

# **Singapore Academy of Law and Chancery Bar Conference 2013**

“Finance, Property and Business Litigation In A Changing World”

25 – 26 April 2013

## **Keynote Address by Chief Justice Sundaresh Menon\***

The Right Honourable Lord Mance of Frogdal and the Right Honourable Lady Justice Arden,

The Honourable Attorney-General Steven Chong,

The Honourable Mr Chan Sek Keong, Retired Chief Justice,

Fellow Judges,

Distinguished guests from the Chancery Bar Association of England and Wales,

Members of the Singapore Academy of Law,

Ladies and gentlemen

### **I. COMMERCIAL LITIGATION IN A GLOBALISED WORLD**

1 It gives me great pleasure to open the first-ever joint conference of the Singapore Academy of Law and the Chancery Bar of England and Wales. In an increasingly borderless world, commercial litigation inevitably takes on a greater multi-jurisdictional dimension. For Singapore and the UK, these changes are keenly felt by our legal communities. Both states rest at the crossroads of international commerce, being in the

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\* I am very grateful to my colleague, Jordan Tan, Assistant Registrar of the Supreme Court, for his assistance in the research and preparation of this speech

top ten globalised economies, according to Ernst & Young's 2012 Globalisation Index.<sup>1</sup> The pace of globalisation slowed somewhat in the aftermath of the 2008 financial crisis, but the same Ernst & Young report observes that it has since picked up speed. With the rise of Asia, globalisation is now characterised by more evenly balanced East-West capital flows.<sup>2</sup>

2 So, as businesses continue to become increasingly internationalised, the disputes they spawn are increasingly multi-jurisdictional. Furthermore, the outcomes of major cross-border litigation can have ramifications across the globe. By way of example, the decision of the Indian Supreme Court last month to deny Novartis International AG ("Novartis"), its patent application for the drug Gleevec has attracted worldwide press coverage. That decision has also reverberated in various legislative halls contemplating patent law reforms and will undoubtedly impact the business behaviour of "Big Pharma" in the years to come,<sup>3</sup> a topic to which I shall return momentarily.

3 Three or four decades ago, the benefits of a joint conference such as this might not have been immediately apparent. After all, the Singapore legal system is based on the English legal system and our lawyers are able to understand the general laws of both countries. But, as the title of this conference suggests, we live in a changing world and can no longer rest on the old assumptions.

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<sup>1</sup>See Ernst & Young Globalisation Report 2012 (available online: <http://www.ey.com/GL/en/Issues/Driving-growth/Globalization---Looking-beyond-the-obvious---Globalization-continues-but-it-is-different> (last accessed 11 April 2013)).

<sup>2</sup> *Id.*

<sup>3</sup> See "The Novartis Decision: Is the Big Win for Indian Pharma Bad News for Investment?" (Time magazine, 1 April 2013) (available online: <http://world.time.com/2013/04/01/the-novartis-decision-is-the-big-win-for-indian-pharma-bad-news-for-investment/> (last accessed 11 April 2013)).

4 From the domestic perspective, Singapore's and the UK's legal frameworks have done well in supporting businesses. Both nations consistently rank in the top ten in the World Bank's "Ease of Doing Business" Index.<sup>4</sup> The Index examines the domestic legal framework to determine the ease of doing business within a particular country. What the Index does not cover is the challenge of conducting multi-jurisdictional businesses. Although the World Bank's report contains a short chapter on "Trading Across Borders",<sup>5</sup> this only looks at limited indicia, for instance, border procedures and customs clearing times. This is understandably so given the infinite diversity of jurisdictions across which international business is carried out.

5 Consequently, the Index does not account for the impediments to doing business caused by the *divergence* of laws between jurisdictions. While Singapore and the UK thrive as commercial centres, where their laws diverge, this will impact businesses operating across both jurisdictions.

6 This is a point we should not lose sight of. Today, Singapore is the UK's largest trading partner in South-East Asia,<sup>6</sup> with more than 700 UK companies in Singapore.<sup>7</sup> However, even as Singapore and the UK build closer and stronger connections through trade and commerce, the laws of both states will evolve in response to their changing

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<sup>4</sup> See the World Bank's "Ease of Doing Business Index" (available online: <http://www.doingbusiness.org/rankings> (last accessed 11 April 2013)).

<sup>5</sup> See for instance, Chapter 13 of the World Bank's Doing Business Report 2013 (available online: <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-Chapters/Trading-across-borders.pdf> (last accessed 11 April 2013)).

<sup>6</sup> See the UK Trade & Investment factsheet on Singapore (available online: <http://www.ukti.gov.uk/export/countries/asiapacific/southeastasia/singapore.html> (last accessed 11 April 2013)).

<sup>7</sup>*Id.*

identity within the international and regional spheres. An editorial in a financial magazine recently predicted that Singapore will be one of ten countries that will dominate world trade in 2050.<sup>8</sup> Regardless of the extent to which that proves to be correct, we can expect that Singapore's commercial laws will be shaped by its status as an international trading and commercial hub, but against the backdrop of a stronger ASEAN identity.<sup>9</sup> Likewise, the laws of the UK will continue to be shaped by its status as a key international player in trade and commerce but as one operating within the European context.

7       Undoubtedly, the complexion of the laws of our two states will not remain static. Some divergence can be expected and where this is the result of domestic imperatives, considered government policy or structural differences in legal systems we should accept this. But in the absence of such imperatives, deliberate policy choices or structural constraints, in the field of business and commercial law, the courts can perhaps better serve national interests as well as the interests of their users by avoiding divergence where possible so as to develop the law in a commercially sensible way which does not detract from the transnational character of the prevailing business environment.

## **II. SINGAPORE AND THE CHANCERY BAR IN THESE CHANGING TIMES**

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<sup>8</sup> See "The 10 countries that will dominate world trade in 2050" (Business Insider, 27 June 2011) (available online: <http://www.businessinsider.com/ten-countries-dominate-world-trade-2050-2011-06> (last accessed 11 April 2013)).

<sup>9</sup>An example would be ASEAN's talks to launch a regional free trade area with six trading partners including China and India.

8 What then do these changing times have in store for members of the legal profession? In my view, they undoubtedly have the requisite qualities to adapt and thrive. The Chancery courts originated as the courts of conscience to right the wrongs caused by the hard-edged common law. Where the common law could not vindicate rights for lack of a suitable writ, Chancery addressed those injustices.<sup>10</sup> The Chancellor, as both judge and jury, delved as deeply as conscience required into the particular circumstances before him,<sup>11</sup> demonstrating a level of dexterity that was unknown to the common law courts. Ironically, the flexibility of Chancery adjudication, despite that being its strength, also led to criticisms of the mercurial quality of equity.

9 Fortunately, equity was not consumed by these criticisms. Instead, it evolved by developing a rules-based system while retaining the key features of the equitable doctrines. Subsequently, with the enactment of the Supreme Court of Judicature Act 1873,<sup>12</sup> the common law and Chancery courts were fused. All judges of the Supreme Court were empowered to administer law and equity.

10 The particular features of Chancery practice thus found their way to the Bar at large, with lawyers seeking and Judges applying equitable remedies in what were previously common law actions. And so, it may be said that the ingenuity characteristic of the Chancery Bar has been cultivated in all lawyers since then. This, amongst many other reasons, is why I am optimistic that our respective legal communities will thrive in

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<sup>10</sup> See *Earl of Oxford's Case* (1615) 1 Rep Ch 1 at 6.

<sup>11</sup> See J H Baker, *An Introduction to English Legal History* (Butterworths, 1990, 3<sup>rd</sup> Ed) at p122.

<sup>12</sup> Supreme Court of Judicature Act 1873, 36 & 37 Vict., c. 66.

this changing world.

11 The particular genius of an event such as this is the opportunity it presents us to think about how the law can keep pace with the changing realities of the transnational business environment which it is its lot to serve. We do this in the first instance by learning from each other; but it is not learning for the sake of it, good as the pursuit of knowledge may be. It is, more importantly, a necessary first step we *must* take if we are to contemplate in a meaningful way the possibilities for the harmonisation of our commercial laws, where this is practical, and to demystify the differences which cannot be bridged.

12 With this in mind, I turn now to consider three areas of Chancery practice from which some lessons may be gleaned.

### **III. INTELLECTUAL PROPERTY – LESSONS IN DIVERGENCE AND CONVERGENCE FROM INDIA**

13 Chronic myeloid leukemia (“CML”) is a cancer which causes the increased and uncontrolled growth of myeloid cells in the bone marrow. For a long time, the prognosis for CML patients was dire: only 30% survived five years after being diagnosed.<sup>13</sup> After 2001, that number rose to 89%.<sup>14</sup> This remarkable turnaround was due to a drug called

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<sup>13</sup> See “Gleevec: the Breakthrough in Cancer Treatment” (Nature, 2008) (available online: <http://www.nature.com/scitable/topicpage/gleevec-the-breakthrough-in-cancer-treatment-565> (last accessed 11 April 2013)).

<sup>14</sup> *Id.*

Imatinib, marketed as Gleevec, which obtained FDA approval in 2001. For patients of CML, Gleevec is a silver bullet, a miracle drug even. For Novartis, Gleevec is big business, specifically, a business worth more than USD 1 billion a year.<sup>15</sup> A year's supply of Gleevec costs CML patients USD 70,000.<sup>16</sup> In contrast, generic versions made in India cost the patient only USD 2,500 a year.<sup>17</sup>

14 Just this month, on 1 April 2013, the Indian Supreme Court denied Novartis' patent application for an updated version of Gleevec<sup>18</sup> on the ground that it was not an invention within the meaning of s 3(d) of the Indian Patents Act. Section 3(d) was introduced in 2005 and reads as follows:

The following are not inventions within the meaning of this Act –

...

(d) the mere discovery of a new form of a known substance which does not result in the *enhancement of the known efficacy* of that substance....

[emphasis added]

15 The Indian Supreme Court clarified that the enhancement required was an enhancement of the *therapeutic* efficacy of the invention,<sup>19</sup> and it found that Novartis had failed to prove any such enhancement. The court pointed out that although Novartis contends that the new form of Gleevec has an increased “bioavailability” of 30%, which

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<sup>15</sup> See Pharmaceutical Executive (May 2011) (available online: [http://www.oliverwyman.com/media/2011\\_PharmExec\\_50.pdf](http://www.oliverwyman.com/media/2011_PharmExec_50.pdf) (last accessed 11 April 2013)).

<sup>16</sup> See “Low-Cost Drugs in Poor Nations Get a Lift in Indian Court” (New York Times, 1 April 2013) (available online: [http://www.nytimes.com/2013/04/02/business/global/top-court-in-india-rejects-novartis-drug-patent.html?\\_r=0](http://www.nytimes.com/2013/04/02/business/global/top-court-in-india-rejects-novartis-drug-patent.html?_r=0) (last accessed 11 April 2013)).

<sup>17</sup> *Id.*

<sup>18</sup> See *Novartis AG v Union of India & Others* (Civil Appeal Nos. 2706-2716 of 2013) (available online: <http://supremecourtfindia.nic.in/outtoday/patent.pdf> (last accessed 11 April 2013)).

<sup>19</sup> *Id.* at [180].

refers to the extent to which a drug is able to reach its site of action within the body,<sup>20</sup> such increased bioavailability did not necessarily lead to an enhancement in therapeutic efficacy.<sup>21</sup> Furthermore, the court was not impressed with the fact that Novartis had compared the new form of Gleevec with a form of the drug which was not ordinarily soluble and was not that which had been marketed previously.<sup>22</sup>

16 In essence, the Novartis decision represents a rejection of the practice prevalent in the US known as “evergreening” where patents may be extended for minor modifications. After its release, the decision attracted support in worldwide press coverage and it has been suggested that the European Union, Australia and Canada may follow India’s lead.<sup>23</sup> The Novartis episode is one which may be duplicated in many jurisdictions should they be persuaded to effect similar reforms by legislation.

17 But even in jurisdictions which do not have an equivalent of s 3(d), the validity of evergreening might still arise before the courts. For instance, s 1 of the UK Patents Act 1977 requires, amongst other things, an invention to be novel and to involve an inventive step. These are requirements found in the legislation of many other jurisdictions, including Singapore’s Patents Act.<sup>24</sup> For an improvement to an existing patented invention to be patentable, that improvement must independently satisfy the relevant criteria including novelty and inventive step. It has been argued that this inherently

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<sup>20</sup> *Id.* at [184].

<sup>21</sup> *Id.* at [189].

<sup>22</sup> *Id.* at [193].

<sup>23</sup> See “EU, Australia, Canada may follow India’s Patent Law” (The Times of India, 4 April 2013) (available online:

<http://timesofindia.indiatimes.com/india/EU-Australia-Canada-may-follow-Indias-Patent-Law/articleshow/19376054.cms> (last accessed 11 April 2013)).

<sup>24</sup> (Cap 221, Rev Ed 2005).



safeguards against evergreening.<sup>25</sup> But it is the breadth and the depth that the courts ascribe to these criteria that will determine the continued availability of evergreening as a practice. A decision to relax the requirements so as to allow minor modifications to be patented will favour the pharmaceutical companies and attract foreign investment.

18 But, this will then have to be balanced against the perceived ills of allowing evergreening as it increases the rent collected by “Big Pharma” at the cost of public health. It may be noted that public health imperatives led the 2001 WTO Ministerial Conference to adopt a Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (commonly referred to as TRIPS) and Public Health<sup>26</sup> which declares that:

[I]ntellectual property protection is important for the development of new medicines [but] the TRIPS Agreement does not and should not prevent members from taking measures to protect public health.

19 The Indian Supreme Court’s decision is one of many difficult decisions which will have an impact beyond domestic borders. The Novartis case demonstrates that globalisation amplifies the potential impact of such decisions. The decision also throws up the tension that sometimes exists between domestic imperatives such as public health and wider commercial interests such as promoting foreign investment and incentivising research and development. Harmonisation in such circumstances might be impacted by how courts in particular jurisdictions strike the balance between these competing pulls. The next area of law I will consider is one in which the tension between

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<sup>25</sup>See Scott Parker and Kevin Mooney, “Is ‘evergreening’ a cause for concern? A legal perspective” (2007) 13 *Journal of Commercial Biotechnology* 235.

<sup>26</sup>(WT/MIN(01)/DEC/2).

domestic and foreign interests is often particularly pronounced.

#### IV. INSOLVENCY – THE UNIVERSAL AGAINST THE DOMESTIC

20 The shocking insolvencies of “too big to fail” corporations in the 2008 financial crisis are still a recent memory. Insolvency practitioners advocate strongly for a “universal approach” to insolvency proceedings. The universal approach entails having a single set of insolvency proceedings based in one country that will apply to the debtor’s assets wherever situated.<sup>27</sup> Apart from being conceptually neat, it satisfies the insolvency practitioners’ ideal of a more equitable distribution of assets without the distortion caused by discordant domestic laws.

21 Lord Hoffmann’s speech in *In re HIH Casualty and General Insurance Ltd*<sup>28</sup> (“*HIH*”) has generally been regarded as the high watermark of English jurisprudence in furthering the universal approach. Similarly, Lord Hoffman’s opinion on behalf of the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc*<sup>29</sup> (“*Cambridge Gas*”) on appeal from the Isle of Man, was celebrated by insolvency practitioners.

22 In *HIH*, the House of Lords decided that it had the power to order the remission of assets collected in England to Australia in aid of insolvency proceedings there. The

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<sup>27</sup> UNCITRAL, *Legislative Guide on Insolvency Law*, p 78 (available online: [http://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf) (last accessed 11 April 2013)).

<sup>28</sup> [2008] UKHL 21.

<sup>29</sup> [2006] UKPC 26.

majority<sup>30</sup> decided that this was a statutory power conferred by s 426 of the 1986 UK Insolvency Act. Lord Hoffman, with whom Lord Walker agreed, considered that such a power also existed at common law.

23 In *Cambridge Gas, Navigator Holdings plc* (“Navigator”), an Isle of Man company, operated five gas transport vessels through its subsidiaries. Cambridge Gas, a Cayman Islands company, owned 70% of Navigator. The business failed and Navigator initiated Chapter 11 proceedings which led a New York Bankruptcy Court to approve the creditors’ plan for reorganisation. The plan envisaged vesting Navigator shares, including those held by Cambridge Gas, in a creditors’ committee. But, Cambridge Gas did not participate in the New York proceedings. The Privy Council nonetheless upheld enforcement of the plan. Lord Hoffmann acknowledged the difficulties with characterising the New York judgment as a judgment in rem as the shares were situated in Isle of Man. It was equally difficult to characterise the judgment as one in personam as the New York court did not exercise in personam jurisdiction over Cambridge Gas.

24 Lord Hoffmann, however, found a middle way and explained the nature of bankruptcy proceedings in these terms:<sup>31</sup>

Judgments in rem and in personam are judicial determinations of the existence of rights...

The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established....

[B]ankruptcy, whether personal or corporate, is a collective proceeding to enforce

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<sup>30</sup> Lord Scott of Foscote, Lord Neuberger of Abbotsbury and Lord Philips of Worth Matravers.

<sup>31</sup> See *Cambridge Gas* at [13]-[15].

rights and not to establish them...

Lord Hoffmann also took the view that at common law, “the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency”.<sup>32</sup>

25 Lord Hoffmann’s pronouncements were considered by the UK Supreme Court late last year. In *Rubin v Eurofinance and New Cap Insurance Corporation v A E Grant*<sup>33</sup> (“*Rubin*”), the UK Supreme Court was faced with the issue of whether a foreign judgment setting aside tainted antecedent transactions, for example, transactions at an undervalue, could be enforced. The court held that no special rule would apply and that the usual requirements for enforceability at common law and under the 1933 Foreign Judgments (Reciprocal Enforcement) Act had to be satisfied. Because the affected parties were not present or resident in and had not submitted to the foreign jurisdiction, these requirements were not met.

26 Lord Collins considered Lord Hoffmann’s suggestion that insolvency proceedings transcend traditional characterisations of in personam or in rem proceedings but concluded that judgments entered into pursuant to avoidance proceedings were in personam, or at best in personam in the context of sui generis proceedings.<sup>34</sup> On either basis, there was no reason to develop a separate rule to determine the enforceability of such judgments.

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<sup>32</sup> *Id* at [21]-[22].

<sup>33</sup> [2012] UKSC 46.

<sup>34</sup> See *Rubin* at [104]-[114].

27 Lord Collins also considered but rejected Lord Hoffmann's view that the domestic court would be able to assist by doing what it could have done in the case of a domestic insolvency. The reason for the rejection was that it was fallacious to think that the English courts would recognise a foreign court as properly exercising in personam jurisdiction simply because the English court could have exercised such jurisdiction had it found itself in corresponding circumstances.<sup>35</sup> Lord Collins also thought that *Cambridge Gas* was wrongly decided.<sup>36</sup>

28 Insolvency practitioners have criticised *Rubin* for detracting from the universal approach.<sup>37</sup> But I suggest a close reading of *Rubin* will demonstrate that such criticisms are not entirely justified. First, the effect of the decision in *Rubin* should not be overstated. Its pronouncements are limited to foreign judgments emanating from avoidance proceedings in which the affected party had not participated.<sup>38</sup>

29 Second, and more importantly, the decision in *Rubin* is not the result of unwillingness on the part of the majority to further the universal approach. The decision was not driven by ideological differences with Lord Hoffman. Rather, the key explanation

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<sup>35</sup> *Id.* at [127].

<sup>36</sup> *Id.* at [132].

<sup>37</sup> See for instance, Jodie Kirshner, "The (false) conflict between due process rights and universalism in cross-border insolvency" (2013) 72 CLJ 27; Lee Aitken, "No return of Alsatia" (2013) 129 LQR 147; Craig Montgomery, "Keep calm and don't submit- the Supreme Court has its say on recognition of foreign insolvency proceedings" (2013) 26 *Insolv. Int* 29; Ian Fletcher, "The extra-territorial scope of fraudulent trading" (2013) 26 *Insolv. Int* 44.

<sup>38</sup> See *Rubin* at [5].

for the majority's decision lies in the following pronouncement by Lord Collins:<sup>39</sup>

A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction ... has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. ...

Furthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit. ...

30 The majority declined to recognise a special rule for insolvency proceedings not because it was unwilling to do so but because it took the view that the proper institution for the development of such a rule is the legislature, and for good reason. The introduction of such rules, which would expand the scope for the enforcement of foreign judgments, risked compromising UK businesses. Of course it might be justified where a corresponding benefit is extracted, for instance, where reciprocal recognition of UK judgments by the foreign jurisdiction is secured. But the judiciary being unable to extract any such reciprocity is not well placed to develop such rules. Instead, it is the legislature, following the act of the executive in extracting an agreement for reciprocal recognition from the foreign jurisdiction, which is better placed to make such rules. In this regard, the UK government has been active in pursuing particular cross-border insolvency policies with the support of the legislature, and the UNCITRAL Model Law on cross-border insolvency was enacted into law in 2006 by way of the Cross-Border Insolvency Regulations 2006.<sup>40</sup> Seen this way, the decision in *Rubin* is a pragmatic one which

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<sup>39</sup>*Id* at [129]-[130].

<sup>40</sup> (SI 2006/1030). See *Rubin* at [1].

seeks not to undermine the universal approach to insolvency but rather, recognises that the institution to further such an approach, should it choose to do so, is Parliament.

31 This decision underscores the point that despite the international dimension of insolvency proceedings, there may well be strong, even compelling, countervailing domestic considerations, in particular, the need to protect local businesses. Notably, Chief Justice Chan Sek Keong has pointed to a similar tension in Singapore's "ring-fencing" laws enacted by the legislature which seek to prefer local creditors over foreign ones.<sup>41</sup>

32 Hence, while there may generally be good in the harmonisation of laws, it might at times be just as well that such harmonisation be left to be pursued by the appropriate institution using the appropriate tools.

## **V. TRUSTS – ELUSIVE CONSENSUS ON OFFSHORE TRUSTS**

33 Finally, let me say a bit about trust law. I am aware that in this conference, there are six sessions on trust law including a plenary session. That being so, I will confine myself to some brief remarks on an area of trust law which has recently received the renewed attention of the international community.

34 A report by the former Chief Economist at McKinsey estimates that there is

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<sup>41</sup> See Chan Sek Keong, "Cross-border Insolvency Issues", (2011) 23 SAclJ at paras 13 to 22.



between USD 21 trillion and USD 32 trillion in offshore trusts.<sup>42</sup> Offshore trusts are prized for their confidentiality; it almost follows therefore that there may be reason to doubt the accuracy of these figures. But to put it in perspective, even the lower estimate is higher than the US GDP.

35 Two recent events have cast the spotlight on offshore trusts. The first is the leak last month of 2 million documents, mainly from the British Virgin Islands. This cache of documents has provided the most information thus far on tax havens.<sup>43</sup> The saturation of offshore moneys amounting to more than USD 20 trillion in a clutch of jurisdictions is mind-boggling. Uglund House in the Cayman Islands is a real life caricature of a tax haven. A 5-storey building, it is home to nearly 19,000 companies. This prompted President Obama to observe wryly that “either this is the largest building in the world or the largest tax scam in the world”.<sup>44</sup>

36 Although tax havens are generally viewed negatively, there is nothing inherently wrong with high net worth individuals or corporations keeping their funds a private matter. The problem lies not in the desire for privacy but in its abuse, the most common form of which is the evasion of taxes.

37 Some have argued that tax optimisation, meaning the use of tax havens to

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<sup>42</sup> See “Leaks reveal secrets of the rich who hide cash offshore” (The Guardian, 3 April 2013) (available online: <http://www.guardian.co.uk/uk/2013/apr/03/offshore-secrets-offshore-tax-haven> (last accessed 11 April 2013)).

<sup>43</sup> *Id.*

<sup>44</sup> See “House of 19000 Corporations” (Foreign Policy, 24 January 2012) (available online: [http://www.foreignpolicy.com/articles/2012/01/24/house\\_of\\_19000\\_corporations](http://www.foreignpolicy.com/articles/2012/01/24/house_of_19000_corporations) (last accessed 11 April 2013)).

alleviate tax burdens *within the letter of the law*, is not evasion.<sup>45</sup> But as there is no bright line test for when optimisation ends and evasion begins and with limited data from tax havens to distinguish the two, affected states are understandably calling for clear definitions of tax evasion to better target dirty money. Germany, for instance, has lobbied within the G20 and the OECD for such a definition.<sup>46</sup> Today, jurisdictions around the world stand guided by two sets of international standards: those of the Financial Action Taskforce (FATF) to combat money laundering; and those of the Global Forum for the Exchange of Information on measures that jurisdictions should take to prevent the misuse of legal arrangements such as trusts. The effect of initiatives such as these has been to promote a growing network of bilateral tax information exchange agreements that allow countries to better enforce their tax claims. The Global Forum has 120 member states including Singapore and the UK and just this month both Singapore and the UK were affirmed as having complied with the internationally agreed standards for information exchange for tax purposes.<sup>47</sup>

38 The second event which has thrust offshore trusts and tax havens into the spotlight is the Cyprus bailout.<sup>48</sup> Cyprus operates a model which attracts foreign depositors with attractive tax rates. When it had to be bailed out, conditions were

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<sup>45</sup> See “Pirates of the Caribbean: Global Resistance to Tax Havens Grows” (Spiegel, 8 April 2013) (available online: <http://www.spiegel.de/international/world/offshore-leaks-gives-boost-to-global-resistance-against-tax-havens-a-892977-2.html> (last accessed 11 April 2013)).

<sup>46</sup> See “Germans See Hope in Leak for Fighting Tax Evasion” (New York Times, 5 April 2013) (available online: [http://www.nytimes.com/2013/04/06/world/europe/german-officials-welcome-offshore-tax-havens-leak.html?\\_r=0](http://www.nytimes.com/2013/04/06/world/europe/german-officials-welcome-offshore-tax-havens-leak.html?_r=0) (last accessed 11 April 2013)).

<sup>47</sup> See “Global Forum Completes Peer Review of Singapore’s International Tax Cooperation Framework” (15 April 2013) (available online: [http://www.iras.gov.sg/irasHome/page\\_ektid14816.aspx](http://www.iras.gov.sg/irasHome/page_ektid14816.aspx) (last accessed 19 April 2013)). Individual country reports available online: <http://www.eoi-tax.org/jurisdictions/> (last accessed 23 April 2013).

<sup>48</sup> *Supra* note 46.

imposed, including a need for compliance with certain standards, for example, the raising of corporate tax; amongst other measures, to combat money laundering and tax flight.<sup>49</sup>

39 But despite heavy lobbying by states such as Germany and the boost the lobby has received from the “offshore leaks” episode, it remains difficult to establish uniform regional or even international rules which, most importantly, a jurisdiction that is ostensibly a tax haven would be willing to accept. After all, save for situations such as a bailout where a country has little choice but to accept the proposed reforms in exchange for aid, it is difficult to see why such jurisdictions would in the ordinary circumstances relinquish a particular business model when they have no other significant primary industries to prop up their economy.

40 Therefore, this is one area of the law which is likely to remain fragmented and for which harmonisation whether by the judiciary or legislature seems improbable.

## **VI. CONCLUSION**

41 The nature of commercial litigation has changed and will continue to change in the light of globalisation. The lessons in dealing with such change from the examples I have considered may be distilled into three propositions. First, in a globalised world where disputes are increasingly multi-jurisdictional, the courts should where possible

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<sup>49</sup> *Id.*

endeavour to achieve the harmonisation of commercial laws and avoid divergence where this detracts from the business environment. Second, where the good of harmonisation competes with countervailing domestic imperatives, the courts should be mindful that sometimes, some other institution may be better placed to balance the relevant considerations. Third, where harmonisation is not possible, it is nonetheless in the interests of the stakeholders to appreciate the reasons underlying the discordance in the relevant laws.

42 It follows from these points, that conferences such as this fulfil a vital objective by enabling the lawyers, themselves a key stakeholding constituency, to better understand and identify the scope for enhancing the commonalities of laws amongst the various jurisdictions, the differences, the reasons for these differences, and by providing a forum to discuss whether and how such differences might be bridged. I am confident we will more than meet these objectives over the next two days given the superb programme that has been put together.

43 It remains for me to welcome all of you and to wish the conference every success and the participants a very fruitful experience.