TCLR (2022), Issue 2
DOI: 10.26494/tclr220228

ARTICLE

The Creative Force in Transnational Commercial Law

Roy Goode*

1. Introduction

Transnational commercial law has been defined as 'that set of principles and rules, from whatever source, which governs international commercial transactions and is common to legal systems generally or to a significant number of legal systems.'[1] Over the past three decades the growth of transnational commercial law has been powered by a series of international conventions and protocols, model laws, restatements and contractually incorporated rules of international institutions, all designed to harmonise conflicting laws or business practices so as to ensure that all participants, in whatever country they may be, play by the same rules. The process of harmonisation is not a mechanistic one. On the contrary, at its highest level it involves creativity in confronting legal obstacles to cross-border trade and finance and devising new tools to overcome them. Good scholars do not shirk a seemingly intractable problem; on the contrary they welcome it as forcing them to raise their game. As in science and mathematics,[2] there is artistry in the making of transnational commercial law, in which academic and practising lawyers join with business interests in finding ways of overcoming the obstacles that impede the efficient conduct of cross-border

* Emeritus Professor of Law in the University of Oxford and Emeritus Fellow of St John's College, Oxford. This article is a revised and updated version of a contribution to *Lawyer, Scholar, Teacher and Activist: A* Liber Amicorum *in Honour of Derek Roebuck* (ed. Neil Kaplan and Robert Morgan), a distinguished academic and a leading authority on the history of arbitration, and is published by kind permission of HOLO Books, omitting the tribute to the honorand.

[1] Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (2nd edn, 2015, Oxford University Press), paragraph 1.03. The first known academic course on transnational commercial law was introduced into the University of Oxford postgraduate law curriculum by the writer in the mid-1990s. The subject is now taught in law schools around the world and is the focus of the Queen Mary-UNDROIT Institute of Transnational Commercial Law established within the Centre for Commercial Law Studies, Queen Mary University of London, in 2017 under the presidency of the late Professor Alberto Mazzoni, then President of UNIDROIT.

[2] See, for example, Marcus du Sautoy, *The Creativity Code* (4th Estate, Harper Collins 2019), 5: 'The creative impulse is a key part of what distinguishes humans from other animals and yet we often let it stagnate inside us, falling into the trap of becoming slaves to our formulaic lives. Being creative requires a jolt to take us out of the smooth paths we carve out each day'.

trade and finance. Problem-solving lies at the heart of this endeavour; and to do this successfully involves breaking traditional rules in order to make new ones that work.

> 'Works of art make rules;
>
> Rules do not make works of art.'[3]

But rule-breaking requires discipline, which as will be seen has not always been exercised.

Sometimes national laws, whether applied directly or through the conflict of laws, do not yield a solution to a given problem, whether through doctrinal problems or the absence of relevant legislation. In such cases creative techniques are necessary in order to surmount the problem. Instances of this will be provided later in this paper. This is not to say that the past should be jettisoned, only that it should be the servant, not the master, of legal development. This was well understood by that great scholar Savigny, whose profound knowledge of and respect for Roman law did not blind him to the need to adapt to change.

> 'The historical view of jurisprudence is entirely misunderstood and distorted when it is regarded as setting up the law which has descended to us from the past as supreme, and requiring the maintenance of its unimpaired authority over the present and the future… In its special application to the Roman law, the historical view does not consist, as many assert, in ascribing to it an undue authority over us. Rather, on the other hand, it seeks to discover and ascertain, in the whole body of our existing law, what is in truth of Roman origin, in order that we may not be unconsciously controlled by it; and on the other hand it strives, within the known sphere of the Roman elements of our law, to set aside what is in fact dead, and retains only from our misapprehension a misleading show of life, in order that there may be free space for the development and healthy influence of the still living portions of those Roman elements.'[4]

---

[3] Claude Debussy, often quoted by the French musician Edgar Varèse, who was known, among other things, as the father of electronic music, refusing to accept sounds that had already been heard, and was encouraged by Debussy to compose the way he wanted to.

[4] Preface to Savigny's outstanding *Systems des hëutigen Römischen Rechts*, vol. 8, published as an independent work and later translated into English by William Guthrie, *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time* (2nd edn, Law Exchange 2003), which reproduces the entire preface, including, at 13, the passage quoted above. In his fine work *A History of Private Law in Europe* (Tony Weir (tr), Clarendon Press 1995) Franz Wieacker gave an example of a new compound produced by the coalescence of principles of Roman and German law, where old Germanic law had

2. Tensions arising from different legal philosophies

One of the problems arising in any harmonisation project is that different legal systems approach an issue from different starting points. The task then is to find a solution that will provide general satisfaction.

2.1. The role of comparative law

In the formulation of the different types of harmonising instrument comparative law has been an essential tool,[5] whether in the field of substantive rules or conflict of laws rules.

Though one of the legitimate purposes of the study of comparative law is knowledge for its own sake, it would be a sterile subject if this were seen as its be-all and end-all.

> 'Modern legal comparison is *critical* in its attitude. The comparatist is not interested in the differences or similarities of various legal orders merely as facts, but in the fitness, the practicability, the justice, and the *why* of legal solutions to given problems. The mere description of a certain legal order might be interesting and illuminating; however, such 'foreign legal data' are not comparative law. True comparative method can put the treasure chest of foreign experience to good use, but this does not get to the essence of legal comparison, which is the critical exploration of the usefulness of foreign solutions for the needs of domestic or international rule-making. Its determinant feature with respect to policy, choices, and critiques is related to Jhering's abhorrence of antiquarianism.'[6]

This passage by two distinguished legal comparatists, one of whom is still happily with us, neatly illustrates the functional approach to comparative law, pioneered which has influenced numerous projects for the harmonisation of commercial law. That ground-breaking work on the common core of contract, led by

protected the of the acquirer of goods wrongfully disposed of by a bailee whether or not the acquirer bought in good faith, while in 1586 the law of Lübeck brought the old and new together by introducing the Roman law requirement of good faith.

[5] H.C. Gutteridge, *Comparative* Law (2nd edn, Cambridge University Press, 1949), 174; Goode, Kronke and McKendrick (n 1) [4.34], Ch 4 of which as a whole is devoted to comparative law and its relevance to transnational commercial law.

[6] Konrad Zweigert and Kurt Siehr, 'Jhering's Influence on the Development of Comparative Legal Method' (1971) 19 Am J Comp L 215, 220-222.

Professor Rudolf Schlesinger in the late 1960s[7] and covering a large number of legal systems, showed that a broader approach to comparative law than that traditionally adopted permitted 'the discovery, within each of the legal systems selected, of the functional and systematic relationship among a large number of precepts and concepts.'[8] For example, in formulating Part 1 of the Principles of European Contract Law, prepared by the Commission on European Contract Law under the inspired chairmanship of the late Danish law professor Ole Lando and consisting of one member from each of the then 15 Member States of the European Communities, we decided from the outset not to look for the lowest common denominator of our different legal systems but rather to seek the best solutions to typical issues arising in the field of contract law. However, it was natural that each member of the Commission should take as the starting point his or her own legal system and to test any proposed rule against this. Such an approach guaranteed vigorous debate, each of us being initially convinced of the superiority of the legal system with which he or she was familiar. I well recall the distinguished French jurist Denis Tallon exclaiming from time to time:

> 'Mais quel est le problème? Comme toujours, le code civil fournit la solution parfaite!'

We all expressed great admiration for the code civil but ventured to suggest that very occasionally an even better solution might be found! In the result, all 15 of us were able to reach full agreement on a text. The best solution might not be found in any of the legal systems examined, it might have to be created. The parallel venture, the UNIDROIT Principles of International Commercial Contracts, prepared under the equally inspired chairmanship of Professor Joachim Bonell, adopted a similar approach and with equal success.

Relatively few scholars are true comparative lawyers; there is simply not enough time to master both one's own legal system and a foreign one. The same is true of other subjects cognate to one's own. As a general commercial law mongrel I

[7] Rudolf B. Schlesinger (ed.) *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana Publications and Stevens and Sons, 1968).
[8] *Ibid*, 2. This was one of the first works to adopt the approach of comparison through a series of fact situations raising legal issues on which each contributor was asked to set out his or her country's law. For more recent examples see the volumes in the Common Core of European Private Law Series published by Cambridge University Press.

have found it necessary to acquire a knowledge of related subjects - contract, tort, property law, equity and trusts, comparative law and private international law – sufficient for my purposes without the need, or indeed the ability, to acquire a mastery of them. Likewise, benefits can be derived from reference to a foreign legal system without a mastery of that system, to which the scholar can usefully resort for the ideas to be extracted from it to solve a specific problem without having a systematic knowledge of it.[9] In the words of that great comparative lawyer Professor Harry Lawson:

> '…there is much to be said for the view that anyone who wishes to get a real insight into law as a whole must be content to develop qualities exactly the opposite to those of the specialist. Instead of getting to know more and more about less and less he must set himself to know less and less about more and more.'[10]

Most of the instruments of harmonisation of laws and practices governing cross-border transactions have been guided by the best-solution approach, which often involves either highly innovative techniques or creative ambiguity. [11]

While a given national law rule may have been the source of inspiration of a provision in an international instrument, that provision has to be interpreted autonomously in the light of other relevant provisions of the instrument, though the rule may provide guidance where it reflects the common understanding of participating States.

[9] See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, U of Georgia Press, London, 1993) 17. Another leading comparativist, Professor Basil Markesinis, has urged the importance of studying a legal system through its case law rather than through its codes. See Basil Markesinis, 'Comparative Law - A Subject in Search of an Audience' (1990) 53 MLR 1.
[10] F.H. Lawson, *Selected Essays* (North Holland Publishing Co., 1977), vol. II, 59.
[11] See, for example, the 1980 UN Convention on Contracts for the International Sale of Goods, the product of the work of UNCITRAL, Article 7(1) of which provides: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and observance of good faith in international trade.' The rule of interpretation in Article 7(1) has become the standard in subsequent commercial law conventions except that in the Convention on International Interests in Mobile Equipment (the Cape Town Convention) 'predictability' has been substituted for 'good faith' to avoid the uncertainties attaching to the concept of good faith in relation to transactions involving high-value equipment.

2.2. Private international law and its attempted exclusion

No set of international rules, however comprehensive, can completely cover the chosen field. Those issues not resolved by the text of the rules or the general principles on which they are based have to be settled by the applicable national law as determined by the rules of private international law of the forum.[12] So private international law, far from being displaced by uniform law as had at one time been its suggested fate, continues to play a vital role and has itself been subject to harmonisation measures in particular fields through international conventions prepared by the Hague Convention on Private International Law and regulations issued by what is now the European Union. There was once an ill-fated attempt to exclude the conflict of laws altogether from an international convention. Article 2 of the Uniform Rules for International Sales (ULIS) embodied in the 1964 Hague Sales Convention provided as follows:

> 'Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law.'

This remarkable provision, reflecting a lack of self-discipline on the part of the drafting committee, met with such a barrage of criticism and ridicule that no organisation involved in harmonisation has had the courage to repeat it, and it finds no place in the successor to ULIS, the 1980 Convention on Contracts for the International Sale of Goods.

The problem, of course, with conflict rules is that since these are everywhere a matter for the *lex fori* the applicable law depends on the place where proceedings are brought. While the impact of differences in conflict of laws rules is reduced by the widespread adoption of the principle of party autonomy in the determination of the law applicable to a contract there are many cases, including those where the parties have not chosen the applicable law, in which it remains necessary to carry out the two-stage process of characterisation and designation of the connecting factor which under the forum's conflict rules links the issue in question to a given Contracting State. Studies in comparative conflict of laws[13]—bringing together private

[12] But subject to the internationally mandatory rules of the *lex fori*.
[13] A subject which that great conflicts comparativist Professor Kurt Siehr has made particularly his own. See Kathariana Boele-Woelki, Talia Einhorn, Daniel Girsberger and Symeon Symeonides (eds),

international law and comparative law—have revealed not only similarities but also sharp differences in national conflict of laws rules. So private international law too has to be brought within the harmonisation process with a view to ensuring that in every State adopting a conflict of laws convention determination of the applicable law will be the same as in other Contracting States. Hence the Hague conventions on trusts,[14] choice of court agreements,[15] securities[16] and judgments.[17]

2.3. International trade usage

From time immemorial the right of trading parties situated in different countries have been governed by international trade usage. The mediaeval *lex mercatoria* was administered primarily, though not exclusively, by the courts of the fairs with all the panoply of a commercial centre: a free pass on routes to the fair, merchant judges, police, currency exchangers, financiers, brokers of various kinds and victuallers, all coming together at international fairs to conduct cross-border business on the basis of usage.[18] The old *lex mercatoria* largely disappeared with the growth of towns and national laws but there has been an intense debate about the new international *lex mercatoria*, which in the view of some constitutes an autonomous legal system governing cross-border commerce but which, correctly analysed, owes its force the readiness of courts to respect reasonable commercial practices. Many of these have now been codified by international business organisations and given effect

Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr (Eleven International Publishing, 2010), especially the graceful tribute paid to him by Professor Peter Mankowski in 'The Principle of Characteristic Performance Revisited Yet Again' at 434. See also in the same volume Herbert Kronke, 'Connecting Factors and Internationality in Conflict of Laws and Transnational Commercial Law' 57 at 59 discussing the assaults by other jurists on the connecting factor as nationalising what is intrinsically international.

[14] Convention on the Law Applicable to Trusts and their Recognition 1985.

[15] Convention on Choice of Court Agreements 2005.

[16] Convention on the law applicable to certain rights in respect of securities held by an intermediary 2006. See Roy Goode, Hideki Kanda and Karl Kreuzer, assisted by Christophe Bernasconi, *Hague Securities Convention Explanatory Report*, 2nd edn, the Hague Conference on Private International Law, 2017.

[17] Convention on the recognition and enforcement of judgments in civil or commercial matters 2019.

[18] See P. Huvelin, *Essai historique sur le droit des marches & des foires* (Arthur Roussea, Paris, 1897); André Allix, *The Geography of Fairs: Illustrated by Old-World Examples* (1922) 12 Geographical Review 532, describing with maps the great commodity fairs of the Middle Ages.

by incorporation into contracts,[19] thus changing their status and almost invariably replacing some usages with new rules. [20]

The true *lex mercatoria*, unwritten trade usage, can be hard to identify and even experienced professionals may differ as to their content. For example, asked what was meant by "payment under reserve" in a documentary credit transaction one banker replied that if it transpired that the beneficiary was not entitled to payment the paying bank could recover it whereas another answered that if the customer refused to reimburse the bank then whether that refusal was or was not justified the bank could recover the payment from the beneficiary, which was held by the English Court of Appeal to be the correct answer.[21]

2.4. Nemo dat versus possession vaut titre

The starting point of the common law is *nemo dat quod non habet* (*nemo plus juris ad alium transferre potest quam ipse habet*); a person cannot transfer a better title than he himself possesses. By contrast, civil law systems focus on protection of the innocent buyer. In the words of Article 2276 of the new French *code civil* "La possession vaut titre." There has been a gradual convergence of the two approaches. The common law has always admitted exceptions to the *nemo dat* rule to facilitate the free flow of goods in the stream of trade,[22] for example, dispositions by an agent acting within his actual or ostensible authority; successive sales by a seller whom the first buyer allows to remain in possession and effect a second sale as apparent owner. In some respect these exceptions go beyond the *possession vaut titre* principle which, under French law at least, protects only a person holding possession with the intention to do so as owner. So the principle does not protect the grantee of a security interest.

[19] See below, sections 3.1 and 4.7.
[20] See Roy Goode, 'Usage and its Reception in Transnational Commercial Law' (1997) ICLQ 1, 14. See also 'Is the *Lex Mercatoria* Autonomous?' in Ross Cranston, Jan Ramberg and Jacob Ziegel (eds), *Commercial Law Challenges in the 21st Century: Jan Hellner In Memoriam* (Iustus Förlag, 2007) 73. Both essays are reproduced in Roy Goode, *The Development of Transnational Commercial Law* (Oxford University Press, 2018), Chapters 18 and 21, though the source of the latter is as above and not as shown in the footnote reference.
[21] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711.
[22] See to similar effect J.G. Sauveplanne, 'The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law' (1965) 29 RabelsZ 651 at 652: 'The rapid circulation of movables makes it difficult, if not impossible, to trace their legal origin. If every purchaser was compelled to investigate his predecessor's title, the circulation of movable property would be seriously hampered. Therefore, as the economic importance of movables increased, the need to protect the purchaser became more urgent, and commercial interests finally outweighed concepts of legal logic.'

Relativity of title in relation to goods also presupposes that there can be two titles to goods at any time, one derived from ownership, the other from possession *animo domini*. Possessory title may be asserted against all third parties except the true owner or one asserting rights with the authority of the true owner. This protection of possession is designed to preserve the peace.

These differences in starting point led UNIDROIT to produce in 1968 a draft Uniform Law on the protection of the bona fide purchaser of corporeal movables. While this attracted much favourable attention it was criticised on two main grounds. First, it was tied to ULIs and therefore applied only to dispositions under a contract of sale. Second, it was considered to over-emphasise the protection of the innocent buyer at the expense of the original owner. In 1974 UNIDROIT presented the draft of a Uniform Law on the acquisition in good faith of corporeal movables. This draft detached the Uniform Law from ULIS and its change of title was a response to the demand to move from the protection first and foremost of the transferee in good faith to a balance of the competing interests.[23] Despite these improvements the new draft Uniform Law fared no better than its predecessor and despite periodic attempts to restore it to the UNIDROIT work programme it was finally dropped for want of adequate support.

2.5. Absolute title versus relative title

Most legal systems possess the concept of relativity of title in relation both to dispositions of goods and to the assignment of claims. So where the owner of goods sells them first to A and then to B the question is generally treated as one of priority, not of validity, so that in given conditions a non-owner can pass a good title as described above. A similar rule applies to claims. So if A assigns a claim first to X and then to Y priority is usually given to Y if he was unaware of the prior assignment and is the first to give notice of his assignment to the debtor. The underlying policy is that as a means of providing a warning to third parties of the existence of a prior assignment the giving of notice of assignment to the debtor is the closest approximation to possession, since an intending assignee can enquire of the debtor

[23] For the text of the Convention, the Annex to which contains the Uniform Law, see 1975 I Unif. L. Rev. 68. The same issue contains the Explanatory Report by Professor J.G. Sauveplanne at 86 *et seq*.

whether he has received any prior notice of assignment. German law, however, is an exception, taking the position that A, having sold to X, has nothing left to sell. This is in contrast to the rule relating to successive dealings in goods, which German law treats as raising an issue of priority, not of validity, because of the importance attached to possession as an indicium of ownership. The reason for the policy difference is unclear.

2.6. Privacy of transactions versus publicity

A third source of difference is between those laws which favour publicity of transactions from those which favour privacy. The principal mode of publicity is a public registry, which may be either debtor-based, with searches made against the name of the debtor, or asset-based, searches being made against a uniquely identified asset. Outright sales of goods are rarely the subject of registration, not so much because of privacy concerns but because of the sheer volume of sales and protection of the innocent buyer through exceptions to the *nemo dat* rule. By contrast many legal systems have machinery for registering security interests in goods and receivables. Again, German law contains no provisions for registration, on the basis that most intending financiers will be aware that the debtor may not be the owner of the goods or claim. This may be true but does not assist the financier who is willing to extend credit on the security of a movable but only if it knows that this is unencumbered. The Cape Town Convention here broke new ground in providing for the establishment of an international asset-based registry for each category of equipment, though to date the only registry so far established is the wholly electronic registry for aircraft objects based in Dublin, a highly efficient, modestly-priced system which in January 2020 celebrated its millionth registration, a notable achievement. Further, the system extends to the registration of outright sales, which is both feasible and necessary, given the high value and unique identifiability of aircraft objects.

2.7. Self-help verus judicial control

A characteristic of common law systems is that they allow the contracting parties a wide scope to make their own rules governing their relations *inter se*. So in business-to-business transactions a contracting party may, without the need for resort

to the court, terminate a contract for breach, rescind it *ab initio* for misrepresentation or exercise default remedies such as peaceable repossession of goods taken as security for a loan or supplied under a title reservation or leasing agreement. By contrast civil law jurisdictions tend to require leave of the court before any of the above measures may be taken.

2.8. The law of trusts

In a common law trust, property rights are divided between trustee and beneficiary. The typical trust is an active trust, where the trustee is given powers to manage the trust fund, which is usually done through fund managers. Beneficiaries under such a trust have a proprietary interest in the trust fund but not in any individual component of the fund. By contrast beneficiaries under a bare trust, such as that constituted by the opening of a securities account with a custodian or other securities intermediary, are full equitable owners and can give directions to the intermediary for transfer of the interests credited to their accounts.

The law of trusts, which was for a long time focused on the family trust, has acquired much greater significance in relation to commercial transactions, where the trust institution places a key role in modern finance, partly because of the equitable proprietary interest enjoyed by beneficiaries and partly because the trust has proved an invaluable tool for the co-ordination of fractional interests. For example, where a company issues bonds on the market the legal title to each bond is vested in the bondholder the appointment of a trustee for the issue in whose favour parallel covenants are made in favour of the trustee to be held on behalf of bondholders enables the trustee to enforce payment on behalf of all bondholders instead of leaving each bondholders to pursue its own separate claim. The appointment of a trust also facilitates secured lending by a syndicate of lenders who together empower the trustee to act on their behalf.

While civil lawyers undoubtedly appreciate the benefits of the trust institution, they face the problem that the civil law has always set its face against divided property rights, so that the continental trust does not allow division of ownership between trustee and beneficiary but requires ownership to be in one or the other. Where it is

in the trustee the beneficiary has no proprietary rights, only a personal claim against the trustee, which leaves the beneficiary vulnerable if the trustee becomes insolvent.

2.9. Functional versus formal approach to characterisation of transactions

When UNIDROIT undertook its initial comparative survey of the law on financial leasing with a view to an international convention it quickly encountered a problem of characterisation. Under Article 9 of the American Uniform Commercial Code financial leases were liable to be characterised as security agreements and would do so as a matter of law if containing an option to purchase for no consideration or only a nominal consideration. Under French law the inclusion of an option to purchase was an essential ingredient of a financial lease. while under English this would convert the agreement into a hire-purchase agreement, a hybrid halfway between a lease and a sale. So three legal systems characterise one and the same transaction in three different ways.

Commercial law conventions have taken no position on issues of characterisation, alive to the danger of disturbing national sensitivities. The 1988 UNIDROIT Convention on international financial leasing applies to finance leases with or without an option to purchase and in the latter case whether or not for a nominal price or rental, regardless of the characterisation under national law, which in some legal systems will treat the typical finance lease as a security agreement.[24] By contrast Article 3(1) of the 2008 UNIDROIT Model Law on Leasing provides that the Model Law does not apply to a lease that functions as a security right, which in effect throws characterisation back to the applicable law. Similarly, Article 2(4) of the Cape Town Convention leaves it to the applicable law to determine whether the transactions is a security agreement, a title reservation agreement or a leasing agreement. It had originally been intended to adopt a functional approach to title reservation and leasing agreements in the Cape Town Convention, but this was opposed by several European States on the ground that it was useful to have a variety of instruments each governed by a distinct legal regime. Again, while laying down conflict rules (Hague Convention) and substantive law rules (Geneva Convention) regarding intermediated securities the two conventions take no position on the nature

[24] See, for example, the US Uniform Commercial Code, § 1-203.

of rights credited to an account with a securities intermediary or the persons against whom such rights are enforceable.

3. The move towards convergence

3.1. The driving force of international trade

The development of transnational commercial law has been powered by the globalisation of commercial transactions and the consequent pressure for uniform substantive law rules to govern cross-border transactions. Without such rules the rights and obligations of contracting parties will depend on the applicable law, which will itself be determined by the conflict of laws rules of the forum. The problem of differences in conflict of laws rules among different States may be overcome by the harmonisation of conflict rules, through such instruments as Rome I,[25] though this applies only to Member States of the European Union or, at a more general level, the 2015 Hague Principles on Choice of Law in International Commercial Contracts. But while this may solve questions of conflicting rules of private international law differences in the substantive laws of different States remain, impeding the efficiency and increasing the cost of cross-border transactions.

There are four international organisations concerned with harmonisation: the International Institute for the Unification of Private Law (UNIDROIT); the United Nations Commission on International Trade Law (UNCITRAL), a specialised agency of the UN; the International Chamber of Commerce (ICC), the world business organisation an important aspect of whose work is the harmonisation of trade practice through uniform rules given effect by incorporation into contracts; and, in the field of private international law, the Hague Conference on Private International Law. There are also academic institutions focused on transnational law, such as the Center for Transnational Law, Cologne which, under the direction of Professor Klaus Peter Berger, has compiled a set of principles based on the concept of the "creeping codification" of transnational law,[26] and the Queen Mary-UNIDROIT Institute of

[25] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual regulations (Rome I).
[26] Klaus Peter Berger and the Translex Research Team, *Principles with Commentary* (5th edn, Cologne, 2019).

Transnational Commercial Law within the Centre for Commercial Law Studies, Queen Mary University of London.

3.2. First steps

A preliminary to any harmonisation project dealing with a particular type of business transaction is a survey of legal systems drawn from the different legal families, accompanied or followed by a questionnaire addressed to national law experts in selected jurisdictions to determine (a) whether in view of the differences in national law there is a need for uniform rules and (b) whether the project is feasible. Good examples are the surveys conducted by the UNIDROIT Secretariat for a proposed project on international factoring[27] and by Professor Ronald C.C. Cuming on behalf of UNIDROIT in 1989 as to the need for and feasibility of an international regime governing the registration and priority of security interests in mobile equipment of high value, such as ships and aircraft.[28] Responses to these surveys showed general agreement that differences in national laws created significant obstacles to cross-border dealings. This was particular true of transactions involving high value mobile equipment, where it quickly became clear that conflict of laws rules, even if harmonised, would be inadequate to overcome these obstacles and that the development of substantive uniform rules was both desirable and feasible.

It is fair to say that the end product of the mobile equipment project, the Cape Town Convention, so vastly exceeded the scope of the original project, and entailed addressing such a huge range of issues, that if this had been apparent at the start it is unlikely that the project would ever have been undertaken!

3.3. Key elements of a successful project

In the harmonisation of the law governing any type of cross-border business transaction there are at least three essential prerequisites. First, the study group set up to carry the project forward should include representatives from all the established legal families. This was not always done and complaints were regularly made that

[27] See UNIDROIT Study LVIII, Docs. 1-3, March 1976 and December 1977.
[28] *International Regulation of Aspects of Security Interests in Mobile Equipment*, UNIDROIT 1989, Study LXXII – Doc. 1, Rome, December 1989.

projects were too focused on Europe, a focus which changed only with the decline in influence of European powers and the involvement of North American, African and Asian States.[29] Second, it must be shown that the proposed harmonisation is both necessary and feasible and may be expected to bring significant economic benefits. To that end UNIDROIT, for example, commissioned economic impact assessments for the Cape Town Convention and Aircraft Protocol[30] and the Pretoria Protocol.[31] Third, it is not only governments that need to be involved but also the relevant industries, without whose support governments will not act and the contribution of whose expertise as members of study groups and working parties is essential in identifying the problems that arise in day-to-day business and the measures needed to overcome them.

Often, behind these, is the driving force of a single individual. For example, without the huge investment of time and resources by the Aviation Working Group under its Secretary General Jeffrey Wool the project leading to the Cape Town Convention would never have come to fruition.[32] Similarly the impetus for the Hague Convention on the law applicable to intermediated securities was the energy and drive of an Australian lawyer, Richard Potok, who initiated the project at a seminar in Oxford in May 1990 and took it to the Hague Conference on Private International Law in April 2000. The basic concept was that the law governing rights in relation to securities credited to a securities account should be based on the law of the place of

[29] See Jürgen Basedow, 'Worldwide Harmonisation of Private Law and Regional Economic Integration' 2003-1/2 Unif. L. Rev. 31.

[30] Anthony Saunders and Ingo Walter, *Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment Through the Aircraft Equipment Protocol: Economic Impact Assessment, A Study Prepared Under the Auspices of INSEAD and the New York University Salomon Center* (September 1998), which concluded that increased certainty and consequent reduction of risk could result in savings of several billions of dollars a year. Subsequent studies carried out after the Convention and Aircraft Protocol came into force have reached the same conclusion. See, for example, Ingo Walter, Anthony Saunders and Anand Srinivasan, *Innovation in Law and Global Finance: Estimating the Financial Impact of the Cape Town Convention*, New York University Leonard N Stern School of Business, Department of Economics (2006); Vadim Linetsky, *Economic Benefits of the Cape Town Convention* (2009) and *Accession to the Cape Town Convention by the UK: An Economic Impact Assessment* (December 2010).

[31] Warwick Economics and Associates, *MAC Protocol Economic Assessment* (August 2018), which found that at the end of the 10-year assessment period, the stock of MAC equipment in developing countries was estimated to be some $90 billion dollars higher than in the absence of reforms associated with the MAC Protocol and that the annualized impact on gross domestic product was estimated at $23 billion for emerging and developing economies and $7 billion for exporting economies.

[32] The Aviation Working Group is a not-for-profit legal entity consisting of major aircraft manufacturers, leasing companies and financial institutions devoted to facilitating aviation finance. It played a major role both in the development of the text of the Cape Town Convention and in promoting adoption through meetings and conferences around the world.

the relevant intermediary approach (PRIMA). The sterling work of the Permanent Bureau, in particular Dr Christophe Bernasconi, and the Herculean labours of the drafting committee led to its approval at a Diplomatic Conference in The Hague in December 2002, a mere 2½ years after it was introduced to the Permanent Bureau an astonishing achievement. It is unfortunate that a change of direction as regards the applicable law from the place of the relevant intermediary to the law chosen by the parties to the account agreement, though a better solution, led to opposition from European players which has held up progress for the best part of two decades. Finally, the adoption of an international instrument represents only the halfway point. There has then to be a drive for ratification. The constrained resources of the harmonising agencies limit their capacity for this key post-adoption activity. Again, it is necessary for both the representatives of participating States and the industries benefiting from the harmonising measure to put their shoulders behind the wheel in promoting the instrument.

3.4. Securing agreement

In every harmonisation project there are likely to be issues of policy so central to the legal philosophy of a number of participating States that without compromise they will simply not support the proposed Convention.[33] There are various ways of resolving this problem. One, of course, is to modify the rule to which objection is made so as to ensure a consensus and that is the most common solution. But there may be other States for whom the rule is seen as central to the objectives of the instrument and who are unwilling to support a modification. Various techniques are available to resolve the impasse.

1) Allow a Contracting State, when ratifying the Convention, to make a reservation, that is, a unilateral statement purporting to exclude or to modify the legal effect of certain provisions of the Convention in their application to the State.[34] Reservations are binding only on those Contracting States that accept them and

[33] "Convention" is here used to include a Protocol to a Convention or any other form of legally binding instrument, as opposed to a Model Law.
[34] Vienna Convention on the Law of Treaties 1969, Article 2(1)(d). For a detailed analysis of what has been described as a subject of baffling complexity see Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press, 2013).

modern commercial law treaties usually contain an express provision that reservations are not permitted unless expressly authorized by the Convention, which usually they are not.

2) Provide in the Convention itself that Contracting States may derogate from or modify particular provisions. Most commercial law conventions allow parties, in their relations with each other, to derogate from or vary the effect of any of its provisions except those that are designated as mandatory.

3) Provide variants of the rule so that a State can select from one or more alternatives.

4) Enable a Contracting State to make a declaration that the rule is not to apply ("opt-out declaration") or make the application of the rule dependent on a declaration to apply it ("opt-in declaration").

All of these techniques except reservations were utilised in the drafting of the Cape Town Convention and Aircraft Protocol and were critical to their success.

4. Key harmonising commercial law instruments

Leaving aside the ill-fated Hague Sales Convention, the period between 1980 and 2019 saw the burgeoning of instruments of different kinds providing uniform rules for cross-border trade and finance. Some of these were failures, either because they did not secure enough ratifications to enter into force at all or because, though entering into force, they were not sufficiently supported to attract the number of ratifications sufficient to make them effective on the international scene. But even the failures provide instructive examples of creative law-making which deserved better success. All of the instruments examined below were the work of one or other of three treaty-making international organisations, UNIDROIT, UNCITRAL and the Hague Conference on Private International Law. Mention will also be made of much earlier and highly effective harmonisation through rules governing documentary credits, followed later by rules on demand guarantees, promulgated by an international organisation which itself has no law-making powers, the International Chamber of Commerce, but which are made effective through incorporation into all

relevant contracts. They are described below less for their substantive content than for their creative force.

4.1. The 1980 Convention on Contracts for the International Sale of Goods

This Convention, the work of UNCITRAL and adopted by the UN, is one of the most successful conventions ever in the field of international commercial law, with ratifications by 94 States at the time of writing.[35] It regulates the contractual aspects of sales contracts and has an interesting and controversial scope provision under which it applies to contracts of sale of goods between parties whose places of business are in different States and where either both States are Contracting States or the rules of private international law (i.e. of the forum State) lead to the application of the law of a Contracting State. The Convention can thus apply even where neither party has its place of business in a Contracting State. Apart from this the Convention's merit lies less in the use of innovative techniques than in the skilful blending of civil law and common law rules. Among the latter is the concept of breach, which under Article 79 of the Convention includes non-performance excused on the ground of *force majeure*, only damages being excluded as a remedy, whereas in common law jurisdictions a failure to perform upon frustration of the contract does not constitute a breach at all. But many of the provisions will also be familiar to common lawyers.

Controversial is whether good faith is required not merely in the interpretation of contracts, as indicated in Article 7(1),[36] but as a general principle underlying other provisions of the Convention. The proponents of the latter view are unfazed by the fact that good faith is not mentioned in any of the other 100 provisions. Influenced by German law they equate unreasonable behaviour, which could include a perceived unreasonable withdrawal from negotiations or unreasonable exercise of contractual remedies, with want of good faith, but this is not generally true of common law jurisdictions or even of all civil law jurisdictions. What is interesting, however, is not

[35] The leading text is Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (4th edn, ed. Ingeborg Schwenzer, Oxford University Press, 2016). The UNIDROIT Convention on international interests in mobile equipment (see below) with its associated Aircraft Protocol is now not far behind, with ratifications of the Convention by 83 States and the Protocol by 80 States, together in each case with what is now the European Union.
[36] See above, n. 11.

so much the division of opinion but the fact that the final text was masterful in satisfying the holders of the two opposing views that each had achieved its objective!

4.2. The 1989 UNIDROIT Conventions on International Leasing and International Financial Factoring

The projects leading to these two international conventions were run in parallel and, unusually, the two were adopted at the same Diplomatic Conference. Though neither was very successful each showed how creative thinking could overcome doctrinal obstacles.[37]

4.2.1. *Convention on International Financial Leasing*

This Convention had a long period of gestation, the project having begun in February 1974 as involving the drawing up of uniform rules on the contract of leasing. At the time cross-border financial leasing was quite rare and this was thought to be due at least in part to major differences in the treatment of finance leases in legal systems. There was early discussion of the form of instrument best suited for this purpose. Was it to be a uniform law, a model law, an international model contract or a set of standard-term clauses?[38] Then the question arose what types of leasing agreement should be covered. The element of internationality was identified from the outset as a prerequisite. But the legal characterisation of the transaction created a threshold problem because of sharp differences in national legal systems. Under French law an essential feature of the *credit-bail* is the inclusion of an option to purchase. By contrast under English law such an option converts the agreement into a hire-purchase agreement, while in the United States it was liable to be treated as creating a conditional sale agreement, which would then convert it into an agreement creating a security interest.

[37] For a recent detailed treatment of the two conventions see Amin Dawwas, 'The 1988 UNIDROIT Convention on International Financial Leasing' (1997) 21 Journal of Law – Kuwait University 3; 'The 1988 UNIDROIT Convention on International Factoring' (1999) 23 Journal of Law – Kuwait University 11. Professor Dawwas is a professor of law at the recently founded Arab American University formed in collaboration with California State University and Utah State University and based in Jenin and Ramallah on the West Bank of Palestine.
[38] Study LIX – Doc. 1, UNIDROIT 1975, paragraph 22.

A financial lease possesses three key characteristics. First, the rentals are based not on the use value of the equipment but on the amount needed to amortise the cost of acquisition to the lessor and the desired return on its outlay. The finance lease is therefore in essence a financial transaction, to be distinguished from the operating lease, where the lessor hires out to different lessees in succession equipment it already owns in return for a use-value rental. Second, it is a tripartite transaction in which the equipment is purchased from the manufacturer or other supplier by a financier, who lets it on lease to the lessee. Third, it is the lessee who, relying on its own experience, selects the equipment and negotiates the terms of the lease. But since it is the lessor who is the buyer and there is no contractual relationship between lessee and supplier only the lessor can assert claims against the supplier for delivery of equipment that is not in conformity with the contract. The lessor could agree to hold any fruits of the claim on behalf of the lessee but this faces the difficulty that since the terms of the lease almost always contain a "hell or high water" clause entitling the lessor to payment of rentals regardless of any defects in the leased equipment, any damages recoverable by the lessor are likely to be purely nominal, as the lessor will have suffered no loss. For the same reason the assignment to the lessee of the lessor's rights against the supplier will be of little value.

Two techniques were available to overcome the lack of privity of contract. One was to provide, as a number of legal systems did, that the lessee can enforce a contract made for its benefit as if it had been the contracting party. The alternative, and the one adopted by the Convention on International Financial Leasing, was to exempt the lessor from liability to the lessee except to the extent that the lessee has suffered loss in reliance on the lessor's skill and judgment and its intervention in the selection of the supplier or the specifications of the equipment (Article 8(1)), while on the other hand providing that the duties of the supplier under the supply agreement are also owed to the lessee as if the equipment were to be supplied directly to the lessee, but without the supplier being liable to both lessor and lessee in respect of the same damage (Article 10(1)). Thus was the problem of privity overcome in a very effective fashion.

Though the Convention failed to gain general acceptance, possibly because it did not apply to operating leases, it was acknowledged as an important reference for States drafting their first leasing laws and a useful starting point for the UNIDROIT Model Law on Leasing,[39] which is not confined to finance leases.

4.2.2. *Convention on International Factoring*

This Convention, which is confined to factoring arrangements under which notice of assignment is to be given to the debtor, as opposed to non-notification invoice discounting, contains several useful and to some extent innovative provisions. One of these, designed to overcome a rule in a number of legal systems requiring specificity in identifying the subject-matter of an assignment and thus precluding the assignment of future receivables, dispenses with the requirement of individual specification of the assigned receivables and provides that as between parties to the factoring contract a provision in the contract by which future receivables are assigned operates to transfer them to the factor when they come into existence without the need for any new act of transfer.[40] Another provision is addressed to the practice by suppliers of including a provision in the factoring contract prohibiting assignment. Such a provision constitutes a serious obstacle to the free flow of receivables in the stream of trade. Moreover, the supplier is likely to be able to impose the provision on the factor only when the supplier has the bargaining power. Article 6(2) in effect overrides such a provision as regards rights against the debtor except where at the time of conclusion of the sale contract the debtor has its place of business in a Contracting State that has made a declaration under Article 18 that the assignment is not to be effective. That this Convention did not gain much traction is probably due to a subsequent strong movement towards non-notification invoice discounting, which has for some time been the dominant form of receivables financing but is not covered by the Convention. Nevertheless, it has been of some influence, particularly in its treatment of prohibitions against assignment, which have influenced domestic legislation.

[39] UNIDROIT Model Law on Leasing 2010, Preamble, 5th and 6th clauses.
[40] Art. 5.

4.3. The 1997 UNCITRAL Model Law on Cross-Border Insolvency

The product of collaboration between UNCITRAL and INSOL International, the UNCITRAL Model Law on Cross-Border Insolvency is designed to facilitate collaboration between courts and insolvency administrators in one jurisdiction and those in another. It applies where there are insolvency proceedings in one State and assistance is sought in another State or a creditor in one State seeks to commence or participate in proceedings in another State.[41] The Model Law has enjoyed a considerable success, legislation based on it having at the time of writing been adopted in 50 States. It is essentially concerned with jurisdiction, recognition and procedure, not with substantive insolvency law, but it is none the worse for that since collaboration between States in such matters is of vital importance in the application of cross-border insolvency regimes.

4.4. The Cape Town and its Protocols

Next to attract attention was the law governing security interests in high value, uniquely identifiable equipment and its proceeds. The focus on secured transactions in movable property was powered by the enormous value of cross-border transactions involving the extension of secured credit; the pressure on less developed countries from organisations such as the World Bank and the European Bank for Reconstruction and Development to reform their legal regimes in order to promote economic development and secure access to credit; and an awareness that differences in legal regimes governing cross-border dealings in equipment of high unit-value created such risk and uncertainty for potential financiers and lessors that the advance of funds, particularly to developing countries, was either not forthcoming at all or made at very high rates. Research conducted for the project estimated that a sound uniform legal regime could result in savings of billions of dollars a year.[42] As regards mobile equipment UNIDROIT initiated and together with ICAO piloted the Convention on International Interests in Mobile Equipment and Aircraft Protocol, followed by the

[41] See the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations, New York, 2014); *Goode on Principles of Corporate Insolvency Law* (5th edn, ed. Kristin van Zwieten, Sweet & Maxwell, 2018), 910-943.
[42] See above, n. 30.

Luxembourg Protocol on railway tolling stock concluded jointly by UNIDROIT and OTIF, the Space Protocol dealing with space assets and the Pretoria Protocol covering mining, agricultural and construction equipment.

Of all the instruments discussed so far, this Convention and its Protocols are far and away the most complex. Indeed, had we known at the outset the size and scale of the ultimate project it is doubtful whether we would have had the audacity to begin These instruments lay down substantive uniform rules governing the creation of international interests[43] in the above categories of equipment, remedies for default, registration in an International Registry established by the Convention and priorities determined primarily by the order of registration as well as the availability of strong protections for the creditor in the event of the debtor's insolvency. Provisions were also introduced governing the constitution and priority of assignments of associated rights, that is, rights to payment or other performance under the agreements constituting the international interest. Space does not allow a detailed examination of these instruments.[44] Suffice to say that they broke new ground in a number of respects, reflecting an unusually high degree of creativity. The following in particular stand out:

1) The two-instrument approach by which the Convention is supplemented by a Protocol for each category of equipment which not only supplements but, quite exceptionally, controls the Convention, which can only come into force as regards any category of object when the relevant Protocol comes into force and takes effect subject to the terms of the Protocol.[45]
2) The incursion into areas of property law previously regarded as taboo because too specific to policies of national law, in particular the establishment of a new property right, the international interest, priority rules governing competing interests and the modification of national insolvency laws.

[43] That is, interests granted by a chargor under a security agreement or vested in a person who is the conditional seller under a title reservation agreement or a leasing agreement (Convention, Article 2(2)).
[44] For a comprehensive treatment see the various Official Commentaries by the author.
[45] The Aircraft Protocol was sufficiently developed by November 2001 that, unusually, the Convention and the Aircraft Protocol were adopted at the same Diplomatic Conference.

3) The establishment of an international, asset-based electronic registration system to register international interests and assignments and various other items and the supervision of the system and the Registrar by a Supervisory Authority.
4) An elaborate system of declarations by which Contracting States are not bound by certain provisions considered sensitive in terms of national policy unless they opt into them and by other somewhat less sensitive provisions from which they can opt out.

Each of the four Protocols presented challenges that had to be overcome. The Aircraft Protocol is of particular importance as it became the prototype for all subsequent protocols. It is particularly notable for provisions rendering international interests immune from the effects of the debtor's bankruptcy. In the Luxembourg Protocol it was necessary to introduce provisions to protect users of public service railway rolling stock by restricting the creditor's rights of repossession,[46] while the Space Protocol limited the exercise of remedies that would make the space asset unavailable for the provision of relevant public services,[47] for example, the provision and maintenance of the space asset and related ground services for educational, navigational, military or surveillance purposes. Moreover, the practice of reinforcing collateral through the assignment to the creditor of debtor's rights, that is, rights of the debtor against third parties for rentals, licence fees and the like, raised the problem how to protect the priority of intangible rights by registration in an International Registry designed for physical assets. The solution was to provide for the recording of such assignments against the registration of the international interest to which they relate, with priority of competing assignments being determined by the order of registration.[48] A further difficulty was the establishment of identification criteria. Many satellites already in outer space had no single mode of identification and even where some of them had serial numbers they were not visible from earth. This apparently insuperable problem, which was left to be dealt with by registry regulations, was solved by providing for the Registrar to open a file allotting a unique identification number to each space asset before any registrations against that asset

[46] Luxembourg Protocol, art. XXV.
[47] Space Protocol, art. XXVII.
[48] *Ibid*., arts. XII, XIII.

on the basis of information provided to the Registrar by the owner of the asset as to the name of the owner, the name of the manufacturer and the manufacturer's contract reference number, which in the case of a contract covering two or more space assets was to include a unique suffix reference number.[49] The contract would provide all the information required.

Finally, inventory financing, for which no special rules were needed in the earlier protocols, raised special considerations in the case of mining, agricultural and construction equipment, where dealers might hold large quantities of stock subject to an international interest, necessitating multiple registration in the International Registry to protect interests that in most cases were transitory, coming to an end as items of stock were sold, requiring a continuous series of discharge, so making the system very inefficient. The solution adopted in the Pretoria Protocol was to allow Contracting States to make a declaration excluding inventory from most of the Protocol provisions and rely on their local registration systems.

4.5. The UN Convention on the Assignment of Receivables in International Trade

The Cape Town Convention was quickly followed by the 2001 UN Convention on the Assignment of Receivables in International Trade, an ambitious and carefully crafted convention covering both the assignment of international receivables and the international assignment of receivables. It had been expected that this Convention would be adopted prior to the Cape Town Convention, which to avoid doubt would then state that in case of conflict the Cape Town Convention would prevail. However, the reversing of the expected chronology raised the problem how the Cape Town Convention could qualify a convention not yet made. The ingenious solution, proposed by the head of the US delegation to the Cape Town Diplomatic Conference, was to provide in an Annex approved by the Conference[50] that upon

[49] Space Regulations, Section 5.3 bis and Annex 2. See the Summary Report of the 4th session of the Preparatory Commission for the Establishment of the International Registry for Space Assets pursuant to the Space Protocol, Fourth Session (UNIDROIT 2015, Prep. Comm. Space/4/Doc. 7 rev.), Appendix III. The author was tasked with preparing the draft regulations and the Explanatory Report, which he introduced at the 4th session. See Summary Report, paras. 6-15.

[50] As noted in the Official Commentary on the Cape Town Convention and Aircraft Protocol (4th edn 2019), paragraph 2.295, the Annex does not feature in the published documents, its effect being exhausted when the insertion was made. However, the Conference approved the draft proposed by the

adoption of the UN Convention by the General Assembly of the United Nations, a new Article 45 *bis* was to be inserted into the Cape Town Convention that in case of conflict the latter would prevail, and this is what Article 45 *bis* now provides – another example of creative thinking and one that will be unfamiliar to most international lawyers!

4.6. The Hague and Geneva Conventions

As regards intangible movables, interests in intermediated securities[51] came into focus in relation to the harmonisation both of the applicable law (Hague Convention) and later of substantive rules (UNIDROIT Geneva Convention). The first of these has already been discussed.[52] The Geneva Convention lays down substantive rules for intermediated securities. The drafters of the Geneva deliberately adopted a functional approach which looked to the results to be achieved, regardless whether a given jurisdiction adopted the transparent approach, by which ultimate investors retain a contractual relationship with the issuer, a non-transparent approach, in which each account holder's relationship is solely with its own intermediary, or a semi-transparent approach, where the account holder is not recorded on the books of the central securities depositary holding on behalf of the issuer but only on the books of an account holder with the central securities depositary. Recognising that there are limits to what can be harmonised with such a diverse set of rules and systems the drafters of the Geneva Convention devised a novel concept, "non-Convention law". This is not to be confused with the applicable law. "Non-Convention law" denotes the domestic law of a Contracting State, whether or not that law is the applicable law under the forum's conflict of laws rules. The virtue of this system is that in a Contracting State all issues not covered by the Convention are governed by the law of that State.[53]

US and the UNIDROIT and ICAO Secretariats, contained in DCME Doc No. 70 dated 13 November 2001 and reproduced at 294 of the Conference *Acts and Proceedings*.

[51] That is, securities credited to an account with a bank or other intermediary.

[52] For a detailed analysis see Roy Goode, Herbert Kronke and Hideki Kanda, assisted by Christophe Bernasconi, *Hague Securities Convention Explanatory Report* (2nd edn, The Hague Conference on Private International Law Permanent Bureau, 2017).

[53] Art. 1(m). See Hideki Kanda, Charles Mooney, Luc Thévenoz and Stéphanie Béraud, assisted by Thomas Keijser, *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* (Oxford University Press, 2012), paragraphs 1-55 to 1-60.

4.7. The UCP and URDG

4.7.1. The rise of the abstract payment undertaking

Nothing more vividly illustrates the power of international trade usage than the emergence of the abstract payment undertaking, a banking device which by the customs of merchants is considered enforceable by virtue of its issue without any of the ordinary elements of a valid contract such as offer and acceptance, reliance, *cause* or consideration. Courts everywhere have found it difficult to accommodate the abstract payment undertaking within traditional doctrine but all have sensibly recognised the importance of upholding such a vitally important financing instrument. What should not be overlooked is the important role of the International Chamber of Commerce in unifying trade and finance practice through the formulation of international rules which are given legally binding force by incorporation into all relevant contracts. There are two main forms of abstract payment undertaking, the documentary credit, governed by the Uniform Customs and Practice for Documentary Credits (UCP), and the demand guarantee, governed by the Uniform Rules for Demand Guarantees (URDG).

4.7.2. The UCP

Pride of place belongs to the UCP, first issued in 1933 but derived from a set of regulations issued in 1920 by the New York Bankers Commercial Credit Conference[54] and periodically revised. The UCP are rules governing the issue of documentary credits. These are undertakings, usually by banks, that the issuer (and in the case of a confirmed credit, the confirming bank) will pay, whether at sight or at a later date through acceptance of a draft or other deferred payment) a given sum to the beneficiary (typically an exporter of goods under a contract of sale) on due presentation of specified transport and other documents. Documentary credits give the export seller the assurance of payment in advance of its manufacture or purchase of the goods. The influence of the UCP was graphically described by Professor Boris

[54] Regulations Affecting Export Commercial Credits.

Kozolchyk in an address given at the UNCITRAL Forum Für Internationales Wirtschaftsrecht in Vienna in November 1991:

> 'No other set of international customary rules is as universally observed as the *Uniform Customs and Practice for Documentary Credits* (UCP): Banks, applicants and beneficiaries in more than 150 nations adhere to it; carriers, freight forwarders and insurers draft their documents to comply with its specifications; legislatures model their statutes after it, and courts treat it as a source of law whose misinterpretations cause quick reversal.
>
> The reason why the UCP has inspired such widespread observance is not hard to surmise: It is the living law of documentary credits. By 'living law' I mean the law that not only adjudicates disputes but also governs every aspect of the everyday 'healthy' (unlitigated or undisputed) letter of credit transactions. The UCP, then, is a law invoked in the courtroom as well as applied in practice. As is characteristic of living law, the UCP contains didactic principles that instruct bankers on the basics of documentary credit business.'[55]

The current version, UCP 600, forms the basis of over US$ 1 trillion transactions and has been adopted in 175 countries. How many international trade conventions can match that?

4.7.3. The URDG

More recent are the Uniform Rules for Demand Guarantees, first issued by the UCC in 1992[56] to replace the 1978 Uniform Rules of Contract Guarantees[57] and later revised to provide a more comprehensive set of rules governing demand guarantees. Under the URDG these are payable on presentation of a written demand, a statement of the respect in which the applicant is in breach of its obligations under the

[55] For a detailed history of the evolution of the UCP see Dan Taylor, *The Complete UCP: Text, Rules and Practice for Documentary Credits ICC Publication No 683*, which reproduces these extracts from Professor Kozolchyk's lecture.
[56] ICC 458.
[57] ICC 325. These failed because their requirements came close to requiring actual proof of default.

underlying relationship and such other documents as may be specified in the guarantee.[58]

4.8. Scholarly restatements

Of the various forms of soft law one deserves particular attention, namely the restatement of contract law by scholars of international standing.[59] Two of these, the Principles of European Contract Law previously referred to and the UNIDROIT Principles of International Commercial Contracts have gained particular prominence.[60] Although the former is regional and covers both commercial and consumer contracts while the latter is international but is confined to commercial contracts there is a good deal of similarity of these two products, which are characterised by the fact that they are the work of scholars from different countries and have not involved either governments or business interests. Both of these, and particularly the UNIDROIT Principles, have influenced legal decisions, especially by arbitral tribunals, and national legislation. Most of the rules follow established principles of contract law, even though their application differs from State to State, but there are a few that are new, at least in some degree. One in particular deals with change of circumstances[61] or hardship.[62] Also of interest is the provision, common to both sets of Principles, designating certain provisions as mandatory and thus incapable of exclusion by the parties. These include the provisions imposing a duty of good faith and fair dealing[63] and reduction of grossly excessive sums payable on

[58] ICC 758, art. 15. Demand guarantees are typically issued by banks to underpin non-monetary obligations of the applicant, such as performance under a construction contract. They share the characteristic of letters of credit in that they are purely documentary and in the absence of fraud are payable against conforming documents whether or not the applicant party to the underlying contract has committed a breach of that contract.

[59] The word "restatement", a convenient label borrowed from the American *Restatements*, is a slight misnomer, since restatements not only state existing law or practice, they also seek to improve it in some degree.

[60] Much valuable work in this area has also been carried out under the auspices of the Academy of European Private Lawyers in Pavia.

[61] PECL art. 6:111, where performance of the contract becomes 'excessively onerous' because of a change of circumstances.

[62] UPICC arts. 6.2.1, 6.2.2, applicable where 'the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.' The increase in cost or diminution in value must be substantial (Comment 2 to art. 6.2.2), given that it must be one that fundamentally alters the equilibrium of the contract. Most legal systems have rules of some kind reflecting change of circumstances (*force majeure*, frustration, etc.), but what is new, at least in most jurisdictions, is the provision for renegotiation of the contract and, failing agreement, recourse to the court.

[63] PECL art. 1:201; UPICC art. 1.7.

default.[64] It may be asked how mandatory rules may be contained in a set of Principles which does not itself have the force of law. But this is not as strange as it appears. In the first place, in those legal systems which recognise the right of parties to choose internationally established rules as the applicable law, choice of the Principles will trigger the mandatory provisions as part of that law. Secondly, where this is not the case the designation of specified rules as mandatory sends a signal to a court or arbitral tribunal of a general acceptance that such rules are indeed to be considered mandatory. Thirdly, such designation may show an intention that such rules, even if not mandatory, are intended to prevail over other, inconsistent rules unless otherwise expressly agreed.

5. The challenges of the digital age

The advent of digital systems based on complex technology has led to intensive efforts around the world to develop legal rules governing the transfer of digital assets. Among the most ambitious of these is the UNIDROIT project on digital assets and private law,[65] which is still in its early stages but is already producing intellectual input of the highest order from scholars around the world as well as international and regional organisations. Central to this work is the examination of property law issues, in particular the acquisition and disposition of digital assets and the priority of competing claims. Key to the success of this work is a clear conceptual underpinning. It is very easy to fall into the trap of seeking to equate the transfer of digital assets with the negotiation of paper-based rights, such as negotiable instruments, negotiable securities and documents of title, with a view to extending the concept of possession to intangible assets so as to create in digital form a status equivalent to that of the holder in due course of a bill of exchange. This attempt to pour new wine into old bottles was rightly resisted by the drafters of the 1994 revision of Article 8 of the Uniform Commercial Code, who went to great pains to avoid applying paper-based rules to paperless assets and instead substituted the concept of

[64] PECL art. 9:509(2); UPICC art. 7.4.13(2).
[65] Study LXXXII. For a detailed description of the issues so far identified by the UNIDROIT Secretariat as requiring consideration by the Digital Assets and Private Law Working Group see the Issues Paper Study LXXXII – W.G.2 – Doc. 2, March 2021, prepared for the second session of the Working Group.

control for that of possession. Happily, the UNIDROIT Working Group is following a similar course.

The 2002 EC Financial Collateral Directive,[66] which seeks to reduce system risk arising from dealings in financial assets, deals with possession and control of both tangible and intangible financial collateral. One might have thought that this would be interpreted as meaning possession of tangible collateral and control of intangible collateral. Instead, the European Court of Justice has treated "possession or control" as a composite phrase without differentiation between possession and control,[67] while regulation 3(2) of the Financial Collateral Arrangements (No 2) 2003[68] stretched the concept of possession to cover intangibles, thereby rendering control redundant. A number of those who favour this approach are in some degree driven by the desire to extend the concept of negotiability to digital assets. But this is based on a fundamental misconception. The key aspect of negotiability is that on a transfer from A to B what B acquires is the self-same asset previously held by A and transferred by delivery with any necessary indorsement. That is not true of digital assets – blockchain, for example – where the value in the transferor's block is succeeded by value in the new block controlled by the transferee, who thus holds a new root of title. The other aspect of negotiability, namely the overriding title acquired by the purchaser for value without notice (in the case of bills of exchange, labelled a holder in due course), can be adequately catered for by the concept of the protected purchaser, that is, the only person protected from adverse claims, as under section 8-303 of the UCC. Where recovery of value from the wrongful acquirer is not sufficient, because the wrongdoer has made ill-gotten gains from its misappropriation, the remedy lies in recovery for unjust enrichment.

Concepts should always be our servants, not our masters, but conceptual reasoning should underpin every law reform project we undertake.

---

[66] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, 43).

[67] *Private Equity Insurance Group SIA v Swedbank* AS (C-156/15) [2017] 1 WLR 1602, and see Beale *et al, The law of Security and Title-Based Financing* (3rd edn, Oxford University Press, 2018), para. 3.53, discussing whether 'possession or control' refers to different concepts and suggesting that it is better to avoid distinguishing them. It seems likely that, as suggested in the same paragraph, the phrase "possession or control" was used to reflect the different concepts of possession in Member States, a suggestion which is not inconsistent with the fact that "possession or control" is an autonomous EU law concept.

[68] SI 2003/3226 as amended by SI 2010/2993, reg. 4(1)(c).

6. Envoi

It is hoped that this this tour d'horizon has amply illustrated the creative forces that have underpinned the development of transnational commercial law. They are characterised by a willingness to break with established doctrine in searching for best solutions to typical problems confronting international trade and finance, sometimes drawing on national legal systems or international trade usage, sometimes inventing new legal techniques. Transnational commercial law has come of age.