

BOOK REVIEW

**Fundamental Concepts of Commercial Law:
Fifty Years of Reflection**

By Roy Goode. Oxford: Oxford University Press, 2018, xxii+504pp.

and

The Development of Transnational Commercial Law

By Roy Goode. Oxford: Oxford University Press, 2018, xxii+423pp.

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These two volumes contain 54 essays drawn from throughout the distinguished career of Professor Sir Roy Goode. They can be seen as an intellectual autobiography, illustrating his energy and enthusiasm for identifying and tackling problems and his belief in the power and value of the law. Of course, these collections represent only a selection of his work. Indeed, his place in commercial law would be secure if one considered only books such as *Commercial Law*, *Legal Problems of Credit and Security*, *Proprietary Rights and Insolvency in Sales Transactions*, and *Principles of Corporate Insolvency Law*, and, of course, the starting point, *Hire-Purchase Law and Practice*, which was first published in 1962. The essays in these volumes are grouped under loose headings, which hardly do justice to the variety of their content: *Fundamental Concepts* comprises sections on instalment credit law, contract law, concepts of personal property, commercial law, secured transactions, unjust enrichment and restitution, corporate insolvency, occupational pensions, and legal education; *Transnational* has four groupings, titled harmonisation, private and public international law, usage and the *lex mercatoria*, and dispute resolution.

The well-known story of Sir Roy writing his book on hire purchase in order to occupy quiet evenings is filled out in *Fundamental Concepts*. He remarks that when he moved to Victor Mischcon & Co in 1960 a lot of his work involved advising

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finance houses which provided insights into practice that greatly enriched the book. This book (among other things) meant that Roy's ascent to become a leading figure in commercial law began long before he stepped inside a university—famously, his LLB was gained as an external student of the University of London. Moreover, it reveals the thread that runs through his work, which has been to bring practice and theory together, so that each is informed by the other and, as a result, the law is improved. This is evident from these essays and from his involvement in a range of committees, both domestic and international, on subjects as diverse as credit, arbitration and occupational pensions. His expertise on credit led to his appointment to the Crowther Committee (which led to the Consumer Credit Act 1974), which, in another insight into his priorities, he joined in preference to a research trip to Yale because he believed it would give him the opportunity to participate in the introduction of much needed changes to the law.

This wish for the constant development of commercial law through criticism based on careful analysis of a problem and recognition of the implications for commercial practice is demonstrated by his most recent essay (first published in this collection) on what he calls the ‘surprising decision’ by the Supreme Court in *The Res Cogitans* [2016] UKSC 23.¹ The essay also illustrates another feature of Sir Roy's writing style in that it begins gently but ends with a searing criticism. Starting from the general view taken by commercial lawyers of one of the core strengths of English law: ‘our judges are usually sensitive to the impact of their decisions and seek to arrive at results which would commend themselves to the business community as producing commercially reasonable results’.² By the end of the paper he is no longer able to conceal his real view:

‘one is naturally hesitant to disagree with unanimous conclusions reached all the way up the adjudicative chain... it is nevertheless clear that a decision which could so readily have been avoided by giving effect to the plain intention of the parties... appears to have been taken with little or no regard either to the fact that it was completely

¹ Roy Goode, *Fundamental Concepts of Commercial Law: Fifty Years of Reflection* (OUP 2018) ch 14.

² *ibid* 237.

contrary to common understanding in the shipping industry or to the serious implications for parties to tens of thousands of contracts'³

A conclusion undoubtedly made worse by his view that all of this was unnecessary.

As that essay shows, Roy's passionate involvement in commercial law shows no sign of wavering. It is also clear that his influence remains strong: just type his name into your favourite law database and stand back. Most recently (too recent for acknowledgement in these volumes), his criticism of aspects of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 has been highlighted by the Court of Appeal. *Linden Gardens* concerned, among other things, attempts to restrict assignment of property rights, and Lord Browne-Wilkinson cited extensively from an early short commentary by Professor Goode on *Helstan Securities Ltd v Hertfordshire CC* [1978] 3 All ER 262.⁴ Later, Roy wrote a criticism of some aspects of *Linden Gardens*.⁵ That paper was extensively cited by Gloster L.J. in *First Abu Dhabi Bank PJSC v BP Oil International Ltd* [2018] EWCA Civ 14 in a judgment which made clear her agreement with Sir Roy and which was the more remarkable because, in spite of the space she gave to that criticism, she admitted being unable to express an opinion on Sir Roy's view that the *Linden Gardens* could be distinguished, since the issue was not before the court, forcing her to conclude, 'with a considerable degree of intellectual disappointment',⁶ that she could not decide the matter.

One of the joys of these essays is their clarity, which makes his identification of problem and solution seem simple and obvious—although they tend only to be simple when analysed by someone with his insight. For example, in the essay, 'Is the Law Too Favourable to Secured Creditors?'⁷ he cuts to the core of the issue when he writes, 'Common lawyers have become so accustomed to security rights that they no longer realize how strongly the present law favours the secured creditor.'⁸

It might have been supposed that, having done so much to establish commercial law as a subject worthy of study in the modern university law school (on legal education, see *Fundamental Concepts*, Part IX), Sir Roy might have relaxed,

³ *ibid* 242.

⁴ *ibid* ch 4.

⁵ *ibid* ch 5.

⁶ *First Abu Dhabi Bank PJSC v BP Oil International Ltd* [2018] EWCA Civ 14 [30].

⁷ Goode, *Fundamental Concepts* (n 1) ch 22; see also ch 6.

⁸ *ibid* 349.

but, as the essays collected in *The Development of Transnational Commercial Law* show, alongside his work on domestic commercial law, he has made a significant contribution to establishing transnational commercial law on the syllabus. As he points out, adopting the words of Professor David, ‘Legal theory suffocates within the frontiers of a State.’⁹ Elsewhere, Sir Roy writes that ‘transnational’ highlights the idea that

‘law... is not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems or even, in the view of its more expansive exponents, a collection of rules which are entirely anational and have their force by virtue of international usage and its observance by the merchant community.’¹⁰

It might seem obvious that a commercial lawyer would be interested in transnational commercial law, if only because the international nature of trade invites—requires—it, but English commercial lawyers can be rather narrow in their focus, reluctant even to embrace EU law let alone the broader world.¹¹ This could be contrasted with the more expansive view taken by their eighteenth-century counterparts, although, paradoxically, the narrow focus emerges as a result of the work of those pioneers. Again, there is the interweaving of practice and theory, and he recognises the different issues that are encountered, and the different pressures involved. The collection begins with issues such as the selection of areas of commercial law appropriate for harmonisation, the bodies that can best undertake the project, and the scope of harmonisation. On whether the project should focus on a narrow area of law, which is more likely to succeed within a reasonable time but may achieve little, or be a more ambitious project, Roy observes that ‘The former approach is usually expanded by ambition, the latter contracted by realism.’¹² The theoretical issues in Part I of *Transnational* are revisited and illustrated through the discussion of various projects in which he has played a significant role, such as the Hague Securities Convention and the Cape Town Convention on international interests in mobile equipment, which, as he shows, is particularly interesting in the solutions it

⁹ Roy Goode, *The Development of Transnational Commercial Law* (OUP 2018) 24.

¹⁰ *ibid* 264; also ch 18.

¹¹ *ibid* ch 6.

¹² *ibid* 10.

adopted, including dealing with areas of private law normally regarded as exclusively for national law (eg the rules on property rights and the impact of insolvency), the creation of an international interest which exists because of that convention and not national law¹³ and the way it shows that a private law convention can impose obligations on Contracting States.¹⁴

At various points in these volumes Sir Roy expresses reluctance, as only ‘a general commercial lawyer’¹⁵ to step into areas in which he is not an expert, quoting the map maker, John Speed, ‘I have put my sickle into other mens corne.’¹⁶ Nevertheless, he steps in, and, indeed, the extent of his involvement in areas such as restitution makes it hard for him to sustain this claim of non-expertise. The more important point is that this is all part of his view that barriers restricting proper discussion need to be broken down: barriers that split a subject, national barriers, and barriers between practice and theory.

Throughout his career Sir Roy has sought to draw together the practitioner and the academic and to highlight the value of both in identifying issues and in achieving what should be the ultimate goal of improving the law. His background as a practitioner has led him to engage with subjects that do not provide a commercially sensible result and to produce solutions so that theory can match with practice: ‘Commercial law has evolved from the needs and practices of the mercantile community; from opportunities to be grasped and problems to be overcome.’¹⁷ As an academic he has argued that, ‘The influence of scholarly writing on the development of the law has consistently been under-acknowledged in this country and is only now beginning to regain recognition.’¹⁸ Unlike many common lawyers, who prefer Parliament to leave the law alone, he is clear about the useful role legislation and international conventions can play, as evidenced by his enthusiastic participation in committees and by his rueful remark that in the US ‘legislators take their commercial law seriously’.¹⁹

¹³ *ibid* ch 16.

¹⁴ *ibid* 227 *et seq.*

¹⁵ Goode, *Fundamental Concepts* (n 1) 334.

¹⁶ Goode, *Transnational* (n 9) 175.

¹⁷ Goode, *Fundamental Concepts* (n 1) 167.

¹⁸ Goode, *Transnational* (n 9) 25.

¹⁹ Goode, *Fundamental Concepts* (n 1) 69; see his criticism of the lack of legislation on rights in dematerialised and immobilised securities in ch 7.

As universities grind towards the next REF, anyone reading these essays might wonder how some of them would be treated. There are plenty that would qualify for this bizarre exercise, but what of Sir Roy's first published works? The essays in the *New Law Journal*²⁰ were brief and in a practitioner journal and his first book on hire purchase would be regarded as a practitioner text, which means that neither would go into a REF submission or (probably) bring promotion, and yet these works influenced the law and launched a stellar career. It is not the quality of Sir Roy's work that is at fault here.

²⁰ *ibid* ch 1.