

**LECTURE HOSTED BY
THE UNIVERSITY OF WESTERN AUSTRALIA LAW SCHOOL AND
THE SUPREME COURT OF WESTERN AUSTRALIA**

**The Law of Commerce in the 21st Century:
Transnational commercial justice amidst the wax and wane
of globalisation**

Wednesday, 27 July 2022

The Honourable the Chief Justice Sundaresh Menon*
Supreme Court of Singapore

The Honourable Robert French AC, Chancellor of the University of Western
Australia

The Honourable Peter Quinlan, Chief Justice of Western Australia

Professor Natalie Skead, Dean of the UWA Law School

Distinguished guests

Ladies and gentlemen

1. A very good evening to all of you. Let me begin by paying my respects to the traditional owners and custodians of the land we are on. Let me also thank Chief Justice Quinlan for graciously hosting this lecture in this historic courtroom, and Chancellor French, my friend and now colleague on the Singapore International Commercial Court, for inviting me to deliver it. My topic today concerns the law's role in supporting and promoting globalisation: in particular,

* I am deeply grateful to my law clerk, Violet Huang, and my colleagues, Assistant Registrars Reuben Ong, Huang Jiahui and Tan Ee Kuan, for all their assistance in the research for and preparation of this address.

my focus is on the legal infrastructure underlying the complex web of commerce that connects us all. It is fitting that I am giving this lecture here in Perth at Bob's invitation, because the strong judicial ties between Singapore and Australia, at both a personal and also an institutional level, are to my mind an exemplar of how we can apply ourselves to strengthening the transnational system of commercial justice. I will say more on this and on a number of other ways in which we can continue to develop this system, and what our priorities might be as we look ahead.

2. But it would be presumptuous to talk about a justice system to support and promote globalisation without pausing to examine the premise, which is the health of globalisation itself. Living in strongly export-oriented economies,¹ we in Singapore and in Western Australia have keenly felt the headwinds that have buffeted international commerce and globalisation. Turn on the news, and there is no shortage of stories that might make one question the very future of the globalised world. And so, before we get to the importance of securing a transnational system of commercial justice, we should first satisfy ourselves that globalisation continues to have a role to play in tackling the world's challenges.

¹ In 2021, Western Australia's exports accounted for 63% of its economy, and amounted to 52% of Australia's total exports. Singapore's exports account for more than 60% of the value added to its economy, and its total exports in 2020 were valued at 176% of its GDP. See Government of Western Australia, "Western Australia Economic Profile – November 2021" at <https://www.wa.gov.au/system/files/2021-12/WA%20Economic%20Profile%20-%20November%202021.docx>; Singapore Department of Statistics, "Estimating Singapore's Dependency on Exports Using the Singapore Supply, Use and Input-Output Tables" at <https://www.singstat.gov.sg/-/media/files/publications/economy/ssn219-pg6-8.ashx>; The World Bank DataBank, <https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?locations=SG>.

My lecture today is therefore in two parts: First, I will consider the prognosis for globalisation, and suggest that as bad as it looks, there might yet be hope if we can learn some timely lessons and act on them. Then, having laid out the argument for why we should continue to sustain and promote globalisation, I will turn to consider how the law can support global commerce through meaningful convergence and harmonisation.

I. Part I: Globalisation

A. *The advance and retreat of globalisation*

3. As the late Professor David Held eloquently put it, the result of globalisation is “a world of overlapping communities of fate”.² This interconnectedness exists in many dimensions, but most conceptions of globalisation converge upon the increasing integration of *economic* activity, characterised by the free and open movement of goods, services and people across the world.³ This is understandable when we consider the scale of economic globalisation and the impact it has had on the world. Between the end of the Second World War and 2010, transnational trade as a proportion of global

² David Held, “Democracy and Globalization” (1997) 3 *Global Governance* 251 at 264.

³ See <https://guides.loc.gov/globalization/definition>; <https://www.piie.com/microsites/globalization/what-is-globalization>; and Nayef RF Al-Rodhan and Gerard Stoudmann, “Definitions of Globalization: A Comprehensive Overview and a Proposed Definition” (19 June 2006) at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.472.4772&rep=rep1&type=pdf>.

GDP rose from 10% to 60%.⁴ In the two decades between 1990 and 2010, it is estimated that almost 1 billion people living in the developing world were lifted out of extreme poverty, with transnational trade being credited as the biggest contributor to this remarkable achievement.⁵

4. Behind these developments stands the law, whose quiet contributions to the success of globalisation should not be understated. Cross-border commerce is possible only against the backdrop of a web of legal obligations and protections. Under normal circumstances, commercial parties routinely conduct themselves in accordance with their legal rights and responsibilities; and when disputes arise, they have recourse to a network of courts, arbitral institutions and other bodies to resolve their differences in an orderly manner. Even when their quarrel is with a sovereign state, businesses can vindicate their rights within the framework of investor-state dispute settlement. And states ordinarily deal with other states more or less as equals on the world stage and more or less in accordance with broadly accepted norms and principles. While there are no doubt transgressions upon these norms, the publicity and alarm that they are greeted with only underscores the extent to which these are the exceptions and not the rule. In short, the law serves as the currency of trust for globalisation: it provides a foundation upon which states, businesses and individuals can deal with each

⁴ See the chart at Douglas A Irwin, "Globalisation is in retreat for the first time since the Second World War" (Peterson Institute for International Economics, 23 April 2020) at <https://www.piie.com/blogs/realtime-economic-issues-watch/pandemic-adds-momentum-deglobalization-trend> ("Globalisation is in retreat for the first time since the Second World War").

⁵ "The world's next great leap forward: Towards the end of poverty" (*The Economist*, 1 June 2013) at <https://www.economist.com/leaders/2013/06/01/towards-the-end-of-poverty>.

other on an even footing governed by rules and norms rather than power and happenstance.⁶

5. For many years, it seemed that this was the inevitable and irreversible way forward for the world. But in recent times both globalisation and the rules-based international order have increasingly been cast in shadow. In the 2010s, globalisation appeared to have started a retreat, marked by a faltering in the volume of transnational trade.⁷ This might be traced to the aftershocks of the 2007–2008 global financial crisis and the impact of the continuing war on terror. This was followed some years later by Brexit and then the pivot by the White House away from multilateralism and free trade in 2017.⁸ The turn of the decade brought the COVID-19 pandemic, which shut borders and, at least for a time, turned countries inwards, as the largest economies of the world tried to reduce their interdependence on each other for their supply chains.⁹

6. This trend of “deglobalisation” was then capped by the Russia-Ukraine war that broke out this year. Aside from the obvious implications of the war on the ability of law to prevail against power, the sanctions imposed on Russia in response to its actions, by a broad alliance of countries, also carry implications

⁶ See Sundaresh Menon, “Justice in a Globalised Age” (keynote at the 3rd Judicial Roundtable on Commercial Law, 29 September 2021) at <https://www.judiciary.gov.sg/docs/default-source/news-docs/3rd-judicial-roundtable-on-commercial-law.pdf> (“Justice in a Globalised Age”) at paras 10–15.

⁷ See “Globalisation is in retreat for the first time since the Second World War”.

⁸ See “Justice in a Globalised Age” at paras 18 and 20.

⁹ Lawrence Wong, “Growth, Inclusion and Sustainability in a Post-pandemic World” (keynote address at the Peterson Institute for International Economics’ Macro Week 2022, 18 April 2022) (“Growth, Inclusion and Sustainability in a Post-pandemic World”) at para 8.

for globalisation. The disconnection of Russian financial institutions from SWIFT, the global messaging system for financial transactions, was described by the French finance minister as a “financial nuclear weapon”.¹⁰ Its deployment has led to warnings of a drive towards de-dollarisation, which in turn could signal an end to the use of the US dollar as the *de facto* international currency and lead to the fragmentation of the international financial system.¹¹

7. Against the backdrop of these cumulative events, some commentators have announced the “fracturing” of the world and the “corrosion” of globalisation, if not perhaps its “end” altogether.¹² The most pessimistic among them foresee a return to insular Cold War blocs for both trade and security.¹³

B. Whither globalisation?

8. But does the present moment of crisis really augur the demise of globalisation? I approach this question with measured hope and optimism,

¹⁰ Giorgio Leali, “France not opposed in principle to cutting Russia from SWIFT: Bruno Le Maire” (*Politico*, 25 February 2022) at <https://www.politico.eu/article/frances-le-maire-not-against-cutting-russia-out-of-swift/>.

¹¹ See the warning from Gita Gopinath, the First Deputy Managing Director of International Monetary Fund: “IMF warns Russia sanctions threaten to chip away at dollar dominance” (Reuters, 31 March 2022) at <https://www.reuters.com/business/imf-warns-russia-sanctions-threaten-chip-away-dollar-dominance-ft-2022-03-31/>.

¹² “Fracturing” of globalisation: Edward Wong and Ana Swanson, “Ukraine War and Pandemic Force Nations to Retreat From Globalization” (*The New York Times*, 22 March 2022) at <https://www.nytimes.com/2022/03/22/us/politics/russia-china-global-economy.html>; “Corrosion” or “End” of globalisation: Adam Posen, “The End of Globalization?” (*Foreign Affairs*, 17 March 2022) at <https://www.foreignaffairs.com/articles/world/2022-03-17/end-globalization>; “Decoupled” globalisation: “Growth, Inclusion and Sustainability in a Post-pandemic World”.

¹³ See Elliott Abrams, “The New Cold War” (*National Review*, 21 March 2022) at <https://www.nationalreview.com/magazine/2022/03/21/the-new-cold-war/>.

perhaps driven by the fear that any other vision simply does not bear contemplating. On that footing, I suggest that the world will eventually be driven back towards greater interconnectedness and integration because we will find that there are simply no other answers to the pressing existential issues that confront the world as a whole.

9. Let me start with what cause we have for optimism. If the law serves as a global currency of trust, the future of globalisation will depend to a great extent on maintaining the global rule of law. The Russia-Ukraine war exacts first and foremost a heavy toll on the territorial integrity of Ukraine and the safety of all who are caught up in the conflict, but it also threatens to undermine the *principles* of territorial sovereignty and non-aggression that are fundamental to the international rule of law – and so paves the way for future conflicts. Yet, there is a glimmer of hope in how the international community has rallied together in response.

10. Economic sanctions have frequently been criticised for their ineffectiveness,¹⁴ but these criticisms typically concentrate on the coercive effects of sanctions, and neglect the vital communicative function that they serve. Sanctions remain perhaps the most potent way in which the international

¹⁴ See Sundaresh Menon, “The Rule of Law, the International Legal Order, and the Foreign Policy of Small States” (S Rajaratnam Lecture, 15 October 2019) at <https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2019/10/20191015-S-Raj-Lecture> (“The Foreign Policy of Small States”) at para 32; Adeno Addis, “Economic Sanctions and the Problem of Evil” (2003) 25 Human Rights Quarterly 573 (“Economic Sanctions and the Problem of Evil”) at 582–586; see also the broader criticism in Joy Gordon, “A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions” (1999) 13 Ethics & International Affairs 123.

community can condemn violations of international norms and re-assert those norms without resorting to the use of force.¹⁵ The powerful and concerted sanctions response mounted by a broad alliance of nations serves as a crucial bulwark against an erosion of the international norms that were painstakingly established over the course of the post–World War Two decades. This is why Singapore too felt compelled to join in imposing these sanctions: as our Foreign Minister explained, we were standing up for our own sovereignty, and for the kind of global order that we wish to live within.¹⁶ The signal sent by the international community is made even stronger by that community’s willingness to accept the significant costs flowing from the extent of the sanctions and the retaliatory steps that have since been taken.¹⁷ Seen in this light, the sanctions imposed on Russia perhaps do not mark the beginning of the end for globalisation: rather, they might be seen as a strong expression of the importance of adhering to the norms of the rules-based international order and of preserving those norms, because we regard them as essential for our shared future. It should give us hope that this is something for which the international community as a whole has been willing to make considerable sacrifices.

¹⁵ “The Foreign Policy of Small States” at para 32; “Economic Sanctions and the Problem of Evil” at 590 and 622.

¹⁶ *Singapore Parliamentary Debates, Official Report* (28 February 2022) vol 95 (Dr Vivian Balakrishnan, Minister for Foreign Affairs): “[U]nless we as a country stand up for principles that are the very foundation for the independence and sovereignty of smaller nations, our own right to exist and prosper as a nation may similarly be called into question one day.”

¹⁷ See Joseph Nasr and Markus Wacket, “Europe’s gas supply crisis grows after Russia imposes sanctions” (Reuters, 13 May 2022) at <https://www.reuters.com/business/energy/gazprom-units-germany-finding-alternatives-russian-gas-minister-2022-05-12/>.

11. In similar vein, the initial response to the disruptions wrought by the COVID-19 pandemic fuelled concerns over the future of globalisation, with a number of countries banning the export of face masks and other medical supplies.¹⁸ Yet, as the world came to terms with the reality of the pandemic, it began to appreciate that a coordinated global response was essential. By February 2022, the COVAX initiative had shipped 1 billion vaccine doses to lower-income countries – almost half of which had been donated by other countries.¹⁹ While the initial reaction might have been to turn inwards, the international community quickly realised that the nature of public health crises is such that our best chance of meeting them is through collaborative efforts. We see another example of this in the eradication of smallpox in 1980, which has been lauded as humanity’s greatest public health achievement, and which came about in large part due to the WHO’s global Intensified Eradication Program.²⁰

12. COVID-19 will not be the last global pandemic, and the world cannot afford not to be actively preparing together for the next one. And it is just one of several global problems that require global solutions. Singapore’s Senior Minister Tharman Shanmugaratnam, who is the co-chair of the G20 High Level Independent Panel on global financing for pandemic preparedness and

¹⁸ Richard Fontaine, “Globalization Will Look Very Different After the Coronavirus Pandemic” (*Foreign Policy*, 17 April 2020) at <https://foreignpolicy.com/2020/04/17/globalization-trade-war-after-coronavirus-pandemic>.

¹⁹ Gavi, “COVAX crosses milestone of 500 million donated doses shipped to 105 countries” (4 February 2022) at <https://www.gavi.org/news/media-room/covax-crosses-milestone-500-million-donated-doses-shipped-105-countries>.

²⁰ “History of Smallpox” (Centers for Disease Control and Prevention) at <https://www.cdc.gov/smallpox/history/history.html>.

response, recently argued that the world faces a “perfect long storm” of 5 challenges: the first two that I have touched on, geopolitical instability and global health security, are joined by the threat of stagflation, the climate change crisis, and the problem of inequality.²¹ To this list I would add a sixth challenge: truth decay, which is the steady erosion of facts and reason to a point that undermines our ability to engage in meaningful public discourse – surely an essential foundation for addressing the other issues.²²

13. These challenges lay bare the extent of our interconnectedness and our shared fragility and vulnerability to common threats. Perhaps the most obvious example is climate change, which inherently respects no borders and demands collective action. Even the bare minimum reduction in the level of our carbon emissions would require massive infrastructure and policy investments across the world, and not just in the countries that can afford them.²³ So, it is encouraging that developed economies have committed to mobilising US\$100 billion a year in climate finance for developing economies.²⁴

²¹ Tharman Shanmugaratnam, “Responding to a Perfect Long Storm” (speech at the IMAS-Bloomberg Investment Conference, 9 March 2022) (“Responding to a Perfect Long Storm”).

²² “Justice in a Globalised Age” at para 42.

²³ An estimated US\$600 billion per year is needed in capital spending on clean energy in emerging and developing economies in order to limit global temperature rise to 1.65°C: “Financing Clean Energy Transitions in Emerging and Developing Economies” (International Energy Agency, 2021) at <https://www.iea.org/reports/financing-clean-energy-transitions-in-emerging-and-developing-economies> (“Financing Clean Energy Transitions in EMDEs”), at p 26.

²⁴ “Financing Clean Energy Transitions in EMDEs” at p 53.

14. The problems of stagflation and inequality will likewise inevitably have a global reach. To convincingly address these challenges without sowing even greater social discord, we will need sustainable economic growth,²⁵ and it is unlikely that we will be able to achieve that by turning inward.

15. To be sure, globalisation's track record has been rightly criticised for having contributed to inequality as a result of the uneven distribution of its fruits.²⁶ But the answer to these criticisms lies in building a more sustainable approach to globalisation – a task around which some degree of consensus is perhaps emerging.²⁷ What vision of globalisation we ought to embrace is a matter for discussion, contestation and experimentation for many years to come. Nevertheless, globalisation in some form appears to be here to stay, if for no other reason than the mounting reality that more and more of our challenges, some of them of existential significance, can only be solved through a collaborative, transnational effort.

²⁵ As Senior Minister Tharman explained in “Responding to a Perfect Long Storm”, this is because the confluence of the many challenges makes it more difficult for governments to solve any one of them. Sustained economic growth will alleviate some of the challenges, making it easier to tackle all of the challenges.

²⁶ See “Justice in a Globalised Age” at para 40. This inequality can be seen in two forms – intra-generational inequality across the rich and the poor in the world today, and inter-generational inequality with future generations inheriting a world with depleted resources: see *Our Common Future* (Report of the World Commission on Environment and Development, 1987) at paras 6, 25.

²⁷ See Emma Aisbett, “Why are the Critics So Convinced that Globalization is Bad for the Poor?” in Ann Harrison (ed) *Globalization and Poverty* (University of Chicago Press, 2007) at p 41; Lawrence H Summers, “Global Trade Should be Remade from the Bottom Up” (Social Europe, 18 April 2016) at <https://socialeurope.eu/global-trade-remade-bottom>.

II. Part II: Transnational commercial justice

A. *The importance of a transnational system of commercial justice*

16. It is on this note of cautious, but I suggest, ultimately rational, hope that I turn to consider the law's role in this transnational enterprise. My focus, in particular, is on international commerce. Whatever shape the future of globalisation takes, the law will remain a critical part of the infrastructure of commerce. This role can be traced back to early civilisations, but a more proximate starting point for examining the law's role in international commerce is the law merchant, or *lex mercatoria*, a common body of rules and customs widely adopted by merchants in Europe around the Middle Ages.²⁸ From the 17th to the 19th centuries, these rules were gradually assimilated into national legal systems and largely lost their transnational character. As a consequence, international commercial law is often thought of today less as part of a coherent system and more as a hodgepodge of rules from different sources.

17. I suggest that a renewed focus on the idea of a transnational *system* of commercial justice will be essential in a globalised world. At the most fundamental level, this is because legal differences and uncertainty increase transaction costs

²⁸ See Sundaresh Menon, "Roadmaps for the Transnational Convergence of Commercial law: Lessons Learnt from the CISG" (speech at the 35th Anniversary of the CISG, 23 April 2015) at paras 7–8; see also Yeo Tiong Min, "The Future Development of the *Lex Mercatoria*" in Sundaresh Menon and Anselmo Reyes (eds), *Transnational Commercial Disputes in an Age of Anti-Globalism and Pandemic* (Hart Publishing, forthcoming 2022) ("The Future Development of the *Lex Mercatoria*").

and hamper growth.²⁹ This happens when international businesses and businesspeople need to familiarise themselves with different sets of rules, and incur the expense of adapting business and transactional structures across jurisdictions. With new risks in emerging areas such as artificial intelligence and data privacy calling for new efforts to regulate the way modern business is conducted, the cost of having fragmented legal frameworks across jurisdictions will only increase exponentially. Furthermore, cross-border business activity inevitably leads to cross-border commercial disputes, and this can add another layer of increased costs. Differences in substantive and procedural laws can even lead to arbitrariness in outcomes depending on where a dispute is adjudicated, which brings with it the incentive to engage in forum shopping.³⁰ A focus on fostering a transnational system of justice would prioritise the convergence of commercial laws where possible, and the minimisation of the inefficiencies that inhere in transnational dispute resolution. The latter could take the form of a more coherent body of law dealing with issues such as choice of laws, choice of jurisdiction, and the avoidance of unnecessary relitigation by applying the doctrine of issue estoppel in a transnational setting.

²⁹ See Sundaresh Menon, “Doing Business Across Asia: Legal Convergence in an Asian Century” (Opening Address, 21 January 2016) at <https://www.judiciary.gov.sg/docs/default-source/news-docs/doing-business-across-asia---legal-convergence-in-an-asian-century-final-version-after-delivery--260116.pdf> (“Legal Convergence in an Asian Century”) at para 6.

³⁰ Such concerns were also raised by Professor Martti Koskenniemi in the context of the fragmentation of international law: Martti Koskenniemi, “Fragmentation of international law: difficulties arising from the diversification and expansion of international law” (International Law Commission, 2014) at para 489.

18. On a further level, there will also be legal issues that have an inherently transnational character, such as those arising from the global response to challenges like climate change and global public health. For example, disputes arising from projects under the Green Climate Fund of the UN Framework Convention on Climate Change (or “UNFCCC”) have already come before arbitral tribunals.³¹ These and other disputes may turn on the commitments made under the Paris Agreement, national rules or policies made to implement those commitments, and the actions of individuals or businesses in response to these events. Another example is the Chancery Lane Project, which has contributors from 113 countries. It has published a set of template contractual clauses which can be inserted into a range of business contracts to mandate the pursuit of climate-related priorities.³² If the project is successful, it will soon fall to arbitral tribunals and commercial courts to interpret these clauses when contractual disputes arise. In both these instances, we depend on the machinery of transnational commercial justice for the disputes to be resolved in an orderly and efficient manner, and the legal norms arising from the decisions rendered have the potential to become the transnational norms that can guide commerce across the world. We will significantly handicap our ability to mount a coordinated response to such global challenges if we were to approach these disputes in an *ad hoc* fashion or in national siloes.

³¹ See *ICC Commission Report: Resolving Climate Change Related Disputes through Arbitration and ADR* (ICC, 2019) at <https://iccwbo.org/climate-change-disputes-report>, at para 2.4 and 4.1.

³² “About the Chancery Lane Climate Project” at <https://chancerylaneproject.org/about/> (accessed on 15 July 2022).

19. None of this means that the law must be the same everywhere, or that we should aim to create a supranational legal system that supersedes national systems. Not only would that be unachievable, the laws of each jurisdiction reflect a compromise between the competing political, social and economic realities within that jurisdiction. But even so, in some select areas, we can attain uniformity; in other areas, we can pursue meaningful convergence; and in the remaining areas, we can at least aim to acquire an understanding of our principled differences. For the reasons I have just explained, these are worthy goals. And to achieve them, we should look at the body of laws that govern international commerce from the perspective of a system rather than a mere compilation of rules: in short, we should seek to develop a modern-day *lex mercatoria*.

B. The components of a transnational system of commercial justice

20. This seems a mammoth task to be sure, made even more difficult to navigate by the fact that different components of it have been worked on variously by different stakeholders over the course of the past few decades. Yet, somewhat ironically, it is because of this steady work on so many fronts that the transnational system of commercial justice is, I suggest, already very much in existence today, and not a merely utopian vision. To facilitate a more systematic approach in our thinking, let me sketch out a blueprint for how the parts might fit together. The transnational system of commercial justice could be split into two facets of

convergence: procedural law, and substantive law. The sources of these laws are each sustained by a number of drivers of meaningful convergence: key amongst which are international organisations, international instruments and international judicial dialogue.

i. Convergence in procedural law

21. I turn first to convergence in procedural law, which can be further split into two different aspects: first, the rules of private international law that determine where disputes should be adjudicated and whether the outcomes of adjudication will be given effect elsewhere, and second, the rules and practices governing the process of adjudication. These are natural starting points, since procedural rules are usually of wider applicability and less complexity than substantive laws. It is also the right place to start, because international businesspeople rightly expect their disputes to be resolved efficiently, and when that has been done, that the outcome should be recognised everywhere, at least for a start.

22. The exemplar for this kind of convergence is the set of rules of private international law governing arbitration agreements and awards. The first aspect of this is the enforcement of the agreement to arbitrate, which can often be the subject of protracted satellite litigation. In the case of *Tomolugen Holdings*,³³ the Singapore Court of Appeal followed the approach taken in Hong Kong and

³³ *Tomolugen Holdings Ltd and another v Silica Investors and other appeals* [2016] 1 SLR 373 (“*Tomolugen*”).

Canada,³⁴ and held that in order to obtain a stay of court proceedings in favour of arbitration, a litigant only had to establish a *prima facie* case that there was a valid and operable arbitration clause, and that the dispute in the court proceedings fell within the scope of the clause.³⁵ This was an approach that recognised that both the court and the arbitral tribunal had their proper roles to play within the system of transnational dispute resolution: while the court remained the final arbiter,³⁶ it nevertheless respected the principle of *kompetenz-kompetenz* which gave the tribunal control over its own competence in the first instance.³⁷ It also had the key benefit of deterring litigants from unnecessarily commencing court proceedings to compete with a pending arbitration.³⁸ And because some of the litigants in *Tomolugen Holdings* were not subject to the arbitration agreement, there was a risk of concurrent arbitral and court proceedings giving rise to conflicting findings. To manage this, we imposed a case management stay on the court proceedings and gave further directions to limit the risk of parallel proceedings arising.³⁹ This reflects what I would call a *systemic* approach to international dispute resolution.

³⁴ *Tomolugen* at [50], [52].

³⁵ *Tomolugen* at [63].

³⁶ See *Tomolugen* at [186].

³⁷ *Tomolugen* at [67].

³⁸ A similar issue also arises where the conflict is not between the court and the arbitral tribunal but between two courts in different jurisdictions. Where there is an exclusive jurisdiction clause, the Singapore courts have held that the merits of the defence are irrelevant in deciding whether the exclusive jurisdiction clause ought to be enforced. This has a similar benefit of avoiding costly satellite litigation in such cases over whether there is a genuine defence or not: see *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [117].

³⁹ *Tomolugen* at [186]–[190]. One of the factors pointing in favour of the case management stay was the fact that there was only one plaintiff, and it was a party to the arbitration agreement. The case management stay therefore did not significantly derogate from the

23. The second aspect worth highlighting is the recognition and enforcement of arbitral awards. Its centrepiece is the 1958 New York Convention,⁴⁰ which, with 170 parties and counting,⁴¹ has created an almost universal regime for the enforcement of arbitral awards. So successful has this regime been that even courts have sought to tap upon it: in 2015, the Dubai International Financial Centre (or “DIFC”) Courts took the innovative step of promulgating a practice direction which would allow a DIFC Court judgment to be converted into an arbitral award so as to facilitate its enforcement overseas,⁴² though the validity of this device remains untested.⁴³ With the 2005 Hague Convention on Choice of Court Agreements⁴⁴ and the 2021 Singapore Convention on Mediation,⁴⁵ the international dispute resolution community has been working to replicate the success of the New York Convention in litigation and mediation respectively.

plaintiff’s right to choose where and whom to sue. Where there are multiple claiming parties, not all of whom are subject to the obligation to arbitrate, the considerations may be more complex: see [187].

⁴⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958, entered into force on 7 June 1959).

⁴¹ Following the deposition by Turkmenistan of its instrument of accession on 4 May 2022.

⁴² DIFC Courts Practice Direction No 2 of 2015 – Referral of Judgment Payment Disputes to Arbitration, at <https://www.difccourts.ae/rules-decisions/practice-directions/difc-courts-practice-direction-no-2-2015-referral-judgment-payment-disputes-arbitration>; see Michael Hwang, “The DIFC Courts Judgment-Arbitration Protocol” (DIFC Courts Lecture, 19 November 2014).

⁴³ See Harris Bor, “Conversion of Judgments into Awards” in Rupert Reed and Tom Montagu-Smith (eds) *DIFC Courts Practice* (2020, Edward Elgar Publishing) ch 8.

⁴⁴ Convention of 30 June 2005 on Choice of Court Agreements (entered into force on 1 October 2015).

⁴⁵ United Nations Convention on International Settlement Agreements Resulting from Mediation (20 December 2018, entered into force on 12 September 2020).

24. These regimes play a valuable role in avoiding the unnecessary relitigation of issues, which would proliferate if the threshold for setting aside or refusing recognition of an arbitral award, for instance, were to be set too low. But there is a further dimension to this issue, which is whether an application to set aside enforcement of an arbitral award should be determined with reference to the outcome of a similar earlier application, whether before a different enforcement court, or an application to set aside the arbitral award in the seat court. On this issue there are many differing views. However, I have argued elsewhere that the best approach would be to apply the doctrine of issue estoppel transnationally. If the criteria for issue estoppel are satisfied, a party should not be allowed to relitigate the same ground for setting aside after the issue has already been decided by another court.⁴⁶ This again takes a systemic approach to transnational commercial justice, rather than a court- or jurisdiction-centric one. These considerations equally apply where there are multiple court proceedings in different jurisdictions that raise the same issues, and they point us to a similar solution: thus, in the case of *Merck Sharp*, the Singapore Court of Appeal affirmed

⁴⁶ See Sundaresh Menon, “The Role of the National Courts of the Seat in International Arbitration” (Keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre, 17 February 2018) at <https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-keynote-address-delivered-at-the-10th-annual-international-conference-of-the-nani-palkhivala-arbitration-centre-2018-the-role-of-the-national-courts-of-the-seat-in-international-arbitration> at para 32.

It should be noted that issue estoppel will typically not apply where the ground for setting aside is public policy, since the issue before each court is whether the award is consistent with the public policy of the jurisdiction where the court is located, and there is therefore no identity of subject matter in relation to this issue when it is decided in different jurisdictions (see *ibid* at para 34).

that foreign judgments could and should give rise to transnational issue estoppel.⁴⁷

25. Let me turn to the process of international dispute resolution. Since international commercial arbitration is likely to involve parties hailing from different legal traditions, it comes as no surprise that it has also led the way in promoting convergence in the *conduct* of dispute resolution. The International Bar Association’s Rules on the Taking of Evidence in International Arbitration (or “IBA Rules”), first adopted in 1999, sought to harmonise this process by borrowing from practices developed in common law and civil law jurisdictions, as well as those indigenous to international arbitration.⁴⁸ When we set up the Singapore International Commercial Court (or the “SICC”), we recognised the benefits of drawing from an internationally accepted and understood set of procedures. For that reason, the rules on document disclosure in the SICC were modelled largely on the IBA Rules:⁴⁹ an example of transnational convergence across different modes of dispute resolution.

⁴⁷ *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 at [25].

⁴⁸ See IBA Rules of Evidence Review Task Force, *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration* (2021) at <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D>, at p 3.

⁴⁹ See Teh Hwee Hwee, Justin Yeo and Colin Seow, “The Singapore International Commercial Court in Action: Illustrations from the First Case” (2016) 28 Singapore Academy of Law Journal 692 at para 20; see also *B2C2 Ltd v Quoine Pte Ltd* [2018] 4 SLR 67 at [23]. A new set of rules on document disclosure applies to SICC cases commenced after 1 April 2022: see the Singapore International Commercial Court Rules 2021, Order 12. The new rules also draw upon the IBA Rules in some respects.

ii. Convergence in substantive law

26. I turn next to convergence in substantive law. This would, of course, translate into the greatest benefits for transnational commercial activity, with the potential to make cross-border transactions little more complex than domestic ones. This might seem to be no more than a distant dream. But again, there are real examples of efforts in this direction.

27. In 1993, a number of predominantly Francophone states in Central and Western Africa formed the Organisation for the Harmonization of Business Law in Africa (known by its French acronym, “OHADA”).⁵⁰ The aim of OHADA was to harmonise business law across its member states so as to provide legal security and promote cross-border investment and trade. Today, OHADA has 17 member states with a combined population of almost a quarter of a billion people.⁵¹ It has passed a number of Uniform Acts governing commercial relationships, corporate entities and commercial dispute resolution, all of which have the status of domestic law in its member states. To ensure uniformity in the application of these laws, OHADA’s Common Court of Justice and Arbitration serves as the final appellate court for disputes from member states relating to the Uniform Acts.⁵²

⁵⁰ See Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence” (2013) *Singapore Journal of Legal Studies* 231 at 245.

⁵¹ See Claire Moore Dickinson, “The OHADA Common Court of Justice and Arbitration: exogenous forces contributing to its influence” (2016) 79 *Law and Contemporary Problems* 63 (“The OHADA Common Court of Justice and Arbitration”) at 65–66.

⁵² See “The OHADA Common Court of Justice and Arbitration” at 67–68.

28. I raise OHADA not to suggest that it is an example that we should seek to emulate, either within this region, or across the world. The precise mode and extent of convergence in each case must depend on its particular context. But it is important to appreciate the high-water mark so that we do not limit our view of what may be possible.

29. At the same time, it is also worth recognising that our starting point is not always or invariably as far behind as we might think. The Convention on Contracts for the International Sale of Goods (or “CISG”)⁵³ has 95 states parties representing more than two-thirds of the global economy,⁵⁴ and applies a set of harmonised contractual principles to the sale of goods between commercial parties. In some important areas, uniformity proved to be impossible to achieve, and so issues of particular controversy, such as contractual validity, are not dealt with in the CISG.⁵⁵ Studies have also suggested that many commercial parties routinely exclude the CISG from their contracts, primarily due to a preference for more familiar domestic laws.⁵⁶ But these limitations should not detract from the scale of the accomplishment that the CISG represents. The task of spreading

⁵³ United Nations Convention on Contracts for the International Sale of Goods (11 April 1980, entered into force on 1 January 1988).

⁵⁴ See https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status and <https://uncitral.un.org/en/cisg40>.

⁵⁵ Michael J Dennis, “Modernizing and harmonizing international contract law: the CISG and the UNIDROIT Principles continue to provide the best way forward” (2014) 19 Uniform Law Review 114 at 140–141.

⁵⁶ Ingeborg Schwenzer and Pascal Hachem, “The CISG—Successes and Pitfalls” (2009) American Journal of Comparative Law 457 at 463–464.

awareness and increasing familiarity with the CISG is a considerably more manageable one than that of arriving at a broadly accepted set of common norms.

iii. Drivers of convergence

30. What I have outlined thus far are examples of *methods* of achieving convergence – through treaties, codifications of principles, the workings of the common law, and so on.⁵⁷ I want to turn my attention, however, to what I term *drivers* of convergence. In domestic law, we take it for granted that the law is made and refined by legislatures and the courts. On the international plane, there is no single authority that has responsibility for the development of the law. Instead, each of the methods of achieving convergence is driven by a multitude of stakeholders with varying degrees of coordination.

a. International organisations

31. Much of the credit for building the transnational system of commercial justice should be laid at the door of a number of familiar international organisations: most notably UNCITRAL, which is responsible for the Model Laws on International Commercial Arbitration and Cross-Border Insolvency and the CISG; but also UNIDROIT, which has published a set of unified Principles of International Commercial Contracts;⁵⁸ UNCTAD, which has extensively studied

⁵⁷ See also the taxonomy of 9 methods of convergence set out by Professor Sir Roy Goode in “Reflections on the Harmonisation of Commercial Law” (1991) *Uniform Law Review* 54 at 57.

⁵⁸ UNIDROIT Principles of International Commercial Contracts (2016).

the international investment regime; the Hague Conference on Private International Law; and many others.

32. A more recent addition to this landscape is the Asian Business Law Institute (or “ABLI”), formed in 2016 as a collaboration among jurists from Singapore, Australia, China and India.⁵⁹ ABLI was launched at an event subtitled “Legal Convergence in an Asian Century” and it is designed to strengthen the foundations that will support what was expected to be a period of unprecedented growth and economic integration across the Asia-Pacific region. Drawing from the experience of the American Law Institute and its Restatements of the Law, ABLI aims to identify and publish common principles of commercial law in Asia. In 2020, ABLI published its *Asian Principles for the Recognition and Enforcement of Foreign Judgments*,⁶⁰ and it is in the process of doing the same for principles of business restructuring and data privacy laws.⁶¹

33. Our task moving forward will be to maintain open channels of communication and foster close collaboration between these institutions to bring their combined efforts and expertise to bear. For example, it is clear that the numerous international instruments that pertain to commercial contracts overlap in many areas, but differ in their coverage of others. Recognising this,

⁵⁹ See “Legal Convergence in an Asian Century” at para 45; and <https://abli.asia/ABOUT-US/BoardofGovernors>.

⁶⁰ Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (ABLI, 2020).

⁶¹ See <https://abli.asia/Projects/Asian-Principles-of-Business-Restructuring> and <https://abli.asia/Projects/Data-Privacy-Project>.

UNCITRAL, the Hague Conference and UNIDROIT came together to jointly publish a “Tripartite Legal Guide” covering the CISG, the UNIDROIT Principles, and a number of other instruments.⁶² Concurrently with the finalisation of the Guide, UNIDROIT hosted a conference to explore further synergies between these instruments, and how they could evolve to meet changing circumstances.⁶³ By bringing together leading experts working in different capacities and at different institutions, these working groups and gatherings function as “brain trusts” for the future development of transnational commercial law.

b. International judicial dialogue

34. Another key driver of convergence is international judicial dialogue. This takes place on at least two levels: First, through the means well-known to the common law – the publication of judgments which are then read by practitioners and cited by courts in other jurisdictions. Second, and less frequently appreciated, is direct communication and collaboration between judges across jurisdictions.

35. On the first level, the cross-citation of authorities across different jurisdictions is an important way in which we ensure that the law develops in a manner that is cognisant of all the pertinent positions and considerations. In the cases I touched upon earlier, *Tomolugen Holdings*⁶⁴ and *Merck Sharp*,⁶⁵ the

⁶² *Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales* (UNCITRAL, HCCH and Unidroit, February 2021).

⁶³ See <https://www.unidroit.org/tripartite-legal-guide-on-international-sales-presented-in-international-hybrid-conference/>.

⁶⁴ See para 22 above.

⁶⁵ See para 24 above.

Singapore Court of Appeal considered the decisions of other Commonwealth courts, both to glean wisdom from their reasoning, and to ensure that the position of Singapore law on matters relating to transnational commerce was coherent with that adopted elsewhere as far as this was possible.

36. Looking to other jurisdictions can be particularly helpful when we are faced with novel situations. In *Quoine v B2C2*,⁶⁶ the Singapore Court of Appeal considered the question of whether cryptocurrency was property capable of being held on trust. After considering authorities from England and Canada, we expressed a tentative view that it could be.⁶⁷ Less than 2 months after we handed down that judgment, it was cited by the New Zealand High Court in deciding that cryptocurrency could be considered property.⁶⁸ Through this form of cross-fertilisation, courts around the common law world will much less frequently be faced with a daunting blank slate in novel areas of law.

37. On the second level, the transnational system of commercial justice also benefits from direct communication and collaboration between judges. Judicial exchanges are an often-overlooked source of strength for a court system: it helps judges keep abreast of legal developments emanating from their colleagues on the bench, and provides them with a sounding board for their own thoughts and ideas. When our practice areas are no longer local but global, *international* judicial dialogue and engagement becomes just as crucial.

⁶⁶ *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 (“*Quoine*”).

⁶⁷ *Quoine* at [139]–[140], [144].

⁶⁸ *Ruscoe v Cryptopia Ltd (In Liq)* [2020] 2 NZLR 809 at [84].

38. *Quoine* is worth mentioning on this count as well, because it was decided at first instance in the SICC by an International Judge, and heard on appeal by a panel which included two International Judges, Justice French and Lord Mance. This is part of a growing phenomenon of judges sitting in foreign jurisdictions,⁶⁹ which benefits the foreign and local judges, the local bar, and the law as a whole. In fact, in *Quoine*, Lord Mance issued a dissent, not on the nature of crypto-assets, but on the equally novel and important question of how the doctrine of unilateral mistake applies to the actions of an algorithm. The productive exchange of views we had had on this issue was therefore recorded for the benefit of the international legal community. In this way, international commercial courts are particularly well-placed to develop the transnational system of commercial law, especially when compared to arbitration, with its emphasis on privacy.

39. Valuable dialogue between judges also takes place in extra-judicial settings. Non-binding instruments that facilitate collaboration between courts, once practically unheard of, have seen increasing use in recent years. For instance, the Supreme Court of Singapore has entered into a number of Memoranda of Understanding with other courts, including the Supreme Court of New South Wales, that allows each court to refer questions concerning the law of the other jurisdiction to its counterpart, greatly simplifying the process of

⁶⁹ A phenomenon Professors Alyssa King and Pamela Bookman have dubbed “travelling judges”: see Alyssa King and Pamela Bookman, “Traveling Judges” (forthcoming) at <https://ssrn.com/abstract=4072854>.

ascertaining a complicated point of foreign law.⁷⁰ At a more informal level, my colleagues and I participate actively in international judicial conferences such as the Judicial Seminar on Commercial Litigation,⁷¹ the Judicial Roundtable on Commercial Law, and the Asia Pacific Judicial Colloquium, among others. These gatherings encourage frank, open and deep discussions between commercial and other judges on common trends and shared challenges. They also raise greater awareness of potential points of convergence as well as the reasoned differences between jurisdictions, and further encourage judges to take a systemic view of transnational commercial justice when they decide cases and develop the law.

40. By highlighting how the drivers of international convergence interact with the sources of international commercial law to shape its two facets, procedural and substantive law, I have sought to conceptualise international commercial law as a system. Encouragingly, many of the foundational elements are already in place. But if we went further and consciously thought of the various moving parts not as discrete elements pointing in vaguely the same direction, but instead as components of a transnational system of justice that regulates cross-border

⁷⁰ See <https://www.judiciary.gov.sg/who-we-are/references-questions-of-law-singapore-foreign-courts>.

Another example is the Multilateral Memorandum on Enforcement of Commercial Judgments for Money published by the Standing International Forum of Commercial Courts (“SIFoCC”), which sets out the understanding of courts from more than 30 jurisdictions of how foreign money judgments can be enforced in their own jurisdiction: SIFoCC Multilateral Memorandum on Enforcement of Commercial Judgments for Money (revised 2nd edn, 2021) at <https://sifocc.org/2021/04/21/sifocc-multilateral-memorandum-on-enforcement-now-with-international-working-group-commentary/>.

⁷¹ See <https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-supreme-court-of-singapore-hosted-the-7th-judicial-seminar-on-commercial-litigation>.

commercial activity, this will surely facilitate the development of coherent and consistent transnational legal norms in these diverse areas of procedural and substantive law; and that would better serve the needs of international commerce. Beyond that, a more systematic way of thinking about transnational commercial justice promotes what Chief Justice James Allsop has called “a culture of problem solving” that goes beyond black letter law and discrete processes, and instead focuses on the sensible and effective resolution of disputes as part of a system.⁷² Finally, by sustaining a reputable system of international commercial dispute resolution, we also strengthen the global rule of law.⁷³

III. Looking ahead: tackling tomorrow’s challenges

41. Looking ahead, as we grapple with the global challenges that confront us, we will increasingly need to call upon the capabilities and potential of the transnational system of commercial justice.

42. A developing case study in how the transnational legal system can adapt and innovate in this way is in relation to the global efforts to combat climate change. One example of an international organisation that is seeking to drive the development of the law is the IBA, which in 2014 published the report of its

⁷² James Allsop and Samuel Walpole, “International Commercial Dispute Resolution as a System” in Sundaresh Menon and Anselmo Reyes (eds), *Transnational Commercial Disputes in an Age of Anti-Globalism and Pandemic* (Hart Publishing, forthcoming 2022); see also James Allsop, “Commercial and investor-state arbitration: The importance of recognising their differences” (ICCA Congress 2018 Opening Keynote Address, 16 April 2018).

⁷³ *Ibid.*

Climate Change Justice and Human Rights Task Force.⁷⁴ Among its numerous recommendations, the report urged all arbitral institutions to take steps to develop rules specific to the resolution of environmental disputes, particularly those between states or between a state and a private entity.⁷⁵ At the same time, the procedural paths to the bringing of such disputes have gradually been opened by rulings in investor-state disputes such as *Aven v Costa Rica*, which was an ICSID arbitration. In that case, the tribunal held that claims for harm done to the environment could in principle be brought as a counterclaim in the investor-state dispute, and opined that investors *could* be subject to international legal obligations relating to the protection of the environment.⁷⁶

43. Individuals have also brought claims seeking to hold states accountable for not doing enough to combat climate change.⁷⁷ In December 2019, the Urgenda Foundation successfully obtained a ruling from the Supreme Court of the Netherlands that the Dutch government had an obligation under the European Convention on Human Rights to take specific measures to meet the greenhouse

⁷⁴ *Achieving Justice and Human Rights in an Era of Climate Disruption* (International Bar Association, July 2014) (“*IBA Climate Change Justice Report*”).

⁷⁵ *IBA Climate Change Justice Report* at pp 14, 137.

⁷⁶ *David Aven v The Republic of Costa Rica*, Case No UNCT/15/3, Final Award at [738], [742]. Ultimately, however, the tribunal dismissed the counterclaim on the basis of a lack of pleading and evidence: at [747].

⁷⁷ Another product of the *IBA Climate Change Justice Report* was the drafting of a Model Statute for Proceedings Challenging Government Failure to Act on Climate Change (published in February 2020), which provides a menu of possible reforms to the law in areas such as standing, the right to intervene, the admissibility of evidence and costs.

gas emission targets under the UNFCCC.⁷⁸ This spurred another driver of convergence, through the ability of a precedent in one jurisdiction to inspire a litigant in another jurisdiction. Thus, in October 2021, Torres Strait Islanders in Australia, supported and advised by the Urgenda Foundation,⁷⁹ filed the *Pabai Pabai* case. They allege that the Australian government has breached its duty of care to protect them against the harms of climate change by failing to adopt adequate climate policies.⁸⁰ These proceedings, which are now pending before the Federal Court of Australia, will in turn be keenly watched across the world – and especially by common lawyers, since the asserted cause of action is the common law tort of negligence.

44. It would not be surprising if future claims of a not dissimilar nature are brought against a commercial entity before a commercial court or in an international commercial arbitration, as foreshadowed by the counterclaim in *Aven v Costa Rica*. With these likely developments on the horizon, commercial judges, arbitrators and practitioners will need to be cognisant of international and domestic norms beyond the traditional boundaries of the law of commerce, and to be prepared to have recourse to them. The transnational system of commercial justice, by encouraging an outward looking approach, by prioritising principled

⁷⁸ *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2007 (20 December 2019, Supreme Court of the Netherlands); see Maiko Meguro, “State of the Netherlands v Urgenda Foundation” (2020) 114 *American J of Intl Law* 729.

⁷⁹ “Landmark class action lawsuit sees frontline communities sue Australian Government for climate crisis” (Grata Fund, 26 October 2021) at https://www.gratafund.org.au/climate_case_release.

⁸⁰ Concise Statement of the Applicants in *Pabai Pabai & anor v Commonwealth of Australia* VID622/2021 (31 March 2022).

convergence and by recognising the value of seeing how others have tackled our common issues, offers the hope that the law can keep pace with and meet these sorts of challenges, which we can expect to face in the years to come.

IV. Conclusion

45. At the turn of the century, many of us thought that the accelerating pace of globalisation was inevitable. But recent events have reminded us that the rapid growth and integration of the world is not pre-ordained. Even though globalisation now faces strong headwinds in the form of both long-term trends and sudden shocks, I suggest that the way forward does not involve jettisoning the idea of globalisation, but reconceptualising and reinvigorating it: the existential problems that the world is already facing and will continue to face demand that we move forward together. Regardless of the form that this new vision of globalisation takes, the law will continue to serve as its currency of trust. It will fulfil this function much better if we think of ourselves not merely as international commercial lawyers but as members of a transnational system of commercial justice. Our responsibility is to develop this system by promoting meaningful convergence in both procedural and substantive law, and we can do so in our capacities as judges, arbitrators, counsel, academics and contributors to international legal organisations. A stronger transnational system of commercial justice will in turn serve a critical role in sustaining the rules-based international order, and help deliver prosperity to the peoples of the world, by coordinating our collective response to the daunting challenges of tomorrow.

46. Thank you very much.