CHAPTER 1

EMERGING DEBATES IN HARMONISATION OF TRADE LAW AND ITS ROLE IN PRIVATE SECTOR REGIONAL DEVELOPMENT

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I INTRODUCTION

This book is the result of the second joint conference between the United Nations Commission on International Trade Law (UNCITRAL) Regional Centre for Asia and the Pacific (RCAP) and the Faculty of Law, University of Macau (UM) in 2015. After the first joint conference was organised in 2014 by the two institutions in cooperation of Comité Maritime International (CMI) Asia Office, it was decided that the next joint conference should take cognizance of the emerging mandate of UNCITRAL. This in turn resulted in the organization of the UNCITRAL Emergence Conference on 30th November 2015 in Macau SAR with a thematic focus on 'Harmonising Trade Law to Enable Private Sector Regional Development'. The theme was particularly designed to take stock of contemporary and emerging international developments in harmonisation and unification of commercial law and its impact on the regional business environment. The conference identified various issues in five different tracks and invited scholars and experts to present papers.

The issues that were identified for potential discussion in the first track focusing on 'Micro, Small and Medium-sized Enterprises (MSMEs)' included preparation of legal standards on simplified business incorporation and registration; legal obstacles faced by MSMEs throughout their life cycle and crowd funding. The second track was broadly defined to comprehend any futuristic issues relating to 'international commercial arbitration'. The third track focused on 'E-commerce' prescribed issues like identity management, mobile payments, digital currencies, electronic Single

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Windows and cloud computing. The issues identified for discussions in the fourth track namely the 'cross-border insolvency' included jurisdiction, access and recognition in the cross border insolvency of enterprise groups and the recognition and enforcement of insolvency related judgements. The fifth and the final track on 'international contract law' identified the rise of international commercial courts; transfer of property; set-off; international distribution contracts and validity issues for potential discussion in the conference.

Among various proposals received in response, a select set of them were reviewed and accepted for presentation in the conference. The invited experts and the papers presented addressed a wide array of issues, contributing to a lively debate in the conference which was well attended by various international participants and delegates. Subsequently, a group of papers presented in the conference were collected and edited for inclusion in the present book. This introductory chapter identifies the core issues and arguments raised by the contributing authors and highlights the relevance of specific discussions to the theme of the book including the harmonisation agenda under the auspices of UNCITRAL.

II COMMERCIAL DISPUTE RESOLUTION

Part I of the book, focusing on 'commercial dispute resolution', includes ten different papers addressing a range of contemporary issues and methods of dispute resolution. The papers in this part primarily discuss commercial dispute resolution in an international context with a prospective outlook. Although most of the papers are related to arbitration issues, mediation, conciliation, as well as, arbitration in specialised topics like investor-state dispute settlement are also addressed. The status of arbitration as a preferred means of international commercial dispute resolution has been increasingly questioned due to the emerging trend of establishing specialised state courts exclusively for commercial or financial dispute resolution. The establishment of Dubai International Finance Centre (DIFC) Courts in 2014 and the Singapore International Commercial Court (SICC) in 2015 raises various issues of potential implications on different alternative dispute resolution (ADR) mechanism and the relevant legal regimes governing such mechanism. It is also important to take stock of these emerging developments in the light of the related UNCITRAL works on arbitration and international commercial conciliation. Akira Saito's paper examines this timely issue as he seeks to critically examine the relationship between international commercial arbitration and the emergence of the new commercial courts.

Akira Saito's paper titled "International Commercial Arbitration and International Commercial Courts: Towards a Competitive and Cooperative Relationship" ponders

on the motivation for Singapore seeking to establish a specialised commercial court, in spite of the prominence of its international arbitration center. Pre-emptive long term strategy and intention to keep ahead of other competing jurisdictions like Hong Kong are attributed as some of the major motives. The author accentuates the continued significance of international commercial arbitration by furnishing some relevant data and highlighting its relative strength and weaknesses viz a viz litigation. In the light of the circumstance, the author calls for the voluntary efforts of the community of arbitration institutions and arbitration lawyers to address the existing weaknesses. He predicts that such a need may inevitably arise in the light of the potential competition arising from the emergence of the specialised commercial courts. On the same vein, the author also suggests the need for re-evaluating the relevant international legal regimes governing arbitration, like the New York Convention 1958, in the light of the potential competition from international commercial courts.

The paper then addresses the issue of re-evaluation of the New York Convention by examining its background and achievements. In this context, the author interestingly chooses to examine the relevance of the 'choice of court agreements' and its specific limitations manifested in the Hague Convention on Choice of Court Agreements 2005 as well as in two specific jurisdictions namely Japan and the European Union. The next part of the paper delves into the competition arising from the commercial courts in Dubai and Singapore and finds it as a probable response to the distrust of arbitrators and arbitration lawyers. The third part of the paper ends with an exposition of some features of the international commercial courts that could rival international arbitration mechanism. The key features presented are related to jurisdiction of the courts, speed and efficiency in dispute resolution, joinder of litigation procedures of third parties, recognition of legal representation by foreign lawyers and confidentiality guarantees.

The paper takes stock of some recent trends aimed at seeking global recognition and enforcement of international commercial dispute resolution. In this regard, the paper first examines some key regional and international legal frameworks for recognition and enforcement of foreign judgments before analysing the applications of the New York Convention on recognition and enforcement of arbitration awards. With regard to the latter issue, the paper makes an interesting analysis of the application of the New York Convention to three specific dispute resolution mechanism namely, international mediation, international investment dispute resolution and judgements made by the DIFC Courts (by virtue of the conversion of its judgements into arbitration awards). The fourth part ends with a brief discussion on the trend of DIFC Courts concluding international memoranda with foreign

jurisdictions in order to enhance the trust and to improve the possibility of recognition and enforcement of its judgements abroad.

The paper concludes with a clear recognition that the establishment of international commercial courts as the beginning of new era in private international law and international civil procedural law, which in turn could trigger a full-scale restructuring process towards globalisation of dispute resolution systems. The paper argues that while these recent developments are intended to satisfy the demands of modern businesses, there is equally a strong requirement for the globalisation of legal systems. The paper closes with the caveat that the relevant stake holders cannot ignore these revolutionary trends in international commercial dispute resolution of which DIFC and SICC courts are said to be just the tip of an iceberg.

The paper of Fernando Simões examines the interesting issue of concurrent arbitration proceedings in the realm of investment disputes under the title "UNCITRAL's Work on Concurrent Proceedings in Investment Arbitration: Overcoming the 'Treaty/Contract Claims' Gap". The paper first examines the ongoing work on concurrent proceedings under the auspices of UNCITRAL, which has devoted significant attention on the matter in recent times. The paper highlights UNCITRAL's reference to the subject since the forty-sixth session of the Commission in 2013 and points to the fact that its mandate is limited to concurrent proceedings in investment arbitration and does not cover commercial arbitration. The paper acknowledges the difficulties recognised by UNCITRAL in defining what constitutes concurrent proceedings as there are the different legal basis for determining when multiple claims could be considered as concurrent.

The paper discusses two factors that cause concurrent proceedings in investment arbitration and discusses the frequent circumstances leading to concurrent proceedings as identified by the UNCITRAL Secretariat. The paper argues that concurrent proceedings are undesirable and discusses four different reasons in support of the argument. While acknowledging that various scenarios may give rise to concurrent proceedings, the paper argues that the most common instance would arise in the context when investment contract claims co-exist with treaty based claims. The existence of investment contract, the paper argues, creates its own set of rights and duties giving rise to the possibility of litigation before domestic courts or initiation of international arbitration and the resulting propensity for jurisdiction could result in concurrent proceedings. The paper highlights UNCITRAL's plan to create model treaty provisions that could be inserted in investment treaties to address the concern on concurrent proceedings and examines the advantages and drawbacks of such a solution.

The second part of the paper examines the delicate distinction between treaty and contractual claims in investment disputes. The second part argues that the international arbitration tribunals in determining their jurisdiction are not bound by the traditional rules on *lis pendens* and *res judicata* and discusses some prominent investment arbitration awards that are pertinent to the issue of the relationship between treaty-based and contract-based claims. Part three of the paper proposes some possible solutions to the concerns on concurrent investment proceedings with reference to measures discussed by the UNCITRAL Secretariat as well as the investment provisions in the North American Free Trade Agreement (NAFTA) relating to the waiver of domestic proceedings.

The third part of the paper discusses in detail the waiver conditions to be satisfied in order to make submission of a claim to arbitration as enumerated in Article 1221 of NAFTA. This part also presents the relevant exceptions to the waiver provisions and distinguishes them with the effects of a typical fork in road provisions in investment treaties. But the paper points to the existence of certain factors that will probably discourage a foreign investor from making use of the domestic options arising out of the exceptions to the waiver provisions. The paper raises some pertinent questions that may arise in the implementation of article 1221 of NAFTA. This includes questions relating to the domestic law issues that are intertwined with treaty claims, the meaning and scope of 'measures' in the sense of article 1121 and the limitation of the jurisdiction of arbitral tribunals imposed by the provisions of NAFTA.

The paper concludes with some concrete suggestions for the development of model waiver clauses. Although the paper raises some questions and identifies some limitations in the NAFTA waiver provisions, it calls upon UNCITRAL to build upon the NAFTA experience. Towards the end, the paper provides some specific suggestion for improvements in waiver provisions like extending the jurisdiction of arbitral tribunals to investment contracts and developing related clauses in conjunction with investment arbitration institutions.

The paper of Anna Koo on "Enforcing International Mediated Settlement Agreements" explores the emerging developments and mechanism to improve the effectiveness of mediated outcome in commercial dispute resolution. The paper highlights some of the existing challenges facing mediated settlement agreements including limitations of its binding nature, dependence on the good will of the parties, lack of a bar in renegotiating the settlement agreement already reached and the indispensable need for further interpretations even for clearly drafted settlement agreements. The paper, at the very outset, expresses the concern that uncertainties over the effect of mediated settlement agreements could create impediments in

utilising the mediation as means of resolving civil and commercial disputes at domestic, regional and international levels.

The paper cites the developments in the European Union as the first and the only example achieving certainty on the enforcement of mediated settlement agreements, especially in the cross border context. The paper shows the effective harmonisation achieved in this regard among the member states of the European Union which mandates cross-border enforcement of written mediated settlement agreements from other member states. However, the paper points out that such an obligation does not exist with regard to similar agreements originating from non-member states. The paper then highlights the renewed interest in the subject matter within the agenda of the UNCITRAL citing the United States (US) proposal at the forty-seventh session of the Commission in July 2014 to develop a multilateral convention on conciliation modelled after the New York Convention 1958. The subsequent mandate given to the UNCITRAL Working Group II at the forty-eighth session of the Commission in 2015 to identify relevant issues on the topic of 'enforcement of settlement agreements resulting from international commercial conciliation' and to develop possible solutions is also highlighted. The paper updates the work of the Working Group II as of February 2016 in identifying six distinct issues, and the possible convention and the model provisions or guidance texts on the subject matter.

The paper seeks to explore the basis for favouring mediated settlement agreements over the ordinary contract. The paper then assesses the justification for establishing an international legal framework for enforcement of mediated settlement agreements and the views on the Working Group II on critical issues to be addressed in the proposed instrument. To establish the basis for differential treatment to mediated settlement agreements, the paper first argues that although the mediated settlement agreements are by their very nature private contracts, they are different from ordinary contracts citing three distinct grounds from a micro-level perspective. The paper also put forward some relevant arguments in this regard from a macro perspective. In exploring the justifications for the need to create an international framework for the enforcement of mediated settlement agreements, the paper first demonstrates the diversity of current domestic mechanisms and the challenges faced in seeking harmonisation on the matter in the UNCITRAL.

The paper, while showing the continuity of the challenges, raises some pertinent questions in this context. Is it time to introduce an international framework for enforcement? Are there any change of circumstances and other compelling reasons to justify intervention where domestic regimes already have some existing means for enforcement although lacking harmonisation among themselves? The paper also furnishes the evidence of some policy factors that could cast doubt on the desirability

of developing an international enforcement mechanism. In the light of the above circumstances and questions, the paper moves on to examine the possible way forward in addressing specific issues and challenges in developing the international legal framework. The paper examines six specific issues arising in the context namely, the subject matter of enforcement; pre-conditions for enforceability; procedural aspects of enforcement; recognition of settlement agreements; defences to enforcement and the possible form the international instrument could take. The paper concludes with a discussion on how the resulting international instrument could perform better than existing domestic regimes in terms of form and content. The paper ends with a reflection on three essential characteristics, which the international legal framework developed by UNCITRAL should incorporate in order to make it more effective and acceptable by states.

Sai Ramani Garimella in the paper titled "Revisiting Arbitration's Confidentiality Feature" examines the place of the duty of confidentiality in international commercial arbitration. At the very outset, the paper emphasises that privacy is a defining feature of arbitration and confidentiality is an implicit element arising from an arbitration agreement. In distinguishing confidentiality from privacy, the paper points out to the argument that confidentiality is impossible without privacy and the latter is meaningless without confidentiality. Firstly, the paper seeks to introduce the discourse on confidentiality in international arbitration, evaluate the arguments and counter-arguments for a duty to confidentiality and discuss the scope of confidentiality clauses. The next section examines some existing legislative measures governing confidentiality and institutional rules pertaining to the nature and scope of the duty to confidentiality. The paper then examines the jurisprudence on confidentiality clause from certain jurisdictions and attempts to prescribe a threshold for confidentiality in international arbitration with reference to the relevant discussions of the UNCITRAL Working Group II.

The paper highlights the difficulty in defining the term 'confidentiality' and examines the arguments for and against the duty of confidentiality with reference to the opinion expressed in judicial decision and the scholarly opinion. In defining the scope of application of the duty, the paper examines whether the duty is applicable to substantive as well as procedural elements and whether the duty obliges that the fact of arbitration should remain confidential. The paper highlights the difficulties in ensuring the confidentiality of the fact of arbitration and argues the absence of a blanket obligation in this regard. Then the paper specifically discusses the scope of the duty with regard to the information and documents related to the arbitration, witness testimonies, deliberations of the tribunal as well as trade secrets and proprietary information revealed during arbitral proceedings.

The next section of the paper examines the rules governing the confidentiality in two different categories namely legislation and institutional rules. The paper first provides the example of New Zealand as the jurisdiction that has prominently codified the duty of confidentiality and discusses the related provisions in The New Zealand Arbitration Act, 1996 as well as the comprehensive confidentiality regime introduced in the amended arbitration law in 2007. The paper then discusses the legislative recognition of confidentiality in Hong Kong through the Arbitration (Amendment) Ordinance (No.2) (Cap.341) of 1989 and the Hong Kong Arbitration Ordinance 2011 (Cap.609) and briefly distinguishes it from the legislative developments in New Zealand. The paper then makes a brief reference to the legislative recognition in Singapore concluding its close similarity with the parallel provisions in Hong Kong. While referring to the confidentiality provisions in Dubai through the Dubai International Financial Centre Arbitration Law 2008, the paper also points out to the legislative recognition of confidentiality in other jurisdictions like France and Spain.

Before examining the institutional rules on confidentiality, the paper identifies four distinct attributes of confidentiality namely confidentiality of the existence of arbitration, confidentiality of the documents produced, confidentiality of the evidence of third parties and confidentiality of the award. It specifically examines the relevant provisions of five different arbitration institutions namely the Rules of London Court of International Arbitration (LCIA) 2014, the International Chamber of Commerce (ICC) Arbitration Rules 2012 and the Internal Rules of the ICC International Court of Arbitration, the World Intellectual Property Organization (WIPO) Arbitration Rules 2014, the Singapore International Arbitration Center (SIAC) Arbitration Rules 2013 and the Hong Kong International Arbitration Center (HKIAC) Rules 2013. Towards the end, the paper provides a comparative table for mapping the scope and extent of confidentiality rules of the above five institutional rules, as well as, the UNCITRAL Arbitration Rules. The table utilises six attributes of confidentiality, which includes the four mentioned earlier, as well as, the general confidentiality and confidentiality about the arbitrators. The table reveals that the WIPO Arbitration Rules 2014 fulfils most of the attributes tested. This is followed by an interesting examination of judicial opinion on the duty of confidentiality in different jurisdictions.

Judicial decisions, which held that there was an absence of an implied duty of confidentiality and the judicial decisions that upheld the existence of an implied duty are discussed separately. Then the paper examines judicial opinion recognizing specific exceptions to the implied duty of confidentiality in situations that involved enforcement actions, public interest, matters before the court, consent of the parties,

compulsion of law, leave of court, disclosure for protecting legitimate interests of an arbitrating party and the existence of an obligation to disclosure. The next section of the paper briefly presents the arguments showing the advantages of recognising some exceptions to the duty of confidentiality and examines the references to the duty of confidentiality in the works of the UNCITRAL.

In conclusion, the paper explores the way forward for the duty of confidentiality and argues that a "statutory delineation of the implied duty to confidentiality, rather than varied judicial opinion could ensure a clear delimitation of the confidentiality feature of arbitration". In the absence of any statutory provisions in the matter, the paper recommends a confidentiality agreement that could recognise a specific set of exceptions to an implied duty. Furthermore, the concluding section of the paper examines the elements of a template for a model confidentiality rule and the features of a model confidentiality clause, and discusses their characteristics.

Jayems Dhingra in his paper titled "Can Justice Be Served without Transparency in International Commercial Arbitration?" examines the need for transparency in the administration of international commercial arbitrations. The paper starts with an argument that the feature of international commercial arbitration preserving business-sensitive information and identities of the parties was not designed to imply secrecy in arbitral procedure or its administration. At the same time, the paper calls for the need to elaborate the importance of transparency in the corporate governance of international commercial arbitral institutions. Referring to the successful work of UNCITRAL on Transparency in Treaty-based Investor-State Arbitrations, the paper proposes the development of 'Rules for Corporate Governance of International Arbitral Institutions' under the auspices of UNCITRAL.

The paper claims that transparent and fair governance of arbitral institutions will minimise avenues for pursuing trials in appeal courts after the arbitration. It argues that the balance between confidentiality and transparency can only be achieved through the development of a related uniform framework and UNCITRAL will be the most appropriate neutral body for such a task. The paper then discusses the scope and meaning of some key terms like 'transparency', 'privacy' and 'confidential' and examines related controversies. The paper presents certain metaphors for the term transparency and examines how they could manifest in specific circumstances like judicial and corporate governance contexts. As arbitral institutions are largely independent organisations and self-regulated, the paper argues that there is a serious need for a closer look at the governance structure for such institutions to maintain the confidence in arbitration. The paper seeks to inspire a dialogue and explore the need for a code or guidelines or rules for the responsible, accountable and transparent governance of arbitral institutions. Next, the paper discusses the OECD corporate

governance models to examine whether they can be a good reference for the governance of arbitral institutions. It elaborates certain broad principles and practices in corporate governance and tests its relevance in the context of arbitral institutions.

The paper then discusses the issue of transparency in the light of some major characteristics of international commercial arbitration. Following this discussion, the paper presents various stages of the due process in international commercial arbitration and identifies key challenges arising in those stages, which could be managed by adopting the principles of corporate governance. The challenges are identified specifically at the stages of notice and commencement of arbitration and appointment of the tribunal. In addressing the issue of governance of arbitral institutions, the paper elaborates the scope of their responsibilities in the future and emphasises transparency as a necessity. After briefly examining the role of UNCITRAL in this context, the paper concludes with the recommendation that UNCITRAL should consider developing the model rules prescribing transparency and governance of international arbitral institutions.

The paper of James Claxton titled "Tailoring International Arbitration for Efficiency" examines rules, procedures, guidelines, and proposals to promote efficiency in international arbitration. At the very outset, the paper highlights the potential tensions that may exist between the need to achieve efficiency, ensuring due process and obtaining a correct result. It argues that the flexibility of international arbitration is capable of achieving a viable balance between them. Emphasising the need to reduce the cost and time in arbitration proceedings, the paper identifies three broad prescriptions for ensuring efficient proceedings. While the first prescription calls for the parties of an arbitration agreement to play a role, the other two pertains to the procedures governing the arbitration, for which the primary responsibility is conferred upon the arbitrators.

The paper briefly examines the relevance of certain non-arbitration measures that could improve efficiency namely adoption of policies by business enterprises that anticipate disputes before they occur and the role of other dispute resolution mechanisms like mediation and expert determination. The paper then calls upon the parties to a contract to negotiate the details of the arbitral procedure and incorporate it in the arbitration agreement at a time before a dispute arises as it would be difficult to focus on the issue of efficiency once a dispute erupts. The paper also highlights the advantage of seeking a sole arbitrator to decide a dispute as it has the potential to improve efficiency. The paper prescribes four distinct limits, which can improve efficiency namely limiting the duration of the proceedings, limiting the number of written memorials and the total pages of submissions, limiting the number of document production and limiting the number of hearings. Provisions for expedited

procedural rules by arbitration institutions and the parties tailoring procedures distinctly for different values of the amount in dispute are some of the other considerations discussed for improving efficiency. The relevance of the place of arbitration, case administration, applicable laws as well as a choice of a single language of arbitration in improving the efficiency are also highlighted.

The paper then shifts its focus on improving efficiency once the arbitration proceedings begin. It identifies many specific opportunities for achieving efficiency namely during the commencement of an arbitration, while exercising the authority of arbitrators, in avoiding the challenges to the appointment of arbitrators, in utilizing the secretariat of arbitration institutions, in customization of procedures, during organizational meetings among the parties and arbitrators, in revising of procedures, during hearings and post hearing stages, and finally during the deliberations of the arbitrators. The paper then examines the role of various aspects of institutional support in achieving efficiency as well as the role of arbitral associations and the states. In conclusion, the paper emphasises the significance of the need for cooperation among different stakeholders to achieve efficiency.

The paper titled "Document Production and E-Discovery in International Arbitration" by Raymond Ho seeks to identify the matters to be taken into consideration to ensure appropriate document production procedure in arbitration proceedings and prescribes how an arbitral tribunal should manage the document production procedure. The paper undertakes a review of the document production or discovery procedures in the common law tradition in Hong Kong and the civil law tradition of China as well as the relevant 'harmonisation' measures achieved in this regard by the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration 2010.

Referring to the freedom of the parties to international arbitration to agree on the procedure, including the document production procedure, the paper points out that the freedom is subjected to the mandatory provisions of the *lex arbitri* and public policy of the place of arbitration. In this regard, the paper shows the difference in common law and the civil law approaches to document production or discovery and the harmonisation of such differences achieved by the IBA Rules 2010. The paper highlights that the modern international arbitral tribunals accord greater weight to the contents of documents in comparison with oral testimony. The paper argues that with the emerging practice of e-discovery adopted by courts, the underlying principles of different procedural approaches to documentary evidence should still be a relevant consideration for the parties, their counsel and arbitral tribunal.

The next three sections of the paper examines the document production or discovery procedures in Hong Kong and the document production procedures in China and the IBA Rules respectively before making relevant recommendations. With regard to Hong Kong, the paper first discusses the Arbitration Ordinance of 2011 and demonstrates its adoption of specific provisions of the UNCITRAL Model Law on Arbitration. On a similar vein, the paper discusses the revised HKIAC Administered Arbitration Rules 2013 and its adoption of relevant provisions of the UNCITRAL Arbitration Rules. The paper highlights the limited public information available with regard to the use of IBA Rules in Hong Kong. It then shifts its discussion to the process of discovery of documents in civil litigation in Hong Kong. The paper presents four classes of documents relevant for discovery and shows the possibility that the court may limit document discovery in managing a case for the objectives of cost effectiveness, procedural expediency, proportionality, procedural economy, and fairness between the parties. It also discusses the legal principles followed by the Hong Kong courts in making an order for discovery of papers and electronic documents and introduces the 2014 Practice Direction on the Pilot Scheme for Discovery and Provision of Electronically Stored Documents issued by the Hong Kong judiciary.

With regard to the document production procedures in China, after introducing the general provisions in the Arbitration Law of China, the paper discusses the special provisions applicable to an arbitration involving foreign elements in detail. The paper mainly introduces the CIETAC Arbitration Rules 2015 and the CIETAC Guidelines on Evidence 2015, before examining the procedure for the Request for the Production of Documents (RFP) as recognised in Chinese law. The paper highlights that a party may request the arbitration tribunal to order the other party to produce a particular document or a specific category of documents under the CIETAC Guidelines 2015 and presents the grounds in which a tribunal may refuse to grant an RFP. The paper also draws the attention to the possibility that the tribunal may on its own initiative require a party to produce any evidence that the tribunal considers necessary. Moreover, at the request of a party and where it is necessary and feasible, the tribunal may itself collect evidence related to the dispute. The paper discusses the rules governing preservation and admissibility of evidence as well as the principles applied by the tribunals to choose between conflicting evidence.

Finally, it introduces the relevant provisions of the Civil Procedure Law of the PRC and the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC 2015. The next part of the paper discusses the IBA Rules including those governing RFP and introduces its major approach and principles. In examining the terms of document production procedure under the IBA

Rules, the paper presents the applicable standards for document production developed by the International Centre for Settlement of Investment Disputes (ICSID) Tribunal based on the guidance from the IBA Rules. Towards the end, the paper briefly introduces the CIArb Protocol for E-Disclosure in Arbitration 2008 issued by the Chartered Institute of Arbitrators as well as the scope of the IBA Rules regarding the production of electronic documents. The paper concludes with specific recommendations for the consideration of the parties and their counsel in formulating a strategy for document production procedure in international arbitration proceedings. Moreover, the paper emphasises the need for the arbitral tribunals to understand the importance to procedural fairness, equality in the treatment of the parties, procedural efficiency, cost-effectiveness and justice, and the utility of IBA Rules in providing guidance to the exercise of arbitral discretion.

Vivek Kapoor in the paper titled "Dealing in the Virtual – International Arbitration's New Turf" examines the role of international arbitration in effectively resolving commercial disputes arising in the digital domain. Noting the shift to e-commerce and the expansion in Business to Business (B2B) and Business to Consumer (B2C) sectors, the paper anticipates various challenges for claimants in related disputes. It argues that arbitration will be the only mechanism that would be able to overcome those challenges. At the very outset, the paper argues that the specific characteristics of arbitration will enable effective redressal of relevant disputes involving micro or complex transactions in both representative and aggregate proceedings. The paper calls for a creative use of information technology, which it believes will be able to address various challenges facing arbitration with the support of the expanding body of soft law and jurisprudence on the subject matter.

The paper first presents how the use of the Internet has resulted in new business models, which have transformed the ways of doing business and how this has impacted the market place and national boundaries. The paper notes the positive response to e-commerce by emerging trade regimes by discussing the digital objectives of the Trans-Pacific Partnership (TPP). The paper furnishes relevant data and discusses the growing size of the e-commerce markets, in particular, the B2C markets in a variety of industries. Noting the dispute prone nature of cross-border electronic transactions, the paper urges the need for effective resolution of virtual disputes in order to enhance the confidence in the electronic market place. The paper matches the fundamental characteristics of e-commerce with those of international arbitration to demonstrate that arbitration is a well-suited dispute resolution method to effectively resolve e-commerce disputes. Then the paper predicts some future course for the e-commerce dispute resolution and examines many evolving trends

namely the increasing amount of consumer protection law applications to online transactions, the possibility for businesses to sue governments, class action arbitration, collective arbitration, mass arbitration, representative proceedings and aggregate proceedings.

The next part of the paper examines the jurisdictional challenges facing e-commerce transactions and demonstrates how arbitration as a method of dispute resolution could overcome those challenges. The paper presents the three types of jurisdictions, namely the prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction and discusses the example of EU regulation addressing the related jurisdictional issues. Then the paper demonstrates the disadvantages of using conventional fora especially in resolving jurisdictional, applicable law and enforcement challenges and discusses how using various distinct features of international arbitration could enhance efficiency. The paper highlights the possibility of the parties to an arbitration choosing various elements including the forum, rules of procedures, arbitrators and governing law. The paper also shows that the effect of international arbitration as a means to harmonise procedures between different legal systems could increase the likely enforceability of the final award.

In order to show the arbitration advantage, the next part of the paper specifically discusses a real example of international arbitration involving IBM and Fujitsu. The paper argues that the IBM Fujitsu arbitration showcases the flexibility, adaptability and malleability of international arbitration processes and procedures making it more suitable for emerging fields of business. The paper then discusses the delocalization phenomena arising from various characteristics of the international arbitration process and the related challenges facing the same. Citing the growing acceptance of UNCITRAL Model Law on Arbitration, the paper argues how such a phenomena will cater to the needs of the effective resolution of electronic and digital disputes. Similarly, the paper also highlights the enforcement advantage of international arbitration awards arising out of the prominence of the New York Convention 1958. However, the paper emphasises the need to develop new methods of enforcement related to digital commerce, which need not go through a court or require physical assets to enforce. It presents three distinct methods of enforcement proposing to follow the money, target the address and attach the reputation.

The next section of the paper examines the response of the legal domain to the evolution of e-commerce. While noting a slow legal response to cater to the development of e-commerce in many jurisdictions, the paper underscores the importance of internationalising the laws. In this regard, the paper argues that the harmonisation of the law related to the Internet issues is the best and the only way to achieve the desired results. Moreover, the paper adds that international arbitration

can act as the medium for the evolution and growth of an autonomous law of virtual commerce. Finally, in the light of the fact that the virtual world will be a new turf for international arbitration, the paper concludes with a recommendation for the establishment of a global institution to facilitate arbitration and other forms of dispute resolution for e-commerce related disputes. To supplement the development of the institution, the paper closes with a recommendation to further develop processes and procedures to effectively cater to the needs of resolution of e-commerce disputes.

Shahla Ali's paper on "Harmonizing UNCITRAL Conciliation and State Mediation Law: Developments in Civil Mediation Reform" seeks to assess the impact of the UNCITRAL Model Law on International Commercial Conciliation 2002 on domestic mediation laws and how it influences judicial efficiency, confidence in courts and perceptions of justice. The paper first examines the definition of the term conciliation under the Model Law and distinguishes it from negotiation and arbitration. In discussing the purpose of the Model Law, its utility in addressing the issue of admissibility of certain evidence in subsequent judicial or arbitral proceedings is highlighted. Moreover, the role of the Model Law in resolving the procedural differences in conciliation to enable the parties and conciliators to carry out the conciliatory process freely is also recognised.

The objective of the Model Law in encouraging the use of conciliation and providing greater predictability and certainty for its use is argued as an important element for fostering economy and efficiency in international trade. The paper shows the significance of the Model Law in harmonising national legislation governing commercial conciliation. In highlighting the scope of the Model Law, the paper points out that in spite of its reference to international and commercial cases, the State enacting the Model Law could consider extending it to domestic and some non-commercial cases as well. With regard to the structure of the Model Law, the paper argues that the provisions relating to the procedural aspects of the conciliation are designed in the nature of default provisions and to serve as a supplement to dispute resolution processes agreed by parties in their dispute resolution agreements. The structure of the Model law is also said to be designed for avoiding situations of information from conciliation proceedings spilling over into arbitral or court proceedings. Its role in avoiding uncertainty resulting from the absence of statutory provisions governing post-conciliation matters like subsequent arbitral or judicial proceedings and enforcement is also highlighted.

The paper then presents the details of the Model Law before proceeding to examine its impact on the domestic mediation legislation in Hong Kong, United Kingdom (UK) and China. The paper analyses the Hong Kong Mediation Ordinance

2012 and discusses its legislative history and the relevant reference to the UNCITRAL Model Law made by the Hong Kong working group on mediation. The scope of the Ordinance covering not only private and contractual mediation but also mediation conducted under the Rules of Court is highlighted. The paper finds that the provisions governing the role of the mediator under the Hong Kong Ordinance are similar albeit not identical to the Model Law. The paper examines the enforcement mechanism of settlement agreements reached during the mediation under the Rules of the High Court of Hong Kong. The paper finds the differences between the Ordinance and the Model Law and points out the silence of the Ordinance on several issues that are raised by the Model Law.

The paper concludes that the Model Law plays an important role in the development of the domestic mediation legislation in Hong Kong. In discussing the domestic regulatory framework of UK, the paper notes the absence of a single specific Act of the Parliament governing mediation. Therefore, the paper observes the application of different regimes in the UK for domestic and cross border mediation. In recognising the application of the European Union Cross-Border Mediation Regulations 2011 governing cross border mediation in the UK, the paper points out the reference to some of the provisions UNCITRAL Model Law made by the European Commission in drafting the Regulations. The paper ends the discussion on the UK with an examination of a domestic judicial decision to show how the different parts of its dictum were in consonance or against the provisions of the Model Law.

In discussing the legislative development in China, the paper observes although China has not yet informed the UNCTIRAL Secretariat about the adoption of specific mediation legislation based on the Model Law, a range of domestic statutory provisions in China could be relevant to the provisions of the Model Law. The paper discusses different types of mediation recognised in China including the judicial mediation under the Chinese Civil Procedure Law 2013, Community Mediation under the Mediation Law 2011, Administrative Mediation under the Administrative Litigation Law 2014 and the Labour Mediation under the Labour Dispute Mediation and Arbitration Law 2008. Although the paper finds that the core principles of mediation in China are the same as the Model Law, it points out to some differences namely the provisions governing the parties power to appoint mediators and the nondisclosure and scope of mediation communications.

In conclusion, the paper argues that the procedural flexibility of the Model Law signifies the diversity of domestic mediation regimes. Moreover, it concludes that the institutional rules in China and Hong Kong have a closer resemblance to

UNCITRAL International Commercial Conciliation Rules 1980 than the UNCITRAL Model Law on International Commercial Conciliation.

III INTERNATIONAL CONTRACT LAW

Part II of the book is focused on 'international contract law' and the four papers included in this part addresses a diverse set of issues on the broader topics of harmonisation of international contract law, harmonisation of performance standards, international commercial contracts in Asia and the principle of freedom of contract in the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG). The paper of Bruno Zeller on "Harmonisation of International Contract Law – Dream or Reality?" explores the question of possible expansion of the CISG and certain regional efforts of harmonisation of contract law. Identifying the achievements of UNCITRAL with its process of legal globalisation, the paper at the very outset points out that the total harmonisation of contract laws has remained elusive and a distant dream. While attributing the cause to political reasons, the author expresses doubts about achieving consensus among sovereign legal systems, which is required to achieve positive results. In this regard, the paper argues that it is important to understand what is politically possible and what instrument covers the need of the user. The paper cites the CISG as the hard law and the International Institute for the Unification of Private Law (UNIDROIT) Principles of Contract Law as soft law as some of the successful examples and furnishes relevant statistics to show that majority of the world trade in goods being potentially governed by the CISG.

The paper argues that the gradual removal of reservations by contracting states has contributed to an internal harmonisation of the CISG and the CISG has positively contributed to the reduction of barriers to trade. At the same time, two related shortcomings are pointed out namely the frequent exclusion of the CISG and the lack of accession of the UK to the CISG, which is attributed to the failure in understanding the benefits of the CISG, especially its potential to reduce transaction costs. The paper seeks to examine the issue of expanding the CISG to a contract law and expresses scepticism regarding the potential of some regional contract law harmonisation initiatives to provide any improvement to the current form of the CISG. With regard to the question of possible adoption of the CISG by the UK, the paper argues that any such accession in the future will make the CISG operate as a part of English law rather than as an alternative to it. The paper takes the position that the CISG must not encroach upon the issues like transfer of property and validity of a contract and should leave it for the determination of the domestic law of the member states.

The paper points out to the harmonisation effect in some specific areas of law in certain jurisdictions (both in civil and common law jurisdictions) that has resulted from their adoption of each other's law reforms. The paper expresses optimism that the new generation of legal professionals, aware of the advantages of the CISG, will promote the usefulness and reduce any automatic exclusion of the CISG. The paper also highlights some important points that need to be understood while seeking to either ratify the CISG or include the same as a governing law in a contract.

The second part of the paper addresses the question of expansion of the CISG in the light of the Swiss proposal at the UNCITRAL during the 45th session of the Commission and demonstrates the weaknesses of the proposal in the light of the work of the UNIDROIT and related regional initiatives in Europe. The second part of the paper also examines the question whether there is any advantage in developing a regional contract law, especially when the CISG is widely adopted by individual states in the region, by referring to specific examples like the region covered by the Organization for the Harmonization of African Business Law (OHADA). The paper explores some of the prospects of how the CISG could be developed in the light of any regional efforts to harmonise contract law. In briefly examining the scenario of possible accession of UK to the CISG, the third part of the paper argues that the CISG would represent a discrete part of English private law.

The fourth part of the paper contends that the gaps in the CISG should be left for the domestic law to fill. It hopes that related domestic reforms either through the judiciary or in the form of statutory changes would prompt other states to follow similar reforms, which in turn may help achieve the necessary harmonisation. The final part of the paper ponders the role of UNCITRAL and interestingly argues that its efforts should be on a promotional basis like hosting of conferences such as the UNCITRAL Emergence Conference in Macao, which will enable the academics to research into the possibility of creating uniformity in areas not covered by the CISG albeit within the mandate of uniformity within the CISG. Moreover, the paper concludes with the suggestion that UNCITRAL could encourage governments and legal professional bodies to invite academics to offer professional development training relating to the CISG to promote its wider application.

In the paper titled "Harmonising Performance Standards under the Uniform Commercial Code and the UN Convention on the International Sale of Goods: A Role for UNCITRAL?" Joseph Dellapenna examines the differences between the US domestic standards relating to warranty as manifested in the Uniform Commercial Code of 1962 (UCC) and the performance standards under the CISG. The paper tracing the origins of the terms 'guaranty' or 'warranty' and its persistence in the modern day commercial law, explores the possible role of UNCITRAL in

reconciling the relevant rules in the US UCC and the CISG. Discussing the fall in international trade during the early centuries and the consequential diminution of the Roman Law, the paper introduces the development of *lex mercatoria* and traces the origin of the term '*guaranti'* to medieval Italians. The paper highlights the influence of *lex mercatoria* and the standard of *caveat emptor* on the common law and its general recognition that the buyer will bear the risk of deficient products unless the seller has provided an express 'warranty'. Then the paper introduces the subsequent development of 'implied warranties' by the American courts.

The paper shows that although there is the lack of complete uniformity of the US state laws relating to implied warranties, some general patterns have emerged that apply to most cases. It shows the contributions made by the uniform laws in this regard by first discussing the relevant provisions of the Uniform Sales Act of 1906 and the implied warranties of fitness it created. The paper highlights the subsequent development of seller's power to disclaim implied warranties and the relevant initiatives made by the National Commissioners of Uniform State Laws to address them. The later efforts between the Commissioners and the American Law Institute (ALI) resulting in the UCC and its relevant provisions on warranty in an entire chapter are highlighted by the paper. The range of issues presented and discussed in the paper includes the warranty of title, the definition of express warranties, the implied warranty of merchantability, the implied warranty of fitness for a particular purpose, the exclusion or modification of warranties, the accumulation of warranties, and the extension of warranties to third-party beneficiaries.

The next part the paper shifts its focus on the performance standards recognised in the CISG and points out the absence of any reference to warranty in the CISG. However, the paper highlights the high degree of similarity between the CISG performance standards and the warranty recognised under the American law. The paper refutes the claim by certain American Judges, lawyers and scholars that the two sets of provisions are identical and the practice of referring to the performance standards in the CISG as warranties. The paper then goes on to explore the characteristics of performance standards under the CISG and then systematically examines the similarities and differences between the CISG standards and the warranties under the US UCC in detail.

The final part of the paper, while arguing the need to address the confusion about the similarities between the two sets of provisions, calls for a major continuing education effort for current judges, lawyers, and scholars as well as making available of accurate teaching materials for use in the US law and business schools. It concludes that UNCITRAL could help to clarify the confusion primarily through promoting educational activities in the legal and business communities. The author

is of the conviction that continuing education will be more effective than other efforts to address the concern.

The paper on Lemuel Lopez with the title "The Curious Case of International Commercial Contracts in Asia" argues that international commercial contracts give rise to controversies in Asia and the ensuing challenges are further exacerbated by the regional diversity and complexity. The paper seeks to examine the peculiar risks and controversies related to international commercial contracts in Asia. The paper discusses the characteristics of doing business in Asia and the nature of international commercial contracts concluded in the region. The controversies associated with international commercial contracts in Asia are examined covering various stages from its conclusion to enforcement as well as those arising due to the language and sociocultural differences. Finally, how the risks identified in the paper are addressed by choice of forum clauses is examined. In order to examine the above issues, the paper first presents various factors and developments contributing to the claim that 21st century is the Asian Century. It highlights the role played by emerging economies in Asia such as China and eight others, who are ranked among world's twenty largest economies in 2015. It also highlights Asian leadership in international trade and the continuing growth in intra-Asian trade.

The paper points out to the changing nature of international trade in Asia including the changes brought about by atomization of the value chain, greater product customisation, and organisational innovation. Moreover, the large volumes of global investments attracted by Asia and the projections of the growth of private equity investments in Asia are shown to have strengthened the global position of Asia. Similarly, the increase in outbound foreign direct investments from certain developing countries in Asia such as China and India and the ranking of some Asian countries within top twenty investors in the world are provided as further evidence to support the claim of growing Asian dominance. Interestingly, the paper argues that the role played by multilateral, regional and bilateral trade and investment agreements including World Trade Organization (WTO) Agreements in shaping the regulatory and policy environment in Asian countries as one of the important factors for the prominence of the Asian markets during the current century.

The next part of the paper investigates the parallel developments in international commercial contracts in the region. It argues that the contracts drafted in the region reflect the circumstances and the developments in trade and investments in Asia and enlists various types of contracts and preliminary agreements widely used in the region. The paper also claims that there has been innovation in contract subsequent to the Asian financial crisis including those related to the establishment of wholly foreign-owned enterprises, franchising, Build-Operate-Transfer, international

management, counter-trade, research and development (R&D) joint ventures and exclusive technology licensing. However, the paper argues that the contracts are generally written on the basis of standardised models, which are mainly drafted in English and employ a common law style of drafting. After briefly discussing the characteristics of the common law models and its comparison with the civil law tradition contracts, the paper argues that the common-law style international contracts may cause challenges in interpretation, performance and judicial enforcement in Asian countries that have different legal systems.

Apart from the common law style of contracts, the paper argues that international commercial contracts in Asia face a range of other challenges arising from the Asian diversity and complexity. In this context, the paper discusses two risks associated with multi-state transactions in Asia namely the 'transactions risk' and 'litigation risks'. With regard to the transaction risks, the paper mainly identifies and examines challenges that could arise out of negotiations and the documentation stage of a contract, adoption of standard international contract, cultural differences and language limitations, difference in perception as to the role of the contracts and parties' attitude, and negotiation of contracts based on imperfect information. The paper further discusses some indirect effects that could be potentially caused by transaction risks, namely the adverse implications on providing legal opinions without qualification and rating of related transactions by the rating agencies. The paper also presents some related non-legal concerns that may arise in Asia and discusses the underlying causes of the direct effect of transaction risks including the expected effect of a contract not materialising.

Ultimately, the paper argues that the identified risks could be managed better through the use of choice of forum clauses and discusses them in detail. In elaborating the function and purpose of choice of forum clauses, the paper emphasises their importance from the perspective of three different interests namely the interest of the parties to the contract, the forum state and the international community. The paper highlights the major interest of the parties to the contract is to reduce risks, gain efficiency and achieve certainty and predictability. The interest of the parties to the contract is elaborately discussed, which includes a systematic analysis of the legal aspects and tactical issues arising from the choice of forum clauses in terms of both substantive and procedural matters. While the interests of the state are mainly identified as attracting investments and trade, advancement of international commerce and trade through enhanced judicial cooperation and certainty in terms of jurisdictional outcomes are argued as the primary motivations for the international community. The paper briefly discusses the interest of the state and international community before concluding that the cross-border transactions

carry higher risk in the Asian context and the use of choice of forum clauses can reduce the associated risks by providing greater certainty and predictability. The paper concludes that advantages of the choice of forum clauses in managing transaction risks provide a strong incentive for Asian countries to recognise and implement these clauses.

Jiang Zuoli in his paper "The Principle of Freedom of Contract of CISG Needs to be restricted for the Interests of the MSMEs: A Perspective of Developing Countries" argues that the protection of the interest of the MSMEs in developing countries warrants the restriction of the principle of freedom of contract in the CISG. In the light of the globalisation, the paper questions the assumptions upon which the principle of freedom of contract was established. It argues that the subjects of the market cannot be of equal bargaining capacity and freedom of contract could cause a wider gap between the enterprises in the developed and developing countries. The paper attempts to analyse the concerns and seeks to justify its proposal for restricting the freedom of contract.

The paper first traces the historical origin of the principle and examines its status in Roman law and subsequently its recognition in Europe. It highlights two essential aspects of the freedom, namely mutual consensus of the parties as the basis of the formation of contract and protection of such formation from legislative interference and other forces. The paper also presents five distinct meanings to the freedom of contract, which comprehends the right to conclude contracts, choosing the other party to a contract, determining contents of contracts, choosing the forms of a contract and freedom to amend contracts. The paper then discusses the freedom in the context of substantive justice and calls for specific restrictions under the globalised world. The paper discusses the basis of recognition of the freedom under the civil codes of the civil law legal systems in the 19th century. It argues that the ideas like "contracts mean freedom" and "contracts are equal to justice" have in globalized times turned to be the order of the strong, resulting in the deviation from the substantive justice in the contract law. As a consequence, the paper claims that restrictions on the freedom have emerged in recent decades in jurisprudential, legislative and judicial fields. The paper discusses specific examples of restriction in the above three fields like the increasing jurisprudential recognition of the principle of good faith, legislative restriction of contractual freedom in labour and consumer protection legislation, and the judicial enforcement of some specific trade terms beneficial to the parties of special social status.

The paper then presents the justifications for calling the restriction of the freedom under the CISG. First, it seeks to justify the restrictions as a pursuit of the value of contractual justice followed by a reference to three distinct principles namely the

principle of good faith, the principle of change of circumstances and the principle of objective interpretation of the contract. The next part of the paper discusses some proposals for restricting the freedom under the CISG and examines specific provisions of the CISG in the light of the concerns expressed. Proposals for amendments are made in both legislative and judicial fields. The paper concludes with a summary of its key discussion and recommendations.

IV E-COMMERCE

Part III of the book focused on the topic 'E-commerce' includes three papers that address diverse set of issues. While the first paper focuses on harmonisation of law governing new technologies with a specific reference to digital currencies and other payment technologies, the other two are focused on the creation of sustainable global supply chains and the implications of UNCITRAL harmonisation efforts relating to Online Dispute Resolution (ODR) on the ODR practice in China respectively. The paper on "Harmonising the Law of New Technology: Digital Currencies, the Blockchain, Distributed Ledger Technology and the Law" by Christine Duhaime addresses various legal issues arising in the usage of digital currencies in general and international transactions in particular. The paper first introduces different types of digital currencies by noting the growing shift in consumer payments and the ways of transferring value from paper based media to electronic methods. It defines the characteristics of digital currency and distinguishes it from virtual currency. It clarifies the realistic nature of the digital currencies by virtue of its existence in real computer coding and points out to the possibility of using it with unidirectional or bi-directional functions.

The paper explains Bitcoin as the most prominent form of digital currency and highlights its independence as a pure machine-to-machine technology capable of being engaged in peer-to-peer transactions. The absence of a central monetary authority and the lack of backing by any central bank, authority or government in the operation of Bitcoin is also clearly pointed out by the paper. The paper then introduces digital currency wallets that could be funded with digital currencies like Bitcoin and mentions its three distinct uses. Two associated keys with the digital currency wallets, namely the public and private keys and their characteristics are discussed along with some related concerns. The possible privacy concerns arising from the public keys, especially the openness of its associated transactions recorded in a Blockchain is pointed out. Moreover, the risk of permanent loss of digital currencies associated with the loss of private keys along with its related consumer protection and legal concerns are pertinently raised.

The paper distinguishes the Bitcoin transactions from other online currencies or payment systems, particularly in respect of the absence of any central authority in operation of the former. In drawing an analogy between the functioning of the Bitcoin and third party clearing house, the paper shows the distinction of the former in terms of its independence as a machine-to-machine technology and discusses various legal and practical advantages and disadvantages arising from its usage for online transactions. The paper also shows the possible impact of the digital currencies like Bitcoin upon financial services sector, especially it's potential to make the entire banking infrastructure redundant. In this regard, the paper briefly traces the evolution of digitalization in different business and societal pursuits.

The next part of the paper discusses specific legal risks that may arise in the usage of digital currencies, especially in international transfers of value. The paper systematically identifies and analyses legal risks in four distinct heads namely the risks related consumer protection, risks pertaining to financial crimes, the risks of denial of access to justice and risk of circumvention of currency restrictions. The paper finally concludes with an examination of a set of positive legal issues in which the important role of Blockchain, distributed ledger technology and digital currencies is specifically emphasised. The paper demonstrates the potential role of digital currencies like Bitcoin in the reduction of financial crime, elimination of the double spending problem and the associated forms of fraud, elimination of systemic corruption, facilitation of financial inclusion and empowerment of financial freedom. The paper also highlights the positive role of specific technologies like the distributed ledger system in facilitating the conclusion of automated smart contracts and developing automated dispute resolution systems. The paper interestingly argues that the potential of such technologies in law provides opportunities for legal harmonisation and urges the need to fill the related legal vacuum.

Trisha Rajput and Abhinayan Basu Bal in their paper titled "Creating Sustainable Global Supply Chains through Single Window and Paperless Trade Initiatives: Efforts of WTO and UNCITRAL in Perspective" examines the role of the WTO and UNCITRAL in making international supply chains sustainable through modernization and harmonisation of international trade law. Noting the continued law and policy initiatives related to e-commerce, the paper elaborates the broader meaning of the term 'trade facilitation' and highlights the related institutional efforts. With the advent of global supply chains, the paper shows a shift of focus from tariffs and quantitative restrictions during Uruguay round of trade negotiations to trade facilitation under the WTO. The paper seeks to explore whether the WTO Trade Facilitation Agreement (TFA) has adequate operational focus and be able to meet the realities of modern business.

With the intention to enhance predictability of supply chains, the paper argues for the creation of a global information channel through the implementation of the 'Single Window' system across trading nations. Citing the key efforts of the UNCITRAL Working Group IV relating to e-commerce, the paper seeks to examine how it's on-going and forthcoming initiatives on electronic transferable records and digital identity management are necessary for the vertical integration of three layers of international supply chains. Moreover, the paper expresses its intention to focus on the development of a legal framework to facilitate the use of supply chain finance (SCF) in international trade. The paper first analyses the WTO TFA closely to explore its relevance to global supply chains. In this regard the paper examines different measures implemented by governments as part of regulatory controls at their borders and identifies the potential challenges business participants of the supply chain could face.

The paper mainly discusses the challenge of increased cost and loss of time for participants of the supply chain and emphasises the need to develop comprehensive trade facilitation reforms to create more efficient trading processes and procedures at the borders. The paper examines the role of WTO TFA in this context and explores the benefits of its specific provisions relating to the Single Window for the international trading environment. The relevance and utility of the works of UNCTIRAL in implementing the Single Window is also examined by the paper. In examining the Single Window, the paper first notes the interaction between the three layers of supply chain involving the physical movement of goods, financial aspects of the transactions and the connected information flows, which is made possible by the increased use of information and communication technologies (ICT). Among them, the importance of flow of information, especially the information that is associated with the physical movement of the goods is specifically emphasised. The paper argues its importance for different actors in the supply chain in order to eliminate any relevant risks as well as for governmental agencies for the purposes of security and revenue collection. In this regard, the paper recommends "an important practical tool for the purposes of co-coordinating the process and procedures at the borders through the flow of information is the Single Window", which it claims is also supported by almost all border management models. Citing the increasing policy recognition of the concept of coordinated border management, the paper shows its explicit recognition by prominent institutions like the European Union and the World Bank. Moreover, the paper shows the importance of the Single Window system for integrated border management as recognized by the World Customs Organizations (WCO) and presents the three basic models for the Single Window prescribed by the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT).

The paper cites the example of implementation of Single Window systems in different countries and regions and expresses the concern about their fragmented growth. Highlighting the importance of a multilateral initiative such as the TFA in implementing Single Window reforms, the paper enumerates various benefits of such implementation. Arguing that the implementation of Single Window system is more than a technological or an organizational challenge, the paper underscores the importance of the legal issues that need to be addressed in the context of Single Window operation. After identifying the relevant legal issues, the paper argues that all of them could not be addressed through contracts and memoranda of understandings and recourse to international standards is necessary to address certain issues. Noting that several standards relevant in context of Single Windows have been developed by international agencies, the paper discusses the importance of the UNCTIRAL texts in providing the legal framework for the operation of Single Window facilities. Moreover, the importance of UNCITRAL initiative on electronic transferable records, electronic transferability of documents of title and the functional equivalence of electronic documents in this context is also emphasised by the paper. The paper then presents a set of challenges that will emanate once the Single Window system is implemented and becomes operational. The final section of this part of the paper emphasises the need for addressing implementation challenges facing the WTO TFA and examines related concerns pertaining to the developed, developing and least developed members of the WTO.

The next part of the paper examines the legal framework necessary to support supply chain financing in international trade. In this regard, the paper first demonstrates the risks of new forms of trade financing exposed during the global financial crisis in 2008. The paper highlights the relatively higher risks in using the new forms like 'open account', in comparison with traditional forms like the 'letter of credit'. The paper also discusses the newer form of intermediated trade financing introduced subsequent to the global financial crisis namely the bank payment obligation (BPO) and shows its similarity and differences with the letter of credit. The paper then examines the financing difficulties faced by small and medium enterprise (SMEs) which can turn them to be the weakest link in a supply chain. In this regard, the paper discusses the relevance of SCF in reducing counterparty risks and preventing the disruption of whole production lines caused by the financial problems of one of parties.

The paper also highlights the close nexus between SCF and supply chain management (SCM) and their roles in promoting the efficiency of physical and financial flows in supply chains. In emphasising the need for developing new laws to support SCF, the paper argues the importance of the legal aspects of electronic

information sharing in supply chains. In this regard, the paper briefly shows the importance of the key legal instruments on electronic commerce and communication developed by the UNCITRAL. The paper then, discusses the relevance of the work of the UNCITRAL Working Group IV on electronic transferable records and examines some of its draft provisions.

The next part of the paper examines the role of identity management and trust services in supply chains and alerts the existence of unresolved legal issues in those fields. The paper argues that although there may be existing laws that could govern the two fields, many of them may be insufficient and outdated. After identifying various areas of law that could be relevant to the two fields, the paper emphasises the need to develop an appropriate legal framework governing them by citing various national and regional initiatives in this regard. The paper also cites the proposals submitted to the UNCITRAL recommending the development of a basic legal framework covering identity management transactions and the positive response received in 2015. Finally, the paper argues that the new laws developed will also enhance the coordination role of the third parties in SCF. The paper reiterates some of the challenges related to SMEs including their limited use of paper less transactions that affects the physical and financial flows in supply chains. Arguing that the national laws facilitating paperless trade and physical and financial flows in supply chains are in the state of infancy, the paper expresses the hope that harmonised international rules in the field would facilitate the provision of SCF services for SMEs with cooperation from banks and other financial intermediaries.

In conclusion, the paper highlights the importance of developing collaborative information sharing between different stake holders related to supply chains, including the private actors and the governments. It argues that a combined work of the WTO and UNCITRAL has the potential to push the international trading community in that direction. On the issue of the Single Window system, the paper concludes that its success is dependent on implementation and highlights the crucial role of relevant legal instruments like the WTO TFA and the UNCITRAL instruments as well as the assistance role of institutions like World Bank and UNCTAD. The paper also points out to the role of transportation and logistics industries in enhancing the efficiency of the supply chain networks. As the final part of the conclusion, the paper calls upon national legislators to domestically implement relevant international rules already existing and participate proactively in the preparation of new rules.

The paper of Zhang Xiaohan on "The Consideration in Drafting the UNCITRAL ODR Rules and Its Implication to the ODR Practice in China" examines the relevance of online dispute resolution (ODR) in effectively resolving e-commerce

disputes and the potential implication of the related UNCITRAL work on the ODR practice in China. Providing the evidence of a large increase in online disputes involving e-commerce in China during the recent years, the paper points out the limitation of traditional litigation as a method of resolving the disputes. Noting the support for ODR among different countries and international organisations, the paper examines the ODR work of the UNCITRAL with reference to the Commission Sessions as well as the various meeting of the Working Group III in recent years. The paper then delves into the challenges faced in coordinating the ODR process with national conflict of law rules and consumer protection laws.

The paper specifically examines the distinct approaches to consumer protection propounded by the EU and the US with reference to their different position regarding pre-dispute arbitration agreements. The paper examines the rationale behind the two approaches and presents the related advantages and disadvantages for the consumers and online sellers. The paper then shifts its focus to the fundamental question arising from the distinct approaches on EU and the US namely "whether online arbitration should be mandatory or whether both the seller and the consumer should be denied access to the court if a pre-dispute agreement to arbitrate exists". The paper discusses the two track system proposed in the Working Group III to accommodate the distinct EU and US approaches, one that would require binding arbitration phase and the other that would not require the parties to go through an arbitration stage. The paper illustrates the benefits and drawback of the two tracks and highlights the challenges for the consumers to determine which track would be applicable in accordance with the relevant conflict of law rules. In the light of the challenges, the paper emphasises the need for developing a mechanism to determine the applicable track and discusses four relevant proposals made in this regard at the meeting of the UNCITRAL Working Group III. Identifying the limitations of those proposals, the paper acknowledges the lack of agreement on the matter.

The paper then examines the scope and extent of ODR practices in China. Citing the trend of development of national ODR platforms in other countries, the paper examines some specific examples of ODR practices in China. It first examines the internal complaint mechanisms developed by online e-commerce platforms like Taobao, followed by four different institutional mechanisms developed by CIETAC Domain Name Dispute Resolution Center, CIETAC Online Commercial Arbitration Center, Shenzhen EBS Center Pilot ODR Programme and 315 Online E-commerce Safeguard Center. The next section of the paper investigates the implications for the Chinese ODR practice resulting from related works of the UNCITRAL. Noticing that the ODR platforms in China are a separate mechanism with no collaboration and no uniform rules regulating them, the paper anticipates hurdles for further growth of

ODR in China. The paper argues that the factors taken into consideration by UNCITRAL ODR works can have significant implication to overcome the hurdles and in specifically establishing a uniform ODR legislative framework and setting up of a nationwide ODR platform conducted by the government.

The paper discusses the modalities of establishing the framework and the nation wide platform in China including those with reference to the related works of the UNCITRAL. The paper also examines the legal feasibility of setting up of the nationwide ODR platform in China specifically in the field of online mediation and online arbitration. The final part of the paper examines a set of other factors that need to be taken into consideration in developing the ODR for e-commerce in China. It examines the issue of enforcement challenges, the importance of a trust-mark programme and public awareness of the benefits of ODR as well as the need for active participation of China in UNCITRAL's ODR work and collaboration with foreign governments, enterprises and non-governmental organisations. Irrespective of whether or not consensus can be reached at the UNCITRAL, the paper concludes that its work on ODR will be of great utility for the development of Chinese ODR legislation and practice. The paper recommends that importance should be attached to ODR by the government and social organisation as it holds a promising prospect for the development of e-commerce market in China.

V MICRO, SMALL AND MEDIUM-SIZED ENTERPRISES

Part IV of the book focused on 'MSMEs' includes two papers that examine different dimensions of crowdfunding. The first paper address the crowdfunding regulation in Hong Kong and the second paper explores the intellectual property strategy for tech start-ups in equity crowdfunding. Lareina Chan's paper on "Crowdfunding and its Regulation in Hong Kong: Room for Inertia?" seeks to examine crowdfunding as a new form of entrepreneurial finance and the role of regulation in facilitating its development. The paper first highlights the growing importance of the technology in shaping the global economy and the society and the emerging innovation in entrepreneurial finance as a consequence of improvements in technology.

The paper cites the example of financial technology ('fintech') and shows that it has benefitted from the non-traditional financial services companies as investors. The paper points out how the fintech targets hundreds of millions of people, who may not be independently wealthy. Moreover it show how fintech takes the middleman out of traditional banking services and enhances the reach by delivering the services through easy-to-access mobile and web-based platforms. The paper then defines crowd funding and categorises it into two major forms namely 'community

crowdfunding' and 'financial return crowdfunding'. While pointing out that there could be other sub-categories or different permutations and combinations of sub-categories of crowd funding in an evolving market, it argues that crowd funding in Hong Kong is still at an infant stage of development.

The paper shows that P2P lending and equity crowdfunding, which are the main forms of focus in this paper have a multi-jurisdictional reach as they involve fundraising through online platforms and are faced with different levels of risks and regulations. The paper then introduces P2P lending and equity crowdfunding separately, before examining crowd funding systematically and elaborately. The paper briefly traces the evolution of crowdfunding and examines its benefits. The next part of the paper identifies different risks and challenges associated with crowdfunding namely the challenges arising out of the lack of and access to information for investors to assess risks, challenges in valuation of the company including its potential assets like the intellectual property rights, risks of fraud and illiquidity, and the lack of experience of the investors.

The paper then shifts its focus to regulatory issues by first identifying the factors relevant to the regulation of crowdfunding, where the paper uses fintech as an example to demonstrate some underlying challenges. In pointing out that some countries have developed separate new regulatory regimes for P2P lending and equity crowdfunding (for example, Australia, Malaysia and New Zealand), it shows that others like the UK have adopted a mixed approach in developing a new regulatory framework for P2P lending and regulating equity crowdfunding under existing rules and codes of conduct. The paper then briefly introduces the related regulatory frameworks in the UK and China before shifting its focus on Hong Kong. While noting that there is no regulation or guidelines specifically governing crowdfunding in Hong Kong, the paper envisages that equity crowdfunding and P2P lending may be subject to various restrictions, depending on the structure and features of the particular model. First, the paper examines different types of offers of investment that could attract regulation namely the Offers of Investment under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and the offers made under the Securities and Futures Ordinance (Cap 571) (SFO). The paper also briefly presents the relevant prohibitions and regulatory requirements namely the prohibition on carrying on a 'regulated activity' under the SFO without being licensed or registered, the prohibition on money laundering and finally the regulatory requirements applicable to automated trading services and/or recognised exchange companies.

The paper then assesses crowdfunding scenario in Hong Kong in which it first discusses the position and potential of Hong Kong referring to various pertinent

initiatives, policy addresses and the government efforts. The paper then takes stock of some of the latest developments in Hong Kong relating to crowdfunding since the March 2015 Legislative Council debate on the regulation of crowdfunding. In prescribing what Hong Kong needs, the paper mainly emphasises that a definitive regulatory landscape is required to provide guidance or direction in order to ensure a smooth development of crowd funding. The paper then exposes that the regulatory framework in Hong Kong is lagging behind other major markets in Asia, amidst the situation where the region itself is generally lagging in introducing required reforms.

Towards the end, the paper addresses the interesting issue of harmonisation and unification of regulations by calling for its need not only between various domestic regimes in the Asia Pacific Region but also between the regulations governing crowdfunding and alternative financing market in individual jurisdictions. The paper concludes with an emphasis on the potential foundational role Hong Kong government could play in creating a positive climate for investment and development of crowdfunding in consonance with its past practice of keeping with the laissez faire principle.

Jerry I-H Hsiao in his paper titled "Intellectual Property Strategy for Tech Start-Ups in Equity Crowdfunding" recognizes two essential components of innovation namely 'newly created business (start-ups)' as a significant source of new ideas, technologies, and processes and 'intellectual property rights (IP)' as an incentive to invent and successfully commercialize the works of the enterprises. In light of the crucial importance of start-ups and the IP, the paper argues that countries have to make sure that their IP environment will serve the needs of their start-ups. The paper takes up the US as an example to study some relevant issues and concerns and provides recommendations for fostering a more tech start-up friendly environment.

The paper expresses two concerns relating to the tech start up IP environment in the US. It argues that the disclosure requirement under the new crowdfunding law might impede start-ups' ability to establish their own patent portfolio. The paper contends that the US has overlooked the interest of their own domestic tech start-ups and has taken approaches overseas not in the favour of their own tech start-ups. The paper emphasises the importance of IP for the tech startups as IP rights are sometimes their only real assets and without key IP assets, they may not be able to obtain the capital necessary for survival. Distinct from the traditional start-up funding channels, the paper introduces crowdfunding as a new form of funding source and defines its characteristics. The paper highlights the advantages of crowdfunding and presents five types of funding offered by crowdfunding platforms including equity-based crowdfunding. Equity based crowd funding is addressed in detail.

The paper first examines the equity-based crowdfunding in the US in the light of its domestic legislation Jumpstart Our Business Startups Act (JOBS Act). In subsequently examining the disclosure issues for start-ups in the equity-based crowdfunding, the paper refers to the position in both US and Australia. Similarly, the paper refers to the position of two jurisdictions namely the US and Japan, while discussing an IP strategy for start-ups and the role of patent offices. Reference to two distinct jurisdictions provides opportunities for comparison. The next part of the paper identifies some challenges like the potential damage that could result from current disclosure requirements under the regulations governing crowd funding and discusses pertinent solutions. The paper concludes that it will be important for the US to learn from the experience of the jurisdictions like Australia and Japan in order to address the IP challenges surrounding equity-based crowdfunding and other related inadequacies in its domestic law. The paper argues that a secure and clear policy from the US government will foster the growth in equity-based crowdfunding and keep the US as the leader in innovation and economic growth. The paper calls for cooperation with countries in Asia-Pacific region to resolve relevant IP issues as an important step forward albeit the conclusion that time is not mature to contemplate harmonisation or the unification of laws in this field.