INSULARITY OR LEADERSHIP? THE ROLE OF THE UNITED KINGDOM IN THE HARMONISATION OF COMMERCIAL LAW*

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I. INTRODUCTION

THE last few decades have seen a substantial growth in what has become known as transnational commercial law, by which I mean that body of commercial law principles and rules, from whatever source, which is common to a number of legal systems. The various types of harmonisation fall broadly into four groups, each possessing its own implementing agency:

- Legislation—the task of governments and legislatures
- Judicial parallelism and judicial co-operation—the task of judges
- Business practices, codes and model forms, including contractually incorporated uniform rules published by international bodies—the task of the international business community and its national and international organisations
- International restatements—the task of scholars.

In the limited space available I shall address only the first and last of these and confine myself to private, transactional law. I am not concerned here, except at the margins, with public law regulating transactions or institutions. My focus is the contribution to the development of transnational commercial law by United Kingdom judges, practising lawyers, businessmen and legal scholars. My thesis is that we make a major input into the fashioning of international instruments of different kinds but all too often walk away from the finished product, so that if we adopt the instrument at all we come in very much later than our major competitors and lose the opportunity to give leadership to the international community and to gain the influence which that leadership would bring in its train. After explaining why I regard transnational commercial law as important in an era of globalisation I shall attempt to analyse the reasons for our failure to become more international in our approach to a legal regime for cross-border transactions, the consequences of that failure and various ways in which we might restore the vision and influence which at the beginning of the century led to the adoption of UK commercial law statutes almost verbatim throughout the common law world.

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II. HARMONISATION THROUGH LEGISLATION

Harmonisation through legislation has two aspects. The first is the implementation of international instruments: the ratification of international conventions and the adoption, wholly or in part, of model laws. The second is the enactment of legislation which is domestic in character but which may nevertheless exert a two-way influence on transnational commercial law, because it draws on the laws of other countries and/or because it is itself used as a model or source of ideas by foreign governments and legislatures. This second aspect, which may be termed legislative parallelism, is often overlooked in discussions of transnational commercial law. It is, however, highly significant both for the improvement of our own law and for the exportability of our law to other countries, particular developing countries and those that have moved or are in transition from a planned economy to a market economy, thereby extending the influence of the common law in general and English law in particular.

A. International Conventions

1. WHY INTERNATIONAL COMMERCIAL LAW CONVENTIONS ARE IMPORTANT

Those engaged in international commerce have become increasingly aware of the need to ensure that national laws are adequately adapted to the needs of global markets and cross-border transactions. The time has long passed when domestic legislation shaped for internal trade can provide sensible solutions to the problems of international commerce. Even within the field of contract law, where parties to an international agreement should be, and usually are, given a wide measure of freedom to make their own rules and choose their own law, there may be substantial advantages in uniform law within a restricted field. The parties are able to sing from the same hymn sheet, to become familiar with the text, to read it in their own language, and to reduce their dependency on local experts in every jurisdiction in which they transact business. Moreover, uniform rules provide a neutral legal regime for the many cases where the parties do not select the applicable law and, indeed, conclude their agreement informally—for example, on the telephone—and settle only the most essential terms. The success of the carriage of goods conventions provides a striking illustration of the advantages of uniform rules in cross-border commerce. So too does the Convention on Contracts for the International Sale of Goods.

In any event, the progressive move towards the globalisation of commerce and finance has resulted in a much greater awareness of the need to go beyond contractual relationships and to harmonise at least some of the rules relating to the acquisition and transfer of rights *in rem* in movable commercial assets, tangible or intangible, in order to enhance the security of transactions. Let us consider the following:

- Cross-border dealings in receivables, which may themselves be international in character
- The need for an adequate security regime to protect the financing of mobile equipment of high unit value
- The legal efficacy of cross-border settlement and payment system rules
- The creation and protection of ownership and security interests in pools of indirectly held investment securities which may involve an issuer and tiers of securities intermediaries, all in different countries
- The implications, yet to be worked out, of cross-border electronic commerce
- The growth of cross-border insolvency of multinational groups of enterprises.

These are matters which, in the light of the magnitude of the interests at stake, can no longer be left exclusively to individual national laws, though these will always retain a prominent role except, in the case of the European Union, where the field is occupied by European Community law. So the importance of harmonising at least some rules of substantive law by international convention should not be under-estimated. We are not here talking of a mere academic desire for a greater convergence of legal systems; we are talking of matters which industry, commerce and banking regard as of immense importance to them.

Two illustrations will serve to underline this point. At a seminar in London to discuss a uniform conflict of laws rule to govern dealings in indirectly held investment securities we were told by a representative from one participant that systemic risk was a constant topic of discussion, there had been a drastic increase in the use of collateral and the figures were in billions of dollars. The industry urgently needed a conflicts rule which adopted the place of the relevant intermediary approach (PRIMA). Moves are now under way both for a new European Directive and for a Hague Conference private international law convention on the subject. Happily, as I shall mention, the UK is playing a leading role in both of these initiatives, through the intensive efforts of two practitioners, Richard Potok (the driving force behind the project) and Guy Morton, and led on the government side by the Treasury.

My second example relates to certain types of mobile equipment of high unit value, notably aircraft, railway rolling stock and space property. The financing of such equipment involves huge outlays. It is estimated that over the next 10 years more than 1,000 commercial satellites will be launched valued at $US 5 billion and that over the next 20 years expenditure on the financing of new aircraft alone will exceed $US 1 trillion. So security over the financed object is of crucial importance to the financier. But how do we protect security interests in objects that move daily from one country to another or, in the case of satellites, are not on earth at all? How do we ensure that an interest created under one legal regime will be recognised and enforced in others? The ambitious project initiated by UNIDROIT is the creation of an

entirely new type of interest in such mobile equipment, an international security or title-retention interest which will be able to be created with very simple formalities, will confer on the secured party a range of essential default remedies and will be perfected by entry in an international register, having priority over unregistered and subsequently registered interests in accordance with a short and simple set of priority rules. A study conducted under the auspices of INSEAD suggests that in relation to aircraft financing international acceptance of a legal regime of this kind, by increasing the security of aircraft receivables, could significantly raise their credit rating and reduce borrowing costs by as much several billion US dollars a year.[1] This important Convention, which in relation to aircraft is being co-sponsored by UNIDROIT and the International Civil Aviation Organization, is expected to be concluded at a Diplomatic Conference to be held in Cape Town at the end of October 2001.

2. THE NEED FOR LIMITED OBJECTIVES

Just as no one—at least, no one of sound mind—enters the academic world because of the pay, so also no one who has experience of the time, hard work and sheer frustration involved in the preparation of instruments of harmonisation embarks lightly on a uniform law project. I am not one of those who believes that harmonisation is *per se* a good thing. Even if it were feasible (which plainly it is not) to harmonise all private law, whether at the international level or at the regional level—for example, within the European Community—I do not think it would be sensible to do so. In the European context Lord Goff has recently observed:

> We have today in Europe a whole range of legal cultures . . . We should be profoundly grateful for this diversity. We can learn far more from these diverse systems than we could have ever have derived from a single monolithic regime.[2]

In his slim but classic work *Comparative Law*, that distinguished Cambridge scholar Professor Harold Gutteridge warned of the damages of over-ambition in the face of fierce loyalties to domestic law:

> The citizens of many countries are deeply attached to their national law; at one extreme we have, for instance, the Frenchman who carries in his pocket the *Code Civil*, the dog-eared leaves of which bear testimony to the frequency with which it is consulted, and, at the other end of the line, the Englishman who never looks at a law book but is nevertheless convinced that his common law is the quintessence of human wisdom and justice.[3]

1. 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* (Sept. 1998) p. 32.

2. 'Coming Together—The Future' in *The Clifford Chance Millennium Lectures*, B. S. Markesinis (ed) (Hart Publishing, 2000) at p. 239.

3. *Comparative Law* (Cambridge University Press, 1949), pp. 157–8. It is not without interest that in the index to the English edition of a leading French textbook on international commercial arbitration the entry under '*Kompetenz-Kompetenz*' reads: 'see *Competence-Competence*'.

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Yet Gutteridge remained firmly committed to the process of harmonisation. The point he was making was that it is necessary to be selective and to keep any harmonising project within manageable limits. During the last 25 years international organisations involved in the harmonisation of private law and private international law have become keenly aware of the need to proceed with circumspection, and in particular, not to embark on a project of harmonisation before satisfying themselves that the differences in national laws create a serious impediment to cross-border trade; to limit the scope of the project to what is both necessary and acceptable to States with widely differing legal philosophies; and to involve the relevant interest sectors not merely through consultation on a finished product but in the creation of the product itself.

3. THE APPROACH OF THE UNITED KINGDOM TO THE HARMONISATION OF COMMERCIAL LAW

Writing in 1949 Gutteridge observed that Great Britain's reputation for obstructing uniform law from selfish motives was undeserved and that with limited exceptions the movement for unification owed much to British initiative and collaboration. He instanced such unifying measures as the York-Antwerp Rules of General Average, the various Brussels Conventions on Maritime Law, the 1921 Hague Rules on the Liability of Shipowners and the Foreign Judgments (Reciprocal Enforcement) Act 1933.

It remains the case that the United Kingdom makes a major contribution to the production of international instruments of various kinds. Our academic and practising lawyers and lawyers and others in the civil service participate prominently as chairpersons or members of study groups, working parties and as rapporteurs; our government departments make an important input through the submission of papers, the organisation of seminars and conferences, and participation as members of UK delegations to diplomatic conferences; our national trade organisations contribute submissions through the international bodies of which they are members. And the UK is highly regarded for its commitment to support of the world's leading general harmonisation institutions, notably UNIDROIT, UNCITRAL, the Hague Conference and the International Chamber of Commerce. But in the field of transnational commercial law our record of implementation has so far been rather dismal.

One could give a number of illustrations. The most striking is the inertia in regard to the 1980 UN Convention on Contracts for the International Sale of Goods (CISG). This is a major gap-filling convention consisting of some 101 Articles and dealing with the contractual (but not the property) aspects of sale. A number of its rules are undoubtedly better than those found in our own Sale of Goods Act, for example, the rule that risk passes with control (i.e. the delivery of actual or constructive possession) rather than with ownership, which is the rule in the Sale of Goods Act and which our courts in practice avoid by inferring a contrary intention on the part of the parties. Now the Convention

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offers no threat whatsoever to party autonomy. It is essentially a gap-filler designed to make provision where, as is not at all uncommon in international trade, the parties have failed to do so because their contract has been concluded informally on the telephone or on the basis of a brief description of the essential terms. The parties are free to exclude the convention almost in its entirety or to exclude or vary particular provisions, either directly or by selecting the domestic law of a particular country to govern their contract. The Convention has been ratified by no fewer than 57 States. They include virtually all our major competitors except Japan and India, the latter awaiting ratification by the UK. Government is not opposed to ratification of the convention; it is simply that it has not been found possible to provide legislative time. Now it is undoubtedly true that the volume and complexity of modern legislation are vastly greater than they were in Gutteridge's time. Even so, one has to say that the excuse of lack of parliamentary time begins to wear a little thin after 20 years!

Even where we do ratify a convention we can take an unconscionably long time to do it. One of the most successful international conventions of all time is the 1958 New York Convention on the Enforcement of Arbitral Awards, which 123 States have now adopted and which has made a huge contribution to the growth of international commercial arbitration. Now you might think that as one of the world's leading arbitration centres the United Kingdom would have been one of the first to ratify the New York Convention. In fact it took us no less than 17 years. Far from being the first we were 48th in line, coming in several years after most of our major competitors, including, this time, India. Happily we were not the last. Malta ratified the convention in September 2000, some 43 years after the event. So it's never too late to repent!

When we make such a major contribution to the fashioning of an international instrument, is it not sensible to adopt it and to give our courts the same opportunity as is eagerly seized by their counterparts from overseas to offer their own interpretative guidance which will then be available to courts and jurists in other jurisdictions? Would not this also have the effect of increasing still further the influence of English law and English courts?

4. SOME REASONS FOR NON-IMPLEMENTATION OF INTERNATIONAL INSTRUMENTS

Why does the UK find it so difficult to give leadership in the adoption of international instruments? Leaving aside sheer bloody-mindedness—as where the UK alone refused to sign the European Insolvency Proceedings Convention because of the row over BSE in British beef—the reasons appear to be a combination of policy considerations and perceived practical difficulties.

As regards policy, there are those who consider that English law in all its majesty is greatly superior to anything that could be devised at international level. For lawyers in this category the Sale of Goods Act is the quintessence of perfection, and the notion that we might benefit from CISG in any way at all is anathema. The fact is that our commercial law did once influence the

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whole of the common law world but our neglect to service it has cost us dear, as one common law country after another has abandoned the old UK legislation in favour of new enactments tailored to the needs of modern commerce. Allied to this notion of the superiority of English law is the implicit assumption that in an international contract it is English law that will be the governing law. But for every contract governed by English law there will be others governed by a foreign law in a contract of which the language or primary knowledge will not necessarily be English and which may be much less favourable to the English party than the rules of an international convention. Is there not merit in at least allowing UK parties to avail themselves, if they so wish, of rules designed specifically for international transactions and available in English language texts?

A further factor in the past has been the lack of industry pressure. It is naive to believe that the only relevant factor is the quality of the measure proposed. Faced with a crowded legislative timetable no government is likely to find time for a measure for which there is no pressure from at least one powerful interest group. Nowadays we recognise that it is crucial to secure the vigorous support of the relevant interest groups so that they in turn can put pressure on government and persuade Ministers that there really is a serious problem which the new measure will properly address. This involves raising the general level of interest and awareness. The Department of Trade and Industry's Business Law Unit here deserves an accolade for its hosting of several seminars to discuss the Leasing and Factoring Conventions and successive drafts of the UNIDROIT Mobile Equipment Convention.

Then there is the familiar problem of lack of parliamentary time, a problem that affects most, if not all, legislatures around the world. This affects our ability to implement domestic legislation as well as international conventions and I shall examine it in more detail in that context. Suffice it to say at this stage that the enactment of legislation as a prelude to ratification of an international instrument[4] can usually be expected to consume a quite short amount of time. The normal practice is to annex the text of the convention as a schedule to the Bill. No line-by-line analysis is involved, because apart from reservations permitted by the convention (which in modern conventions are usually the only reservations allowed) it cannot be changed; it must be enacted as it stands or not at all. This makes the inability to find time for the Vienna Sales Convention all the more mystifying.

4. This article is concerned with private commercial law conventions which are intended to confer rights and duties within the United Kingdom and thus have to be carried into effect in the UK by legislation. Ratification is invariably deferred until after such legislation in order to avoid the risk of the Bill not being passed, resulting in the UK government being in breach of its international obligations, and takes effect at the same time as the Act comes into force. There are, of course, international treaties which are intended to take effect solely in international law. These do not require legislation but UK constitutional practice as crystallised by the 1924 Ponsonby Rule is to lay before both Houses of Parliament for a period of 21 days after signature and before ratification every treaty which is not intended to be enacted or dealt with under some alternative parliamentary procedure.

But perhaps the most potent factor of all is that apart from the valiant work of the Law Commission we have long ago ceased to take an interest in servicing even our own general law. The Victorians had the foresight to expend large amounts of time, energy and money in providing an infrastructure that would last 100 years. We do not have this vision. Our commercial legislation, like our water pipes, our railways and our underground, suffers from underinvestment and patchwork adjustments which in the end cost more than if we had done a proper job. It is therefore scarcely surprising that we are so inert when it comes to adopting international instruments. This is, I believe, a matter of the utmost gravity, and I shall say more about it when I come to discuss ideas for a UK commercial code.

B. Model Laws

Just a brief word about model laws—instruments that will not in themselves acquire legal force at international level but are available to be adopted by States if and to the extent that they desire to do so. A good example in the field of commercial law is the UNCITRAL Model Law on International Commercial Arbitration. The initial response to this from the DTI Advisory Committee on Arbitration Law (DAC) in its 1989 Report was decidedly lukewarm. A new Arbitration Act was certainly needed. No doubt the Model Law provisions should be adopted where possible; but while the Model Law was good enough for countries whose arbitration law was relatively undeveloped—which included Scotland—it did not appear to have a great deal to offer the English. In those early days we were still wedded to concepts that had long been discarded in continental Europe: the dependence of the arbitration clause on the validity of the underlying agreement; the application of English rules of evidence and English conflict of laws rules in an English arbitration; and, of course, the vital importance of judicial review of arbitral awards. But by the time the DAC came to issue its final consultation paper six years later its views had undergone something of a sea-change. On the majority of issues where English law had been felt superior to the Model Law, it now fell into line. The resulting Arbitration Act 1996, drafted with admirable clarity and precision by Mr. Geoffrey Sellers, does, indeed, embody much of the philosophy of the Model Law.

But what is particularly significant about the Arbitration Act is that, lacking government interest, it started as a purely private enterprise in which one of our leading arbitrators, Mr. Arthur Marriott, persuaded private organisations and individuals to contribute funds for the preparation of an unofficial Bill, which was in due course produced. Eventually the DTI agreed to take over the Bill and the result was the excellent product we have today. But we might not have had it at all if there had been no private initiative. Is this the way to carry our commercial law forward? Perhaps it is!

C. Legislative Parallelism

As I have previously explained, even domestic legislation has the potential to contribute to the harmonisation of commercial law, by a process of borrowing and lending. A proper reform of our commercial law requires a careful study of developments in other jurisdictions, both civil law and common law, though naturally in the field of commercial law America has pride of place. Where we borrow concepts from others we contribute to the harmonisation process, even if only at the level of ideas and concepts rather than detail. By the same token, if we frame a commercial law statute which is responsive to the needs of modern commerce, including cross-border commerce, then we have an exportable product which will help to spread the influence of English law and resort by foreign lawyers to English academic and practising lawyers.

The sad fact is that we no longer take seriously the review and reform of our commercial law; minor tinkering is all we seem able to achieve. Almost every statute governing commercial transactions is in substance, and in most cases in form, well over a century old. Instances are the Bills of Sale Acts 1878–1891, the Bills of Exchange Act 1882, the Factors Act 1889, and the Sale of Goods Act, which though dated 1979 is not substantially changed from the Sale of Goods Act 1893. So we find ourselves in the twenty-first century with legislation enacted in the nineteenth—a shocking indictment of our approach to the modernisation of our law.

In the field of commercial law we seem to be particularly resistant to legislative change except at the margins. Successive governments have largely opted out of the field, leaving it to the courts to fill the vacuum. Our judges do a splendid job, but even though we now recognise that judges do not merely declare law, they also create it, there is a clear limit to what can be achieved through the common law, particularly where it is encumbered by archaic statutes. Our law of personal property security remains rooted in 19th century concepts and legislation despite the fact that no fewer than three official reports—the Crowther Report on Consumer Credit in 1971, the Cork Insolvency Law Review in 1982 and the Diamond Report on Security Interests in Property 1988—recommended the adoption of a functional approach to personal property security law along the lines of Article 9 of the American Uniform Commercial Code.

Again, the review of company law, which was launched in 1998 as a project designed to provide a strategic framework for a modern company law, seems to have moved away from its stated purpose and to have focused on a series of smaller and detailed changes which, though useful in themselves, do not represent a fundamental review starting from first principles. Nevertheless the Final Report, *Modern Company Law*, shows a welcome awareness of the wider issues arising from the review and includes a recommendation that the question of security interests in personal property should be referred to the Law Commission for a deeper study. The American experience over decades

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is that by simplifying and modernising commercial law, costs can be significantly reduced and business procedures streamlined.

There are other, equally pressing, concerns. A leading international financial lawyer, Mr. Hugh Pigott, in an article focusing attention on a marked increase in the cross-border use of securities as collateral, has noted the lack of legal certainty in identifying which laws apply to which parts of a transaction.

> This lack of legal certainty is compounded by the fact that the laws of the Member States of the European Union relating to the use of collateral are in many cases complex, inconsistent and impractical. The resulting uncertainties seriously impede the efficient use of collateral. This in turn restricts access to financial services and raises costs.[5]

In March of this year the Collateral Law Reform Group of the International Swaps and Derivatives Association published a report identifying the main legal impediments to the efficient use of collateral and urging, not an international convention, but a reform of national laws so as to embody certain key principles that would result in practical harmonisation across Europe—in other words, convergence through legislative parallelism. This is a warning call we simply cannot afford to ignore.

The fault does not lie with the civil service, which, though labouring under huge pressures exacerbated by years of diminution, neglect and denigration, tries very hard to ensure that our law keeps abreast of developments. But it is, perhaps excessively, constrained in its thinking by the difficulties of securing a slot in the legislative timetable. In any event, there are certain fields of law which are best reviewed outside government, whether by a departmental committee or Royal Commission, the Law Commission or some other expert group. Government departments are at their best in tackling issues high in political content. But the review and reform of technical general law are matters for outside specialists, working in extensive consultation with the various interest sectors and, of course, with participation from them and from the relevant government departments. Only the outsiders have the knowledge, experience and time to undertake the work and to review developments in other countries and lessons to be learned from these.

The fundamental problem is that our parliamentary machinery is wholly inadequate for the needs of modern commerce. It is this fact above all that has inhibited a more broad-brush approach by government and the Law Commissions. The concerns I have expressed are echoed, in the field of company law, in a thoughtful and imaginative report by the Law Society's Company Law Committee, *The Reform of Company Law*, published in February 2000 and endorsed by the Law Reform Committee of the Bar Council. That report repeated criticisms expressed by the committee nine

5. Hugh S. Pigott, 'Steps Towards the Harmonisation of Collateral Law in Europe' (2000) JIBFL 347.

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years previously that company law reform was failing because of inadequate resource, inadequate consultation, lack of political commitment to make Parliamentary time available and a Parliamentary process which was no longer delivering sound technical legislation, so that recommendations in reports of the highest quality from bodies such as the Law Commission remained unimplemented. It also stressed the need for regular review of the state of company law, saying that 38 years (the period since the Jenkins Report) was too long, particularly when change in the business sector is more rapid than was previously the case. Every word of this excellent report is equally true of commercial law; and if 38 years is too long to wait for a new review, what are we to say of our commercial law, which has not been the subject of review for over a century?

The only reason our commercial law continues to enjoy regard, both here and abroad, is because of the quality of our judges, their sensitivity to legitimate commercial needs and their receptiveness to new legal instruments and concepts fashioned to serve those needs. As an American professor once remarked to Lord Wilberforce:

> The elegance, style and analytical powers of the British legal community have survived the decline of the British Empire intact.

The combination of well-informed judges and generations of textbook writers has masked the fragmentation, obscurity and inaccessibility of our commercial law. These deficiencies are not always evident to judges, for by the time they come to hear a difficult case a great deal of work will have been done by counsel and solicitors for all parties, so that the facts are winnowed, the relevant issues identified and sharply defined and the case cogently presented. But the cost of the legal research involved in the preparatory process and of taking complex issues of law through the hierarchy of courts must run to tens of millions of pounds *every year*—and that is only the cost of the lawyers, not the value of the time of their clients or the cost of impediments to legitimate business.

Hence the proposal which I have ventured to put into play for a United Kingdom commercial code. Now let me be clear about what is envisaged. It is not the codification of our entire commercial law. In his lecture at the British Academy in November 2000 the Lord Chancellor, Lord Irvine, observed that no code can be entirely comprehensive.[6] I entirely agree. To seek to codify the whole of commercial law would be a preposterous undertaking. It would not even be sensible to cover all the main types of commercial contract. In fact, the code can literally be restricted to a handful of topics where review and, if appropriate, reform are really necessary. So I see no reason to include a treatment of negotiable instruments other than those

6. 'The Law: An Engine for Trade', a lecture delivered at the British Academy on 22 Nov. 2000.

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issued on a market as investment securities. The Bills of Exchange Act is not perfect but nowadays creates few problems. For the same reason paper-based payment systems do not need to feature in a commercial code, nor do documentary credits or demand guarantees, which are perfectly well covered by contractual incorporation of uniform rules published by the International Chamber of Commerce. Again, there is no need to deal with marine or even non-marine insurance or with carriage of goods. In fact, the great bulk of the work of our specialist Commercial Court can be readily handled within our existing law.

What, then, does qualify for inclusion in a commercial code? First, a few general principles relevant to commercial contracts, including electronic commerce. Then, the sale of goods, which is the central commercial contract. Sir Mackenzie Chalmers' Sale of Goods Act was a brilliant codification but now needs updating. After all, what was enacted in the nineteenth century is scarcely likely to be adequate for the twenty-first Professor Hugh Beale, a Law Commissioner, has identified in a very preliminary study at least 28 matters which call for reconsideration. I have already referred to the state of our personal property security law, which is a disgrace. We urgently need a modern law covering dealings in investment securities, including market-responsive rules governing indirectly held securities and their use as collateral, along the lines of Article 8 of the Uniform Commercial Code, and a statement of the principles and rules governing electronic funds transfers, which involve the turnover of vast sums every night. Finally, there is much to be said for a restatement of the law relating to suretyship guarantees, which even if generally satisfactory is hard to access.

A code has several advantages over ordinary legislation. It gathers together in one place the main principles and rules in the selected field. It is prepared by or in collaboration with experts in that field, who, free from the pressures imposed on parliamentary draftsmen in the preparation of ordinary legislation, can take the time to consult practitioners in the field, to examine developments in other jurisdictions and to produce a structured text in plain English and logical sequence. An excellent modern example is the Arbitration Act 1996, where parliamentary draftsmen worked in close collaboration with the Chairman and members of the DAC to produce a text which is widely admired for its clarity as well as its content. The Act does not attempt to codify the whole of English arbitration law. It focuses on those principles and rules which are central to arbitration, leaving leeway for the courts to accommodate the Act to new developments. As Lord Wilberforce pointed out many years ago when speaking to the Law Commissions Bill, codification is not the enemy of the development of the common law but rather its enhancer.

> . . . by presenting to the courts legislation drafted in a simple way by definitions and principles we may restore to the judges what they may have lost for many years, to their great regret, the task of interpreting law according to statements of principle, rather than by painfully hacking their way through the jungle of detailed and intricate legislation. So I believe that a process of codification, intelligently

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> carried out, will revive the spirit of the Common Law rather than militate against it.[7]

Lord Wilberforce went on to describe the export value of a code:

> As our friends the French know very well indeed, and apply in practice, legal institutions and legal ideas are a cement of great value in holding together the exporting country and the other countries in pursuit of common values.[8]

In 2000 the Department of Trade and Industry kindly hosted a seminar to test the response to the idea of a commercial code. Of the 60 people who attended, including academic and practising lawyers, representatives of banks and multinational companies, all who spoke strongly supported the code and not one participant dissented. Moreover, there was a clear consensus in favour of legislation, not merely a kind of Highway Code, which it was thought would simply add another layer of uncertainty. The Law Commission has indicated its willingness, subject to the Lord Chancellor's approval, to examine two topics in detail over a two-year period. It is hoped that the DTI will be the sponsoring department and provide the additional resources needed. It is envisaged that the project will be in the nature of a public-private partnership in which the professionals will play an active role. Professor Christian von Bar, who is directing the European civil code project, has indicated that a UK commercial code could exercise considerable influence in the development of commercial law in continental Europe. So it is doubly important for this project to proceed.

III. HARMONISATION THROUGH INTERNATIONAL RESTATEMENTS

This brings me to the last of my topics, harmonisation not through any normative instrument but through 'restatements' by international groups of scholars. Two of these have attained particular prominence: the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law produced by a private group, the Commission on European Contract Law. These sets of principles are not, of course, restatements, for since national laws differ from one to another they necessarily change at least some of the rules in each of the legal systems represented. The search was not for the lowest common denominator but rather for best solutions to typical problems. The impact of the two sets of Principles has exceeded the wildest expectations of their progenitors, particularly in the field of international commercial arbitration. They demonstrate the immense persuasive power of rules produced by groups of independent scholars of international repute which are non-normative and therefore pose no threat to national law but are available as a resource to courts, arbitral tribunals and legislators. Even more striking is the fact that all the participants were satis-

7. HL Deb 1964–5, vol 264, cols 1175–6.
8. Ibid.

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fied that for the most part the Principles reflected rules already embodied in their own legal systems.

Plainly the Principles, which are the product of extensive debate on policy issues, concepts and technical considerations, should feature significantly in university student texts and contract courses. Unhappily in England, at any rate, they do not. Most of our contract textbooks make no mention of them at all. Nor, with a very limited number of exceptions, do the Principles appear to feature in undergraduate or postgraduate courses. This is a reflection of a wider problem, namely the inadequate, though gradually increasing, attention to comparative law in our law schools. All this is a pity, because quite apart from exposing our students to ways of thinking that in some respects are different from our own, discussion of other systems and other rules helps us to see more clearly the characteristics of our own legal system. Where we do find prominence and support given to the Principles of European Contract Law is not in the student textbook but in an essay contributed by the then Lord Chief Justice and current Senior Law Lord, Lord Bingham, in his important contribution to the Clifford Chance Millennium Lectures.[9]

IV. THE WAY AHEAD

In the light of this rather lamentable state of affairs in our commercial law, what is to be done? First, we need to become much more aware of the benefits to be derived from implementation of international instruments to the preparation of which we contribute so much. Secondly, we need to take the servicing of our own commercial law much more seriously than we have until now, recognising that a good modern code which focuses on those aspects of commercial life crucial to the smooth functioning of business and markets can not only produce better results but also save a huge expenditure of time and money currently devoted to ascertaining the law and, in addition, provide us with a product which we can export to other countries. In this task the members of the Commercial Bar Association, with their long expertise in handling commercial disputes, can play an invaluable role.

Thirdly, we in the law schools must engage the interest of our students in international instruments relevant to their fields of study in domestic law, so that they can see how there may be several ways of tackling a common problem and can have a keener appreciation of the characteristics of their own law. There are welcome indications that this is now beginning to happen.

Finally, there is an urgent need to review our parliamentary procedure in order to find time to implement international commercial law instruments with which we are in sympathy and to provide the framework of a modern commercial law. One way is to reduce not only the volume but also the complexity of

9. 'A New Common Law for Europe' in *The Clifford Chance Millennium Lectures*, B. S. Markesinis (ed) 27.

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modern legislation. Is it really necessary to add several hundred pages of text to our tax law every year? Should we be so preoccupied with trying to cover every eventuality and stop up every loophole? And could we not have a mechanism by which a Bill that is technical rather than political and has secured a consensus within the sectors affected can be presented to Parliament to approve the principles on which it is based and then amended as necessary and brought into force by statutory instrument? This was one of the many useful proposals advanced by the Law Society's Company Law Committee in the report to which I have previously referred. Such a procedure would enable us to simplify and modernise our commercial law and to make it accessible and exportable and worthy of a country whose capital is the world's leading financial centre.

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