ae/dubai-and-singapore-commercial-courts-discuss-closer-collaboration/>>.

<sup>22</sup> See the Status Table for the CISG available on UNCITRAL’s website, accessible at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>.

<sup>23</sup> See Thomas L Friedman, *The World is Flat: The Globalized World in the Twenty-First Century* (Penguin Books, 2006).

which pose obstacles to free and seamless trade. The challenge now is to operationalise this goal.

### ***Setting sights on the creation of a permanent research institute***

16 By the middle of 2014, a desire for legal convergence and a broad blueprint had crystallised. It was time to take the next step and this led to the idea of establishing a permanent research body that would act on this blueprint. This was an idea that took shape after conversations with judicial colleagues from several jurisdictions which are well-represented here today, most notably Australia, China and India. In addition, there was also meaningful dialogue with institutions such as UNCITRAL and the ALI. These exchanges led us to conclude that, to complement and build upon the original idea of holding an international conference, there should also be a centralised organisation dedicated to collecting, studying, testing and implementing the ideas exchanged at such a conference. Such an organisation could also devise its own proposals to be fed into the intellectual mix to sustain and enrich the convergence conversation.

17 With that, the ABLI began to take shape. At an event to commemorate the 35th anniversary of the CISG last year, I offered a glimpse of how the ABLI might

play a strategic role in this region as we enter what might be called the fourth chapter of the *lex mercatoria*.<sup>24</sup> The *lex mercatoria*, or Latin for merchant law, has its beginnings in the commercial renaissance of the Middle Ages. Despite its vintage, it could not be more relevant today. Law has always been the handmaiden of commerce and what the transnational business community needs at this time is, precisely, a transnational system of law; a true *lex mercatoria* in the normative sense of the term.<sup>25</sup> This is the modern-day challenge that we face and the ABLI has been created with this in mind.

18 So much, then, for some of the more significant milestones leading to the ABLI's inception. Let me now turn to some of its key aspects.

### **Key aspects of the ABLI**

#### ***Focus, identity and strategy***

19 I propose to highlight on three distinct areas that pertain to the Institute's *focus, identity and strategy*.

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<sup>24</sup> Sundaresh Menon, "Roadmaps for the Transnational Convergence of Commercial Law: Lessons Learnt from the CISG" (23 April 2015) ("*Lessons Learnt from the CISG*"), accessible at <https://www.supremecourt.gov.sg/default.aspx?pgid=5941&printFriendly=true>.

<sup>25</sup> *Lessons Learnt from the CISG* at para 4.

*(a) An Asian-centric focus*

20 It is worth emphasising the *Asian* focus of the ABLI if only to make the point that this is the first institute of its kind in the region. Unlike in other parts of the world, Asia does not yet boast an institute in the mould of the European Legal Institute (“ELI”) in Europe or the ALI in the US; nor, for that matter, do we have a specialised regional grouping like OHADA in Central-Western Africa. From this purely geographical perspective, then, the ABLI certainly breaks new ground.

21 However, there is a further, more important, reason why the ABLI’s focus on Asia bears particular mention. In recent times, we have seen a number of significant economic developments which suggest that Asia is on the cusp of an unprecedented degree of economic integration. Less than three weeks ago at the turn of the year, we witnessed the formation of the ASEAN Economic Community (“AEC”). The AEC transforms the 10-member ASEAN grouping into a single market and production base. In so doing, it promises to give a very important boost to the competitiveness and connectivity of ASEAN as a whole. Indeed, there are suggestions that, with this new development, ASEAN has the potential to emerge as the fourth largest economy in the world by 2030.<sup>26</sup>

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<sup>26</sup> See, for example, the Straits Times article titled “6 things you need to know about ASEAN Economic Community” (13 Oct 2015), accessible at *(cont’d on next page)*

22 The formation of the AEC itself follows on the heels of two landmark events last year. The first, in June, was China's launch of the Asian Infrastructure Investment Bank ("AIIB"). This is an integral component of China's broader regional infrastructure plan that aims to expand rail, road and maritime transport links between China, Central Asia, the Middle East and Europe.<sup>27</sup> With 57 countries having already pledged their support as the AIIB's founding members, there is momentum behind this initiative which might one day truly enable pan-Asian trade to be conducted, as envisioned by China, on a "One Belt, One Road" superhighway. Indeed, the wheels have well and truly been set in motion after the AIIB convened the inaugural meeting of its Board of Governors just last week.<sup>28</sup>

23 The second significant event was the announcement in October last year that the Trans-Pacific Partnership ("TPP") trade deal had been struck between a dozen countries in the Asian-Pacific rim. The TPP will slash some 18,000 tariffs between participating states in a seismic bid to open up markets and facilitate trade and investment flows. The TPP also aims to go beyond traditional trade

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<http://www.straitstimes.com/business/6-things-you-need-to-know-about-asean-economic-community>.

<sup>27</sup> See, for example, the Financial Times article titled "AIIB launch signals China's new ambition" (29 June 2015), accessible at <http://www.ft.com/intl/cms/s/0/5ea61666-1e24-11e5-aa5a-398b2169cf79.html>.

<sup>28</sup> See, for example, the China Daily article titled "AIIB Board of Governors holds inaugural meeting" (16 January 2016), accessible at <https://www.rt.com/business/329208-china-aiib-development-bank/>.



agreements by tackling non-tariff issues including, for example, measures to develop the digital economy to protect intellectual property and a mechanism for foreign investors to bring member States to arbitration.<sup>29</sup>

24 I should also mention one other major regional trade deal which is in the offing, and which policymakers have recently intensified efforts to conclude, possibly within the year, namely, the Regional Comprehensive Economic Partnership (“RCEP”).<sup>30</sup> The RCEP is an initiative led by ASEAN to broaden and deepen its engagement with its six free trade partners – Australia, China, India, Japan, Korea and New Zealand. When the RCEP is concluded, it will effectively create a 16-party free trade bloc in the Asia-Pacific region comprising over 45% of the world’s population and a third of the world’s current annual GDP.<sup>31</sup> The RCEP and the TPP have been described as “mutually-reinforcing parallel tracks” that lead towards the ultimate goal of economic integration in the Asia-Pacific.<sup>32</sup> The countries which are participants in the RCEP and the TPP may differ but taken

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<sup>29</sup> See the Straits Times article titled “TPP: What’s in it for Singapore?” (14 Oct 2015), accessible at < <http://www.straitstimes.com/business/economy/tpp-whats-in-it-for-singapore>>.

<sup>30</sup> See the Straits Times article titled “Call to ‘intensify efforts’ to seal regional trade accord” (23 November 2015) accessible at <<http://www.straitstimes.com/asia/se-asia/call-to-intensify-efforts-to-seal-regional-trade-accord>>.

<sup>31</sup> See the Factsheet on the RCEP, accessible at < [http://www.fta.gov.sg/press\\_release%5CFACTSHEET%20ON%20RCEP\\_final.pdf](http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf)>.

<sup>32</sup> See the Factsheet on the RCEP, accessible at < [http://www.fta.gov.sg/press\\_release%5CFACTSHEET%20ON%20RCEP\\_final.pdf](http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf)>.

together, their combined effect will surely be to make more seamless the conduct of cross-border commerce over as wide an area as possible.

25 This confluence of watershed developments suggests that the integration of Asian markets will happen on a scale, and at a pace, not yet seen. For us to capitalise on this monumental opportunity, it is imperative that our business laws keep up. This, I think, makes the launch of the ABLI, with its notably Asian focus, most timely. What this does is to cast a spotlight for the first time on the state of our business laws. With the heightened visibility and more sustained treatment given to the convergence of business laws in Asia, it is hoped that the ABLI will, in time, establish itself as a valuable partner in propelling us towards the more seamless conduct of transnational commerce.

*(b) A polycentric and practice-oriented identity*

26 I turn to the ABLI's identity. There are two points which I wish to make here.

27 First, I am aware that I have thus far been describing the ABLI in terms of a research institute. However, I must emphasise that the ABLI's work will not be fuelled by primarily academic interests. Instead, the stimulus for its work will come from a wide cross-section of relevant stakeholders who run the gamut from businesses, legal practitioners and in-house counsel, academia, the judiciary,

governments and local, regional and international institutions. Being premised on such a broad base of stakeholders, the ABLI may be seen as having a polycentric identity, of the sort which would not typically be associated with a pure research institute.

28 This leads me to my second point, which is that the ABLI is specifically meant to be practice-oriented in nature. The ABLI is an independent entity created under the auspices of the SAL and its objective is to address matters of development and commercial concern by putting forth practical solutions that will appeal to policy makers and legal practitioners. This is a key factor that distinguishes the ABLI from any set-up housed in a university or a private institution whose work is directed towards purely academic purposes.

*(c) The strategy for promoting convergence*

29 Let me also share with you some thoughts on the ABLI's strategy for promoting convergence.

(i) Research projects

30 To begin with, the core of the ABLI's work will be to undertake original research into the business laws and policies of Asia. In this process, common ground between different jurisdictions will be identified, points of departure teased

out, and alternative avenues to achieve meaningful convergence carefully studied and proposed. Ultimately, these research projects should culminate in concrete policy recommendations and legal tools that could be applied to the Asian context. The studies conducted should provide a well of knowledge which can be drawn upon, for the ABLI to issue publications at regular intervals. This could take the form of a compilation of policy and legal ideas by eminent ABLI participants or perhaps a practitioner's handbook on a selected topic.

31 An important source of inspiration for the work of the ABLI will be the various techniques already used by other like organisations to promote the harmonisation of laws. The ALI, for example, has painstakingly developed and continues to maintain an encyclopaedic set of "*Restatements of the Law*" which in essence seeks to state the law in various areas as it presently stands or might plausibly be stated by a court in the United States.<sup>33</sup> In time, the ABLI could conceivably embark on something of a comparable scale for this region. Another technique which the ABLI could adopt would be the promulgation of uniform standards which could directly affect a particular area of commercial practice. There are plenty of positive experiences in this regard which can serve as a useful frame of

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<sup>33</sup> See the description for Restatements of the Law provided on the ALI's website, accessible at < <https://www.ali.org/publications/frequently-asked-questions/#differ>>.

reference for the ABLI; these include UNCITRAL's success with the CISG, the ALI's work with the UCC, and the Incoterms rules published by the International Chamber of Commerce.<sup>34</sup>

(ii) Outreach efforts

32 Beyond the core of its research-based project work, the ABLI will also undertake sustained outreach efforts to build a strong network of relevant stakeholders who will serve as an important feedback channel. This will ensure the continued relevance of the ABLI's work.

33 We contemplate a multi-tiered outreach focus:

(a) First, the ABLI will host a biennial international conference on the convergence of Asian business laws as its anchor event. Future iterations of this event will not only enable us to bring the range of stakeholders together, it should also give us the opportunity to review the research output of the ABLI undertaken in the intervening period;

(b) Second, the ABLI will host events such as workshops and seminars regionally to promote its work to relevant stakeholders;

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<sup>34</sup> *Transnational Protection of Private Rights* at p 241.

(c) Third, representatives from the ABLI will bring the convergence message to key events in Asia;

(d) Fourth, the ABLI will aim to establish partnerships with other regional and international institutions such as the ALI, the ELI and UNCITRAL. There are others, of course, including the International Bar Association, LAWASIA, the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT); and

(e) Fifth, the ABLI will look for opportunities to engage policy-makers in the importance of this issue.

### **Governance, funding and projects**

34 I turn now to elaborate on three further critical aspects of the ABLI, namely, its governance, funding and projects.

#### *(a) Governance*

35 In terms of its governance, the ABLI will be steered by a Board of Governors who will have authority over the projects to be commissioned and adopted by the Institute and also the responsibility for its overall work output. The Board of

Governors will comprise at least 12 influential members drawn from the judiciary, academia and practitioners from different jurisdictions including Singapore, China, India and Australia. Such a diverse group of eminent individuals at the helm will equip the ABLI with the necessary insights into the socio-economic realities of our operating environment without being confined within jurisdictional silos.

36 As the President of the SAL, and a member of the Board of Governors, it gives me great pleasure to introduce to you the members of the ABLI's inaugural Board. In alphabetical order of their nominating jurisdictions, they are:

(a) From Australia

- (i) The Honourable Justice Robert French AC, Chief Justice of the High Court of Australia
- (ii) The Honourable Justice Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria
- (iii) Mr Kevin Lindgren AM QC, former Judge of the Federal Court of Australia

(b) From China

- (i) The Honourable Justice Zhang Yongjian, Senior Judge, Chief Judge of the Fourth Civil Division, SPC
- (ii) The Honourable Justice He Zhonglin, Senior Judge, Director General of International Department, SPC

(iii) The Honourable Justice Jiang Huiling, Senior Judge, Director of China Institute of Applied Jurisprudence, SPC

(c) From India

(i) The Honourable Justice A K Sikri, Judge of the Supreme Court of India

(ii) Mr Parag P Tripathi, Senior Advocate of the Supreme Court of India

(iii) Mr Rahul Singh, Professor of Law at the National Law School of India University

(d) and nominated by Singapore, aside from myself:

(i) The Honourable Mr V K Rajah, Attorney-General of Singapore

(ii) The Honourable Justice Andrew Phang Boon Leong, Judge of Appeal of the Supreme Court of Singapore

(iii) Professor Joseph Weiler, President of the European University Institute and whose work in the context of ASEAN legal integration will be well known to many of you, and

(iv) Ms Lucy Reed, Director-Designate of the Centre for International Law of the National University of Singapore

36 In addition, an Advisory Board will in due course be created and its membership should, likewise, reflect the wide range of stakeholder interests. The Advisory Board will engage key business players, academics, legal practitioners,



and judges in Asia to guide the priority areas of its focus. Its members will contribute by providing feedback, market-testing and validating the output of the Institute. We expect to establish the Advisory Board later this year.

*(b) Funding*

37 Let me also say something about how the ABLI will be funded.

38 Given its polycentric identity, an institute of this not-for-profit nature will need to build a collaborative network of public and private sources of long-term funding and project partnerships. Such long-term funding will determine the sustainability of the ABLI, the reach of its projects, and the pace at which it can progress its objectives. We therefore are very grateful to the many top tier corporations in the legal and business industries that have shared the urgency of this vision and already pledged their valuable support. We hope that, in time, we will be able to grow our pool of supporters and benefactors. Meanwhile, SAL has provided seed funding to get the ABLI secretariat up and running. The secretariat begins its work immediately after this conference.

*(c) The ABLI's anticipated projects*

39 Let me finally outline three examples of the sort of projects that the ABLI could undertake subject to the approval and further directions of the Board of Governors.

40 The first is one that mirrors the opening act of the three-part script, which I outlined earlier. This would focus on the harmonisation of the rules on the recognition and enforcement of foreign judgments in Asia including, of course, ASEAN and its major trade partners such as Australia, China and India. If the Board of Governors sanctions this, the aim would be to publish, within a fairly ambitious timescale of two to three years, a product that contains a comprehensive review and discussion on the subject of foreign judgments. This could be published as a handbook, a best practices guide, a core text, a model law or a draft treaty. Whatever the precise form of this output, it should provide a springboard for discussions on how to promote harmonisation of the rules governing recognition and enforcement. Both the commentary and the discussions on the law should also serve as valuable reference points for judges and lawyers alike.

41 The second project could be aimed at the convergence of data privacy laws. This is an area that is ripe for policy and legal review and reform in this age of the

Internet and smart businesses. The number of national data privacy laws in the world has grown exponentially since the first such legislation was passed in Sweden in 1973.<sup>35</sup> Data privacy laws are now a common feature of the legal landscape in most countries but, in Asia, studies suggest that they are neither “universal nor ... close to uniform”.<sup>36</sup> This has been attributed to our different legal traditions and also to our diverse rates of development, policies and cultures. This could be earmarked as a subject that would benefit greatly from further study. To that end, preliminary discussions with similar institutes to collaborate in a joint project to draw up global principles on data privacy laws have been met with considerable interest.

42 The third project that the ABLI could undertake is to develop a document on Definitions, General Principles and Model Rules for contracts in cross-border transactions in Asia. Such a common reference frame could function as a powerful tool to aid commercial parties from different legal systems to speak the same contractual language, thus enabling them to structure their agreements from a common understanding. Moreover, by melding together contractual principles from different legal cultures, the common points of reference might also

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<sup>35</sup> Graham Greenleaf, *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (Oxford University Press, 2015) (“*Asian Data Privacy Laws*”) at pp 6–7.

<sup>36</sup> *Asian Data Privacy Laws* at p 12.

be the catalyst to refine existing domestic legislation in different jurisdictions. Indeed, as time goes by and the content of the common reference frame is increasingly argued before courts across the region, a settled understanding of its terms and, more broadly, a transnational body of the fundamentals of contract law might begin to emerge.

## **Conclusion**

43 The theme of this conference situates us firmly in the context of the “Asian Century”. The Asian Development Bank projects that, by 2050, Asia has the potential to nearly double its share of global GDP to 52%<sup>37</sup>; and Asia’s per capita income could rise six-fold to reach the levels which Europe enjoys today.<sup>38</sup> Add to this the current developments in respect of the AEC, the AIIB, the TPP and the RCEP, there is good reason to be optimistic about the region’s continued economic growth despite its present woes.

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<sup>37</sup> Asia 2050: Realizing the Asian Century (Asian Development Bank, 2011), accessible at: <<http://www.adb.org/publications/asia-2050-realizing-asian-century>>.

<sup>38</sup> Asia 2050: Realizing the Asian Century (Asian Development Bank, 2011), accessible at: <<http://www.adb.org/publications/asia-2050-realizing-asian-century>>.

44 However, amidst such buoyant expectations, we must be careful not to assume that our economic destiny is somehow “preordained”.<sup>39</sup> After all, we are a mere 16 years into a new century and if the Global Financial Crisis of 2007–2008 has taught us anything, it is that the fates and fortunes of our economies can change overnight. The “Asian Century” can become reality only if there is a strong conviction matched by an unceasing effort on our part to continually innovate and so improve the economic attractiveness of our region as a whole. The ABLI is a small step to forge common legal standards. If we are united and committed towards realising this vision, then we might one day look back with satisfaction that collectively we *have* played a useful role in truly making this the “Asian Century”.

45 I wish, finally, to acknowledge the invaluable contributions of those who have made today’s launch of the ABLI possible. This includes the members of the Steering Committee, the Ministry of Law, the Economic Development Board and the corporate and legal firms which have readily expressed their firm interest to be Founding Partners of the ABLI. I would also like to thank The Honourable Mr Arun Jaitley for his video-recorded address which will be shown in a moment, as

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<sup>39</sup> Asia 2050: Realizing the Asian Century (Asian Development Bank, 2011), accessible at: <<http://www.adb.org/publications/asia-2050-realizing-asian-century>>.

well as the many distinguished speakers and panellists who will no doubt contribute to a vibrant discussion at this conference and to the work of the ABLI in the future. I also express my heartfelt appreciation to my counterparts and colleagues from Australia, China and India who have worked closely with us to get us to this point. Last but not least, I thank each of you here today for participating in this inaugural conference, particularly those who have travelled from as many as 14 countries to be with us today. I hope that you will find this a rewarding experience, but also be inspired to be part of the work of the ABLI.

46 Thank you.