CHAPTER 2

INTRODUCTION

DELIBERATIONS ON TRADE DEVELOPMENT THROUGH HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW

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For nearly half a century, the United Nations Commission on International Trade Law (UNCITRAL) has served as a preeminent body for improving the legal framework governing international trade and investment. Established in 1966 by the United Nations (UN) General Assembly, the UNCITRAL has made substantial contributions towards the facilitation of international trade and investment. This is achieved through progressive harmonization and modernization of the laws in various fields like dispute resolution, international sale and transport of goods, cross-border insolvency, e-commerce, international payments and secured transactions. UNCITRAL legal instruments and texts, resulting from the harmonization process, are widely accepted by States with different legal traditions and levels of economic development. The success could be attributed, among other reasons, to the inclusive nature of the very harmonization process that involves not only diverse member

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states but also intergovernmental and non-governmental organizations. Moreover, UNCITRAL has also been quite open to various informal working methods (including the organization of symposiums and colloquia on specific topics related to its harmonization mandate) especially in the preliminary stages of developing legal texts under its Working Groups.

To supplement its international mandate, UNCITRAL has taken effective steps to enhance its regional and national focus. As noted by the UN General Assembly Resolution 64/111 in 2009, UNCITRAL initiated efforts to establish a regional or national presence to facilitate the provision of technical assistance to the use and adoption of its legal texts. Such efforts led to the establishment of the Regional Centre for Asia Pacific (RCAP) in January 2012 with a set of regional objectives. The UNCITRAL RCAP is mainly aimed at enhancing international trade and development in the region through the dissemination of international trade norms and standards, providing technical assistance to states for adoption and uniform interpretation of UNCITRAL texts through workshops and seminars, coordinating with organizations active in trade law reform projects and improving communication between states in the region and UNCITRAL. In lines with its aims and objectives, the UNCITRAL RCAP has been actively pursuing various cooperative initiatives in the region and the UNCITRAL Asia-Pacific Fall Conference 2014 is one of the important events resulting from such initiatives.

The conference with a theme of "Trade Development through Harmonization of International Commercial Law" was jointly organised by UNCITRAL RCAP with the Faculty of Law, University of Macau and Comité Maritime International Asia Office during 17-18 October 2014 at the new campus of the University of Macau. The University of Macau is a leading public university in Macau SAR with diverse legal education programmes and research in three different languages, namely Chinese, Portuguese and English. The Comité Maritime International is a non-governmental international organisation established in 1897 with an aim of promoting the unification of maritime law through the establishment of national associations and cooperation with other international organisations like UNCITRAL.

The conference was inaugurated by six keynote speakers and numerous international experts and scholars, who addressed the conference on various fields of international commercial law in eight different sessions spread over the two days of the conference. The conference sessions were organised on various topics namely International Commercial Arbitration and Conciliation, Investor-State Dispute Settlement and UNCITRAL Texts on Transparency, International Sale of Goods, International Transport of Goods and the Rotterdam rules, Cross-Border Insolvency, and E-Commerce Law and Modern Trends in International Commercial Law.

The conference included speakers from diverse jurisdictions including Australia, Brazil, China, Hong Kong (China), Japan, Macau (China), Philippines, Singapore, Republic of Korea, Sweden and the United States of America. The experts and scholars addressing the conference were affiliated to leading institutions including the Comité Maritime International Asia Office, the University of Tokyo, the City University of Hong Kong, UNCITRAL the Australia National Coordination Committee, the Supreme Court of Singapore, the Faculty of Law, University of Macau, Ewha Womans University, the University of Hong Kong, Curtin University, the Department of Justice of The Philippines, the Hague Conference on Private International Law Asia Pacific Office, the International Arbitration Court of Hengqin, the Australasian Dispute Resolution Centre, the Chinese University of Hong Kong, the University of Canberra, Peking University School of Transnational Law, Jinan University, Beijing Normal University, the University of Gothenburg and other major legal institutions in Macau. The conference was also attended by a large number of registered delegates and participants from different walks of life, who actively took part in the debates and questions that followed each session of the conference.

With that brief introduction to the conference and the relevant institutions instrumental for its successful organisation, this chapter will now introduce the papers that are included in this book. The papers included in this book were written or updated by the authors subsequent to the conference and were submitted for publication during the first quarter of 2015. While most papers included are written in a lucid style of formal papers, a few of them are presented in an informal style. The papers are arranged in six different parts of the book, which follows the thematic sessions of the conference and the papers that address multiple themes as well as those addressing other emerging issues are presented in the last part. Due to the very diverse nature of the issues addressed in the papers, an in-depth introduction of the specific issues comprehended in individual papers is undertaken rather than to identify and compare common elements across the papers. Although, most papers categorised under each part are predominantly related to its theme, there are some papers that address issues related to more than one topic. The present chapter also highlights the major arguments and perspectives of the authors in a systematic manner, to provide a good overview of the underlying issues covered. As there is no separate abstract of the papers included in the book, the detailed introduction can enable readers to quickly understand the scope of each paper before referring them in detail.

The Millennium Development Goals Report 2013 reported that several of its goals have been met earlier than the schedule. The substantial increase in international trade and the resulting economic benefits, in spite of its imperfections,

undeniably have played an important role in reaching some of the visionary goals of the Millennium Developmental Agenda. If global trade is an effective vehicle to deliver economic development and alleviation of poverty around the world, international policy and legal measures aimed at trade development and promotion are necessary precursors to facilitate international trade. Trade development is a multifaceted challenge, which requires the legal battle to be fought in various frontiers of public and private law. While it is the mandate of the WTO to break tariff and non-tariff barriers to international trade attributable to states, UNCITRAL is delegated the task of harmonization and unification of international commercial law to facilitate private cross-border transactions in international trade. As in the case of the WTO mandate, the harmonization agenda of UNCITRAL to promote trade development also requires a multidimensional approach. This is clearly reflected by the characteristic of large diversity of harmonization issues comprehended and addressed in the papers presented in this book.

The continuously evolving agenda of various Working Groups of UNCITRAL and the diversity of views held by its member states also reveal the inevitable need to adopt a multidimensional approach. The papers presented in this book do not distinctly demonstrate how specific issues of harmonization raised for discussion could result in trade development. If the thesis, which argues that achieving legal harmonization as a larger goal inevitably would result in trade development, is an acceptable proposition, then it is not necessary to establish how each and every harmonization measure specifically achieves trade development. Therefore, this introductory chapter does not aim to show the link between the specific issues of harmonization raised in the papers and trade development. Alternatively, this chapter endeavours to highlight how the harmonization agenda is characterised by a diversity of issues and the resulting complexities makes the tasks of harmonization challenging. This chapter provides a comprehensive introduction to a wide range of specific issues addressed in each paper and identifies various works of UNCITRAL that are linked to those issues. The aim is to demonstrate that tackling the diversity and related challenges requires a concerted dynamic effort of various stakeholders involved in the work of UNCITRAL to ensure that trade development is effectively achieved through harmonization of commercial law.

Part I of the book consists of five papers that are related to the theme of investor-state dispute settlement (ISDS) and UNCITRAL texts on transparency. The paper of Corinne Montineri epitomises the significance of the emerging standards on transparency in treaty-based investor-state arbitration through a close examination of the key UNCITRAL instruments on transparency, the related Registry and the multilateral debates that led to their adoption. The author acclaims the adoption of the transparency texts and the Registry by the UNCITRAL as the most recent

successful results of a multilateral endeavour to reform investment arbitration. The author also highlights the consequent attention it has triggered in various other international forums like the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP) negotiations. The author's reference to the observation of Canada, which argued that the failure to undertake the work on transparency by UNCITRAL 'might amount to an endorsement of secrecy in investor-state arbitration and would be contrary to the fundamental principles of good governance and human rights' underscores the significance of the achievement alluded by the author earlier. Similarly, the author's reference to transparency in other core bodies like the Human Rights Council and the UN and its prenominal value for achieving human rights, good governance and the rule of law signifies its importance further.

The distinction drawn by the author as to the role of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules), the Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) and the Transparency Registry exemplifies the supplementary nature of each of them in enhancing transparency. The importance of the transparency works of UNCITRAL, in developing confidence in the existing international investment framework and providing legitimacy to international investment law and arbitration as a whole, are aptly argued by the author. The author argues that the legitimacy concerns arise due to the increase in the number of treaty-based investor-state arbitrations; the number of frivolous claims; the amount of awarded damages; the inconsistency of awards and concerns about the lack of predictability and legal stability; and the uncertainties regarding how the ISDS system interacts with important public policy considerations.

The author addresses the contributions of UNCITRAL relating to transparency in investor state investment arbitration in three distinct parts of the paper, which describes not only the content of the UNCITRAL Arbitration Rules, the Mauritius Convention and the Registry but also the related deliberations giving rise to them. The author concludes that providing transparency and meaningful opportunity for public participation in treaty-based investor-state arbitration constitutes a means of promoting the rule of law, good governance, due process, fairness, equity and the right to access information. At the same time, the author is keen to point out the limited scope of the established transparency standards as they govern only treaty-based investor-state arbitration. The author recognises the need for achieving transparency with regard to the other aspects of treatment of investments namely in the conduct of states' investment-related administrative procedures, in the design and implementation of domestic investment laws and regulations, and in states interactions with individual investors.

Peter Malanczuk in his paper titled "China and the Emerging Standard of Transparency in Investor-State Dispute Settlement" provides an in-depth analysis of the position and practice of China concerning ISDS and examines key transparency issues arising in ISDS arbitration proceedings involving China. The author argues that the issue of ISDS has become a highly controversial topic in recent times, which is said to have intensified further in several ongoing large-scale trade and investment negotiations involving several countries including China. The author points out that one of the central issues in the controversy on ISDS is the concern for the lack of transparency in related arbitral proceedings and argues that the UNCITRAL Transparency Rules constitutes an important development in offering a broader solution to the concern. A comprehensive introduction to the concept of transparency as well as the background related to ISDS is presented by the author first. As ISDS is primarily related to foreign direct investment (FDI), the author presents an impressive array of data relating to the significance of FDI in international economic transactions that indicates the importance of the ISDS process.

Showing the limited investment mandate within the WTO legal framework, the author highlights the relevance of bilateral investment treaties (BITs), international investment arrangements (IIAs) and free trade agreements (FTAs) with specific chapters on investments. The author presents data revealing the increasing number of ISDS cases, especially against Asian states and highlights some of the concerns arising out of ISDS cases. The concerns include the 'chilling effect' on the right of states to regulate and adopt measures to implement public policy objectives, the frivolous nature of some cases, frequent inconsistency in ISDS decisions and the lack of appellate review, decisions granted by private and "secretive" international arbitral tribunals and serving the interest of a small and elite group of ISDS arbitrators. Such concerns reveal the depth of the problem and highlight the urgent need for transparency.

In introducing the concept of transparency, the author interestingly highlights some recent assessments in literature that concluded transparency as an emerging 'general principle of law'. This provides a much stronger basis for arguments calling for transparency in ISDS. The author demonstrates how the application of the concept distinctly manifests in fields of international trade and investment laws. Although the concept of transparency in ISDS is a general and undefined term, the author interestingly prescribes six different elements that can be distinguished in implementing ISDS transparency. Moreover, the author provides the examples of some international rules on ISDS transparency prescribing specific procedural elements. In this context, the author introduces the UNCITRAL Transparency Rules and discusses its limitation. He examines how the Mauritius Convention could play a role in filling the gaps left open by the UNCITRAL Transparency Rules. Then the

paper introduces a whole gamut of Chinese BITs and FTAs that have a specific investment chapter before elaborating the specific provisions relating to ISDS that were found in other Chinese treaties.

The author undertakes a discussion on the ISDS cases involving China in major investment arbitration forums to reveal the relevant concerns. The author contrasts the relatively low number of ISDS cases involving China in recent times with the number of WTO trade disputes involving China. The author argues that China has changed its position in recent times towards a positive approach with regard to ISDS Transparency in UNCITRAL deliberations. The author then ventures into the examination of specific Chinese treaties and instruments to identify the relevant ISDS transparency provisions recognised. They include the Chinese Model BIT, some specific BITs and IIAs already concluded by China, and a more detailed discussion about the relevant provisions of the separate BIT negotiations of China with the US and EU.

The paper concludes that China's recent positive evaluation of the UNCITRAL Transparency Rules and accepting ISDS transparency provisions in Canada-China FIPA indicate a significant shift in its basic position towards transparency in investor-state arbitration. However, the author is still wary of this having any far-reaching effect, due to the limited practice of China in accepting ISDS transparency obligations in IIAs. The author discusses the dilemma China could face in becoming a party to the Mauritius Convention as well as in negotiating ISDS transparency obligations in the ongoing BIT negotiations with USA and EU. The paper concludes that in deciding whether to undertake obligations for higher levels of transparency in the future, China should be mindful of the balance that needs to be achieved between its increasing interests as an outward investor and its continuing interest in attracting FDI flows to its territory.

The next paper, presented by Michael Douglas, aims to examine the significance of transparency to legitimise ISDS from an Australian perspective. The paper makes a fundamental argument that transparency is a necessary condition for not only gaining legitimacy but also securing the very survival of ISDS in a desirable form. By referring to the fundamental principle, which prescribes that justice should not only be done but be seen to be done, the author is quick to underline the importance of perceptions of justice for political or legal institutions to survive. The author briefly examines the concept of legitimacy and enumerates its basic characteristics before seeking to explore the nexus between the transparency of ISDS and the legitimacy of ISDS. The paper first provides an overview of transparency in ISDS and refers to the relevant UNCITRAL Transparency Rules and the draft version of the Mauritius Convention. The paper then briefly introduces the concept of legitimacy and its characteristics along with some consequences of lack of

legitimacy. In assessing the importance of transparency to achieve legitimacy in ISDS, the paper examines a set of interesting issues. The issue of lack of publication of awards or decisions in ISDS, causing predictability concerns and the concerns arising out of deviation from the historical practice of open method of dispute resolution or private resolution of public disputes, are discussed succinctly.

The paper briefly elaborates three important values that are widely held namely, transparency, democracy and rule of law. The paper raises an interesting question, whether lack of legitimacy in ISDS makes any practical difference. The author is of the view that it does and cites the indeterminate position of Australian domestic policy with regard to the acceptance of ISDS. The author argues that ISDS lacks political legitimacy in Australia and such lack of legitimacy at a domestic level can result in refusal to include ISDS provisions in investment treaties, which in turn will cause a significant impact on the future of ISDS. The author expresses concern that policy shifts will undermine ISDS and impact on the negotiation of future investment treaties. The author concludes that the future success of ISDS requires strong transparency measures in investment treaties, which could be promoted through the UNCITRAL Transparency Rules. However, the author is convinced that transparency should be achieved across the board to prevent any treaty shopping that is aimed at taking advantage of old investment treaties lacking transparency provisions. To address such concerns, the author rightly identifies the importance of the need for a wider adoption of the Mauritius Convention. The paper closes with the caveat that transparency is only a step towards legitimacy and transparency in itself will not be sufficient to provide legitimacy to ISDS.

The brief paper of Zhonghong Bai on Investor-State Arbitration highlights the importance of UNCITRAL Arbitration Rules, especially in the context of the Energy Charter Treaty (ECT). In spite of its regional characteristic, the author points out the uniqueness of the ECT as the only multilateral agreement of its kind specifically devoted to energy cooperation issues. After tracing its origin and salient features, the author expresses concern regarding the weakness of the dispute resolution mechanism under the ECT. To substantiate the concerns, the author makes a brief attempt to examine the limitations of some specific provisions of the ECT and highlights the possibility of use of other rules of dispute resolution contemplated under such provisions.

The author points out the number of international arbitration options provided by the ECT and the possibility it creates for using the UNCITRAL Arbitration Rules. The author also provides evidence that in nearly twenty-five percent of the cases arising under the ECT, reference was indeed made to the UNCITRAL Arbitration Rules as of January 14, 2015. The paper then compares arbitration provisions under the ECT with the arbitration under the International Centre for Settlement of

Investment Disputes (ICSID) arbitration and identifies its differences. Finally, the author ventures to examine the implications for China, if it seeks to become a member of ECT and concludes that it will provide overall benefits to improve its energy supply, stabilise energy prices, enhance energy efficiency and benefit Chinese energy companies. At the same time, the author is quick to raise a caveat that China should exercise due caution in accepting the relevant provisions of ECT relating to investment arbitration comprehensively. By implication, the author demonstrates the continued relevance of other international arbitration rules including those of UNCITRAL.

Shahla Ali attempts to briefly examine the prospects of utilizing investor-state mediation and UNCITRAL Transparency Rules for polycentric environmental disaster-related disputes by using a specific case study. The paper mainly refers to the example of investment arbitration in 2012 between a Swedish nuclear plant operator called Vattenfall and the State of Germany at the International Center for Settlement of Investment Disputes. The author first highlights the change in policy regarding nuclear energy in Germany subsequent to the Fukushima nuclear disaster in Japan and the resulting legal amendments. The author also alerts the readers about a previous arbitration dispute in 2009 between both parties, in which Vattenfall challenged the excessive imposition by Germany, of water quality standards for a coal power plant by Germany, which was subsequently settled in 2011. In 2012, when Vattenfall sought fair compensation against Germany under the Energy Charter Treaty for the rapid phase-out of their two nuclear plants, the author points to a very pertinent concern arising out of lack of information about the dispute. Given the very minimum amount of information made available to the public the author discusses a possible impact international rules like the UNCITRAL Transparency Rules might have on the dispute.

The paper briefly introduces the International Bar Association (IBA) Rules for Investor-State Mediation and highlights its scope and application. The paper quotes some professional comments on the IBA Mediation Rules before examining the question of possible applicability of Investor State Mediation and the UNCITRAL Transparency Rules to the *Vattenfall* Case. The author mainly highlights some empirical evidence showing that arbitration in the context of investor-state disputes is not a swift and cost-effective mechanism. The author points to the sky-rocketing of the average costs of investor-state arbitration between 2005 and 2012. Moreover, the average length of investor-state arbitration is also shown to be quite long. The author presents some of the reasons for the high costs before arguing that investor state mediation has the potential to offer a relatively efficient alternative. The author contends that mediation could pave the way for exploring creative and innovative solutions beyond the strict legal remedies that are necessary to address complex force

majeure issues arising out of unforeseen natural disasters. The author urges the parties to consider the importance of confidentiality requirements associated with investor state mediation. The author shows how confidentiality of a mediated process is protected during any subsequent litigation on the issues related to the topics addressed during the mediation and highlights some limited exceptions to such protection. Based on confidentiality, process and efficiency considerations, the author recommends investor state mediation for cases involving sensitive polycentric issues concerning policy and force majeure events. At the same time, for cases raising clear issues of legal rights and desiring consistency of rulings, the author is favourable to the UNCITRAL Transparency Rules.

Part II of the book focusing on the topic of international commercial arbitration and conciliation includes five papers. João Ribeiro and Jin Lee in their paper present an overview of UNCITRAL texts on international commercial arbitration in Islamic Law Influenced Jurisdictions (ILIJ). Firstly, the paper succinctly introduces the New York Convention and the UNCITRAL Model Law on Arbitration. The authors highlight the diversity of legal systems among the members of the ASEAN Economic Community (AEC) and contextually present the mandate and success of UNCITRAL in promoting harmonization and unification of laws in similar situations of large diversity. The paper introduces the history of arbitration in the Islamic world and discusses some related principles under the Shari'ah law. The authors introduce the initial negative perception among many Arab States regarding international commercial arbitration and the resulting scepticism. The authors, however, point to the change in approach in the 1980s when ILIJ states, particularly those in the Middle East, became capital exporters and the subsequent increase in the accession to the New York Convention. The authors at the same time expose a set of challenges facing enforcement of foreign arbitration awards in Middle Eastern jurisdictions. The authors aptly point out the role of UNCITRAL Model Law in this regard and its impact on the domestic arbitration laws in ILIJ states.

The authors engage in an interesting discourse on the issue of arbitration under Shari'ah Law, in which they identify the traces of recognition of arbitration and argue that arbitration has long been rooted in the Gulf region, even before it became prominent in some other countries. They also cite relevant principles and sources in Shari'ah Law to demonstrate the compatibility of arbitration as a dispute settlement mechanism. Therefore, the authors argue that ILIJ States might be better equipped to deal with alternative remedies than most common law countries. Similarly, the authors show the general recognition of arbitration under various schools of Islamic jurisprudential thought and discuss the related limitations and differing views that prevail in some of those schools. The authors address these concerns by clarifying

the supplementary role of arbitration and how it can co-exist with the jurisprudence of the relevant schools.

The authors then investigate the arbitration law and practice in the three ASEAN ILIJ states focused on in this paper namely Malaysia, Brunei and Indonesia. The paper first discusses the two major reservations to the New York Convention made by Malaysia and its enactment of a new arbitration law in 2005 based on the UNCITRAL Model Law. The authors examine the judicial attitude towards arbitration in Malaysia by examining some specific cases and demonstrate its minimalist intervention in arbitration matters. The practice of arbitration institutions taking into account of Shari'ah principles in Malaysia and the possible referral to the Shari'ah Council to seek expert opinion on Shari'ah law are discussed succinctly. The paper also discusses the relevant arbitration law and practice in Brunei and Indonesia, which are also members of the New York Convention and as in the case of Malaysia subject to certain reservations. The paper draws our attention to specific features of arbitration laws in the two jurisdictions. For example, in case of the Indonesian domestic arbitration law, the paper draws attention to a problem of ambiguity with regard to the public policy ground for annulment of an arbitration award.

Beyond the three jurisdictions, the paper examines the position of arbitration in specific Middle Eastern states that are governed by Shari'ah law. The authors highlight some general concerns prevailing in those jurisdictions, the circumstances leading to their acceptance of New York Convention and some limitations on enforcement of awards in spite of the New York Convention. The authors then briefly explore the related situation in two other Middle Eastern ILIJ states, namely Iraq and Kuwait. A closer examination of the arbitration law and practice in some individual member states of the Gulf Cooperation Council (GCC), namely, the United Arab Emirates, Oman, Saudi Arabia, Qatar and Bahrain is carried out by the authors. They take the opportunity to examine key domestic legislation and cases concerning arbitration in these jurisdictions in the light of the influence of Islamic law. Finally, the paper makes reference to the practice in Malaysia and provides practical suggestions to ASEAN ILIJ states for considering Shari'ah principles, when dealing with international arbitration cases.

The authors call for the need to narrow the gaps between domestic law and New York Convention in both ASEAN ILIJ and GCC states. The authors also recommend thatthe arbitration laws in these states to be brought in line with the Model Law on Arbitration in the light of the specific advantages it offers. As an overall conclusion, the authors argue that the adoption of UNCITRAL standards in these jurisdictions will enhance a rule based trading system, which in turn will promote the rule of law and access to justice to ultimately achieve improved governance and judicial

standards. Finally, the authors accentuate the importance of UNCITRAL standards by reminding us of the higher goals which the United Nations aspires to achieve through the harmonization and modernization of international trade law and practice.

The paper by Dalma R. Demeter on "Freedom versus Security in Regulating ADR and International Arbitration" stems from the trend of transformation, in party autonomy in the process of arbitration, which is caused by increased regulation. It examines the potential impact a similar trend might have over other areas of alternative dispute resolution (ADR), especially upon mediation. The author begins the discourse by referring to the romantic nostalgia of the town elder model to trace the origin of arbitration, which was dominant with party autonomy. Such a model, however, is shown to be unsuitable, whenever the complexity of the underlying relationships increases as in the case of international trade and the resulting cross-border commercial disputes. In response, the process of arbitration itself is said to have become more complex and highly regulated. Although the continued importance to the principle of party autonomy is acknowledged, the author argues that autonomy has since been stifled by various norms regulating arbitration. Such regulation is perceived to be a source of benefits and of damage at the same time.

To demonstrate the advantages and disadvantages of overregulation, the author undertakes a comparative overview of various trends manifested by different normative sources regulating arbitration and its effects. The author then extrapolates the findings relating to arbitration to assess the potential impact on other alternative methods of dispute resolution and makes recommendations to offset the negative effects of overregulation. The paper examines different sources including international harmonization instruments like the UNCITRAL Model Law on Arbitration and UNCITRAL Arbitration Rules. Reference is also made to the proposed work of UNCITRAL relating to the enforcement of settlement agreements resulting from conciliation or mediation. The paper identifies the major areas subjected to overregulation in arbitration and the underlying rationale and concerns triggering such increased regulation. The author concludes the paper with a set of important recommendations, which deserves serious consideration in any pursuit to balance freedom and security in the regulation of ADR and international arbitration.

Anna K C Koo in the paper titled "UNCITRAL and International Commercial Mediation in China" raises a provocative question whether the UNCITRAL texts on conciliation have become obsolete or remain relevant in the Asia-Pacific context? The author points to the relatively limited response of the states to the UNCITRAL Model Law on International Commercial Conciliation 2002 (Model law on Conciliation) as the justification for the underlying concern. However, the author acknowledges the pioneering nature of the Model Law on Conciliation in prescribing conciliation as a method of dispute settlement in cross-border commercial

transactions. Its salient features and advantages in enhancing predictability and certainty in the use of the conciliation process are distinctly articulated by the author. The broader connotation in which the term 'conciliation' is used in the Model Law on Conciliation to comprehend all procedures involving a third party assisting to settle a dispute without imposing a binding decision, (including mediation, neutral evaluation, mini-trial or similar proceedings) is highlighted.

Given the wider use of mediation in the Asia Pacific region, the paper seeks to identify the major challenges involved in international commercial mediation by studying three distinct international surveys on dispute settlement, including one that is specifically focused on the region. After studying the international and regional surveys, the author examines the mediation rules and laws in the three major jurisdictions in Greater China, including mainland China and its two special administrative regions of Hong Kong and Macau. The distinct rules in the three jurisdictions governing specific issues, namely the commencement of mediation, appointment of the mediator, venue of mediation, principles of mediation, role of the mediator, role of the parties, confidentiality, enforceability of settlement agreement and the role of the mediator in subsequent proceedings are closely examined. The author also makes an interesting comparison of these rules with the relevant provisions of the UNCITRAL Conciliation Rules and the Model Law on Conciliation. Although the policies underlying the UNCITRAL texts were found to echo the relevant Chinese regulatory and legal framework, the author calls for an urgent need to update the UNCITRAL Conciliation Rules and the Model Law on Conciliation in order to enhance their harmonizing role in Greater China.

Fernando Dias Simões in his paper questions the necessity of harmonisation of arbitration laws in the Asia-Pacific region. The author first identifies the factors, which makes arbitration a standard mechanism for international dispute resolution involving international trade, commerce, and investment. The typical reasons that make arbitration suitable for resolving international disputes are elaborated by the author before the significance of international commercial arbitration in Asia-Pacific region is highlighted. The author argues that the augmentation of use of arbitration in the region is due to the increased global trade in the region and the ensuing rise in commercial disputes. The author compares the lack of comprehensive international treaties for effective enforcement of national judgements abroad with the relative strength and the wider adoption of Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) in the region to further demonstrate the growing significance of arbitration in the region. The effective function of international arbitration is attributed to a complex system of legal instruments composed of international treaties, rules enacted by arbitral institutions, and national domestic laws.

The author discusses the significance of the national arbitration laws and role of national courts in this regard, before highlighting the importance of international harmonization measures like the UNCITRAL Model Law on International Commercial Arbitration (Model Law on Arbitration).The author demonstrates how the Model Law on Arbitration assists states to reform and modernise national arbitration laws to meet the needs of international commercial arbitration. In particular, the discussion on how national case law and interpretations compiled and disseminated by UNCITRAL through the online CLOUT database system and published digests could lead to a harmonized interpretation of UNCITRAL texts is an important element to be noted. He draws attention to the importance of institutional arbitration and the similarity in their rules that are influenced by UNCITRAL Arbitration Rules. Beyond the general institutional roles, the availability of subject-specific guidelines on arbitration like the UNCITRAL Notes on Organising Arbitral Proceedings and its Recommendations to assist arbitral institutions and other interested bodies are also pointed out by the author.

Finally, the author undertakes to show that adoption of Model Law on Arbitration itself may not offer all the solutions or make a jurisdiction attractive for international arbitration. The author indeed provides evidence that most international arbitration is still held outside the states or the popular arbitration seats that have not adopted the Model Law on Arbitration. The author argues that the relevance and impact of the *lex arbitri* may vary in different cases and international arbitration proceedings are not exclusively regulated by the *lex arbitri*. Towards the end of the paper, the author also argues that the choice of the seat of arbitration by the parties is not only influenced by legal factors but also by factual elements like infrastructure, technical expertise and costs. However, citing studies showing that the most important factor influencing the choice of the seat of arbitration is the 'formal legal infrastructure', the author concludes that states should not only strive to modernise their arbitration regimes but also adopt a multifaceted and long-term approach to ensure that needs of the business world are effectively met.

Gao Shulin's paper traces the reform path towards independence of arbitration institutions in the southern coastal town of Zhuhai in China. The enabling legal source for such an independence drive is traced at the very outset, namely the Chinese Arbitration Law 1994, which declares that Arbitration Commissions are independent of and not subordinate to any administrative organs. In order to guarantee independent operation and promote impartiality and the efficiency of arbitral awards, the Zhuhai arbitration reform was launched in 2013. The paper first discusses a set of factors that essentially drove the seeking of independence of arbitration institutions in Zhuhai. The author argues that impartiality, which is an essential attribute of commercial arbitration, requires independence of the arbitration

institutions. Moreover, it is considered as an inevitable characteristic required for the internationalisation of commercial arbitration and a necessary approach to obtain credibility of commercial arbitration. In this context, the author makes relevant reference to the UNCITRAL texts on arbitration.

The paper sets out the objectives and approaches of the reform. Stimulating a sustainable development of arbitration and establishing a contemporary management structure are specifically included in the objectives, which sought to achieve an overall improvement and independence in arbitration. The author traces the origin of the reforms in Zhuhai arbitration institutions to the Guidance on Carrying Forward Reform of Classified Public Institutions issued by the Central Committee of the Communist Party of China and the State Council in March 2011. Then the paper enumerates various reform measures that were introduced as a part of the independence drive. Firstly, the Arbitration Institution Management Regulations of Zhuhai was drafted and reported to the Legal Affairs Bureau. A drafting of the Charter of the Zhuhai Arbitration Commission has been initiated along with a range of specific regulatory documents governing the Council, the Board of Supervisors, and the Advisory Committee of the Commission. To improve the corporate governance mechanism, plans to establish specific bodies within the Commission and to appoint candidates have been laid. Reforms governing personnel management and financial management have also been planned. The paper concludes with a note of caution about certain barriers that are currently faced in promoting the reforms that are specifically attributable to the existing personnel and financial management systems in the Commission.

As seen earlier, Dalma Demeter's paper addressed the increasing regulation of arbitration and its implications for other methods of ADR. Similarly, Delcy Lagones de Anglim expresses concern about over-regulation of arbitration and the potential effects of over-regulation of mediation. Raising serious questions like whether over-regulation is killing arbitration and whether it will kill mediation, the short and informal narrative of Delcy Anglim highlights the significance of mediation as a means of dispute resolution. It mainly argues for protecting the inherent features of mediation from being subjected to any potential overregulation. The basic premise of the author's argument rests on the fundamental characteristic of party determined outcome in mediation, which the author argues does not give room for any over-regulation as in the case of arbitration. In distinguishing modern arbitration from the past, the author enquires whether it has been over-regulated and over-institutionalised. Although the need for regulation to provide order is acknowledged, the author argues that such regulation ought to respond to the needs of the process and of the parties utilising the process. While arguing that arbitration has become a regulated multi-million dollar industry, the author wonders whether mediation will

also face a similar conundrum in the future given the international initiatives to create legal norms to effectively enforce mediated agreements.

Distinguishing mediation from other methods of dispute resolution and demonstrating its advantages to the business community, the author emphasises that the fundamental philosophy of mediation is the empowerment of the parties to find a resolution to their dispute. In light of such self-empowerment, the author wonders whether legal measures seeking enforceability of a mediated outcome would be a contradiction to the basic philosophy of mediation. The author argues that in a properly conducted mediation, enforceability should not be a concern. However, in cases where compliance with a mediated outcome is hindered by a hidden agenda or bad faith of a party or parties, the author refers to some solutions in domestic jurisdictions to register and enforce an out-of-court settlement. The author's reference to such a need for enforcement of an out-of-court settlement should be seen in light of the ongoing efforts of UNCITRAL relating to the enforceability of international commercial settlement agreements, discussed in the other chapters of this book. But the author is not sure whether a New York style convention to enforce mediated outcomes is warranted. Nevertheless, the author candidly admits that the complexity of international commercial disputes requires a legal framework to provide certainty and finality. Finally, the author concludes that the question, whether the advantage of enforceability balances the disadvantage of over-regulation in mediation, warrants further discussion in an environment of cooperation and honesty.

Part III of the book addresses the topic of the international sale of goods and contains a diverse set of papers. The paper of Leung Sze Lum makes a critical evaluation of methods employed to calculate interest rates under Article 78 of the CISG. To set the background, the paper introduces the limitation of Article 78 of CISG in prescribing only the obligation to pay interest without enumerating the details of calculating the rate of interest or the time of its accrual and the consequent controversies and differences of opinion it triggers. In this process, the paper emphasises the underlying rationale and the practical significance of Article 78 of CISG and discusses the challenges faced during its drafting history. Following that, the paper critically investigates how in the absence of any guidance from the CISG, the courts, tribunals and commentators have approached the question of the determination of the interest rate. The author then seeks to identify the common denominator from the diverse approaches above in order to propose a solution. The general right to interest and the scope and limitations of such a right under Article 78 are briefly introduced before some specific controversies about interest determination are discussed.

The author elaborately points out to the controversies surrounding different approaches in determining the interest rate. The domestic law approach, where the operation of private international law will determine the governing law applicable to the computation of the interest rate, is discussed first. Then a uniformity approach consisting of the application of international sources like the general principles of CISG and the Principles of UNIDROIT is specifically examined. The paper also scrutinises the issues surrounding the application of international trade usage or the use of a commercially reasonable rate. Depicting this uncertain scenario, the paper goes on to explore the possibility of devising a satisfactory approach to resolve the interest rate problem in CISG. The author calls for a coherent and uniform solution that should lead to a clear and easily identifiable rate. The author demands that such a solution should be rooted in the general principles of the CISG and avoid unfair advantages or disadvantages arising out of currency fluctuations.

The author ultimately puts forward a three-step approach to determine the interest rate, which takes into account firstly the express agreement of the parties and relevant international trade usages, secondly the law of the payment currency in the absence of an agreement between parties, and finally the principle of reasonableness in the absence of a statutory rate. The author argues that the proposed solution is devised based on the reference to Opinion No. 14 of the CISG Advisory Council and some scholarly opinion and conforms with the general principles of CISG. Interestingly, the author examines the specific debates surrounding the applicability of compound interest. The author disagrees with the practice of granting compound interest and argues that following the general principle of full compensation under CISG would make the need to grant compound interest redundant. The author concludes clearly in favour of the development of a uniform solution to determine the interest rate, using Article 78 and the general principles of CISG.

The paper of Rosario Elena A. Laborte-Cuevas examines the CISG from the perspective of Philippines. Opening with a candid acknowledgement that the experiences and learning from the 2014 UNCITRAL Asia-Pacific Fall Conference will truly contribute to the efforts of the Philippines government to diminish legal obstacles to promote international commercial transactions, the author elaborates the Philippines' perspective in the rest of the paper in detail. The paper also seeks to compare the CISG provisions with the laws of Philippines and discuss the views about its possible accession to CISG. Firstly, the paper examines a specific comparative study undertaken in Philippines during the preliminary stages of discussion among relevant government departments about the prospective accession of Philippines to CISG. In the absence of a special domestic law on the international sale of goods in Philippines, a diverse set of laws that would become applicable is highlighted by the author.

The author presents the results of the comparative analysis made between CISG and relevant provisions of the domestic law in Philippines focusing on a specific set of issues namely the formation of contracts, the revocation of offer, interpretation of contracts, forms of contract, price, rescission and fundamental breach, specific performance, anticipatory breach, stoppage in transit by seller, limitations for warranty claims and the passing of risk. On each of the above issues, the author follows a systematic order of presenting the specific provisions of the CISG first, before comparing them with the relevant domestic rules. After a detailed discussion of the above issues, the author concludes that the similarities and differences discovered do not indicate any major clash between the two systems. The author also highlights some specific advantages of CISG that does not affect the domestic relations on the sale of goods or the fundamental principles of contract law in Phillipines. The author comes to the conclusion that there is nothing legally objectionable for the Philippine's accession to the CISG. Showing the wider acceptance of CISG by countries constituting the majority of global trade as well as by the key trading partners of Philippines, the author recommends that the nation continues to take steps to accede to the CISG.

Joyce Williams examines the issue of conformity of goods as governed by the CISG, in the light of corporate social responsibility (CSR). The focus of the paper stems from an interesting question, whether a breach of a non-physical or intangible feature of goods can constitute non-conformity of goods under Article 35 of the CISG. As courts and arbitral tribunals tend to view non-conformity as a consequence of the physical features of goods, the author argues that consumers' expectation of goods indeed contains two dimensions namely the physical quality of the goods and the emotional value of the goods. The author is quick to point out the positive response of business enterprises to such expectation through spending a significant budget on branding and goodwill. This is shown to have resulted in an increasing amount of CSR policies and rules of conduct. The author argues that this emerging business trend warrants the law of international sales adapting to potential legal implications of any attempt to define nonconformity in an unconventional manner.

The paper calls for attention to the success of the United Nations Global Compact Initiative ("UNGCI") and its recognition by the business community as a useful initiative to develop corporate social responsibility framework. The author claims that the UNGCI principles have become very relevant to the conduct of companies in the manufacturing of goods and proposes to examine how such a trend leads to a new or expanding definition of non-conformity under Article 35 of the CISG. The paper briefly introduces the core principles of CISG and its scope before presenting the vision and characteristics of the UNGCI. The rules on conformity of goods as in Article 35 of CISG are analysed before debating an interesting question whether

those rules can be violated by the breach of UNGCI principles. The author envisages that similar issues could be raised in the process of interpretation and application of Article 35(2) that contains various express, implied or necessary standards relating to purpose, quality and packaging of the goods, which need to be verified in order to determine whether the seller produced goods in conformity. The challenges arising when a buyer claims for the breach of an implied purpose are specifically highlighted.

The author cites the contextual example of a buyer relying on its own advertisements as a global compact company to claim an implied notice to the seller that the goods must fit and align with the message of the advertisement. However, the author admits that there exist controversies about the application of the rules on conformity to the emerging trends of relying on CSR policies to claim breach of obligations. The author identifies the source of such controversies to specific challenges like how to determine or define the "purpose" when the buyer did not define it during the negotiation stages, and how to determine liabilities of the parties when the buyer claiming non-conformity itself is not in total compliance with the UNGCI principles. Therefore, the author calls for the need to develop a set of guidelines to help courts, arbitral tribunals and other stakeholders to find consistency and cooperation while dealing with the question of relationship between manufacturing of goods and the promotion of CSR policies. The author concludes that it is time for CISG to revisit the issues relating to CSR policies.

Part IV of the book under the topic of 'international transport of goods and the Rotterdam Rules' presents two papers. Tomotaka Fujita in his paper titled "The Rotterdam Rules in the Asian Region" examines the origin and progress of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) and the scope of its acceptance and relevance for Asia. Interestingly, the author first ponders the question of why the need for the new rules on carriage of goods by sea arose and points to the practice of containerisation and the emergence of e-commerce as the relevant factors. The author is, however, quick to point out that the Rotterdam Rules went beyond addressing the two factors and developed rules covering other important elements like right of control, the delivery of goods, and volume contracts, which were not regulated by previous conventions.

The author argues that the new rules will bring harmonized solutions and enhance predictability. The paper then addresses some emerging scepticism as to the entry into force of the Rotterdam Rules, which the author challenges by citing the historical example of the Hague Rules of 1924 that experienced initial delay in the entry into force but ultimately turned out to be successful. The author argues that the number of ratifications typically tends to accelerate at some stage before conventions

enter into force and expects the same would happen to the Rotterdam Rules after the ratification by the United States. The paper then points to the grim situation of lack of interest of Asian states in ratifying Rotterdam Rules and identifies the common interest of other states that are signatories to the Rules. The author then tenders some advice to Asian states in making a rationale decision about ratifying or rejecting the Rules. Firstly, the author calls on the states to make such a decision based on accurate and reliable information on the Rotterdam Rules, rather than on groundless rumours or emotional responses. The author then emphasises the need to make a correct comparison in answering a pertinent question, whether the Rules, as a whole, are better than other possible alternative regimes? The author also alerts readers about the possible consequences of the failure of the Rotterdam Rules. Then the author seeks to refute some important misconceptions about the Rotterdam Rules held by carriers and shippers. For example, the author rejects the common perception among carriers that the Rotterdam Rules impose a higher level of liability. In order to break such a myth, the author interestingly computes the difference between the potential liabilities under the Rotterdam Rules with the existing liabilities under other conventions to demonstrate that they are hardly different.

With regard to the shippers, the author addresses two of their major concerns. The first concern is about the increased number of rules addressing shippers' obligations and liabilities under the Rotterdam Rules in comparison with other conventions. The second concern pertains to the possibility of carriers derogating from the mandatory liability regime recognised under the Rotterdam Rules. Both these concerns are rejected by the author. The author mentions that a shipper's liability under the Rotterdam Rules is not much different from the applicable national laws or contract terms and claims that the shippers are even more protected in some respects under the Rotterdam Rules. With regard to the second concern, the author points to the high threshold prescribed by the Rotterdam Rules that would make the derogation from the mandatory liability regime highly difficult and improbable. The conclusion reiterates the major findings and recommendations of the author.

The next paper is by Tan Chiang Huat Edward. It provides a practical consideration in managing legal claims arising out of carriage of goods using a multimodal transportation involving road, rail, air and sea conveyance across multiple jurisdictions. The author highlights that the complicated nature of the underlying transactions creates both commercial and legal challenges that are difficult to address. The author traces the origin of the need for modification of commercial and legal approaches to the development of modern transportation techniques and unitisation of goods by standard containers during the 1960s. The common practice of freight forwarding agents operating as a multimodal transport operator (MTO) or legally contracting as carrier, issuing different types of bills of

lading without owning any vehicles or the vessels transporting the goods is pointed out by the author. Although this provides convenience to the shippers or consignees, as they need to pursue only one single operator in the event of any loss of or damage to the goods, the legal challenges resulting from such practice are highlighted. The author aptly attributes this to the lack of an effective and unified legal regime governing the multimodal transportation industry.

Some of the existing carriage of goods laws and conventions are found to provide only a fragmented solution because a multimodal transport contract comprises a number of unimodal stages of transport and the process typically involves several parties in different jurisdictions. In such circumstances, although the application of national laws and regulations would be attracted, the author contends that they may be inconsistent or insufficient to cover claims that could typically involve loss of or damage to goods arising in between different modes of transportation or in between parties located in different territories. The author also highlights other legal complexities that could arise out of a freight forwarder performing the duty as a carrier or a stevedore acting as an agent. The author points out the pertinent challenges that may arise when truckers or the intermediate land transporters are involved. The author highlights that they could rely on their own carriage contract containing standard trading conditions (STC) as they are "carriers" in their own rights. After demonstrating a series of legal complexities that could arise in multimodal transportation claims, the paper briefly introduces some of the international and domestic legal instruments pertinent to the multimodal operations including the Multimodal Convention 1980, the Rotterdam Rules and the UK Carriage of Goods by Sea Act 1992. The paper then examines the legal status of the relationships of principal-agent, independent contractors and the carrier by referring to the relevant national judicial decisions and laws. The paper makes a useful analysis of a set of legal issues arising in the context of employing standard forms of contract, which includes definitional, jurisdictional, limitation and procedural issues.

In conclusion, the author emphasises that the complexities arising from multimodal transportation requires uniformity in practice and implementation of an effective regime to govern disparity. He reiterates the objectives of the Multimodal Transport Convention and points out the lack of related initiatives to develop a multimodal transport document or a unified regime regulating the contents of such a document. The laws governing multimodal carriage of goods were found to have witnessed limited development only in some regimes governing the carriage of goods by sea segment. The author attributes this lukewarm response to the obstacles to uniformity arising from vested interests like those of insurance companies, which favour specific conventions protecting their interest and limiting the claims. To overcome this challenge, the author makes specific suggestions including the

development of strong international legislation to exert pressure upon key players in the transportation industry and the insurers to achieve a uniform solution. To achieve uniformity, the author finally makes an interesting practical suggestion - to create an international risk pooling arrangement or a mutual scheme, to enable all those exposed to claims to share and contribute to a common adventure.

The subject of cross-border insolvency is addressed in Part V of the book, which contains two distinct papers. Augusto Teixeira Garcia examines the key features of the legal regime governing bankruptcy and insolvency in Macau SAR and the pertinent question of how Macau law addresses cross-border insolvency issues. The author also responds to some comments on the issue of pre-liquidation asset protection under Macau law with regard to specific cross-border insolvency cases involving Macau companies that were filed in Hong Kong courts. The author first provides an overview of the key features of bankruptcy law and procedure in Macau. He points to the traditional division between bankruptcy (applicable to merchants) and insolvency law (applicable to non-merchants), which is still maintained under the Macau law, and explains its differences before furnishing the underlying rationale for keeping such a division. In spite of the division, the similarity of the legal procedures applicable to both clusters under the Macau Civil Procedure Code is aptly highlighted by the author.

The paper examines the specific features of the bankruptcy law and procedures including the actions triggering the beginning of the bankruptcy procedure, the consequent duties of the debtor, conditions indicating the incapacity to pay, creditors meetings and possible agreements to prevent or stay a bankruptcy judgment, the appointment of a bankruptcy administrator and his duties and powers. The author demonstrates the wide powers of a bankruptcy administrator to propose any measures to the court to prevent asset stripping in order to protect the interests of the creditors. Therefore the author argues that there is sufficient pre-liquidation assets protection under Macau law, contrary to some comments that expressed the opposite view, in light of the *Zhu Kuan Group Bankruptcy* case involving the winding-up procedures of a Macau incorporated company that was filed in Hong Kong courts. The paper also highlights the other key features of Macau bankruptcy laws including the declaration of bankruptcy, the consequences of certain acts of the debtor before and after declaration of bankruptcy, liquidation and distribution of assets, and the future consequences of bankruptcy for the debtor.

The paper then specifically addresses the issue of cross-border insolvency and the author points to the lack of specific rules aimed at dealing with cross-border insolvency. However, the author argues that some rules under Macau law have the scope to address cross-border insolvency proceedings. In this regard the author explains a very interesting feature of Macau law, which does not provide any

precedence to a foreign insolvency judgment recognised and executed in Macau to override the interest of the local creditors in Macau. The author cites the specific provisions of the banking law and the Commercial Code in Macau that provide priority to the interest of the local creditors. The author also shows that Macau law takes a territoriality approach while giving effects to insolvency by limiting its consequences only upon the assets belonging to the representation in Macau. The author argues that such an approach is contrary to the universality theory of insolvency, in which a worldwide effect over the assets of an insolvent company found anywhere is recognised. The author then discusses some criticism and justifications related to the practice of offering preference to local creditors (referred to as ring-fencing) in cases involving cross-border insolvency issues. Interestingly, the author argues that the UNCITRAL Model Law on Cross-Border Insolvency seems to be indirectly open to such measures and elaborates the relevant provisions of articles 21 and 22 of the Model Law. The author supplements the argument with further examples from specific legislative provisions of Singapore, USA and Japan. Based on the above examples, the author comes to the conclusion that the legal provisions of Macau do not contradict the approach of the Model Law on Cross-Border Insolvency and its practice of ring-fencing may not trigger any retaliatory measures by other countries.

The paper by Min Han focuses on the effects of discharge of pre-insolvency claims, particularly in the context of the consequences of insolvency arising from a foreign insolvency proceeding. The paper argues the importance of discharge in the context of cross-border insolvency and examines the effects of a foreign discharge. It investigates, whether and how the discharge effected in a forum state would be recognised and enforced in another state under the current cross-border insolvency regimes. Finally, it suggests some measures to enhance harmonization in the context of cross-border recognition of the effect of a discharge. The author first introduces the discharge of a debtor's debts in respect of pre-insolvency claims by citing examples from the laws of Republic of Korea. The significance of the issue of discharge is emphasised in two contexts, namely the rehabilitation proceeding and a liquidation proceeding arising out of an insolvency.

The paper first explains how the liabilities of the debtor for pre-insolvency claims could be discharged in cases of rehabilitation of insolvent business entities in Korea or in bankruptcy proceedings against a natural person. Interestingly, the author draws our attention to the difference between two elements of 'indebtedness' and 'liabilities' under the Korean law in cases of a discharge. Citing judicial decisions, the author shows that even when the liabilities of the debtor are discharged by a rehabilitation plan, the indebtedness would remain and will not be discharged, although its implications are mainly voluntary in nature and do not give rise to enforceable

claims. The paper emphasises that insolvency proceedings are a collective compromise among the relevant stakeholders in which discharge plays a crucial role. The paper points to the requirement that insolvency proceedings should be collective in nature in order to qualify for recognition and relief under the Model Law on Cross-Border Insolvency.

The paper introduces the law governing an insolvency proceeding with reference to the choice of law rules recommended by the UNCITRAL Legislative Guide on Insolvency Law. The issues arising in the context of cross-border enforcement of discharge are identified using a hypothetical case. The author calls our attention to the ongoing work of Working Group V in the UNCITRAL to develop a model law or model legislative provisions for the recognition and enforcement of 'insolvency-derived judgments', which the author believes would include court decisions effectuating a discharge. The paper examines the mandatory and discretionary relief provided by the Model Law on Cross-Border Insolvency upon recognition of a foreign insolvency proceeding and presents the relevant limitations. Then the paper shifts its focus to Korean law and examines the relevant procedures and requirements for recognition of a foreign discharge, followed by a discussion on a real and a hypothetical case.

The paper then carries out a comparative review of some key domestic insolvency regimes. First, the issues of recognition and enforcement of a Korean insolvency proceeding in foreign jurisdictions that have either adopted or not adopted the UNCITRAL Model Law are discussed. Secondly, the specific issue of recognition of a foreign discharge in different jurisdictions that have either adopted or not adopted the Model Law is examined. A brief introduction to the European Insolvency Regulations is made before the paper concludes by identifying a set of problems that would arise in recognition of a foreign discharge. Therefore, the author recommends developing the Model Law or model legislative provisions governing the procedures and requirements for recognition of the discharge effected by or relating to a foreign main proceeding. The paper also recommends some relevant additional measures which need to be considered in the specific context of a closed foreign main proceeding.

Part VI of the book dealing with the issue of e-commerce law and the modern trends in international trade law presents four papers. Xue Hong takes an international perspective in achieving effective regulation of various intermediaries involved in e-commerce transactions. Benefitting from the post-conference submission dates set for the papers, the author brings up-to-date an incident involving the e-commerce company Alibaba in January 2015 to indicate the adverse impact, any regulatory intervention could cause on e-commerce operations. Interestingly, the example demonstrates the potentially huge impact even informal

actions like the disclosure of a survey report or the release of the "records" of a meeting could cause on E-commerce firms. Due to such actions, Alibaba is said to have suffered a plunge in its stock price to the account of 11 billion US dollars in a single day. While providing pertinent data of Alibaba's impressive short-term growth prior to the incident, the author attempts to show the advantages and potential of e-commerce business models on the one hand and the legal risks and dilemma they face from regulatory authorities on the other.

The author argues that the regulation of e-commerce platform services requires careful monitoring and elaboration, as they may have a potentially serious impact on the internet economy. Especially, as the internet services across multiple jurisdictions, like Alibaba, would have to face a constellation of legal and regulatory regimes, more caution is suggested while regulating e-commerce. Uninformed or inconsistent policies and blunt and heavy handed regulatory measures are specifically criticised by the author as having the potential to cause burdens and uncertainty to internet platform services. Therefore, the author calls for enhancement of coherency and consistency in regulatory approaches in order to improve the health and sustainable development of the world digital economy.

The paper first introduces the nature of platform services like Alibaba and emphasises some of the important characteristics, like neutrality, which are required to facilitate sellers and buyers trade effectively on such internet platforms. Given the nature of the services provided by such platforms, they are identified as internet intermediaries, and the author highlights the dual role of regulation of such intermediaries namely protecting legitimate use and combating illegitimate use. The paper then elaborately addresses the crucial issue of intermediary liability arising out of the third-party content or communications. It examines three distinct models of intermediary liability namely strict liability, broad immunity and conditional liability and analyses the relevant criteria for attributing liability and the possible defences available. The author refers to domestic laws and judicial decisions to highlight different legal standards governing intermediary liability in internet transactions. As the platform services typically involve actions of third parties, internet intermediaries have a key obligation to assist law enforcement, which is aptly addressed by the author citing examples from China.

Given the evolution and potential of the e-commerce platforms, the author contends that the imposition of liability on them should only be the last resort of regulation. Instead, the author calls for a better governance of such platforms through supervision and guidance of their daily operations aimed at preventing harmful acts. The author seeks to achieve a better governance of e-commerce platforms through the development of appropriate terms of services and subjecting them to due process standards and verifying their legitimacy. In conclusion, the paper highlights the

power of the e-commerce platforms as intermediaries to govern the subscribers, as well as non-subscribers, through their own transactional rules. As e-commerce platforms and their transactional rules are increasingly subjected to legal review, sanctions and monitoring in different jurisdictions, the author calls for the development of appropriate regulatory approaches. Similarly, the need for e-commerce platforms to balance the interests of various stakeholders, including the interests of the general public, is pertinently emphasised towards the end.

Rostam J. Neuwirth and Alexandr Svetlicinii present a comprehensive analysis of the nexus between three core fields of economic law and examine a set of related cases to demonstrate a need for better regulatory cooperation that is blended with elements of regulatory competition. The authors first introduce the tendency towards segmentation in regulating international economic activities and the consequent struggle of lawyers to find the best regulatory approach to realise the economic objectives. They highlight the nature of typical legal debates on the regulatory approach that are framed in antithetical terms like regulatory diversity vs regulatory harmonisation (or) regulatory competition vs regulatory cooperation. The authors also point out other issues of concern including the threats to the unity of international law caused by its growing fragmentation and the continued debate on the public–private law divide. The above factors, along with the trend of 'internationalization of law' is said to have resulted in a greater complexity for which the need for a more adequate response at the level of regulatory theory is urged.

The paper refers to the notion of 'regulatory co-opetition', defined by some scholars to indicate the requirement of a flexible mix of competition and cooperation between governmental actors, as well as between governmental and non-governmental actors, to achieve optimal governance. The paper claims that the underlying arguments have become more pressing in light of various changes to both the architecture of the international (economic) legal order and the way business is conducted in the globalised world today. The paper goes on to demonstrate the effects of new technologies upon international business, commerce and the legal order. The paper then argues that the prevalent set of related conditions in the legal regimes governing international trade, intellectual property and competition largely diverge by referring to the relevant state of international harmonization in each of three fields. As a consequence, the paper claims that these three closely related fields of law presently face a complex situation caused by the respective differences in the degree of their international harmonisation.

In order to achieve an optimal regulatory approach to international trade and commerce, the paper calls for a better coordination between the various international organizations active in the relevant areas. After identifying the key international organizations in areas of international trade, intellectual property and competition

law including the UNCITRAL, the paper examines six specific case studies in order to highlight the need for greater 'regulatory co-opetition' between the governmental and non-governmental actors in the three areas. The six cases studies touch upon diverse set of issues that fall across the three areas and consequently are governed by the separate set of rules emanating from the respective legal regimes. Each of these case studies is critically examined by the authors and presented in a cohesive manner to keep track of the core arguments raised in the paper.

The first case study concerns the issue of parallel imports and examines how it is addressed by the three areas. The second case study raises a number of legal issues including public health concerns and related issues under the WTO law, intellectual property law and foreign investment law. The third case study deals with the issue of involvement of private parties and the lack of their legal status in the international legal forums like the WTO. This case study highlights how the involvement of a private party can give rise to complex questions in the areas of WTO law, intellectual property and competition rules. The authors argue that this is an important example, where the disparities in terms of regulatory coordination at the global level between relevant areas of law are the cause for regulatory conflict. The fourth case study focuses on the specific nexus between international trade and competition rules by showing how a change of tariff classification impacts on the conditions of competition but yet the underlying challenges could not be addressed due to the lack of effective regulatory co-opetition.

The fifth case study highlights how the use and abuse of standard essential patents can give anti-competitive effects. This case study exposes the deficiencies of the intellectual property and competition rules in addressing the problem to show that more regulatory coordination between the two regimes is required. The last case study identifies the problems arising out of the private enforcement of EU competition rules and shows how the divergences in the procedural rules of individual Member States prevent a coherent enforcement of the substantive competition rules. The authors use this case study to argue for the need for regulatory co-opetition between the substantive and procedural rules in this field and among the EU Member States. The paper reaches the conclusion that the analysis of various cases and the diverse issues evidences the inadequate coordination between the international rules governing the three areas as well as their principal institutions like the WTO, WIPO, UNCTAD, UNCITRAL, and the OECD.

The authors argue that the degree of harmonisation between the rules of trade, intellectual property and competition differ largely at the multilateral level and consequently their respective global regimes are in a state of regulatory competition and even potential regulatory conflict. They go one step further to claim that such lack of harmonisation has resulted in even larger disparities at the national level,

impeding effective global coordination. In conclusion, the authors show certain paradoxes like those resulting from the absence of international harmonization initiatives in the area of competition laws or from the presence of such initiatives in trade related intellectual property laws. In the light of such paradoxes and other challenges identified in the paper, the authors conclude that the best possible response lies in the paraconsistent logic underlying the concept of regulatory co-opetition. The paper recommends that regulatory cooperation in this context should seek a better coordination not only between governmental and non-governmental bodies but also between inter-governmental and international organizations. The paper specifically recommends stronger and more efficient institutional ties between the WTO, the WIPO, UNCTAD, UNCITRAL and the OECD towards that end.

The paper of Abhinayan Basu Bal examines the role of UNCITRAL in creating strong and secure global supply chains. The author investigates this role by exploring the nexus between transportation and e-commerce laws and how adaptation to modern legal standards could result in improved global trade financing. Highlighting the significance of global supply chains to international trade, the author sets the scene for the paper by citing the example of the two trillion dollar credit gap for micro, small, and medium-sized enterprises identified during the global financial crisis. The author calls for measures to effectively address such credit gaps in order to sustain the entire supply chain. The author argues that such a situation offers a unique possibility for the maritime transportation industry to contribute to the strengthening of supply chains. He claims that the industry possesses information useful in assessing counterparty credit risk as well as other risks unique to cross-border trade transactions. By embracing electronic means of doing business, the author contends that the industry could effectively assist financial institutions to manage their risks better in trade financing.

The author argues that the continued use of paper documents by small and medium size shippers is due to the non-availability of open systems for electronic documentation in the maritime transportation industry. The author attributes this to the industry, which has not yet found any compelling benefits for adopting such an open system. The author predicts that the incentive to embrace electronic means and promote electronic transport records can come from the possibility of adopting new business models. The use of e-commerce, the author claims, can pave the way for the maritime and logistics industries to participate in the evolving field of supply chain finance. The participation of maritime and logistics industries, in turn, is predicted to have the potential to facilitate the transactions of customers by providing financial risk evaluation techniques. The author is optimistic that a better trade financing mechanism would result from the feeding of relevant data by these

industries through a centralised system and would further lead the micro, small and medium-sized enterprises (MSMEs) to efficiently participate in international trade.

The paper focuses on the examination of the legal framework of transport records and the tracing of the evolution of trade finance to demonstrate that updating transport and e-commerce laws will lead to better financing techniques. To accomplish this, the author chooses to investigate the legal framework for negotiable transport documents from the perspective of English law, albeit with a brief scrutiny of relevant provisions of the Rotterdam Rules. The author then describes various trade finance arrangements along with its patterns and recent trends. He also attempts to make a case for maritime and logistics industries to expand their scope of business through the use of electronic transport records. The author calls for a revision of domestic maritime and e-commerce laws to achieve the desired goals articulated in the paper, which he claims would aid the interest of diverse stakeholders namely the shipper, the carrier and financiers of international trade. To promote a sustainable growth in international trade and secure global supply chains, the author recommends that the maritime transport industry play the role of a trusted intermediary to enable enterprises and MSMEs to have a better access to trade and working capital finance. He concludes by highlighting the potential role the Rotterdam Rules and other relevant initiatives of UNCITRAL could play.

My paper on "Contemporary Issues in Harmonization of Commercial Law" seeks to provide the background to the papers presented in the book. As the papers in the book were mainly presented in few months after the 47th Session of the Commission held during 7-18 July 2014, my paper provides a close overview on a range of key issues arising out of that session. Works of relevant UNCITRAL Working Groups are also examined as they formed the contemporary reference to the UNCITRAL Asia Pacific Fall Conference held on 17-18 October 2014. With the objective of setting the context to the readers, the paper analyses several key issues arising out of a specific set of topics covered by the 47th Session, namely arbitration and conciliation, MSMEs, online dispute resolution, electronic commerce, insolvency law, security interests, technical assistance to law reform, uniform interpretation and application of UNCITRAL legal texts, promotion of the rule of law and future issues. In examining each of these issues separately, I present the core debates that are pertinent to the matters raised by different papers presented in this book.

The approach taken is to succinctly introduce specific issues arising under different topics, by referring to the origin of the issues, the progress achieved in the past, the deliberations in the relevant Working Groups, the divisions among member states during the 47th Session and the future course contemplated. In this process, the analysis of some topics ended up much broader than others, which was inevitable due to the significance of the emerging debates and their pertinence to the papers

presented in this book. I have also resisted reflecting my personal position on the issues raised, in order to ensure that the paper achieves its objective of providing the relevant background without influencing the minds of the readers. In conclusion, I draw the attention of the reader to the effectiveness of the harmonization mandate of UNCITRAL and examine the future issues facing its agenda. I highlight the evolving nature of the agenda within specific working groups and the implications of certain stalemates.

I argue that in spite of the odds, the overall progress of harmonization and the quality of the results have been quite impressive. I express concern about the potential consequences that may arise out of the limitation of resources and budgetary constraints faced by the Secretariat and make some recommendations. I advert to the emerging trend to reserve time to discuss future works at the Session of the Commission and highlight its positive impact on the research agenda and early involvement of potential stakeholders. At the same time, I refer to the few setbacks experienced in having exclusive debates on future issues and discuss the implications. I express optimism about the continued recognition of the utility of informal working methods including colloquia or academic conferences like the UNCITRAL Asia Pacific Fall Conference 2014 and call upon the academia to take cognizance of the deliberations of the Commission in order to ensure that theory does not remain idealistic but reflects the reality.

A close introduction to all the papers presented in this book reveals a large diversity of harmonization issues facing UNCITRAL in the process of achieving trade development. The papers are marked by two distinct characteristics. First of all, many papers provide a rare glimpse of unique regional perspectives on various international agenda items grappled by UNCITRAL. Secondly, most papers provide interesting academic perspectives that go beyond common issues and debates and highlight a range of allied issues that are difficult to raise and debate in formal forums like the UNCITRAL Working Groups or the Commission meetings. Taking into account the above perspectives and involving the relevant stakeholders to promote a concerted action is crucial for UNCITRAL to be successful in achieving an effective harmonization at a multilateral level. Given the increasing diversity of issues influencing the harmonization process and the ensuing complexity, it is important to take a multidimensional and dynamic approach to promote universally accepted harmonization standards.

After the success of UNCITRAL RCAP, other regions in the world have expressed interest in establishing a regional office to promote regional perspectives. Although, resource constraint remains an issue in promoting such proposals, it is undeniable that regional perspectives and developments should be continuously fed into the international harmonization process of UNCITRAL. This is important not

only to promote universality of harmonization standards but also to avert regionalism or fragmentation of standards. Moreover, as argued elsewhere in this book, it is equally important to continue to use informal working methods in UNCITRAL like conducting colloquia and conferences. To develop a concerted multidimensional approach to address future challenges in harmonization, it is important to promote regional debates on emerging issues of harmonization, as initiated by UNCITRAL RCAP widely in the region since its establishment.

The success of the 2014 UNCITRAL Asia Pacific Fall Conference and the unique opportunity it provided to document the regional perspectives and diverse issues on the important topic of 'Trade Development through Harmonization of International Commercial Law' through this book is good evidence of the obvious benefits of a concerted cooperation between international diplomatic institutions, regional stakeholders and academia. I sincerely hope this book and the regional perspectives it presents will inspire cooperation among all key stakeholders in any relevant future harmonization endeavours.