CREATIVITY AND TRANSNATIONAL COMMERCIAL LAW: FROM CARCHEMISH TO CAPE TOWN

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Abstract This article examines the creative aspects of a range of international commercial law instruments which have in common that they seek to bypass traditional doctrine in order to increase commercial efficiency and ease of transacting. In short, the purpose of the harmonising measure is functional in that it seeks to overcome a serious obstacle to cross-border trade by providing commercially sensible solutions to typical problems regardless whether this disturbs established legal theory, which should always the servant of the law, not its master. Creativity applies not only to the formulation of an instrument but also to its interpretation. Those entrusted with preparing a commentary on the detail of such an instrument are likely to face difficult issues of interpretation which may take years to surface and may only be resolved by a willingness to risk error in order to provide the reader with clear guidance rather than sheltering behind the presentation of alternative interpretations, while at the same time resisting the temptation to ascribe to words in a convention the meaning they would have under one's own national law.

At least one of the instruments examined was conceptually flawed; it is mentioned to highlight the danger of over-ambition in delineating the sphere of application of the convention concerned. Undisciplined creativity comes at a cost. Another convention, and a highly successful one, is referred to only to demonstrate the value of creative ambiguity.

Keywords: private international law, creativity, harmonisation, business practice, codification, function, doctrine.

I. INTRODUCTION

A. Some Historical Antecedents

From the very earliest times rules have developed in response to the driving force of cross-border trade. Whether commerce was conducted along caravan

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routes, such as the Silk Roads running from China to Europe, or along shipping lanes developed by the Phoenician master navigators or, in the Middle Ages, at international fairs such as those held at Flanders, Antwerp and Champagne, success depended on a high level of organisation and creative thought. Routes had to be established and means of transport provided,[1] currency exchanges, brokerage and credit facilities had to be organised and systems devised for the settlement of cross-border transactions, the speedy resolution of disputes and the enforcement of judgments, not to mention the provision of vast quantities of food and drink. Of utmost importance was the preservation of the peace,[2] and particularly the protection of foreign merchants, because commerce tended to go hand in hand with violence. In the words of Mephistopheles:

> Krieg, Handel und Piraterie,
> Dreieinig sind sie, nich zu trennen.[3]

The mediaeval *lex mercatoria* was a combination of commercial law as developed by the custom of merchants and maritime law, which generated partnerships and contracts for the carriage of goods by sea, while special rules developed governing maritime loans. Payment obligations were localised through the bill of exchange, the bill of lading and, much later, the documentary credit and the demand guarantee.

Yet the history of commercial law is characterised by the constant reinvention of the wheel. The Italians are credited with the invention of the bill of exchange, yet these were found nearly 2,000 years ago inscribed on tablets from Carchemish, which also provided an ancient form of documentary credit. The Greeks had developed the maritime loan based on custom nearly 2,500 years ago and secured by hypothecation, the loan being at a very high rate of interest because it was repayable only if the ship arrived safely,[4] the lender taking the maritime risk, which distinguished the maritime loan from other types of loan.[5] The English take great pride in their floating charge, yet the

[1] Before the domestication, around 4,000 BC, of the horse, the camel and the mule for use as a means of transport of goods and communication, traders either had to undertake a sea voyage or to travel on foot carrying their wares with them. The invention of the wheel in about 3,500 BC transformed the transportation of goods.

[2] P Huvelin, *Essai Historique Sur le Droit Des Marchés & Des Foires* (A Rousseau 1897) 338: 'L'idée essentielle de laquelle découle toute l'histoire interne des marchés et des foires, l'idée qui a enfanté tout l'organisme, c'est l'idée de la paix …' ('The essential idea from which flows the entire internal history of markets and fairs, the idea which gave birth to the entire system, is the idea of peace…'). In this fine work Huvelin himself acknowledged his debt to the remarkable multi-volume work of the German scholar Levin Goldschmidt, *Universalgeschichte des Handelsrechts* (Verlag von Ferdinand Ente 1891).

[3] JW Goethe, *Faust. Der Tragödie zweiter Teil* (JG Cotta 1832) 304 ('War, trade and piracy: an inseparable Holy Trinity').

[4] FR Sanborn, *Origins of the Early English Maritime and Commercial Law* (Century Company 1930, reprinted Professional Books 1989) 4–7; WA Bewes, *The Romance of the Law Merchant* (Sweet & Maxwell 1923) 74.

[5] W Ashburner, *Nomos Rhodiōn Nautikos; The Rhodian Sea-Law* (Clarendon Press 1909) 210.

Roman law of *hypotheca* provided much the same facility, allowing security to be taken over any kind of asset, tangible or intangible, and over present and after-acquired inventory, which on disposal would escape the security interest while new items of inventory would fall within it.

In each age it is the merchants and financiers who develop new instruments in search of reduced cost, greater efficiency and enhanced security, relying on the law to bless their practices and understandings. The sophistication of a country's commercial law is related directly to the volume and range of its transactions. It is therefore no surprise to find that the United States, whose volume of business transactions is enormous and whose laws strongly favour entrepreneurial activity, has been the leader in the development of commercial law, particularly through the provisions of its Uniform Commercial Code relating to securities (Article 8) and secured transactions (Article 9).[6] Yet harmonisation at the international level depends on consensus, which itself depends on respect for legal systems within other legal families, notably the civil law and the socialist law, which have made significant contributions to the development of transnational commercial law.

Harmonising instruments take many forms: conventions, model laws, rules adopted by private international organisations and incorporated into contracts, international restatements, model forms and legislative guides. For reasons of space only the first four of these are examined in this article. While the primary actors are States, no development of transnational commercial law has any prospect of success without the strong support of the relevant industry or financial institutions. A relatively new factor is the advent of regional bodies of which the most powerful is the European Union, which participates in all harmonisation projects and seeks to establish a common position on the part of EU Member States which is designed in particular to preserve key features of EU law.

Private law conventions differ in important respects from public law treaties. The most important distinction lies in the fact that while in both cases the parties are States the primary beneficiaries of private law conventions in the field of commercial law are private parties: parties to transactions and third parties who may be affected by them. It is a curious phenomenon, upon which the writer has remarked elsewhere,[7] that our writers on international law in general and treaty law in particular never ever refer to private law conventions.

The present article examines a selection of instruments prepared by or under the aegis of the four main harmonising agencies: the International Chamber of Commerce, UNIDROIT, UNCITRAL and, in the field of conflict of laws, the

[6] The American Law Institute and the National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code* (2017–2018 edn, Thomson Reuters 2017).

[7] R Goode, 'Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of the Cape Town Convention 2001 and Its Protocols' (2016) 65(3) ICLQ 523, reproduced in R Goode, *The Development of Transnational Commercial Law: Policies and Problems* (Oxford University Press 2018) Ch 16.

Hague Conference on Private International Law. The focus is on those elements of the instruments in question which, on the international plane at least, are truly creative. Creativity has manifested itself in a variety of forms: through the development of business practice codified in contractually incorporated rules of a national or international industry organisation; imaginative drafting techniques, coupled with deliberate ambiguity; evolution of new concepts and harmonising techniques to cut through doctrine that has proved an impediment to the efficient conduct of business; and the use of legal techniques to co-ordinate parallel proceedings in different jurisdictions. Of note also is the diversity of institutions involved: States and other international organisations; business interests; and scholars, many of whom have also participated as members of delegations at Diplomatic Conferences. Sometimes, as will be seen, the experiment proved too bold to gain traction or died the death because the instrument as a whole did not receive significant support. The reasons for failure are many and diverse:

> Unification cannot be achieved by a stroke of the pen, nor can it be carried out within the four walls of law libraries, practitioner's offices or professorial studies. The ground must be very carefully surveyed, and the interests concerned must be won over before any action is undertaken. It is necessary, for our present purpose, to underline the fact that many of the woes from which movement for unification suffers are undoubtedly due to premature and ill-advised attempts to draft schemes for unified law which have little or no prospect of acceptance.[8]

But as we shall see, amid the failures there have been notable successes.

B. Codification

A word about codification, the success of which at national level depends on a combination of style and content. Pride of place belongs to the French *code civil*, the outcome of a project inspired and driven by Napoleon Bonaparte and entrusted by him to a commission of four eminent jurists.[9] The principal draftsman was that remarkable lawyer Jean-Etienne-Marie Portalis, under whose direction the drafting was completed in a mere four months, though the code was not published until 1804. The code was intended to be readable by the ordinary citizen. The key elements of the final product were clarity, simplicity, precision and an awareness that it was futile to seek to cover every eventuality. The particular case fell within the province of jurisprudence, not of the code.

> Nous nous sommes également préservés de la dangereuse ambition de vouloir tout régler et tout prévoir. Qui pourrait penser que ce sont ceux mêmes auxquels un

[8] HC Gutteridge, *Comparative Law* (2nd edn, Cambridge University Press 1949) 157.
[9] The current edition is *Code Civil* (120th edn, Dalloz 2020).

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> code paraît toujours trop volumineux, qui osent prescrire impérieusement au législateur, la terrible tâche de ne rien abondonner à la décision du juge?[10]

In striking contrast was the Prussian Civil Code (*Allgemeines Landrecht)* initiated by Frederick I of Prussia but completed only half a century later in 1794 in the reign of his successor Frederick William II. Running to over 17,000 paragraphs this Code was designed to provide a definitive solution to every legal problem, present or future, and thus avoid the need for judicial interpretation, which, indeed, was prohibited. The Prussian Civil Code lasted for 106 years before being replaced in 1900 by the *Bürgerliches Gesetzbuch*, which was everything the *code civil* was not: abstract, conceptual, technical and scientific in its approach and designed not to preserve but to exclude the interpretative role of the judge. In England there was no attempt to produce a civil code; instead, specific areas of law were codified. In the field of commercial law Sir Mackenzie Chalmers produced two elegant codifications, the Bills of Exchange Act 1882 and the Sale of Goods Act 1893, while in the United States much of commercial law was harmonised by the Uniform Commercial Code, which is outstanding for its content, if not always for its style.

Why is codification relevant to the making of transnational commercial law? First, because the limpid style of the *code civil* rather than the mass of detail found in modern legislation is the desideratum of an international commercial law convention; and second, because codes influenced by a desire to modernise the law rather than merely restate it can provide the inspiration for creative thinking on the international plane.

II. THE FORCE OF BUSINESS PRACTICE

Commercial law has largely developed from the customs of merchants, who devise new practices and new instruments and look to the courts to uphold them. Generally they do. After all, when millions or even billions of dollars involved in market transactions are at stake, it is a bold court that, finding no precedent, will strike them down as not entitled to legal recognition. This has led scholars to devise the concept of a new international *lex mercatoria*, an autonomous body of free-floating law existing outside national legal orders and deriving its force solely from the custom of merchants. The mere existence of the custom makes it binding.[11] I do not subscribe to this concept

[10] J-É-M Portalis, *Discours préliminaire du premier projet de Code civil* (1801) <https://mafr.fr/IMG/pdf/discours_1er_code_civil.pdf> 16. ('We have also guarded against the dangerous ambition of wanting to regulate everything and to foresee everything. Who could believe that the very same people for whom a code always seems too voluminous are also the ones who dare to imperiously charge the lawmaker with the terrible task of leaving nothing to the judge's discretion?')
Earlier in the same discourse Portalis had emphasised (at 14) that laws are made for people and not people for laws, a philosophy rather different from that of abstract, conceptual types of code.

[11] For a detailed analysis see O Toth, *The Lex Mercatoria in Theory and Practice* (Oxford University Press 2017).

of the *lex mercatoria*, which in my view fails to distinguish what is binding as matter of practice from what is binding as a matter of law.[12] *De facto* the *lex mercatoria* exists because courts around the world give the business community a wide latitude in creating its own rules. But contracts are not law, in the last resort they depend for their efficacy on validation by national legal systems, whose contract laws address such matters as mistake, unconscionability, radical change of circumstances, illegality, and the like. Nor is it an answer that decisions of arbitral tribunals provide the necessary legal underpinning, for everywhere there is legislation governing the validity of arbitration agreements and providing recourse to the courts against irregular or otherwise improper arbitral awards. Developments in commercial practice and the emergence of new instruments ultimately depend for their efficacy on the sensitivity of national courts or, failing them, national legislators to the legitimate needs of the business community.

III. TWO SETS OF RULES PROMULGATED BY THE INTERNATIONAL CHAMBER OF COMMERCE

The International Chamber of Commerce is the world's largest business organisation. Founded in 1919 it has been granted observer status at the United Nations General Assembly. Among its many other activities it produces uniform rules which, since the ICC is not a law-making body, take effect by incorporation into relevant contracts. Two of these rules are the Uniform Customs and Practice for Documentary Credits[13] and the Uniform Rules for Demand Guarantees.[14] A documentary credit is an undertaking, usually issued by a bank, to make payment, usually to the seller of goods as beneficiary, on presentation of specified documents, which at minimum are a bill of lading or other transport document, a commercial invoice and a policy or certificate of insurance. A demand guarantee, which is designed primarily to support non-monetary obligations such as the construction of buildings or the provision of other services, is an undertaking, again usually by a bank, to pay against presentation of a demand, a statement of the respect in which the service provider is in breach, and any other specified documents. The common feature of these two instruments is that they are abstract payment undertakings[15] which are triggered solely by presentation of the specified

[12] See R Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46(1) ICLQ 1, reproduced in R Goode, *The Development of Transnational Commercial Law: Policies and Problems* (n 7) Ch 18.

[13] The current edition is International Chamber of Commerce, *ICC Uniform Customs and Practice for Documentary Credits* (ICC Pub No 600, rev edn 2007) (UCP 600).

[14] International Chamber of Commerce, *ICC Uniform Rules for Demand Guarantees* (ICC Pub No 758, rev edn 2010) (URDG 758).

[15] For a detailed discussion see R Goode, 'Abstract Payment Undertakings' in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Oxford University Press 1991) Ch 9, reproduced in R Goode, *Fundamental Concepts of Commercial Law: Fifty Years of Reflection* (Oxford University Press 2018) Ch 3.

documents, so that in the absence of fraud the bank has to pay against apparently conforming documents even if, in the case of a documentary credit, the goods have been not been shipped in conformity with the contract of sale or, in the case of a demand guarantee, the applicant has not in fact committed a breach of the underlying contract.

Scholars in both common law and civil law jurisdictions have not found it easy to identify the feature that makes documentary credits and demand guarantees enforceable. For a common lawyer they do not appear to conform to any of the basic rules of contract formation, since there is no offer, no acceptance, no consideration and no reliance; the instrument becomes binding on issue, that is, when it leaves the control of the issuer.[16] In English law the documentary credit and the demand guarantee are treated as contractual in nature and are considered binding as a matter of mercantile usage, though to date there has not been a single reported case in which the validity of a documentary credit or demand guarantee has been challenged.[17] In the United States a documentary credit has been labelled an 'engagement' rather than a contract. In France the courts were much exercised by what appeared to be a lack of *cause*—an ingredient of a contract which, in form at any rate, has disappeared—but contrived to find one nevertheless. There is now a special provision in the new *code civil* which provides for '*la garantie autonome*',[18] but long before this the French courts, like those of other countries, had accepted the autonomy of the documentary credit and the demand guarantee. They could scarcely have done otherwise, for what court would be so intrepid as to rely on general contract doctrine to strike down bank undertakings in the light of the near-universal use of the UCP and the growing importance of the URDG? So in a very practical sense the business community, operating through influential international bodies such as the ICC, is able to fashion its own law. It remains to be see how these two instruments can be refashioned for the age of the digital transaction, distributed ledger technology and the smart contract. But that is for a different article!

IV. INTERNATIONAL SALES

I turn to an examination of just two provisions of each of two sales conventions: the ill-fated Uniform Law on the International Sale of Goods (ULIS) annexed to the 1964 Hague Convention Relating to a Uniform Law on the International

[16] This is not specifically stated in the UCP but is expressly provided for in art 4(a) of the URDG.

[17] No bank would wish to invoke want of consideration as invalidating its payment undertaking, for fear of destroying its reputation. A bank's liquidator might conceivably do so but is likely to be deterred by the thought that the chance of a court striking such an instrument down is remote, and also by the fact that the bank itself may suffer if, eg, it has advanced funds against a back-to-back credit.

[18] *Code Civil* (n 9) art 2321.

Sale of Goods[19] and the highly successful 1980 UN Convention on Contracts for the International Sale of Goods (CISG),[20] which has now been ratified by 94 States.[21] The first is mentioned only to show that creativity needs to go hand in hand with restraint; the second, that in the drafting of international instruments there is a role for studied ambiguity.

A. Kicking over the Traces: ULIS

Article 1(1) of ULIS provided as follows:

> The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:
>
> (a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;
>
> (b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;
>
> (c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

So if Seller carries on business in Urbania and exports goods to Buyer whose place of business is in Ruritania the courts of a Contracting State would have to apply the Uniform Law even though neither party carried on business in a Contracting State.[22] Even more remarkable was Article 2:

> 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 provision was inserted despite the existence of the 1955 Hague Convention on the Law Applicable to International Sales of Goods. Its effect was to require the courts of a Contracting State to apply ULIS even if the applicable law was not that of a Contracting State. Finally, at the insistence of the United

[19] Convention Relating to a Uniform Law on the International Sale of Goods (adopted 1 July 1964, entered into force 18 August 1972) 834 UNTS 107.

[20] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG).

[21] The degree of success cannot readily be measured because the parties are free to exclude the Convention in its entirety or modify its provisions. But by any yardstick the number of ratifications is impressive.

[22] This was somewhat alleviated by art III of the Convention permitting a Contracting State to limit the application of the Uniform Rules to cases where each of the parties to the contract of sale had its place of business in different *Contracting* States.

Kingdom[23] a Contracting State was permitted to make a declaration that it would apply the Uniform Law only to contracts where the parties had chosen that Law as the law of the contract,[24] which of course they could do anyway by incorporating the provisions of the Uniform Law as terms of the contract. It seems that the drafting committee kicked over the traces, impervious to the cautionary words of other delegates.[25] What this experience demonstrates is the need to combine creativity with control, otherwise things can get out of hand.[26] No subsequent harmonising project has sought to repeat this experiment.

B. Deliberate Ambiguity: CISG

Article 7 of CISG provides as follows:

> (1) 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 the observance of good faith in international trade.
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The question that has divided scholars around the world is whether good faith merely goes to interpretation or whether on the other hand it constitutes one of the general principles on which the Convention is based. The latter interpretation has been pressed with particular vigour by German jurists, as is noted in the leading work on CISG by two leading German scholars,[27] which give the various uses of 'reasonable' in the Convention as the basis for treating good faith as governing not only interpretation of the Convention but also the contractual relations of the parties. This is said to be because 'reasonable' is a functional equivalent of 'good faith'.[28]

[23] One of only nine States to ratify the Convention.

[24] Art V.

[25] The exclusion of any connecting factor was described as a 'shocking result' attributable to the intransigence of the drafting committee, by KH Nadelmann, 'The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio' (1965) 74(3) Yale LJ 449, 457.

[26] In his fascinating book *Music as Alchemy* (Faber & Faber 2012) Tom Service recounts his discussion with Sir Simon Rattle while conductor of the Berlin Philharmonic Orchestra, when he would implore them by gesture to give him 'still more sound and more excitement', conductor and orchestra pushing each other to previously unknown heights. 'The danger with these people' said Rattle, is that if you ask more and more, they will give you more and more and more. Here, if you ask them, they'll drive off the cliff – with pleasure!'

[27] P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (I Schwenzer ed, 4th edn, Oxford University Press 2016) art 7, paras 16–17.

[28] ibid 136, art 7, para 32, fn 106. It is noteworthy that this magisterial work does not subscribe to the view that art 7 goes beyond interpretation.

This is evidently the position in German law,[29] and it is difficult for any commentators, however detached, not to be influenced by their own legal system. But what is true of German law is not necessarily true of common law systems, which, starting from a concept of 'honesty in fact', have now broadened the concept to include 'fair dealing' but do not necessarily equate a mere failure to give notice within a reasonable time, or otherwise to act reasonably, with unfairness, which seems to import some concept of improper behaviour, such as taking unfair advantage in breach of accepted business standards, Even in a civil law system such as French law the duty of good faith, as enlarged by Article 1104 of the new *code civil* and given a more central role, does not appear to go beyond the observance of ethical conduct, loyalty, co-operation and 'coherence',[30] that is to say, acting consistently with what the other party has been led to believe. Again, the underlying concept seems to be *fairness*, not *reasonableness*. So there is a sharp division of opinion, no doubt influenced at least in some degree by each writer's own national law. The better view (which, of course, means the view held by oneself!) is that there is no general principle of good faith in CISG.[31]

However, the point of referring to Article 7 is not to argue in favour of one view or the other—there is now a copious volume of literature on the subject—but to note that it gave rise to a great deal of debate in which there were acute differences of opinion, and the outcome was a negotiated compromise[32] which seems to have been successful in persuading the proponents of the opposing views that each had been successful! This is a good example of what may be described as creative ambiguity—and it worked!

V. THE UNIDROIT LEASING CONVENTION AND THE MODEL LAW ON LEASING

A. The UNIDROIT Convention on International Financial Leasing

UNIDROIT is an international, intergovernmental organisation founded in 1926 and based in Rome. Its primary function is the progressive harmonisation of private law, with a particular emphasis on commercial law. Like other international organisations working in the field of harmonisation UNIDROIT has had its failures but also notable successes. But even projects that did not in the end succeed made innovative contributions to legal

[29] Art 242 of the BGB imports a general principle of good faith which has generated a huge volume of case law and commentary. In practice it tends to be used as an underpinning of more specific provisions of the BGB.

[30] S Rowan, 'The New French Law of Contract' (2017) 66(4) ICLQ 805, 814, though it is fair to say that these are given only as examples. See also more generally on the new code J Cartwright and S Whittaker (eds), *The Code Napoléon Rewritten* (Hart Publishing 2017).

[31] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (n 27) art 7, para 17; M Bridge, 'Good Faith, the Common Law and the CISG' (2017) 22(1) UnifLRev 98.

[32] See J Honnold, *Uniform Law for International Sales* (3rd edn, Kluwer Law International 1999) paras 94ff.

techniques designed to remove obstacles to international trade. One of these was the Convention on International Financial Leasing, concluded in Ottawa in 1988, which is designed to provide a uniform set of rules governing international financial leasing, its sphere of application being expressed in the following terms:

> *Article 1*
> 1 This Convention governs a financial leasing transaction as described in paragraph 2 in which one party (the lessor),
> (a) on the specifications of another party (the lessee), enters into an agreement (the supply agreement) with a third party (the supplier) under which the lessor acquires plant, capital goods or other equipment (the equipment) on terms approved by the lessee so far as they concern its interests, and
> (b) enters into an agreement (the leasing agreement) with the lessee, granting to the lessee the right to use the equipment in return for the payment of rentals.
> 2. The financial leasing transaction referred to in the previous paragraph is a transaction which includes the following characteristics:
> (a) the lessee specifies the equipment and selects the supplier without relying primarily on the skill and judgment of the lessor;
> (b) the equipment is acquired by the lessor in connection with a leasing agreement which, to the knowledge of the supplier, either has been made or is to be made between the lessor and the lessee; and
> (c) the rentals payable under the leasing agreement are calculated so as to take into account in particular the amortisation of the whole or a substantial part of the cost of the equipment.
> 3. This Convention applies whether or not the lessee has or subsequently acquires the option to buy the equipment or to hold it on lease for a further period, and whether or not for a nominal price or rental.
> 4. This Convention applies to financial leasing transactions in relation to all equipment save that which is to be used primarily for the lessee's personal, family or household purposes.[33]

It will be apparent that whereas CISG involved only two parties, seller and buyer, the leasing convention predicated a tripartite relationship giving rise to two contracts, a supply contract and a leasing contract. This presented challenges both in defining the sphere of application and in ordering the rights and liabilities of the parties to the two contracts.

In order for the Convention to apply the lessor and lessee have to have their places of business in different States and either those States and the State in which the supplier had its place of business were Contracting States or both the supply agreement and the leasing agreement were governed by the law of a Contracting State.[34] The Convention does not apply to operating leases, where the equipment is let out for successive periods at a rent equal to its use value, but is confined to leases used primarily as a financing tool, where the rentals are

[33] UNIDROIT Convention on International Financial Leasing (adopted 28 May 1988, entered into force 1 May 1995) 2321 UNTS 195 art 1. [34] ibid art 2.

structured to produce a sum equal to the capital cost of the equipment plus the desired return on capital.

A key feature of a finance lease is that when it comes to the selection of the equipment it is the lessee who is in the driving seat. The lessee is the party who relies on its own skill and judgement to select the equipment, negotiates with the supplier and then arranges for the lessor to purchase the equipment and supply it on lease. And here lies the kernel of the problem. The lessor is not involved in the selection of the supplier of the equipment or of the equipment itself and therefore naturally wishes to exclude any liability to the lessee for the supplier's tender of non-conforming equipment. But the sale contract is between the supplier and the lessor; the lessee is not a party to it. So if the equipment is not delivered or is delivered late and does not conform to the sale contract the lessee has no claim against the supplier[35] but is dependent on the lessor to enforce the sale contract. But the lessor can recover only for its own loss, and the 'hell or high water' clauses in leasing contracts, which entitle the lessor to collect rentals whether or not the equipment was unsatisfactory, mean that the lessor usually suffers no loss. Of course, the lessee can, and frequently does, negotiate with the lessor to take an assignment of the lessor's rights against the supplier, but that does not solve the problem, because again the lessee as assignee can only recover for the loss suffered by the lessor.

How were these problems to be solved? The answer was by modifying the privity of contract rule to provide that the duties of the supplier under the supply agreement are also to be owed to the lessee, though not so as to render the supplier liable to both the lessor and the lessee in respect of the same damage.[36] As a corollary, the lessor incurs no liability to the lessee in respect of the equipment save to the extent that the lessee has suffered loss as the result of its reliance on the lessor's skill and judgement and on the lessor's intervention in the selection of the supplier or the specifications of the equipment.[37] The lessor does, however, warrant quiet possession.[38]

Though the Leasing Convention entered into force it only gained 10 ratifications, so the innovations it introduced appeared not to have gained traction. However, 20 years later UNIDROIT returned to the fray with a

[35] The position is alleviated in jurisdictions the laws of which allow a third party to enforce a contract made for its benefit.

[36] Convention on International Financial Leasing (n 33) art 10. The problem of want of privity of contract has also been overcome in relation to investment disputes. The 1966 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) provides that an investor in a host Contracting State who is a national of another Contracting State party to an investment treaty with the host State may, though not itself a party to the treaty, request an arbitration of a legal dispute arising directly out of an investment between the investor and the host State. Both the investor and the Contracting State of which it is a national must consent in writing to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID).

[37] Convention on International Financial Leasing (n 33) art 8(1)(a).

[38] Convention on International Financial Leasing (n 33) art 2.

Model Law on Leasing[39] which, so far as it relates to finance leases, to which it is not confined, broadly follows the Convention and retains the same innovative features.

VI. THE UNIDROIT CONVENTION ON INTERNATIONAL FACTORING

Concluded at the same Diplomatic Conference as the Leasing Convention, the UNIDROIT Convention on International Factoring also contained provisions designed to facilitate cross-border factoring service and overcome obstacles presented by national laws.[40] First, to enable the efficient acquisition by the factor of the supplier's after-acquired receivables it dispenses with the doctrine of specificity by providing in Article 7 that 'a factoring contract may validly provide as between the parties thereto for the transfer, with or without a new act of transfer, of all or any of the supplier's rights deriving from the contract of sale of goods, including the benefit of any provision in the contract of sale of goods reserving to the supplier title to the goods or creating any security interest'. Secondly, it significantly restricts the effect of contractual provisions between supplier and debtor precluding the supplier from assigning its receivables. Under the primary rule such assignment is to be effective notwithstanding the prohibition against assignment[41] but not against the debtor who at the time of conclusion of the contract of sale had its place of business in a Contracting State that had made a declaration under Article 18 to that effect.[42]

The purpose of this provision is to promote the free flow of goods and services in the way of trade. A supplier may wish to use the services of a factor for any one or more of three reasons: to transfer risk, to relieve itself of the burden of administering a large number of accounts and to obtain finance in advance of maturity of the receivables. A supplier who is precluded from

[39] UNIDROIT, 'UNIDROIT Model Law on Leasing' (2008) Study LIXA – Doc. 17, which unlike the Convention is not confined to finance leases. It is unusual for a sponsoring organisation to provide an alternative to one of its own instruments, particularly when that instrument has entered into force, but it was hoped that what could not secure widespread adoption on the international plane might achieve a similar result through the harmonisation of national laws. The Preamble to the Model Law records that the Convention had not only removed legal impediments to international financial leasing but also frequently served as an important reference point for States drafting their first leasing laws.

[40] UNIDROIT Convention on International Factoring (adopted 28 May 1988, entered into force 1 May 1995) 2323 UNTS 373.

[41] ibid art 6(1).

[42] ibid art 6(2). In retrospect this was a mistake: the debtor should always have an absolute right to refuse to recognise the title of the assignee. The mischief which Article 6(1) was designed to overcome was an invalidation of the assignment as between assignor and assignee. The debtor has no legitimate interest in the invalidation of such an assignment, which would have the effect that on the insolvency of the assignor, the assignee, having paid for the assigned receivables, would be left to prove as an unsecured creditor in the winding-up. The assignment should be considered effective as between the parties as a matter of property law, with the result that while the debtor's obligation would remain owed only to the assignor, the latter would have to account for the collected proceeds to the assignee.

resorting to these facilities is thereby deprived of an important facility and this may significantly damage its business, while investigation of individual contracts by the factor would entail considerable delay and expense, as would other attempts to alleviate the problem. The supplier is protected by a declaration under Article 18 and/or a rule of its national law which, while preserving the validity of the assignment as between assignor and assignee, entitles and obliges the debtor to ignore the assignment and to pay the assignor. It may be noted that the situation described is one where it is the debtor, not the supplier, that has the bargaining power enabling it to impose the no-assignment clause on the supplier.

The Factoring Convention, like the Leasing Convention, has not achieved its hoped-for success; though in force it has secured only nine ratifications. This may have been partly due to bad luck, in that it was confined to factoring arrangements involving notice of assignment to the debtor, whereas there was soon to be a sharp move towards non-notification factoring, or invoice discounting, where the supplier retains control of collections and continues direct relations with its customers, who will be unaware that the receivables have been assigned. But the overriding of no-assignment clauses which it helped to pioneer was adopted in the 2001 UN Convention on the Assignment of Receivables in International Trade[43] and in the 2007 UNCITRAL Legislative Guide on Secured Transactions[44] and is increasingly featuring in national legislation.[45]

VII. CROSS-BORDER INSOLVENCY

The complexities of domestic insolvency law are compounded where a debtor in one country also has assets in another and the insolvency administrator in the debtor's State seeks to reach assets in the other State, or where there are concurrent insolvency proceedings in different countries or a creditor in one State seeks to participate in proceedings in another. In such cases two sets of issues may arise: jurisdictional issues and issues concerning the applicable law.

On jurisdiction there are two sets of opposing principles: unity versus plurality and universality versus territoriality. Unity is based on the exclusive jurisdiction of an enterprise's home State, however that is defined, whilst plurality embodies the concept of concurrent proceedings in different

[43] United Nations Convention on the Assignment of Receivables in International Trade (adopted 12 December 2001) <https://uncitral.un.org/en/texts/securityinterests/conventions/receivables>.

[44] UNCITRAL, *UNCITRAL Legislative Guide on Secured Transactions* (United Nations 2010) paras 106–110.

[45] See, for example, the (UK) Business Contract Terms (Assignment of Receivables) Regulations 2018 (SI 2018/1254), which provides that, with specified exceptions, a term in a contract has no effect to the extent that it prohibits or imposes a condition, or other restriction, on the assignment of a receivable arising under that contract or any other contracts between the same parties (reg 2(1)), 'receivable' being defined as a right to payment for the supply of goods, services or intangible assets (reg 1(3)).

jurisdictions, as where creditors and/or assets are located in different States. The universality/territoriality dichotomy is concerned with the assets over which an insolvency administrator appointed in a particular jurisdiction should have control. On the universality principle one insolvency proceeding should cover all assets on a worldwide basis, whilst the territoriality principle contemplates the prospect of concurrent proceedings each of which would be confined to assets within the particular insolvency jurisdiction. A number of States claim jurisdiction over all assets in their own insolvency proceedings while reluctant to accept the same principle for insolvency proceedings opened elsewhere. For each of the two sets of principles there has been a measure of convergence, recognising that there has to be some scope for control of local assets in local insolvency proceedings, thus envisaging parallel proceedings one of which at least is confined to local assets. Overlaying this is the recognition that to maximise value to creditors on a worldwide basis it is necessary to have co-operation between courts and rules of recognition of the status in one jurisdiction of orders and administrator appointments made in another. Two major instruments have addressed these concerns: the 1997 UNCITRAL Model Law on Cross-Border Insolvency[46] and, at regional level, the 2015 EU Insolvency Regulation (recast),[47] both evolving over time to produce creative legal regimes designed to maximum efficiency and value-preservation in cross-border insolvencies.

A separate question is what law should govern insolvency proceedings and their effects. This also is dealt with by the EU Insolvency Regulation (recast) but is not the subject of any international instrument. This Regulation is designed to give primary control over assets to one jurisdiction and to apply a single law to the insolvency and its effects.

A. The UNCITRAL Model Law

Following on a proposal by the late Professor Clive Schmitthoff,[48] the United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 as an organ of the United Nations to co-ordinate the work of organisations promoting the progressive harmonisation of the law of international trade and to prepare international conventions and model laws in this field.[49] Like UNIDROIT it has had its successes and its failures. One

[46] UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations 2014).

[47] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19.

[48] Initially in 'The Unification of the Law of International Trade', an address to Gothenburg University in 1964, followed by the preparation of the preliminary draft of a report for the United Nations proposing the establishment of UNCITRAL, a proposal adopted by unanimous resolution of the UN General Assembly in December 1966.

[49] In its early days, UNCITRAL took over drafts initially prepared by UNIDROIT, such as ULIS, but thereafter UNIDROIT organised its own diplomatic conferences to adopt its draft instruments.

of its several undoubted successes is its 1997 Model Law on Cross-Border Insolvency.

Many years of effort had been devoted to the jurisdictional aspects of cross-border insolvency, and after several failures collaboration between UNCITRAL and INSOL International led to a breakthrough in the shape of the UNCITRAL Model Law. What this achieved was a balance of the competing principles governing procedure in cross-border insolvencies. The vexed problem of identifying a single home country that would serve as the anchor for the doctrine of universalism[50] was resolved by reference to the debtor's centre of main interests (COMI), presumed to be its registered office.[51] Insolvency proceedings are divided into foreign[52] main proceedings, that is, those opened in the jurisdiction where the debtor has its COMI, and foreign non-main proceedings, that is, territorial proceedings in another jurisdiction where the debtor possesses an establishment, these being limited to local assets. Recognition by a court of a main proceeding opened elsewhere imposes an automatic stay on proceedings in that court's jurisdiction except as to local assets or the enforcement of property rights or rights of set-off. There are also provisions for the grant of relief applied for by a foreign representative. What marks out the Model Law is not so much the originality of the underlying ideas as the skilful forging of a consensus based on compromises that had eluded previous efforts.[53]

The Model Law has recently been supplemented by a second model law, the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments,[54] designed, among other things, to overcome the effect of judicial decisions declining to apply the Model Law on Cross-Border Insolvency to the enforcement of insolvency-related judgments.[55]

B. The EU Insolvency Regulation (Recast)

At the European level endeavours to secure agreement both on jurisdictional issues and on the applicable law had resulted in the EC Convention on Insolvency Proceedings 1995, which required adoption by all 15 Members of

[50] LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (2000) 98 (7) MichLRev 2216, 2223–7.

[51] *UNCITRAL Model Law on Cross-Border Insolvency* (n 46) 8, art 16(3).

[52] 'Foreign' as viewed from the perspective of the courts of 'the enacting State', that is, another State that has adopted the Model Law and in which insolvency proceedings have been opened.

[53] To date, legislation based on the Model Law has been enacted in 48 States, the process being assisted by the UNCITRAL *Guide to Enactment of the UNCITRAL Model Law* accompanying the Model Law itself.

[54] UNCITRAL, *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (United Nations 2019).

[55] See, for example, the decision of the UK Supreme Court in *Rubin v Eurofinance* [2013] 1 AC 236.

the EC but fell because the UK declined to ratify it.[56] All that changed with the decision to convert the Convention into an EC Regulation,[57] which is, of course, directly applicable in Member States. Running to 92 Articles and Annexes what is now the EU Regulation (Recast) covers both jurisdictional issues, retaining the distinction between main proceedings based on the debtor's COMI and territorial proceedings,[58] and rules as to the applicable law, which is in general the law of the State within the territory of which proceedings are opened and which governs all aspects of insolvency law and procedure, but subject to certain exceptions, including the preservation of third party rights *in rem* and rights of set-off. The Regulation is also notable for its attention to the procedural aspects of corporate groups, as matters of considerable importance not touched on either by the Convention or by the Model Law.

What these measures demonstrate is the determination to remove obstacles to cross-border recognition and enforcement not only in relation to insolvency proceedings themselves but also to judgments related to such proceedings. UNCITRAL is the lead player in this field.

VIII. THE CODIFICATION OF PRIVATE LAW: SCHOLARLY RESTATEMENTS AND THE DCFR

A. Contract Law

Devising rules for a common contract code has exercised scholars over many decades. Among the various contract codes prepared, two were to prove significant on the international plane, namely the UNIDROIT Principles of International Commercial Contracts ('UPICC'), published under the auspices of UNIDROIT[59] but, unusually for UNIDROIT, not involving the participation of governments, and the Principles of European Contract Law (PECL), prepared by the self-styled Commission on European Contract Law[60] under the chairmanship of the late Professor Ole Lando. The two sets of Principles[61] have much in common. According to their respective titles the

[56] Not because it was opposed to the content of the Convention but because of the EU's refusal to lift the ban on the export of British beef imposed on account of anxiety about mad-cow disease, coupled with concerns about threats to the UK's sovereignty over Gibraltar, leading to the UK's policy of non-cooperation with the EU.

[57] Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings [2000] OJ L160/1, later superseded by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19.

[58] Termed 'secondary proceedings' where main proceedings have already been opened but otherwise conveniently labelled 'independent proceedings'.

[59] The latest version being published in 2016. UNIDROIT, *UNIDROIT Principles of International Commercial Contracts* (4th edn, UNIDROIT 2016) (UPICC).

[60] Published in three Parts, Part III being published in 2003. The Commission on European Contract Law, *Principles of European Contract Law, Part III* (O Lando, B Clive, A Prüm and R Zimmermann eds, Kluwer Law International 2003) (PECL).

[61] Which can conveniently be termed 'Restatements', adopting the label of the American *Restatement of Contracts*, though like ICC Uniform Rules they do not merely restate existing rules but also develop them.

former are confined to international commercial contracts, the latter to European contract law, but the distinction rarely features in the texts. Both groups of scholars adopted from the outset an approach based not on the common core of contract, which would simply produce the lowest common denominator of legal systems, but on the formulation of rules that would lead to the best results in the typical case. This approach meant that despite members of the two groups being drawn from different legal families and a diversity of legal systems all the members of each group were able to agree on a common set of contract principles. Many of these do indeed represent principles commonly found in national laws but they also contain ideas novel to many legal systems. Both contain provisions of a mandatory character,[62] both amplify the provisions of Article 78 of CISG on interest by setting out how this is to be determined and both entitle a party (1) threatened with a repudiatory breach to demand adequate assurance of due performance and (2) suffering hardship where an event fundamentally alters the equilibrium of the contract to request renegotiation. The UPICC in particular have been widely resorted to by arbitrators, and to a smaller degree by courts and legislatures, where the existing law is seen as deficient.[63]

What is interesting is the relationship between the UPICC and CISG, which has been well described in the following terms:

> In 2004, a distinguished learned practitioner could simply state: 'To a unified sales law such as the CISG one can try and add a *general part* of contract law. This is what happened in Art. 1 of the UCC, and now also with the UNIDROIT Principles which may be seen as a general part of the CISG.' Indeed, the idea to draft a 'general part' not only for the conventions on international sale of goods but for the entirety of international conventions on specific types of contract, had been at the origins of the UPICC. Consequently, they show a clear ambition to be both more comprehensive and bolder than the CISG or its predecessors as regards formation, interpretation, content, performance and non-performance even as regards technicalities such as the rate of interest (Article 7.4.9). The Working Group for the preparation of the UPICC was—at the price of renouncing governmental endorsement—able to carry out legal analysis unbridled by political and diplomatic constraints. Also, the mere passing of

[62] That is, they are not excludable by the parties. These include the principles of good faith and fair dealing, the provisions on fraud, threat, illegality and the like, and the preclusion of a party from acting inconsistently with its prior conduct on which the other party has relied or from excluding judicial review of grossly excessive penalty clauses. As to how restatements, which in most legal systems do not have the force of law and operate purely as a matter of contract, can themselves contain mandatory rules, see R Goode, 'International Restatements and National Law' in W Swadling and G Jones (eds), *The Search for Principle* (Oxford University Press 1999) 45, 51–2, reproduced in R Goode, *The Development of Transnational Commercial Law* (n 7) Ch 3.

[63] See MJ Bonell, 'The Law Governing International Contracts and the Actual Role of the UNIDROIT Principles' (2018) 23(1) UnifLRev 15. Professor Bonell was the progenitor of the UPICC and the Chairman of the successive Working Groups and remains the driving force behind their application.

time and the deepening discourse among comparativists secured a higher degree of maturity for the later instrument.[64]

B. European Private Law

Not to be outdone the European Commission launched an initiative in 2001 to produce a European contract law, a project which broadened into the development by an international group of scholars of a Draft Common Frame of Reference (DCFR) going well beyond the law of contract and covering most fields of private law.[65] This was a monumental endeavour on the part of groups of scholars in different countries, almost certainly the most ambitious of its kind ever, and was intended to be followed by a political Common Frame of Reference apparently designed to be used as an EC legal toolbox from which material could be extracted as required.[66] But the project became fined down to a draft Common European Sales Law (CESL), an unusual kind of animal which would not displace national sales laws in Member States but would sit alongside them as an alternative sales contract regime.[67]

One has to applaud the sheer ambition of these projects and the extraordinary degree of commitment and scholarship that went into these products. But instructive though they are to comparative lawyers there does not appear to be any appetite for the CESL, still less for the DCFR. In my respectful view, they were the products of over-ambition as regards the CFR, reflecting a long-held view of the Commission, entirely untested by evidence, that differences in contract laws had an adverse impact on cross-border trade and that these instruments would significantly reduce transaction costs. As regards sales law we already have CISG, which has attracted a large number of ratifications. Why do we need to reinvent the wheel—again? The DCFR is valuable for comparative lawyers but it should remain the work of scholars and not involve governments.

[64] H Kronke, 'The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond' (2005–06) 25 JL&Com 451, 456–7. For a detailed examination of the question see J Kotrusz, 'Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial Contracts' (2009) 14(1–2) UnifLRev 119.

[65] Study Group on a European Civil Code and Research Group on the Existing EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*, edited by C von Bar, E Clive and H Schulte-Nölke (Sellier 2009). In conception it was a European Civil Code but it was thought prudent to avoid this label.

[66] For an overview see P Giliker, 'The Draft Common Frame of Reference: Moving from the "Academic" to the "Political". A Comparative Lawyer's Perspective' in J Devenney and M Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos* (Cambridge University Press 2013) 23.

[67] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 final.

IX. INTERMEDIATED SECURITIES

A. The Hague Securities Convention

The traditional conflict of laws rule governing investment securities was the place of the issuer's incorporation but that rule was found to be wholly unsatisfactory for intermediated securities, particularly in non-transparent systems involving a chain of intermediaries where no investor had a direct relationship with the issuer, only with his own intermediary. It was therefore not surprising that Article 9(2) of the 1998 EC Settlement Finality Directive[68] and subsequently in expanded form Article 9(1) of the EU Financial Collateral Directive[69] provided that the governing law was to be the law of the place where the account was maintained. Thus was established the concept of the place of the relevant intermediary approach (PRIMA).

This was picked up on the international plane by the Hague Conference on Private International Law which piloted the 2006 Hague Securities Convention.[70] The Convention is triggered by the credit of securities to an account and applies to all issues arising in the relations between the intermediary and the account holder, between the intermediary and third parties and between competing third parties[71] except issues that are purely contractual or otherwise purely personal.[72] The project from beginning to end was completed in a little over two and a half years, an astonishing achievement facilitated by the novel procedure under which the drafting committee was mandated by the Permanent Bureau of the Hague Conference and subsequently by the Experts meeting to seek an informal consensus on key issues and to revise the draft text on the basis of such consensus.[73]

[68] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems [1998] OJ L166/45.

[69] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements OJ L168/43.

[70] Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (adopted 5 July 2006, entered into force 1 April 2017) 46 ILM 649 (Hague Securities Convention). The Convention was in fact adopted in December 2002 but the practice of the Hague Conference at that time was to treat its conventions as drafts until the first signature, the text meanwhile undergoing *toilettage*.

[71] ibid arts 2(1) and 2(2). See generally R Goode, H Kanda and K Kreuzer (eds), with the assistance of C Bernasconi, *Hague Securities Convention Explanatory Report* (Hague Conference on Private International Law 2003, issued as a 2nd edition in 2017 in a new format but with no significant change); R Goode, 'The Hague Convention on Intermediated Securities' in *The Development of Transnational Commercial Law* (n 7) Ch 14.

[72] Hague Securities Convention (n 70) art 2(3)(a). 'Purely contractual' denotes contractual questions not related directly to the securities, such as the standard of care, the frequency of account, etc. But a contractual claim to delivery or transfer of securities is within the Convention.

[73] This was organised by Mr Richard Potok, initiator of the project and its Legal Advisor, who went to great lengths to solicit views from all participants, usually in the form of three-hour telephone conferences which were highly successful and saved a great deal of time later even if, as he has been gracious enough to acknowledge, they did induce among those who participated a state of *rigor mortis*!

The project was strongly supported by the European Commission and had it remained in its original form based on PRIMA would almost certainly have come into force within a year or two of the finalisation of the text. However, colleagues from the US correctly pointed out that the function of maintaining accounts might be dispersed among different offices of the intermediary situated in different jurisdictions,[74] leading to uncertainty. Influenced by the revised Article 8 of the Uniform Commercial Code[75] PRIMA was modified so as to provide that the law to all the issues specified in Article 2(1) was that expressly agreed in the account agreement as the law governing that agreement or, if the account agreement expressly specifies another law, then such other law,[76] but only if the intermediary has an office in the specified State fulfilling one of the functions of maintaining securities accounts.[77] The effect of this is to route the law governing all relationships, as regards the specified issues, to a single law, that specified in the account agreement, which remains the root of title unless and until the securities are transferred to a new securities account.

It is undoubtedly counter-intuitive that parties A and B to a securities agreement should be able to specify the law governing priority between competing assignees C and D, but it works, because all parties acquiring an interest in securities credited to the account will call for production of the account agreement. However, this proved to be a case of the best being the enemy of the good, because the new rule raised concerns (albeit unfounded) that parties could use a choice of law to avoid regulation. In the result, the Convention still has only the minimum number of ratifications (three) required to bring it into force. Nevertheless, what it demonstrates is creativity both in the working method, which could usefully be emulated, and in the translation of the Article 8 provision into the international plane. It is to be hoped that it will not be too long before this valuable convention gains the widespread support it deserves.

X. THE GENEVA SECURITIES CONVENTION AND THE CONCEPT OF NON-CONVENTION LAW

As noted above the Hague Convention on intermediated securities is purely a conflict of laws convention. Shortly before its adoption as a draft in December 2002 UNIDROIT embarked on the even more ambitious task of preparing a convention on substantive rules. Seven years were to elapse before the project was completed with the adoption of the UNIDROIT Convention on

[74] For example, the account is opened with the intermediary in State A, account statements and dividends are sent to the client from State B, while advice as to the state of the account from time to time is sent from State C.

[75] Uniform Commercial Code (n 6) art 8-110|(e).

[76] Hague Securities Convention (n 70) art 4(1).

[77] Hague Securities Convention (n 70) art 4(1)(a), a provision designed to avoid a capricious selection of the applicable law.

Substantive Rules for Intermediated Securities.[78] The legal treatment of intermediated securities varies from jurisdiction to jurisdiction but the different systems fall broadly into three groups: the transparent system, which in substance is scarcely an intermediated system at all, because the ultimate investor remains at all times in a direct relationship with the issuer, the intermediaries functioning merely as record keepers and operators; the non-transparent system, in which, in a tiering of accounts through a chain of intermediaries, each account holder's relationship is solely with its intermediary, with no look-through to upper-tier intermediaries or the issuer; and what may be called semi-transparent systems, in which the ultimate investor's relationship is with an intermediary below the level of the central securities depository, the CSD maintaining omnibus accounts for its customers without identifying the customers' own account holders.

Like the Hague Convention, the Geneva Convention is neutral on systems, applying equally to all three of the above. It is a wide-ranging convention, covering the rights of the account holder, the transfer of intermediated securities, the impact of insolvency and a variety of other issues.[79] Given the wide diversity of systems and national laws it is a remarkable achievement. Space does not permit more than a reference to a novel feature of the Convention, the concept of the 'non-Convention law'. The standard provision for interpretation of a commercial convention is exemplified by Article 7(2) of CISG:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

It is a universal principle that the applicable law[80] is determined by the conflict of laws rules of the forum. The Geneva Convention contains references not only to the applicable law, which is not defined, but also to the 'non-Convention law'. What is this curious animal and why is it there? Non-convention law is not to be confused with the applicable law. It is the domestic law of the Contracting State whose law is applicable under the conflict of laws rules of the forum. This ingenious concept is designed to ensure that as regards any provision of the Convention referring to it the relevant domestic law is that of the same State as the Contracting State whose law is applicable under the

[78] UNIDROIT Convention on Substantive Rules for Intermediated Securities (adopted 9 October 2009) <https://www.unidroit.org/instruments/capital-markets/geneva-convention>.

[79] For a detailed analysis which includes the history of each provision see H Kanda, C Mooney, L Thévenoz and S Keijser, assisted by T Keijser, *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* (Oxford University Press 2012). For a valuable recent publication covering a range of both legal and policy issues on intermediated securities, see L Gullifer and J Payne (eds), *Intermediation and Beyond* (Hart Publishing 2019).

[80] By which is meant the *domestic* law of the relevant State, excluding its conflict of laws rules, since the doctrine of *renvoi is* rarely applied in commercial cases.

conflict rules of the forum and thus meshes with the Convention and any declarations made under it by the Contracting State in question. For example, while Articles 11 and 12 of the Convention prescribe the method by which intermediated securities may be acquired or disposed of, Article 13 provides that the Convention does not preclude any other method provided by the non-Convention law. So in proceedings in State A, a Contracting State under whose conflict rules the applicable law is the law of State A, the non-Convention law is the domestic law of State A, which may provide alternative methods of acquiring or disposing of assets that would be valid alternatives to Articles 11 and 12 of the Convention. Similarly, if the conflict rules of State A (whether or not this is a Contracting State) lead to the application of the law of Contracting State B, any alternative method of acquisition or disposal provided by the domestic law of State B would be a valid alternative under Article 13. By contrast, where the conflict rules of State A lead to the application of the law of non-Contracting State C, the entire Convention is inapplicable. Of course, it is implicit in the Convention that any questions not settled in it or in the general principles on which it is based or in the non-Convention law are to be determined in the usual way by the law applicable under the conflict rules of the forum.

XI. THE CAPE TOWN CONVENTION AND ITS PROTOCOLS

This brings me, finally, to the 2001 Cape Town Convention on International Interests in Mobile Equipment and its four Protocols.[81] These instruments, developed under the direction of UNIDROIT, can fairly be described as among the most creative in the history of private international law-making. They evolved through a desire to enhance the protection of creditors under security agreements, title reservation agreements and leasing agreements relating to uniquely identifiable objects of high-unit value crossing national borders in the ordinary course of business. The categories identified were aircraft objects, railway rolling stock and space assets, now joined by mining, agricultural and construction (MAC) equipment under the Pretoria Protocol, concluded in November 2019. MAC equipment does not feature in the Convention itself, the Pretoria Protocol being adopted pursuant to Article 51 of the Convention.

[81] UNIDROIT Convention on International Interests in Mobile Equipment (adopted 16 November 2001, entered into force 1 March 2006) 2307 UNTS 285 (Cape Town Convention); UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (adopted 16 November 2001, entered into force 1 March 2006) 2367 UNTS 517 (Aircraft Protocol); UNIDROIT Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (adopted 23 February 2007) (Luxembourg Protocol) <http://www.unidroit.org/english/conventions/mobileequipment/railprotocol.pdf>; UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (adopted 9 March 2012) (Space Protocol) <http://www.unidroit.org/english/conventions/mobile-equipment/spaceassetsprotocol-e.pdf>.

The problem that the Convention and Protocol sought to address can be illustrated by the financing of aircraft objects, namely airframes, aircraft engines and helicopters. Security interests in such objects may be very effective under the law of the jurisdiction in which they were created but it may be quite another matter when they are flown abroad. In the event of the debtor's default the creditor may find that default remedies readily available in its own country are much more restricted in another, debtor-friendly jurisdiction. Then there is the problem of securing priority over competing interests. This will depend on the applicable law, which itself depends on where the proceedings are brought. The traditional *lex situs* rule in the conflict of laws is not well-suited to transactions in which the equipment is constantly on the move, so that any location abroad is likely to be transitory. And even if a uniform conflicts rule could be devised on a more satisfactory basis there would remain potentially major differences in the substantive laws of different States. All these factors create uncertainty for prospective financiers, uncertainty imposes costs and creates risk and risk may lead the prospective financier either to refuse to advance funds at all or to do so only on terms very disadvantageous to the intending debtor. Similar considerations apply, in varying degrees, to the financing of railway rolling stock, space assets and MAC equipment.

Nevertheless, the initial approach was to harmonise conflict of laws rules, including rules governing the recognition in one country of security and quasi-security interests created under the law of another, substantive harmonisation being considered too difficult. But over time that changed with the realisation that a conflicts approach would not solve the fundamental problems. The project powered by the aircraft industry's Aviation Working Group began to focus on substantive rules and grew ever bigger, specialist working groups were set up to assist the study group and drafting committee, the International Civil Aviation Organization joined UNIDROIT as joint organiser and held its own meetings as well as joint meetings, and countless other gatherings took place around the world. It is fair to say that if any of us had realised how vast the project would become it would never have been undertaken! Yet it was, and in relation to aircraft objects at least it has been immensely successful, significantly reducing the cost of finance as well as credit insurance and providing as an alternative to bank lending the raising of funds through the marketing of aircraft receivables.

The legal regime that evolved was based on four key objectives: the creation of a new interest, the international interest, safeguarded by the provision of effective and speedy default remedies; the preservation of priority by registration in an international registry to be established for the purpose; protection for the creditor against the debtor's insolvency; and provisions for the assignment, subrogation and subordination of interests and their registration. Predictability was considered so essential to transactions that might involve financing to the tune of hundreds of millions of dollars that it

was substituted for the standard reference to good faith in the general interpretative rules embodied in Article 5(1) of the Convention. To deal with the complexities arising from these issues a range of innovative techniques were developed, each of which is briefly described below.

A. The Concept of the International Interest

An international interest is an interest in a uniquely identifiable object granted by the chargor under a security agreement or vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing agreement.[82] The distinctive feature of the international interest is that it is a property interest deriving its force from the Convention, not from national law, and therefore operating even in a Contracting State which does not have any equivalent in its domestic law. The international interest does not preclude parallel interests under national law but when registered will usually have priority over these.

B. The International Registry

The idea of a single international registry to record international interests through a wholly electronic system would at one time have been thought a flight of fancy, yet the International Registry for interests in aircraft objects commenced operations in March 2001 and by the end of 2018 completed its millionth registration. Over time the International Registry, based in Dublin and operating under the direction of its Supervisory Authority ICAO, has developed into a highly effective organisation which can accept multiple registrations and even has an electronic closing room facility to order the sequence of registrations before they are released to the Registry.

C. The Two-Instrument Approach

This was one of the most striking innovations of all. Three interest groups, dealing respectively with aircraft objects, railway rolling stock and space assets, were working in parallel but at different speeds, the aviation industry being well ahead and not wanting to be held up. Then again a lot of technical questions began to arise: how to define an airframe or an aircraft engine, how to devise limits to exclude light aircraft, what criteria to adopt to ensure unique identification. Similar questions would arise in relation to railway rolling stock and space assets. To address all these in a single convention would make it extremely long and hard to read. One way of resolving these problems was to have a series of stand-alone conventions, one for each type of object. But that had serious drawbacks, not the least of which was

[82] Cape Town Convention (n 81) art 2.

duplication of equipment-neutral provisions coupled with the drafting of a series of conventions by different hands, undermining the uniformity of the instruments. So after much controversy it was agreed that there should be a framework convention applicable to all three categories of equipment and then a separate protocol for each category. There is, of course, nothing unique in protocols but the distinctive feature in the case of the Cape Town Convention is that the Protocol not only supplements the Convention but also controls it, so that the Convention would not enter into force as regards a given category of equipment unless and until a Protocol covering that equipment was in force and takes effect subject to the provisions of the Protocol.[83] The great merit of the two-instrument approach was that it allowed each industry to advance at its own speed and enabled the Convention to be modified to meet the needs of the particular industry involved.

D. Priority Rules

Eschewing the approach of national legal systems, where priority issues tend to be of considerable complexity, the drafters of the Convention went for simplicity. In principle a registered interest has priority over a subsequently registered interest and over an unregistered interest, whether or not registrable.[84] To this there are a few quite simple exceptions.

E. Non-Consensual Rights or Interests

A private law convention dealing with transactions is primarily focused on consensual rights and interests. But the role of non-consensual rights or interests, particularly in aircraft financing, is so important that it was felt necessary to cover these. Under the Convention non-consensual rights or interests are of two kinds: those which under national law have priority over the equivalent of an international interest and if covered by a declaration by a Contracting State, preserve their priority without registration[85] and those which a Contracting State may by declaration make registrable as if they were international interests.[86]

F. Protection Against Insolvency

Registration of an international interest ensures that its proprietary effects have to be recognised in the debtor's insolvency,[87] and the only grounds of avoidance

[83] Cape Town Convention (n 81) art 49(1). The Convention and Aircraft Protocol entered into force on 1 March 2006, not on 1 April 2004, not by reference to the deposit of the third instrument of ratification, which would have brought the Convention and Aircraft Protocol into force on 1 April 2004.

[84] Cape Town Convention (n 81) art 29(1). Remarkably, with the exception of provisions relating to the assignment of associated rights, all the rules on priorities are governed in Article 29.

[85] Cape Town Convention (n 81) art 39.

[86] Cape Town Convention (n 81) art 40.

[87] Cape Town Convention (n 81) art 30(1).

under national law that continue to apply are those relating to preferences and transfers in fraud of creditors.[88] Still more powerful are the provisions of Alternative A of Article XI of the Aircraft Protocol, which allow a grace period for the debtor or insolvency administrator to cure defaults and undertake future performance, failing which the creditor becomes entitled to repossess the aircraft object, and the court may not intervene to prevent this or to allow further time for payment or otherwise modify the agreement. These provisions have been replicated in subsequent Protocols.

G. *Technical Solutions to Some Difficult Problems*

Finally, the draftsmen of the different Protocols found themselves confronted by a series of difficult problems that could be resolved only by some ingenious technical solutions. Among these may be mentioned the following:

(1) In the Space Protocol, how to protect the priority of interests in 'debtor's rights'[89] given to the creditor as additional collateral[90] when the registration system is confined to physical assets. The solution was to provide for such interests to be recorded against the registration of the international interest in the space asset to which they related.
(2) In the same Protocol, how to establish identification criteria for spacecraft which have no serial number or which are already in space, so that the serial number cannot be seen. After much cogitation this was resolved by a provision in the Space Registry Regulations 2015[91] enabling the owner of the space asset to request the Registrar to issue a unique identification number linked to the name of the manufacturer and the manufacturer's contract reference number, which in the case of a contract concerning two or more space assets is to include a unique suffix to the reference number as provided by the manufacturer.[92]
(3) In the Pretoria Protocol, how to limit its sphere of application to assets of high unit-value and capable of unique identification. This was

[88] Cape Town Convention (n 81) art 30(3)(a).
[89] Rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset (Space Protocol art I(2)(a)), eg rental or licence fees for access to the debtor's satellite.
[90] For obvious reasons, a creditor's recourse to the physical space asset is limited, so that the creditor relies mainly on the debtor's income stream. In other words, space financing is in substance project finance rather than asset finance.
[91] Prepared by the Preparatory Commission as Provisional Supervisory Authority.
[92] Space Registry Regulations, Annex 2, para 2. For the text of the regulations, see UNIDROIT Preparatory Commission for the Establishment of the International Registry for Space Assets Pursuant to the Space Protocol, 'Summary Report of the Fourth Session' (Rome 10–11 December 2015) Prep.Comm. Space/4/Doc. 7 rev. <https://www.unidroit.org/english/documents/2015/depositary/ctc-sp/pcs-04-07rev-e.pdf> Appendix III.

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neatly resolved by a Working Group by a small selection of codes selected from some 5,244 codes contained in the World Customs Organization's Harmonized Commodity Description and Coding Systems (HS Codes) and limited to assets characterised by high unit value and identification by serial number. Also unique to the Pretoria Protocol is the special treatment of inventory held by a dealer as debtor under an agreement creating or providing for an international interest. For creditors holding interests in large stock of inventory an asset-based registration system requiring unique identification of each equipment is far from ideal. In the first place, the number of registrations required is potentially large. Secondly, international interests in items of inventory are likely to be transitory in character, disappearing as such items are sold, so that creditors would be involved in constantly registering international interests only to have them rapidly discharged. Accordingly Article XII of the Protocol provides that a Contracting State may make a declaration that an interest in inventory created or provided for by an agreement under which the dealer is the debtor is not an international interest if the dealer is situated in the declaring State at the time the interest is created or arises. This enables a Contracting State to substitute its own domestic rules on, among other things, registration and priority and in particular its own debtor-based registration system.

XII. CONCLUSION

What this article has sought to show is how businessmen and their lawyers seek to overcome barriers to efficient cross-border trade and finance by devising legal rules that bypass established doctrine in order to resolve the problems. The institution best placed to initiate and monitor a project and the most suitable type of instrument depend on a range of factors. Contractually incorporated business rules should be left to the relevant industry organisations; international substantive law conventions to bodies such as UNIDROIT and UNCITRAL; conflict of laws rules to the specialist Hague Conference; and international restatements to scholars. Those involved in projects of harmonisation have not always been successful but, pressed to raise their game, they have often produced imaginative solutions which have achieved their objective. That is one of the fascinations of law in general and transnational law in particular—there is always the opportunity for creative thought in overcoming legal obstacles to international deal-making.