An Historical Perspective of the Convergences and Divergences in the Common Law of Contract

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The Seventh Biennial Conference on the Law of Obligations will explore the theme of convergence and divergence in the common law of obligations between different common law jurisdictions. An important aspect of this theme is the legal history underpinning these developments. A significant factor behind the convergence of the common law is that the different legal jurisdictions within the British Commonwealth both received English common law and had the interpretation and application of this common law developed under the directing guidance of a narrow cohort of men in London. In the words of Henry Brougham, ‘all this immense jurisdiction over the rights of property and person, over rights political and legal, and over all the questions growing out of such a vast and varied province, is exercised by the Privy Council unaided and alone.’ And as Brougham explained, the Victorians saw it as their ‘bounden duty’ to provide a ‘correct and speedy justice’ to the countless millions they governed.

A result of this imperial justice was that the Judicial Committee of the Privy Council and, through an interlocking cohort of judges, the House of Lords, exerted a powerful influence upon the development of contract law across what was the British Empire from the late nineteenth century until well past the mid twentieth century. This author proposes to examine the role of the Privy Council and the House of Lords in establishing converging trends or developments in three areas of contract doctrine: privity, frustration and unconscionability. The first two are areas which frequently reached final appellate courts; the last area very rarely. Such an examination also explores the extent to which the Privy Council allowed or fostered divergent trends. While the focus is historical, with an emphasis upon the role of the Privy Council in this process of development, it is also comparative as the examination will extend across various common law jurisdictions (England and Wales, Canada, Australia and Singapore). The paper will begin with the centrality of the Privy Council and the House of Lords in establishing a convergence of the common law in these areas of contract law and then continue to explore the reasons behind the divergences between the common law in these countries. A particular focus is an assessment of the impact of divergences between different jurisdictions. Such an examination, it is hoped, will shed light not only on the role of the Privy Council in creating a convergence but also the extent to which divergences were created by this judicial body. Finally, and most importantly, how has the law developed in these different jurisdictions in these particular areas of contract law since the centrality of a judicial cohort in London ceased? An answer to this question will shed light on the processes by which the common law, or common laws, will develop in the future.