

2003

## Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa

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### Recommended Citation

Oloka-Onyango, J. "Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa." *American University International Law Review* 18, no. 4 (2003): 851-913.

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# TRANSNATIONAL COMMERCIAL LAW: THE WAY FORWARD

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This Article seeks to examine the impelling need for the creation of international rules to govern international commerce, the motivations thereof, and international experience in that regard. No nation is immune from the need to craft solutions of an international nature to govern its interactions with others. This need extends across the spectrum from systems as evolved as the United States to those of some African nations. Distrust can only be overcome in the presence of rules that are formulated by the international community. The following pages examine these issues in the context of two international instruments: the United Nations Convention on the

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International Sale of Goods ("CISG")<sup>1</sup> and the Convention on International Interests in Mobile Equipment ("CIIME").<sup>2</sup>

## I. WHY HARMONIZE?

International contracts inevitably raise the question as to which of the various national laws will govern the transaction. The uncertainties and inconveniences that stem from this are manifest; because of the different national rules of private international law, parties risk remaining uncertain of the law applicable to the contract until the competent forum is established. This is a heavy price to pay in international commerce where the allocation of risk is predicated on certainty. Thus, there is some virtue in evolving an international legal regime that avoids solutions that have not been bargained for. The principal motivations for harmonization endeavors are, *inter alia*:

1. Uncertainty caused by the existence of a plethora of national laws, any of which may apply;
2. The fact that the harmonizing instrument provides another choice that is neutral, for both parties, when neither entity is willing to surrender reliance on their own law;
3. National laws may be inappropriate for international transactions;
4. There may be disparities between different national laws;
5. National laws may be written in languages that are not internationally understood;

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1. See United Nations Conference on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, 19 I.L.M. 668 (*entered into force* Jan. 1, 1988) [hereinafter CISG] (including sixty-two contracting states as of 2002, such as Argentina, Australia, Canada, China, France, Germany, Israel, Iraq, Italy, Mexico, Russia, and Spain), *available at* <http://www.uncitral.org/en-index.htm> (last visited Apr. 5, 2003). The CISG is the culmination of over fifty years worth of work and was ratified in December 1986 by the United States. *Id.*

2. See Convention on International Interests in Mobile Equipment (adopted on Nov. 16, 2001) [hereinafter CIIME] (noting that sixty-four nations attended the diplomatic conference in Cape Town, South Africa and fifty-three nations signed the final act); *see also* Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, *at* <http://www.unidroit.org/english/conventions/c-main.htm> (last visited Feb. 12, 2003). The Convention and its Protocol have been signed by twenty-four nations to date. *Id.*

6. The harmonizing instrument is drafted in several languages and is more accessible;<sup>3</sup>
7. Proving foreign laws in courts is both expensive and time consuming;
8. The existing international legal regime may be inadequate;
9. The new instrument provides those countries with deficient legal regimes with a ready-to-adopt instrument, whereby developing countries get an opportunity to get rid of their colonial laws in favor of a modern regime;
10. Harmonization promotes international trade and economic development by eliminating barriers.<sup>4</sup>

While plurality of legal solutions is in itself a source of problems, this is accentuated by the varying degrees of sophistication of the various solutions that may exist to a given problem. More often than not, commercial laws mirror the economic development that characterizes society, and the laws of economically developed nations reflect concepts and remedies that are an attendant part of such development. Developing countries, on the other hand, may have legal regimes that have not encountered particular concepts, and therefore find themselves deficient. Apart from this situation, there may also be instances of the international legal regime not reflecting the needs of modern commerce. All of these provide powerful motivations to engage in the harmonization process. Opponents of

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3. See CISG, *supra* note 1; CIIME, *supra* note 2 (explaining that versions are available in Arabic, Chinese, English, French, Russian, and Spanish); see also International Chamber of Commerce (publishing its Incoterms in thirty-one languages), available at <http://www.iccwbo.org/incoterms/translation.asp> (last visited Feb. 12, 2003); International Institute for the Unification of Private Law ("UNIDROIT"), Principles of International Commercial Contracts (1994) [hereinafter PICC] (noting that the UNIDROIT Principles of International Commercial Contracts are available in fifteen languages, including Arabic, Chinese, Czech, Dutch, English, Farsi, French, German, Hungarian, Italian, Portuguese, Russian, Slovak, Spanish, and Vietnamese), available at <http://www.unidroit.org/english/publications/principles/main.htm> (last visited Feb. 12, 2003).

4. See J.S. Hobhouse, *International Conventions and Commercial Law: the Pursuit of Uniformity*, 106 LAW Q. REV. 531 (1990) (discussing the grounds for harmonization).

harmonization, although increasingly a dying breed, cannot be dismissed easily.<sup>5</sup> Their arguments include:

1. International conventions are inevitably drafted as multicultural compromises between different legal orders and will hence be enervated, inconsistent, and incoherent.<sup>6</sup>
2. The systemic faults in international drafting deprive the instrument of the force that is required for it to be an effective tool to tackle the problems of international commerce.<sup>7</sup>
3. The pursuit of uniformity is an idealistic notion, since national laws are premised on different traditions and assumptions.<sup>8</sup>
4. Any uniformity that is achieved is born with an inherent hollowness caused by the realization that national courts will interpret the instrument in the backdrop of their own legal systems with the resultant divergences of interpretation.<sup>9</sup>
5. To expect that judgments from other jurisdictions would be easily available or accessible is to be overly optimistic.<sup>10</sup>
6. This quest for uniformity uncovers the reality that where uniformity is not achieved, a “diplomatic uniformity” is sought to be hammered out, very often in clever guises.<sup>11</sup> One widely adopted tactic is that of a rule immediately emasculated by an

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5. *See id.* at 531 (analyzing whether conventions serve a useful purpose in commercial law).

6. *See id.* at 533 (arguing that conventions inevitably have less value than the individual legal systems from which they stem).

7. *See id.* (stating that conventions “lack coherence and consistency . . . create problems of scope. . . and introduce uncertainty where [none] existed before”).

8. *See id.* (explaining that uniformity is not practical since the world is made up of independent states with distinguishing legal traditions).

9. *See* Hobhouse, *supra* note 4, at 533. *See generally* ADRIAN BRIGGS, CIVIL JURISDICTION AND JUDGMENTS 240 (3d ed. 2002) (discussing the chaos resulting from the dichotomy of approaches adopted by courts in applying the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters).

10. *See* Hobhouse, *supra* note 4, at 533 (adding that this would further enhance uncertainty).

11. *See id.* at 534 (arguing that uniformity achieved through diplomatic means, in practice, does not represent a freely chosen system of codes, and ultimately interferes with parties’ contracts).

equally broad exception.<sup>12</sup> This results in the production of an inadequate legal tool without any commensurate gain.<sup>13</sup>

7. Non-English versions of rules are frequently vague and lacking in comprehensible meaning.<sup>14</sup>
8. International Conventions have an extremely prolonged gestation period, are very difficult to amend, and the

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12. *See id.*; *see also* CISG, *supra* note 1, art. 16(1) (“Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.”); art. 16(2) (“However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.”); art. 39(1) (“The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.”); art. 39(2) (“In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.”); art. 43(1) (“The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.”); art. 43(2) (“The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.”); art. 44 (“Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.”); art. 68 (“The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.”). These examples exemplify various instances where rules become immediately ineffective as a result of broad exceptions made.

13. *See* Hobhouse, *supra* note 4, at 534 (noting that conventions which are an “amalgam of inconsistent rules drawn from different systems differently structured with different underlying assumptions” is not a proper basis for a commercial code).

14. *See id.*

signatories are prisoners to it until a new convention is created.<sup>15</sup>

9. National laws are easier to amend and can respond more effectively to the demands of changed circumstances.<sup>16</sup>
10. Diversity in of itself is a great virtue. It affords the opportunity to choose the best amongst a host of competing legal regimes, and the market determines the best law.<sup>17</sup>
11. Several legal concepts cannot be expressed in other languages without losing their essential genius, and they are lost in translation into an international instrument.<sup>18</sup>

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15. *See id.*; *see also* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (“UNCITRAL”), STATUS OF CONVENTIONS AND MODEL LAWS [hereinafter UNCITRAL STATUS] (explaining the status of the conventions and model laws originating from the Commission), at <http://www.uncitral.org/english/status/status-e.htm> (last visited Feb. 12, 2003). The CISG was veritably a five-decade long project. *Id.*; *see also* UNIDROIT, DEVELOPMENT OF WORK WITHIN UNIDROIT ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (discussing the progress of efforts within UNIDROIT on International Interests in Mobile Equipment), at <http://www.unidroit.org/english/internationalinterests/history.htm> (last visited Mar. 4, 2003). The Convention is a good example of expeditious drafting that took over a decade to attain fruition. *Id.* The difficulty, unlike national laws, which only have to satisfy one constituency, is that the final act must appeal to disparate parliaments and lawmakers to trigger the requisite number of ratifications for life to be infused. *Id.* Very frequently, there is a latency period post-adoption at a diplomatic conference (in the case of an international convention), until the required number of countries deposit their instruments of ratification. *Id.* One method of reducing this latency period is to reduce the number of ratifications required to trigger entry into force. *See* CIIME, *supra* note 2, art. 49 (explaining the stipulations for entry into force of the Convention).

16. *See* Hobhouse, *supra* note 4, at 534 (asserting that most national laws can be amended by amending acts passed by national legislative bodies, which is relatively easy to do provided there is space on the legislative calendar). International conventions, in contrast, require the convening of diplomatic conferences, thus making the process almost as cumbersome as the creation of a new international instrument. *Id.* Even after such an arduous task has been concluded, victory may not materialize until such amendments are ratified. *Id.*

17. *See id.* at 534-35 (stating that international commerce is best served by developing different schemes in a climate of free competition and choice, allowing the market to choose the most efficient schemes to govern its transactions).

18. *See id.*; *see also* John Honnold, *The Uniform Law for the International Sale of Goods: The Hague Conventions of 1964*, 30 LAW & CONTEMP. PROBS. 326, 350 (1965) (stating that the difficulty with the Uniform Law on the International Sale

In a world where trade is increasingly international, none of the above criticisms of the harmonization process can outweigh the benefits of having a truly international regime based on traditions and principles that are commercial, rather than nationalistic.<sup>19</sup> Commercial people demand certainty and predictability more than nationally determined notions of justice or fairness, and a legally average sameness is often preferable to disparately brilliant national formulations.

## II. HARMONIZATION EXPLAINED

Harmonization, contrary to common assumptions, is not an endeavor to distill the lowest common denominator out of a varied medley of national legal systems. The fallacy of such an assumption is manifest; the result would be an enervated and conceptually unclear body of law that surely would not be a legitimate pursuit of the rational mind. Harmonization, truly, is the favored child of reform. The purpose is not merely to arrive at a uniformity that can be marveled at, but to produce a harmony of result by deriving the best possible solution in any given area of law, quarrying from the mines of diverse legal systems. The end result may often bear little or no resemblance to any one legal system, and even the most advanced and sophisticated system may need amendment. The following pages highlight some issues that come into play when one examines the process of harmonization of national commercial laws.

## III. CREATING A TRANSNATIONAL COMMERCIAL LAW

Transnational commercial law is born as law that is neither particular to nor the product of any one legal system.<sup>20</sup> It represents the union of rules taken from many legal systems.<sup>21</sup> In its more

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of Goods' ("ULIS") key concept of "deliverance," loosely and deceptively translated as delivery, is illustrative).

19. See *supra* notes 5-17 (summarizing the criticisms of the harmonization process).

20. See Roy Goode, *Usage and its Reception in Transnational Commercial Law*, 46 INT'L & COMP. L.Q. 1, 2 (1997) (defining the phrase "transnational commercial law").

21. See *id.* (explaining the meaning of transnational commercial law).



generous proponents' views, transnational commercial law signifies a melding of rules that are completely "anational" in character, and it derives its meaning through international usage and its execution by the business world.<sup>22</sup> Therefore rules, in addition to actions and events, cross national boundaries.<sup>23</sup> However, agreement as to the meaning or content of transnational commercial law has been elusive.<sup>24</sup>

Some equate the meaning of transnational commercial law with the new *lex mercatoria*.<sup>25</sup> Lord Justice Mustill asserts that the fostering of the *lex mercatoria* has nothing to do with the harmonization of international trade law. This is because the aim of the latter is to minimize the differences between the laws of individual nations, so as to provide a stable and uniform basis for commerce.<sup>26</sup> Ergo, the debate on transnationalism is about whether it can and should be brought about. In contrast, the debate on the *lex mercatoria* is about whether it can and does exist as a viable system.<sup>27</sup> Rules embodied in an international convention can validly be described as part of transnational commercial law. Unlike conventional law, however, they are not part of the *lex mercatoria* because the convention in which they are incorporated functions only by the will of states that become parties to it or otherwise adhere to it.<sup>28</sup>

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22. See *id.* (commenting on the "anational" aspects and usage of transnational commercial law).

23. See *id.* (describing the characteristics of transnational commercial law).

24. See *id.* (discussing the element of agreement in transnational commercial law).

25. See Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 750 (1985) (noting that *lex mercatoria* is given different meanings by different writers); see also The Rt. Hon. Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years in LIBER AMICORUM FOR LORD WILBERFORCE* 151 (Marteen Bos & Ian Brownlie eds., 1987) (discussing in detail the meaning of *lex mercatoria*).

26. See *id.* at 152 (expanding on the purpose of the harmonization of international trade law).

27. See *id.* at 153 (considering the practicality of the *lex mercatoria* system).

28. See Goode, *supra* note 20, at 2 (explaining that the essence of *lex mercatoria* is non-codified, non-statutory, and non-conventional).

This formulation is not free from difficulty. It is argued that it may still be *lex mercatoria*, as the principles that may or may not be embodied in a convention depend on state adherence only for limited purposes. The principles may be dispositive anyway, and nothing prevents an arbitral tribunal from taking note of it irrespective of ratification by a state.<sup>29</sup> Very often, transnational commercial law is merely a vocalization of an already extant *lex mercatoria*, and watertight compartments are incapable of formulation. True, as Professor Goode says:

[A]n international convention or a contractually adopted codification is at most evidence of the uncodified rules previously existing; and by itself it is not very reliable evidence because the purpose of most conventions or contractual codifications is not to reproduce an existing set of universally adopted usages—for in truth no such universality exists—but, rather, to build on existing usage and to provide best solutions to current problems. It is in the nature of conventions and codifications that they do not simply reproduce the status quo; they change it, and sometimes quite radically.<sup>30</sup>

Thus, a divorce of *lex mercatoria* from transnational commercial law is erroneous. The former is the quarry for the latter, and the latter often subsumes the former.<sup>31</sup> Transnational commercial law, at least in the modern context, is the product of harmonization endeavors.<sup>32</sup> It is a deliberate concoction with its most potent forms being international conventions. The reasons are obvious. In a shrinking

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29. *See id.* at 5 (describing how, even in a country where a convention has become operative, its provisions will often be made subordinate to a contrary agreement by the parties).

30. *Id.* at 3.

31. *See* MUSTILL, *supra* note 25, at 151 (defining *lex mercatoria* as being “anational” and constituting an autonomous legal order); *see also* Lando, *supra* note 25, at 748 (explaining the benefits of applying the *lex mercatoria* to arbitration proceedings). By choosing to apply the *lex mercatoria*, the parties avoid the technicalities of national legal systems and rules, which are unsuitable for international contracts. *Id.* “Thus they escape peculiar formalities, brief cut-off periods, and some of the difficulties created by domestic laws, which are unknown in other countries, such as the common law rules on consideration and privity of contract.” *Id.* In addition, all of the individuals involved in the proceedings plead and argue on an equal footing and neither party is disadvantaged by having the case pleaded and decided by his own law or by a foreign law. *Id.*

32. *See supra* notes 20-24 and accompanying text (discussing the meaning of transnational commercial law).

world still obsessed with notions of state sovereignty and a proliferation of national laws passed in exercise thereof, international conventions represent the most forceful manifestations of solutions that transcend national borders in their applicability.<sup>33</sup> Given the risk that is attendant in international transactions and the reality that commercial certainty is predicated upon the allocation of risk, such allocations can only rest upon the bedrock of international conventions in order to be meaningful.<sup>34</sup>

#### A. WHAT TO HARMONIZE?

Getting this question right is central to the success or otherwise of a harmonization initiative. It is advisable to embark upon areas where genuine problems impede trade rather than be pushed along by the steam of ambitious idealism. Rosett's words bear remembering:

I do not think that uniform laws and restatements have been the major driving force for harmonization of the civil and commercial law of the United States. Implicit in this statement is the view that unification and codification by international conventions and uniform laws are not central goals for their own sake . . . . The wonderful virtue of seeking to achieve harmonization without resorting to unification or codification is that we are betting on a sure winner. Harmonization will occur for reasons exogenous to the law. Our efforts to draft unified laws are symptoms and indications of the process of unification, not their cause.<sup>35</sup>

#### B. WHAT FORM IS THE PROCESS TO TAKE?

Much has been written about the relative merits of the various routes that harmonizing agencies may resort to in their attempt to give shape to a formulation.<sup>36</sup> They may decide to embody the fruits of their labors in a multilateral convention without a uniform law,

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33. See *supra* notes 4-10 and accompanying text (analyzing the justifications and objectives of international conventions).

34. See Hobhouse, *supra* note 4, at 533 (discussing the inherent risk in international trade due to fluctuating markets).

35. Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AM. J. COMP. L. 683, 684 (1992).

36. See *id.* at 683-97; see also Lando, *supra* note 25, at 747-56 (analyzing harmonization measures of various agencies).

each of which has its own advantages and disadvantages, such as: a multilateral convention embodying a uniform law; bilateral treaties; community legislation, a model law;<sup>37</sup> a codification of custom and usage promulgated by an international non-governmental organization;<sup>38</sup> international trade terms promulgated by it;<sup>39</sup> model forms;<sup>40</sup> contracts;<sup>41</sup> and restatements by leading scholars and

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37. See UNCITRAL, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (June 21, 1985) [hereinafter UNCITRAL MODEL LAW] (exemplifying soft law that was designed to assist countries in reforming and modernizing their arbitration laws in order to make them relevant to the needs of international commercial arbitration), available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>. (last visited Mar. 24, 2003). This model law has been enacted into law by a large number of jurisdictions including Australia, Azerbaijan, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran, Ireland, Jordan, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Republic of Korea, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; within the United States of America: California, Connecticut, Illinois, Oregon and Texas; Zambia, and Zimbabwe. See UNCITRAL STATUS, *supra* note 15.

38. See INTERNATIONAL CHAMBER OF COMMERCE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY, ICC INTERNATIONAL CUSTOMS GUIDELINES (July 10, 1997) (presenting a set of practices considered to be valuable for those engaged in international trade and transport), available at [http://www.iccwbo.org/home/statements\\_rules/rules/1997/customdoc.asp](http://www.iccwbo.org/home/statements_rules/rules/1997/customdoc.asp) (last visited Feb. 12, 2003). The International Chamber of Commerce ("ICC") was founded in 1919 in Paris and constitutes a federation of business organizations and businessmen. See ICC, WHAT IS ICC, at [http://www.iccwbo.org/home/menu\\_what\\_is\\_icc.asp](http://www.iccwbo.org/home/menu_what_is_icc.asp) (last visited Mar. 5, 2003). The ICC is a non-governmental body, neither supervised nor subsidized by governments. *Id.*

39. See ICC, INCOTERMS 2000 (defining "International Commercial Terms" most commonly used in international sales contracts), available at [http://www.iccwbo.org/incoterms/index\\_incoterms.asp](http://www.iccwbo.org/incoterms/index_incoterms.asp) (last visited Feb. 12, 2003). The ICC introduced the first version of Incoterms, which is an abbreviation for "International Commercial Terms," in 1936. *Id.* Some of the most famous Incoterms include EXW (Ex works), FOB (Free on Board), CIF (Cost, Insurance, and Freight), DDU (Delivery Duty Unpaid), and CPT (Carriage Paid to). *Id.*

40. See ICC, ICC MODEL CLAUSES FOR USE IN CONTRACTS INVOLVING TRANSBORDER DATA FLOWS (Sept. 23, 1998) (creating safeguards to protect those who wish to transfer personal data from countries that regulate export of data to countries that do not provide protection for personal data), at [http://www.iccwbo.org/home/statements\\_rules/rules/1998/model\\_clauses.asp](http://www.iccwbo.org/home/statements_rules/rules/1998/model_clauses.asp) (last visited Feb. 12, 2003).

experts.<sup>42</sup> Conventions and treaties have binding force once ratified, whereas the others are essentially soft law. Restatements and model laws tend to be largely hortative—this by no means undermines their efficacy — and the intellectual weight and international standing of their progenitors has often resulted in a potency that has baffled most skeptics.

### *1. International Conventions*

If it is intended to provide obligatory rules of international application, the adoption of an international convention and its subsequent introduction into municipal law is the only method to give effect to measures aimed at achieving international uniformity. The initial uniformity, however, may be lost by subsequent amendments that may be adopted by some states and not by others. Even if there are no subsequent amendments, the uniform character of an international convention intended to have obligatory character in the legislation of the adopting states may be impaired by the general practice to allow reservations to signatory or acceding states. Even the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by 132 countries, admits two reservations.<sup>43</sup> Reservation 1 provides that “any state may

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41. See GRAIN AND FREE TRADE ASSOCIATION (“GAFTA”), GAFTA MEMBERSHIP (stating that GAFTA has over eighty contracts covering CIF, FOB and delivered terms), at <http://www.gafta.com/gaftamembership.asp> (last visited Mar. 4, 2003).

42. See Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Nature, Purposes and First Experiences in Practice* (describing the history and principles of the PICC), at <http://www.unidroit.org/english/principles/pr-exper.htm> (last visited Mar. 4, 2003); Roy Goode, *Reflections on the Harmonization of Commercial Law*, in COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS 1-27 (Ross Cranston & Roy Goode eds., 1993) (discussing how domestic law does not often meet the needs of international trade and commerce). See generally PICC, *supra* note 3 (consisting of 119 articles and signifying a classic instance of soft law finding application due to the sheer weight of its quality).

43. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 84 Stat. 692, 330 U.N.T.S. 3 (entered into force June 7, 1959), art. 1(3) (applying to the recognition and enforcement of arbitral awards), available at <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>. In article 1(3), sixty-five parties have made reservations under the first limb, and sixty-six parties

on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state.”<sup>44</sup> Reservation 2 asserts that a state may also declare that “it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making the declaration.”<sup>45</sup>

Once uniformity has been achieved and the international measure in question has been accepted by a considerable number of states and a wide circle of the commercial community, there exists the danger that uniformity may, in the course of time, be lost by subsequent amendments. Some of these amendments may be adopted by some states, while other states may retain the former un-amended law. This may be illustrated by comparing the law relating to the Carriage of Goods by Sea, with the Hague Rules,<sup>46</sup> the Hague-Visby Rules,<sup>47</sup> the Hamburg Rules,<sup>48</sup> and various hybrid versions competing for

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have entered reservations under the second limb of this provision as of December 2002. See UNCITRAL STATUS, *supra* note 15.

44. UNCITRAL STATUS, *supra* note 15.

45. *Id.*

46. See INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING (1924) (*entered into force* on June 2, 1931) [hereinafter HAGUE RULES] (signifying the first attempt by the international community to find a workable and uniform means to tackle the problem of ship owners regularly excluding themselves from all liability for loss or damage to cargo), available at <http://www.comitemaritime.org/ratific/brus/bruidx.html> (last visited Mar. 24, 2003). Its central objective was to establish a minimum mandatory liability of carriers. *Id.*

47. See *id.* (amending the Hague Rules).

48. See UNITED NATIONS CONVENTION OF THE CARRIAGE OF GOODS BY SEA (1978) (*entered into force* Nov. 1, 1992) [hereinafter HAMBURG RULES] (denoting that the *raison d'être* for this concoction was the strenuous argument by developing countries that the Hague Rules had been developed by “colonial maritime nations” in 1924, largely for the benefit of their own maritime interests, and that the imbalance between ship owners and shipper interests needed to be redressed), available at [http://www.uncitral.org/english/status/status-e.htm#United%20Nations%20Convention%20on%20the%20Carriage%20of%20Goods%20by%20Sea,%201978%20\(Hamburg\)](http://www.uncitral.org/english/status/status-e.htm#United%20Nations%20Convention%20on%20the%20Carriage%20of%20Goods%20by%20Sea,%201978%20(Hamburg)) (last visited Mar. 24, 2003). Although twenty countries acceded to the Convention, it was severely emasculated by the fact that none of the world’s major trading nations have acceded to it as yet. *Id.* Twenty-eight nations have ratified it as of December 2002. *Id.*

acceptance. Consequently, in the field of maritime transport, there exist at least three different legal regimes.<sup>49</sup> While it is true that amendments render uniformity nugatory, by no stretch of the imagination can this be an argument against undergoing the process. The fundamental goal is not uniformity, rather it is the pursuit of the best solution.

Another factor that may endanger the uniformity of an international convention, is that it may be interpreted differently by the various national courts.<sup>50</sup> This can be avoided somewhat if courts interpret international conventions differently than they do national laws.<sup>51</sup> Lord Diplock stated that they should be interpreted in an international spirit as in *Fothergill v. Monarch Airlines Ltd.*:<sup>52</sup>

The language of that convention (the Warsaw Convention on the International Air Carriage of 1929, as amended by the Hague Protocol 1955, and as scheduled, in its amended form, to the UK Carriage by Air Act 1961) that has been adopted at the international conference to express the common intention of the majority of the states represented there is meant to be understood in the same sense by the courts of all those states which ratify or accede to the convention. Their national styles of legislative draftsmanship will vary considerably as between one another. So will the approach of their judiciaries to the interpretation of written laws and to the extent to which recourse may be had to *travaux préparatoires*, doctrine and jurisprudence as extraneous aids to the interpretation of the legislative text. The language of an international convention has not been chosen by an English parliamentary draftsman . . . . It is addressed to a much wider and more varied judicial audience than is an act of parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (UK) Ltd.*, 1978 A.C. 141,

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49. See Clive M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, in THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 26 (Norbert Horn & Clive M. Schmitthoff, eds., 1982).

50. See, e.g., *Fothergill v. Monarch Airlines Ltd.*, 1981 A.C. 251 (handing down a decision that is one national court's interpretation of the Carriage by Air Act 1961, an international convention).

51. See *id.* (comparing the language of the international convention to the that of the British law that codified the international agreement).

52. See *id.* at 278-79 (noting that when a national court interprets an international convention, the court should look to the overall purpose of the convention in order to resolve legal ambiguities).

152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.'<sup>53</sup>

## 2. *Soft Law*

This category includes model laws, restatements, and standard contract forms.<sup>54</sup> Model laws<sup>55</sup> differ from uniform laws<sup>56</sup> in that they seek merely to inform and to provide a model for state legislatures to consider, but do not produce a statute designed to be adopted without change. A classic example, in the national arena, is the monumental Model Penal Code, which has driven law reform across the United States.<sup>57</sup>

Standard contract forms are flexible, can easily be adapted by necessary modification, and have come to characterize both national

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53. *Id.* at 281-82 (setting forth the opinion of Lord Diplock).

54. See BLACK'S LAW DICTIONARY (7th ed. 1999) (defining 'soft law' as it relates to international law, as "[g]uidelines, policy declarations, or codes of conduct that set standards of conduct but are not directly enforceable").

55. See *id.* (defining 'model act' as "[a] statute drafted by the National Conference of Commissioners on Uniform State Laws and proposed as guideline legislation for the states to borrow from or adapt to suit their individual needs").

56. See *id.* (defining 'uniform act' as "[a] law drafted with the intention that it will be adopted by all or most of the states").

57. See *id.* (defining 'Model Penal Code' as, "[a] proposed criminal code drafted by the American Law Institute and used as the basis for criminal law revision by many states"). A product of the American Law Institute, the Model Penal Code was promulgated in 1962 and heralded a wave of state code reforms in the 1960's and 1970's, which were influenced to varying degrees by the Model Code. See AMERICAN LAW INSTITUTE, ABOUT THE AMERICAN LAW INSTITUTE, at <http://www.ali.org> (last visited Mar. 4, 2003). The Judiciary has not been far behind—thousands of court opinions have relied on the Model Penal Code as persuasive authority for the interpretation of statutes, and as a harmonizing instrument it is one of a kind. *Id.*



and international commercial activity.<sup>58</sup> As a tool of harmonization, the importance of soft law has been tremendous yet silent.<sup>59</sup>

Comparisons between conventions, or uniform laws, and model laws as tools of harmonization reveal that the essence of their difference lies in their flexibility, especially with regard to acceptance.<sup>60</sup> A model law may be accepted in whole or in amended form or at least be cherry-picked by a State while legislating.<sup>61</sup> This contrasts with the “take it or leave it” appeal of a convention that is not easily modified.<sup>62</sup> Herrmann argues that the shortcoming of a model law, in terms of binding effect, is minimal as regards the basic question of whether or not the State decides to take the international text. The difference, however, is vast as regards the extent to which it does so.<sup>63</sup> He argues that another advantage of model laws is the rapidity of their implementation, evidenced by the speed with which the Model Law on International Commercial Arbitration became law in British Columbia. This was less than a year after it was adopted on June 21, 1985, as opposed to the eight years that it took for the CISG

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58. See PETER L. BOOEN, FIDIC'S CONDITION OF CONTRACT FOR THE NEXT CENTURY: 1998 TEST EDITIONS: 1999 ICLR (discussing the flexibility that is inherent in recently created standard contract forms), *available at* [http://www2.fidic.org/resources/contracts/icla\\_v16/booen.rtf](http://www2.fidic.org/resources/contracts/icla_v16/booen.rtf) (last visited Apr. 4, 2003).

59. See Clive M. Schmitthoff, *Contracts of Adhesion and the Protection of the Weaker Party in International Trade Relations*, in 1 NEW DIRECTIONS IN INTERNATIONAL TRADE LAW 181-82 (UNIDROIT 1977) (explaining that the United Nations Economic Commission for Europe has sponsored a number of standard contract forms). However, of even greater importance are the standard contract forms sponsored by trade associations, *e.g.*, the Grain and Feed Trade Association (United Kingdom), the Federation of Oil, Seed and Fats Association (United Kingdom), *verein der getreidehandler der hamburger borse* (Germany), and the *comite van graanhandelaren* (Netherlands). *Id.*; see also BOOEN, *supra* note 58 (explaining that the FIDIC conditions of contract for works of civil engineering construction with forms of tender and agreement have acquired prominence in the construction industry).

60. See *supra* notes 55-56 and accompanying text (explaining the difference between uniform laws and model laws).

61. See *supra* note 57 and accompanying text (defining model law).

62. See Gerold Herrmann, *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, 1998 UNIF. L. REV. 483; see also *supra* note 56 and accompanying text (defining uniform law).

63. See Herrmann, *supra* note 62, at 485.

to come into force.<sup>64</sup> There is no denying the virtue of model laws — they come without the stoniness of conventions, and in practice have demonstrated a wider acceptability and greater utility.<sup>65</sup>

### C. WHAT SHOULD THE INSTRUMENT TACKLE?

The concern over the seas on which one sails is no less a problematic question than deciding on the voyage itself. Several issues must be grappled with to include the scope of the substantive law that should fall under the purview, the restriction to international transactions, the exclusion of consumer contracts, and the requirement of a connection to a contracting state.<sup>66</sup> The issue of transnationality, which is perhaps the key limitation, is discussed below.<sup>67</sup>

Experience in the context of international sales is illustrative. Uniform law regarding international sales has used different definitions of transnationality.<sup>68</sup> Both Hague Uniform Sales Laws, which are the Uniform Law on the International Sale of Goods<sup>69</sup> and the Uniform Law on the Formation of Contracts for the International Sale of Goods,<sup>70</sup> provide that sales are international if the contracting

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64. *See id.* (pointing also to Singapore, which enacted legislation within two years of the conclusion of the Model Law on Electronic Commerce).

65. *See supra* notes 60-64 and accompanying text (discussing the benefits of model laws).

66. *See supra* note 41 and accompanying text (noting the importance of model laws and the factors that must be considered when formulating them).

67. *See infra* notes 68-80 and accompanying text (considering the issues surrounding various ways to define transnationality, *i.e.*, how to determine whether a contract will be considered “international”).

68. *See infra* notes 73-78 (exemplifying the fact that different countries utilize different definitions of “transnationality”).

69. *See* CONVENTION RELATING TO A UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS (July 1, 1964) [hereinafter HAGUE ULIS] (furthering a desire to establish a uniform law on the international sale of goods, and providing a list of those countries that have signed and ratified the Convention), *available at* <http://www.unidroit.org/english/conventions/c-ulis.htm> (last visited Mar. 4, 2003).

70. *See* CONVENTION RELATING TO A UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (July 1, 1964) [hereinafter ULFIS] (furthering the desire to establish a uniform law on the formation of contracts for the international sale of goods), *available at* <http://www.unidroit.org/english/conventions/c-ulf.htm> (last visited Mar. 24, 2003);

parties have their places of business in different countries,<sup>71</sup> and either: (1) the goods are in the course of carriage or will be carried from one country to another country; (2) the acts constituting offer and acceptance have been effected in different countries; or (3) delivery has to be made in a country other than that in which offer and acceptance have been effected.<sup>72</sup>

This objective element has been dropped by the UNIDROIT Convention on International Factoring<sup>73</sup> and the UNIDROIT Convention on International Financial Leasing<sup>74</sup> because of the

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*see also* UNIDROIT, STATUS REPORT: CONVENTION RELATING TO A UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (providing a list of those countries that have signed and ratified the Convention), *at* <http://www.unidroit.org/english/implement/I-64ulf.htm> (last visited Mar. 4, 2003).

71. *See* HAGUE ULIS, *supra* note 69, art. III (limiting the scope of the Convention to contracting parties with a place of business in Convention states); *see also* ULFIS, *supra* note 70, art. III (limiting the scope of the Convention to contracting parties with a place of business in Convention states).

72. *See* UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS (1964) [hereinafter ULIS] (creating a uniform law to apply to all sale of goods contracts entered into by parties with places of business in different states), *available at* <http://www.jus.uio.no/lm/unidroit.ulis.convention.1964/doc.html> (last visited Mar. 4, 2003). This uniform law allows various ways for a contract to be considered international. *Id.* art. 1(1).

73. *See* UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (May 28, 1988) (furthering the importance of creating uniform rules to facilitate international factoring, while maintaining a balance of interests between the various parties involved in factoring transactions), *available at* <http://www.unidroit.org/english/conventions/c-fact.htm> (last visited Mar. 4, 2003); *see also* UNIDROIT, STATUS REPORT: CONVENTION ON INTERNATIONAL FACTORING (providing that only four countries have ratified the Convention and that it entered into force for France, Italy and Nigeria on May 1, 1995, for Hungary on December 1, 1996, for Latvia on March 1, 1998, and for Germany on December 1, 1998), *at* <http://www.undroit.org/English/implement/I-88-f.htm> (last visited Mar. 4, 2003).

74. *See* UNIDROIT CONVENTION IN INTERNATIONAL FINANCIAL LEASING (May 28, 1988) (carrying through a desire to create uniform rules regarding the civil and commercial law areas of international financial leasing), *available at* <http://www.unidroit.org/english/conventions/c-leas.htm> (last visited Mar. 4, 2003); *see also* UNIDROIT, STATUS REPORT: CONVENTION IN INTERNATIONAL FINANCIAL LEASING (providing that the Convention entered into force between France, Italy and Nigeria on May 1, 1995, on December 1, 1996 for Hungary, on October 1, 1997 for Panama, on March 1, 1998 for Latvia, on January 1, 1999 for the Russian Federation, on March 1, 1999 for Belarus and on February 1, 2001 for

uncertainties that it would have engendered.<sup>75</sup> This was a process that started with the United Nations Convention on the Limitation Period in the International Sale of Goods,<sup>76</sup> and was affirmed in the CISG.<sup>77</sup> Both conventions provide that a sales contract is international if the contracting parties have their places of business in different contracting states,<sup>78</sup> thus broadening their scope.

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the Republic of Uzbekistan), at <http://www.unidroit.org/english/implement/i-88-1.htm> (last visited Mar. 4, 2003).

75. See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 78 (1999) (explaining that the degree of freedom afforded in such Conventions is possible because of the exclusion of certain transactions and issues from the Convention); see also Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS §§ 1.1-1.16 (Nina M. Galston & Hans Smit eds., 1999) (elaborating on the Convention's background, starting with the UNIDROIT initiative in the 1930s and explaining the concerns discussed during the process of creating the Convention).

76. See UNITED NATIONS CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS (June 14, 1974) (establishing uniform rules governing the period of time within which legal proceedings arising from an international sales contract must be commenced), available at <http://www.jus.uio.no/lm/un.limitation.period.sog.convention.1980/> (last visited Mar. 4, 2003). This Convention has been amended by a Protocol adopted in 1980 in Vienna when the United Nations Sales Convention was adopted. *Id.* Both the original Convention and the Convention as amended entered into force on August 1, 1988. *Id.*; see also UNICITRAL STATUS, *supra* note 15 (providing that the Convention has been ratified by seventeen nations as of December 2002, including Argentina, Cuba, Mexico, and the United States).

77. See CISG, *supra* note 1 (creating a set of laws to be used in international contracts for the sale of goods).

78. See *id.* art. 1 (explaining what types of contracts the Convention applies to). CISG Article 1 states:

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
- (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 1 (3) of the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration<sup>79</sup> provides that arbitration is international if: (a) the parties have their places of business in different states; (b) the states in which the parties have their places of business are different from the place of arbitration as determined in or pursuant to the arbitration agreement, any place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.<sup>80</sup> Clearly, a multitude of factors determines transnationality.<sup>81</sup>

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*Id.*; see also Allan E. Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17, 19 (1984) (explaining the scope of the Convention as well as the history of how it came into being); Kazuaki Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT'L LAW. 7, 12 (1984) (noting that the Vienna Convention is applicable to sales contracts concluded between parties whose places of business are in different states, and providing a concise summary of other work done by UNCITRAL).

79. See UNCITRAL MODEL LAW, *supra* note 37 (creating a model law that applies to international commercial arbitration when each party to the arbitration has its place of business in a different country).

80. See *id.* art. 1(3) (defining when an arbitration is to be considered international).

81. See UNCITRAL CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES (1988) (displaying the result of a movement to establish a modern self-contained set of international laws that would apply to the various forms of international payments), available at <http://www.jus.uio.no/lm/un.bills.of.exchange.and.promissory.notes.convention.1988/doc.html> (last visited Mar. 4, 2003); see also *id.* art. 2(1) (explaining that bills of exchange and promissory notes will be treated as international for the purposes of the United Nations Convention on International Bills of Exchange and International Promissory Notes). Article 2 provides:

1. An international bill of exchange is a bill of exchange that specifies at least two of the following places and indicates that any two so specified are situated in different States:

- (a) The place where the bill is drawn;
- (b) The place indicated next to the signature of the drawer;
- (c) The place indicated next to the name of the drawee;
- (d) The place indicated next to the name of the payee;

Rabel, one of the progenitors of the sales convention said:

[T]he proposed international law is not meant as a substitute for the actual domestic law. The overwhelming majority of sales contracts remain under the same rules as they are at present. It intends to do no more than to take the place of the rules of the conflict of laws concerning sales and the legal norms called for by the conflict rules. The law thus to be applied now might be that of any foreign country, different in different cases, and difficult to apply. The proposed international law, on the other hand, would be uniform, kindred to the Sales Act, and at least intelligible.<sup>82</sup>

Much later, Rabel would note that he originally proposed to limit the scope of the uniform law to international sales for tactical reasons “although all the time vainly hoped to be overruled.”<sup>83</sup>

All that can be said with certainty is that there are a great variety of ways in which the “international” character of contracts may be defined.<sup>84</sup> The solutions adopted in national and international

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(e) The place of payment, provided that either the place where the bill is drawn or the place of payment is specified on the bill and that such place is situated in a Contracting State.

2. An international promissory note is a promissory note which specifies at least two of the following places and indicates that any two so specified are situated in different States:

- (a) The place where the note is made;
- (b) The place indicated next to the signature of the maker;
- (c) The place indicated next to the name of the payee;
- (d) The place of payment,

provided that the place of payment is specified on the note and that such place is situated in a Contracting State.

*Id.* The Convention requires ten ratifications or accessions to enter into force, but has only been ratified by three nations as of December 2002. *Id.*

82. See Ernst Rabel, *A Draft of an International Law of Sales*, 5 U. CHI. L. REV. 543, 544 (1938) (introducing to the American legal field a draft of a uniform international sales of goods act).

83. See Ernst Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58, 60 (1952) (commenting on the Hague Conference on the Unification of Sales Law, and focusing specifically on the attitude of the meeting, which suggested a universal vote on the main lines of this modern sales law).

84. See *supra* notes 68-80 and accompanying text (discussing the issues surrounding various ways to define “transnationality,” in other words, how to determine whether a contract will be considered “international”).

legislations range from a reference to the difference of nationalities of the parties, to their domicile or residence in different countries, or to the international nature of the effect of the transaction.<sup>85</sup> One thing is certain: a restriction of harmonizing instruments to international transactions is now an accepted fact of life—a surrender of the hortative to the pragmatic—given the reluctance of national legislators to cede what they regard as their exclusive domain.<sup>86</sup>

Having set the stage and defined the context for the impulse to create international commercial law, two instruments shall be examined in the following pages: The Vienna Sales Convention (“CISG”) and the CIIME.<sup>87</sup>

### *1. The Vienna Sales Convention*

The 1980 Convention marks the culmination of fifty years of diligent work to arrive at a uniform legal standard governing international sales contracts.<sup>88</sup> The process can be traced to the 1930s when legal experts, working under the umbrella of UNIDROIT (the International Institute for the Unification of Private Law), prepared several draft texts, which embodied a number of policy decisions that underpin the convention.<sup>89</sup> The second stage, starting after World War II, ended with the 1964 Hague conference that produced the uniform sales laws.<sup>90</sup> The limited acceptance of these instruments led

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85. See *supra* notes 71-72, 78-79 (noting agreements that focus on the place of business of the parties as a means to determine applicability of a convention).

86. See *supra* notes 82-83 and accompanying text (explaining the benefits of uniform sales laws).

87. See *infra* notes 88-106 and accompanying text (discussing the Vienna Convention and the CIIME).

88. See CISG, *supra* note 1 (creating a set of laws to be used in international contracts for the sale of goods); see also Winship, *supra* note 75, § 1.3 (discussing the background of the Vienna Convention).

89. See Rabel, *supra* note 82, at 545 (discussing late 1930s viewpoints of a proposed uniform international law of sales); see also John Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview* 27 AM. J. COMP. L. 223, 223-24 (1979) (describing the origins of a uniform international sale of goods act, from its start under UNIDROIT).

90. See ULIS, *supra* note 72 (creating a uniform law to apply to all sale of goods contracts entered into by parties with places of business in different states);

to a fresh initiative by UNCITRAL that culminated in the CISG in 1980.<sup>91</sup> It was decided even at the earliest stages that the CISG text should not be a compilation of rules selected from existing sales laws but that it should be a comprehensive new body of sales law designed to meet the practical needs of merchants.<sup>92</sup>

The drafting committee made two major decisions: (1) they applied the Convention to international sales contracts only because if the technique of including domestic transactions adopted in the 1930 and 1931 Geneva Conventions on Negotiable Instruments<sup>93</sup> were followed as well, acceptability would be the casualty; and (2) they highlighted the principle of party autonomy, whereby even if a particular transaction fell within the rubric of the Convention, parties were free to exclude it.<sup>94</sup> An examination of the development of the Vienna Convention reveals that the creation of a drafting process, which includes more participation by people from across the legal spectrum, has been equally important as the refinement of the text itself.<sup>95</sup> While the first UNIDROIT committee represented only the principal legal systems of Western Europe, UNCITRAL took care to

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*see also* ULFIS, *supra* note 70 (creating a uniform international law for the formation of contracts for parties whose contracts fall under the ULIS).

91. *See* CISG, *supra* note 1 (creating a uniform body of law on international sales of goods); *see also* Honnold, *supra* note 89, at 223 (describing the activities of UNCITRAL in creating the CISG). In 1966, the United Nations established UNCITRAL, which, in 1968, prioritized the development of an effective uniform international sales law. *Id.* at 225. Between 1968 and 1978, nine working sessions were held and a group comprised of fourteen nations produced the draft text of the CISG. *Id.* at 226.

92. *See* Winship, *supra* note 75, § 1.6 (describing the UNIDROIT initiative of the 1930s and beyond).

93. *See* CONVENTION PROVIDING A UNIFORM LAW FOR BILLS OF EXCHANGE AND PROMISSORY NOTES (June 7, 1930) (creating a uniform law for international bills of exchange and international promissory notes), *available at* <http://www.jus.uio.no/lm/bills.of.exchange.and.promissory.notes.convention.1930/doc.html> (last visited Mar. 4, 2003); *see also* CONVENTION FOR THE SETTLEMENT OF CERTAIN CONFLICTS OF LAWS IN CONNECTION WITH CHEQUES (Mar. 19, 1931) (furthering the desire to adopt rules to settle certain conflicts of laws in connection with checks), *available at* <http://product.chinawe.com/cgi-bin/lawdetail.pl?LawID=713> (last visited Mar. 4, 2003).

94. *See* Winship, *supra* note 75, § 1.33 (discussing the considerations of party autonomy that went into the CISG).

95. *See id.* § 1.15 (summarizing the background of the Vienna Convention and reflecting on the importance of the drafting process).



ensure representation from all geographic, economic, and political areas of the world.<sup>96</sup> Procedures for regular consultation with governments and other international organizations also evolved, and there were constant comments on the text at every stage.<sup>97</sup> Delegations from sixty-two countries had met at the Vienna conference.<sup>98</sup>

The jettisoning of the “universalist” approach of the ULIS and the replacement of it with a requirement that there exist some connection between a sales transaction and a contracting state before the CISG is applicable is the one clear difference between the CISG and ULIS. This is a definite cure for one of the prime ailments that condemned the ULIS.<sup>99</sup> However, under the CISG, a transaction may be concluded with delivery made in a single state and yet be international for the purposes of applicability. This is because the test is simple and marks a refreshing change from the ULIS formulation, which required an “objective” indication that the transaction was

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96. *See id.* (discussing the importance of the make-up of the participants in the Convention).

97. *See id.* (describing the process for consultation with governments and other groups during the text writing).

98. *See id.* § 1.9 (discussing the participants in the Hague Conference of 1964). Twenty-eight countries had taken part at the 1964 Hague Conference: twenty-two European or other developed nations, three Socialist nations, and three developing nations. *Id.*; *see also*, Gyula Eorsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 316 (1979) (discussing the doctrine of consideration).

99. *See* CISG, *supra* note 1, art. 1 (explaining types of contracts the Convention applies to). CISG Article 1 states:

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

*Id.*

international.<sup>100</sup> The CISG affords an inescapable tool for analysis by its very nature as a prize horse in the UNCITRAL stable, its wide acceptance, and the demonstrated pulls along national, ideological, legal systemic, and other lines.

## 2. *The 2001 Convention on International Interests in Mobile Equipment*

The law on security interests in mobile equipment is mainly under the guidance of national legal systems.<sup>101</sup> This situation is owed largely to the complex and diverse nature of the law surrounding security interests in movable property and the truth that, of all legal constructs, property rights are the most particular to a legal system.<sup>102</sup> Following the 1988 Ottawa Conventions, it was felt that it may be profitable to examine the feasibility of harmonizing the law relating to security interests in mobile equipment, and Professor Cuming was charged with that task.<sup>103</sup> The Cuming Study found that the various

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100. See ULIS, *supra* note 72, art. 1(1) (explaining the scope of the application of the uniform law). ULIS Article 1(1) states:

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.

*Id.*

101. See Ronald C.C. Cuming, *International Regulation of Aspects of Security Interests in Mobile Equipment*, 1990 UNIF. L. REV. 63, 67 (1990) (discussing the focus of Cuming's study and recognizing that some, although little, international law of security interests in mobile equipment exists); see also CIIME, *supra* note 2 (addressing the international concerns around international security interests in mobile equipment).

102. See Cuming, *supra* note 101, at 67 (explaining why little international law exists on security interests in mobile equipment).

103. See *id.* at 63 (providing a background for the study and explaining that at least one member of the Governing Council of UNIDROIT thought that the international aspects of security interests in mobile equipment should be explored).

national approaches to the recognition of foreign security interests in movable property often result in financing organizations encountering difficulties when dealing with issues of recognition and enforcement of their security interests in a new *situs*, thus leading to the extension of secured financing.<sup>104</sup> The *lex situs* is the law governing rights *in rem* in movables outside North America.<sup>105</sup>

The rule that seems simple ceases to be so when the movables acquire a new *situs*<sup>106</sup> or, in other words, when the movables subject to a security interest validly created under the law of State A are moved to State B.<sup>107</sup> This leads to the question of whether a security interest acquired in State A has extra-territorial effects even though the security interest, if taken in State B, would be invalid.<sup>108</sup> The problem, however, does not stop there. If the security interest is recognized as valid under the law of State B, another question of whether the interest is displaced by the *in rem* rights acquired in the property under the law of the new *situs* arises.<sup>109</sup> This has important implications for issues like priority. The prevailing expert opinion is an affirmative, but qualified, answer to both questions.<sup>110</sup>

Under common law, the foreign security interest is treated as valid in the new *situs* unless and until it is displaced by a new title acquired in accordance with the new *situs*.<sup>111</sup> In contrast, some continental European legal systems appear to hold that the continued

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104. *See id.* at 69 (detailing the focus of the Cuming Study and explaining the difficulties that arise when mobile equipment subject to a security interest in one jurisdiction is moved into another jurisdiction).

105. *See id.* at 69, 79 (noting that difficulties in enforcing foreign security interests in movable property can arise due to change of situs).

106. *See id.* at 79 (noting the complexity of the *lex situs* rule when chattels are transferred among states).

107. *See* Cuming, *supra* note 101, at 79 (explaining how the *situs* of a movable can change).

108. *See id.* (questioning the extra-territorial effects of an acquired security interest).

109. *See id.* at 81 (noting that most experts answer with a qualified affirmative).

110. *See id.* (citing ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 70-73, 76-78, 86 et seq. (Vol. 4 1958)).

111. *See* ALBERT VENN DICEY & JOHN HUMPHREY CARLILE MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 677 (Lawrence Collins, et al. eds., 12th ed., vol. 2 1992) (defining *lex situs*).

existence of a security interest right created under the original *situs* is dependant upon whether the foreign security interest can be incorporated into the municipal law of the new *situs*.<sup>112</sup> Theoretically, these different approaches mean that the common law recognizes forms of security interest that do not fit within the traditional common law categories, while the continental European approach restricts the parties to a proscribed number of *in rem* interests, often resulting in a refusal to recognize mortgages on movables.<sup>113</sup> Common law courts are more willing to look to the original *lex situs* to determine the nature of a foreign security interest before deciding how it is to be treated, and these courts have less difficulty in accommodating most foreign security interests because of the flexible requirements for a valid security interest in an equitable mortgage or equitable charge.<sup>114</sup> The continental European approach, in contrast, may lead to the law of the second *situs* not recognizing a security interest as valid if it does not have an analogous counterpart that can be accommodated in its own law.<sup>115</sup> Even if it does recognize the security interest as valid, its efficacy is open to two possibilities. The security interest would have the same *inter partes* effect and priority status in the second *situs* as it has under the law of the *situs* where the security interest was created. Alternatively, the security interest would be transposed and would have the same status as that enjoyed by similar types of security interests under the law of the second *situs*.<sup>116</sup>

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112. See Cuming, *supra* note 101, at 81 (explaining the different approaches towards foreign security interests in movables in continental European legal systems and common law systems).

113. See *id.* (noting the conceptual differences between the continental European legal systems and the common law system).

114. See *id.* at 83 (claiming that common law systems should be more inclined to seek guidance from the original *lex situs* to determine the characteristics of a foreign security interest).

115. See *id.* (noting that the continental European approach is more restrictive than the common law); see also Theodor J.R. Shilling, *Some European Decisions on Non-Possessory Security Rights in Private International Law*, 34 INT'L & COMP. L.Q. 87, 97-98 (1985) (analyzing the methods used by various continental European countries to recognize foreign security rights).

116. See Cuming, *supra* note 101, at 85 (discussing what effects the second *situs* is willing to give to foreign security interests).

The latter approach appears to be the one employed in many countries.<sup>117</sup> The domestication of foreign security interests elicits two issues: first, to find an institution in the new legal system that is equivalent to the foreign security interest; and second, and probably more difficult, the task of adapting the foreign to its domestic counterpart.<sup>118</sup> Transposition creates uncertainty where analogies between foreign security interests and those recognized by the municipal law of the second *situs* are only very approximate because the security interest may end up with rights greater or less favorable than that accorded to it under the law of the *situs* that created the security interest.<sup>119</sup> Judicial practice in some countries is evidence that the attitude of the courts in the receiving country is strongly influenced by the forum's general approach to security interests, as evidenced by Germany's very broad reception of foreign security interests.<sup>120</sup> In contrast, Austrian courts have recognized only those German security interests that complied with Austrian law, but generally rejected those that were incompatible.<sup>121</sup> The very restrictive French attitude to security interests has resulted in a general denial of effect to foreign security interests if domestication has not been undertaken.<sup>122</sup> A U.N. study concluded that:

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117. See Shilling, *supra* note 115, at 98-104 (discussing the procedures used by numerous European states to implement foreign security interests).

118. See Commission on International Trade Law, U.N. Doc. A/CN.9/SER.A/1977 [hereinafter Yearbook] (claiming that the domestication of foreign security interests gives rise to two separate questions, finding the appropriate legal institution in the new *situs*, and then adjusting the foreign and domestic security interests so that they are complementary). The only legislative rule that the study found for domestication was in the Canadian (Uniform) Conditional Sales Act, adopted in most of the Anglophonic provinces. *Id.*

119. See Cuming, *supra* note 101, at 85 (noting that transposition may result in greater rights in the second *situs* than granted in the original *situs*). This is especially so where the law of the first *situs* is more willing to give scope to non-possessory security interests than the law of the second *situs*. *Id.*

120. See Yearbook, *supra* note 118, at 214 (demonstrating that the German system has a liberal approach towards the acceptance of foreign security interests).

121. See *id.* (noting that Austrian courts limited the efficacy of German security interests to those that complied with Austrian law).

122. See *id.* (claiming that the French system is very restrictive and unlikely to give effect to foreign security interests that are not domesticated).

First, the chances of domesticating a foreign-created security interest depend a great deal on the spirit and structure of the substantive rules governing security interests at the new location of the encumbered goods. The more developed and liberal this law is, the easier the domestication of foreign security interests will be. Thus, the all-embracing, uniform security interest of the United States should be particularly open in receiving any foreign security interest whatsoever. On the other hand, the widespread French spectrum of the varied, specific security interests will create considerable obstacles to the domestication of foreign security interests . . . . Thirdly, on a technical level domestication should achieve continuity between the foreign and the domestic security interest. Domestication is only the transformation of a pre-existing security, which preserves its identity, although it may change its form and effects. Wherever the time of creation of a security interest is relevant (e.g. in the rules on fraudulent preferences), the original creation at the foreign *situs* should be relevant.<sup>123</sup>

In the United States, under Article 9-103(3) of the Uniform Commercial Code, the law, including the conflict of laws rules, of the jurisdiction where the debtor is located governs the perfection and the effect of perfection and non-perfection of a security interest in, “goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and the like, if the goods are equipment or inventory leased or held for lease.”<sup>124</sup> The debtor is “deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence.”<sup>125</sup> If the debtor changes his location, perfection continues until the expiry of four months after the change or until perfection ceases in the first jurisdiction, whichever period expires first.<sup>126</sup> The law applicable to the issues associated with the validity of a security interest in mobile equipment is not the *lex situs* of the equipment at the date the security interest is created. The controlling law, including the conflict of laws rules, is determined by the location of the debtor;

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123. *Id.*

124. U.C.C. § 9-103(3) (1978).

125. *Id.* § 9-103(3)(c).

126. *See id.* § 9-103(3)(e) (claiming that the efficacy of a foreign security interest expires four months after a change in the debtor’s location).

thus, this represents a rejection of the *lex situs* rule.<sup>127</sup> The law of the debtor's location governs not only issues associated with the validity of a security interest in mobile equipment, but also priority and public disclosure of such an interest.<sup>128</sup> The underlying premise is that a third party who deals with a debtor in possession of the equipment will prefer to conduct a search in the jurisdiction where the latter is located rather than the *situs* of the equipment.<sup>129</sup>

At its April 1989 meeting, the Governing Council of UNIDROIT instructed the Secretary General to prepare, in conjunction with Professor Cuming, a questionnaire to be sent to business and financial circles to elicit the empirical information required before a final decision is made as to whether UNIDROIT should proceed further with work directed toward the preparation of a draft convention.<sup>130</sup> Approximately one thousand copies of the questionnaire were sent out with Professor Cuming's report, typically to banks and financial institutions, confederations of industry, major industrial concerns, and airlines. Ninety-three replies were received, from twenty-nine countries and five international bodies. The categories of respondents featured have tremendous significance in light of much that will be said, and accordingly must be borne in mind. Of the respondents, there were fifty-two lenders, eight sellers, ten buyers, one foreign trade corporation, two governmental agencies, ten law teachers, and twelve practicing

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127. *See id.* § 9-103(3)(b) (noting that the law of the jurisdiction where the debtor is located governs the efficacy of the security interest).

128. *See* Cumings, *supra* note 101, at 103 (claiming that the American system rejects *lex situs* as the applicable law for security interests in mobile equipment).

129. *See id.* (arguing that U.S. laws assume that third parties will understand that they must know the laws of the jurisdiction where the debtor is located, not the jurisdiction where the equipment is located).

130. *See* UNIDROIT, International Regulation of Aspects of Security Interests in Mobile Equipment: Questionnaire, Study LXXII-Doc. 2 (1989) (on file with the *American University International Law Review* ("AUILR")) (noting the need to test five assumptions before proceeding with the preparation of the convention). The assumptions are that (1) valuable mobile equipment is moved across national frontiers; (2) the laws of most nations that deal with security interests are inadequate, (3) the UNIDROIT Convention can address the inadequacies, (4) international experts in the field support the initiatives of the UNIDROIT Convention, and (5) that financing organizations will be more willing to provide financing for high cost mobile equipment if there were accepted international standards regarding the matter. *See id.*

lawyers.<sup>131</sup> A very interesting response indicated that the largest group of debtors were domestic buyers who used the movables principally within the State where they were purchased and rarely transported them elsewhere.<sup>132</sup> Most of the respondents stated that secured creditors rights were recognized either occasionally or frequently by the law of other States to which they have been taken.<sup>133</sup> The Analysis of replies is rather sketchy in the answer to the most crucial question:

Question 5. The lack of an international system of law providing that the rights of secured creditors created under the laws of one state will be recognized in other States:

- a. is of no significance to sellers or buyers of the high cost movables;
- b. is of no significance to lending organizations which deal with businesses that acquire movables that are moved from one state to another;
- c. results in sellers refusing to sell on a secured credit basis movables that are of a type that are moved from one state to another;
- d. results in lenders refusing to lend money on the security of movables that are of a type that are moved from one state to another;
- e. is a negative factor in decisions on the part of sellers of high cost movables to sell on credit movables that are of a kind that are moved from one state to another;
- f. is a negative factor in decisions on the part of lenders to make loans where the security for the loans consists of movables that are of a kind generally moved from one state to another;
- g. results in higher credit charges for buyers of movables that are of a kind generally moved from one state to another and/or higher loan charges for borrowers which offer such movables as collateral for loans;
- h. has the following effects: (please specify).<sup>134</sup>

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131. See UNIDROIT, Analysis of the Replies to the Questionnaire on an International Regulation of Aspects of Security Interests in Mobile Equipment, Study LXXII-Doc. 3 (1991) (on file with AUILR) (concluding that “the types of legal problems arising in the context of the international recognition of security interests in mobile equipment could be adequately addressed through an international convention containing a mix of choice of law and substantive rules the implementation of which would not require sweeping changes in the municipal law of most States”).

132. *Id.* at 5.

133. *Id.* at 6.

134. *Id.* at 6-7.



The analyzed answer provided by the UNIDROIT Secretariat is:

Many respondents considered the lack of an international system of law in this area a negative factor in decisions by lenders to sell on credit or take security interests in movables of a kind generally moved from one State to another and asserted that this resulted in higher credit charges. One respondent (a New Zealand buyer) cited the narrowing of available markets and higher transaction costs. This point was also raised by a U.K. lender.<sup>135</sup>

This author's attempts to find out how many came to naught, as the actual replies were untraceable in Rome! The importance of this data cannot be overemphasized. Given the fact that the majority of debtors used the movables principally within the State where they were purchased and infrequently transported them elsewhere, and given that the majority of respondents were lenders and sellers, how many could this "many" be? Further, such an assertion can have very little persuasive value unless it emanates from debtors or buyers, as it would be absurd for a lender to suggest to the debtor that he lends at an excessive price!

The value of credit is that which debtors are willing to pay, and unless they assert that they do not receive adequate value, credit price cannot be said to be excessive. Moreover, the replies do not indicate any significant complaint from debtors that they are unable to obtain high cost equipment because of the unavailability of credit. The only assertion stems from lenders, shouting themselves hoarse, that buyers, irrespective of what they are saying, actually need credit, which the former will not provide, so long as there are deficient laws. Ever after, the assertion that the absence of a legal regime governing security interests in mobile equipment created problems for sellers and lenders financing such equipment. It constituted a negative factor in the latter deciding whether to provide finance on the security of mobile equipment, and it is parroted like a mantra.<sup>136</sup>

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135. *Id.* at 7.

136. See UNIDROIT, Restricted Working Group to Examine the Feasibility of Drawing Up Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment, Report LXXII-Doc. 5 (1992) (on file with AUILR) (explaining that the Working Group concluded that the absence of an international legal regime created problems for sellers and those financing mobile equipment).

This is a classic case of repetition creating the truth. Further, the kind of responses that were obtained to this question should have conditioned the whole process of harmonization as this forms the *raison d'être* for engaging in the process in the first place. In the absence of a categorical assertion by debtors and buyers that they did not have access to movable equipment at reasonable rates under the present regime, the veracity of the Cuming study's conclusion that the existence of an international convention should have an important positive effect on the availability of credit to owners of equipment is open to question. It is not this author's case that a draft convention is not desirable. The crux of the argument is that, the need for harmonization could have been better demonstrated.<sup>137</sup>

Model laws on secured transactions were sponsored by the World Bank in a number of Central and South American jurisdictions.<sup>138</sup> The European Bank for Reconstruction and Development ("EBRD") had been working on a model law for security rights, designed to assist Central and Eastern European countries in their attempts to draft their own securities legislation, and this was being pursued with great urgency to attract investment.<sup>139</sup> The first session of the UNIDROIT Subcommittee for the Preparation of First Draft noted,

[A]ll these initiatives pointed up the marriage of common law and civil law ideas already taking place on this subject. It would of course be important for UNIDROIT . . . to build on these regional initiatives. The usefulness . . . might in particular be seen in its ability to incorporate the

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137. See UNIDROIT, Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Revised Draft Articles of a Future UNIDROIT Convention on International Interests in Mobile Equipment, Draft Articles LXXII-Doc. 36 (1997) (on file with AUILR) (relating Mr. Sommer's comments on the revised draft articles as proposed by the drafting group at its fourth session in July 1997, rather pointedly states: "This article (2(1)) reads as if the convention were primarily drafted for big business. I thought that the first intention was to help the medium sized and small companies working in Europe without commercial frontiers, but with legal boundaries").

138. See, e.g., Todd Nelson, *Secured Financing Project* (noting that the World Bank is currently assisting Mexico in attracting investment), at <http://www.natlaw.com/pubs/sfproj.htm> (last visited Mar. 4, 2003).

139. See EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, SECURED TRANSACTION PROJECT (explaining the model laws developed by the EBRD regarding security rights in Central and Eastern Europe), at <http://www.ebrd.com/st.htm> (last visited Mar. 4, 2003).

lessons to be drawn from the operation of these first generation laws and to offer these to the wider world business community. UNIDROIT could also play an important role in filling a need that had manifested itself as these various regional initiatives had developed, namely in bringing together the various organizations engaged in these efforts so as to ensure the maximum coordination between these various projects.<sup>140</sup>

Replies dealing with the law applicable to the enforcement of security interests did not indicate overwhelming support for any one of the possibilities suggested, *viz*, a party to the proposed convention would agree to recognize the enforceability of a security interest in mobile equipment as provided in the law of the debtor's principal place of business subject to two qualifications: (1) recognition need not extend to remedies other than seizure and sale of the equipment, and (2) all procedural matters associated with seizure and sale would be governed by the law of the state concerned.<sup>141</sup> A majority supported the formulation of a set of substantive rules to be included in a convention, while a significant number of respondents wanted the matter to be left to the applicable law.<sup>142</sup> Comparing this with Airbus Industry's suggestions that the Convention set forth practical steps enabling the recovery of an asset, and the fundamental premise of the Economic Impact Assessment ("EIA") that speedy recovery is absolutely essential for monumental financial gains, makes interesting reading.

All throughout the drafting of the proposed Convention, the aircraft lobby generated a tremendous noise about the possible mind-boggling economic advantages if the Convention is pushed through. The lure of the lucre seems to have had so much blinding effect on all the participants that no questions addressed the veracity of these assertions. The EIA conducted by INSEAD and the New York University Salomon Center, found that the trading liquidity of

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140. UNIDROIT, Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Sub-Committee for the preparation of a First Draft, Report LXXII-Doc. 12, at 7 (1994).

141. *See* UNIDROIT, Restricted Exploratory Working Group to Examine the Feasibility of Drawing Up Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Basic Issues identified in responses to the Questionnaire on an international regulation of aspects of security interests in mobile equipment, Report LXXII-Doc. 4, at 9 (1992).

142. *See id.*

bonded debt is generally higher than tradable bank debt. They felt that this suggested a large potential investor appetite for asset-backed securities related to aircraft financings and large potential benefits in terms of the cost and availability of credit in this highly capital-intensive sector.<sup>143</sup> However, this would happen only if governments incorporated asset-based financing principles into their legal regimes, because its attractiveness is premised on the assumption that the law lowers the credit risk.<sup>144</sup>

The shape that the economic impact assessment takes is very revealing. First, it was conducted at a fairly advanced stage in the harmonization process, and in many ways could have served as a *fait accompli*. Although work on the draft convention started in the early 1990's, the EIA came only in September 1998, by which time a basic framework had already evolved. Interestingly, after establishing that asset-based financing models are advantageous, the EIA concluded that the great economic returns are conditional on particular kinds of legal regimes! Any derogation from the desirable regime reduces the figures to a point of unattractiveness. The study does not demonstrate that a case of a non-asset-based financing model is costlier than an asset-based one. It assumes so from general principles. It does not estimate the economic impact of legal regulation *per se*, *i.e.*, it does not demonstrate the benefits of a convention, without tying it to contentious elements of such a convention.

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143. Anthony Saunders & Ingo Walters, *Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment Through the Aircraft Equipment Protocol: Economic Impact Assessment*, reprinted in 23 AIR & SPACE L. 339 (1998) (hereinafter EIA).

144. *Id.* at ix (noting that the scale of securitization of commercial aircraft-related assets is very small, and the packages are invariably complex, and incorporate various guarantees to the creditors to protect against default on their leases and other payments). One very important fact that the study points out is that many U.S. originated packages are rated and become marketable because of the protection accorded to investors by section 1110 of the U.S. Bankruptcy Code, whereby the creditors may repossess the aircraft and associated equipment within 60 days of the debtor's filing for bankruptcy in the event that the debtor does not resume payments. *Id.* This is related to the cost of external asset-based financing significantly, because international credit rating agencies will give a rating enhancement of up to two notches to debt issues so protected, and this has a major effect on the cost of funds available. *Id.*

The EIA examines the draft convention framework to see if it promotes asset-based financing under three heads. First, the “transparent priority principle,” which means that the lessor must be able to determine whether its proprietary interest in a financed or leased asset is superior to all potential competing claims against the asset.<sup>145</sup> The authors opine that the basic convention rules create an international registration system and concomitant priority framework that are consistent with the transparent priority principle. However, the EIA accepts that there are undoubtedly strong reasons for countries to designate certain creditors as preferred nonconsensual creditors.<sup>146</sup> Such designations should be limited to ensure the maximum economic benefit of the proposed convention/aircraft protocol.<sup>147</sup> The only explanation is that the more limited this category is, the more asset-based financing principles will be respected, and thus risk/return assessments will reflect such principles.<sup>148</sup> The EIA provides no examination of the economic impacts of priorities to nonconsensual creditors, and no conclusive establishment that these are outweighed by giving priority to consensual creditors.

Second, the “prompt enforcement principle” empowers lessors to take possession and sell or redeploy aircraft equipment in case of default. There are two kinds of remedies, “self help” and “judicially assisted” speedy relief. The EIA stresses that the applicability of one or both of these sets of optional convention rules are essential to maximizing the potential financing-related benefits, especially in countries where the risk of enforcement delays is a key factor.<sup>149</sup> The EIA then points out a “problematic ambiguity” in Article 15 of the then-proposed Convention,<sup>150</sup> which suggests that the listed default remedies need not be cumulative, and states:

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145. *See id.* at xi.

146. For example, tax creditors, repairers, etc.

147. EIA, *supra* note 143, at xi-xii.

148. *Id.* at xii.

149. *Id.*

150. *Id.* The EIA states that “if not clarified in a manner consistent with the prompt enforcement principle, it would reduce such financing related benefits.” *Id.*; *see also* CIIME, *supra* note 2, art. 8 (providing the remedies of a chargee). The Article states:

It is integral to our analysis that the full set of remedies, including the ability to sell or redeploy aircraft equipment and realize and apply the resulting proceeds, are promptly available to financiers and lessors in countries that accept the optional expedited relief rule. To the extent economic considerations are a primary consideration, that Article should be reformulated to ensure that *any and all* (emphasis that of the authors of the EIA) specified default remedies are promptly available.<sup>151</sup>

Yet again, the EIA speculates as to what the Convention should look like, rather than making an impact assessment. Throughout the EIA, the absence of any apparent terms of reference blurs the dividing line between an assessment and an opinion. Furthermore, many of the EIA's opinions appear to lack sufficient empirical data.

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1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:
    - (a) take possession or control of any object charged to it;
    - (b) sell or grant a lease of any such object;
    - (c) collect or receive any income or profits arising from the management or use of any such object.
  2. The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.
  3. Any remedy set out in sub-paragraph (a), (b) or (c) of paragraph 1 or by Article 13 shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.
  4. A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:
    - (a) interested persons specified in Article 1(m)(i) and (ii); and
    - (b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.
  5. Any sum collected or received by the chargee as a result of exercise of any of the remedies set out in paragraph 1 or 2 shall be applied towards discharge of the amount of the secured obligations.
  6. Where the sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall distribute the surplus among holders of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, and pay any remaining balance to the chargor.

*Id.*

151. EIA, *supra* note 143, at xii.

Third, the EIA states that the treatment of a financier or lessor in the context of bankruptcy or insolvency proceedings is the litmus test of asset-based financing. The optional convention rule denoted the “international insolvency rule” will permit countries to put in place a system consistent with the true asset-based financing principles.<sup>152</sup> This therefore assists in internationalizing the types of financing benefits and alternatives available to U.S. airlines under Section 1110.<sup>153</sup> Yet again, the EIA fails to offer supporting facts, stating

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152. See UNIDROIT, Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Revised Draft Articles of a Future UNIDROIT Convention on International Interests in Mobile Equipment, Study LXXII-Doc. 36 Add. 3 (1997) (on file with AUILR) (providing optional guidelines for insolvency proceedings in Articles XIII-XVII that shall operate in tandem with the practices of the obligor’s “primary insolvency jurisdiction”). Which are distinguished from quasi-asset-based financing, where important contractual, proprietary or priority rights of a creditor are invalidated or materially qualified or modified when the debtor’s assets are being liquidated or reorganized. See, EIA, *supra* note 143, at xii.

153. EIA, *supra* note 143, at xiii, *see also* § 1110. - Aircraft equipment and vessels:

(a) (1) Except as provided in paragraph (2) and subject to subsection (b), the right of a secured party with a security interest in equipment described in paragraph (3), or of a lessor or conditional vendor of such equipment, to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract, and to enforce any of its other rights or remedies, under such security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment, is not limited or otherwise affected by any other provision of this title or by any power of the court.

(2) The right to take possession and to enforce the other rights and remedies described in paragraph (1) shall be subject to section 362 if - (A) before the date that is 60 days after the date of the order for relief under this chapter, the trustee, subject to the approval of the court, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract; and

(B) any default, other than a default of a kind specified in section 365(b)(2), under such security agreement, lease, or conditional sale contract -

(i) that occurs before the date of the order is cured before the expiration of such 60-day period;

(ii) that occurs after the date of the order and before the expiration of such 60-day period is cured before the later of -

(I) the date that is 30 days after the date of the default; or

(II) the expiration of such 60-day period; and

that, "countries will be asked to weigh the very clear economic

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(iii) that occurs on or after the expiration of such 60-day period is cured in compliance with the terms of such security agreement, lease, or conditional sale contract, if a cure is permitted under that agreement, lease, or contract.

(3) The equipment described in this paragraph -

(A) is -

(i) an aircraft, aircraft engine, propeller, appliance, or spare part (as defined in section 40102 of title 49) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that, at the time such transaction is entered into, holds an air carrier operating certificate issued pursuant to chapter 447 of title 49 for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo; or

(ii) a documented vessel (as defined in section 30101(1) of title 46) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a water carrier that, at the time such transaction is entered into, holds a certificate of public convenience and necessity or permit issued by the Department of Transportation; and

(B) includes all records and documents relating to such equipment that are required, under the terms of the security agreement, lease, or conditional sale contract, to be surrendered or returned by the debtor in connection with the surrender or return of such equipment.

(4) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the approval of the court, to extend the 60-day period specified in subsection (a)(1).

(c) (1) In any case under this chapter, the trustee shall immediately surrender and return to a secured party, lessor, or conditional vendor, described in subsection (a)(1), equipment described in subsection (a)(3), if at any time after the date of the order for relief under this chapter such secured party, lessor, or conditional vendor is entitled pursuant to subsection (a)(1) to take possession of such equipment and makes a written demand for such possession to the trustee.

(2) At such time as the trustee is required under paragraph (1) to surrender and return equipment described in subsection (a)(3), any lease of such equipment, and any security agreement or conditional sale contract relating to such equipment, if such security agreement or conditional sale contract is an executory contract, shall be deemed rejected.

(d) With respect to equipment first placed in service on or before October 22, 1994, for purposes of this section -

(1) the term "lease" includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

(2) the term "security interest" means a purchase-money equipment security interest.



benefits of this provision with the competing economic and noneconomic values underlying their existing rules.”<sup>154</sup> As stated, the EIA fails to describe the “very clear economic benefits.”

The EIA continues to make generalizations. For example, it states that the proposed Convention will potentially allow developing and emerging country airlines improved access to secured loans and leases on a commercial basis. The EIA further asserts that it will enhance the prospects of their access to international capital markets. The EIA continues by noting a number of considerations that financiers and other risk assessors will take into account when making determinations relating to the continuing need for sovereign guarantees. In other words, there is no guarantee that the cost of credit to nations who already pay a high cost is likely to be significantly reduced. It could instead create a win-win situation for lenders. On one hand, they would have speedy recourse to the equipment in case of default. On the other hand, they need not lower credit prices for those who pay high costs currently.

The EIA notes that the greater reliance on asset-backed aircraft finance instruments, made possible by the proposed convention/aircraft protocol, will, to varying degrees, divert financing that would otherwise require sovereign bank credits or sovereign international bond issues into the private sector.<sup>155</sup> By stating that there would be tremendous savings made as a consequence of the proposed Convention, the study assumes that there would be an automatic change in credit ratings as a result of the convention’s implementation. If, as is likely, this does not happen, poorer countries would be stuck with higher credit costs while surrendering to lenders their existing legal regimes in favor of a special swift system that treats aircraft differently. There can be no benefit that accrues to anyone but the lender in this scenario.<sup>156</sup>

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154. EIA, *supra* note 143, at xiii.

155. *Id.* The extent of that diversion is predicated on the facts and circumstances relating to residual transaction risk. This diversion derived capital can be used *inter alia*, to reduce the sovereign external debt levels with the flow-through reductions in debt-service burdens, or for future borrowings to fund other development projects.

156. See UNIDROIT, Governing Council, 77th session, Rome, 16-20 February 1998: Extract from the Report on the Session, Study LXXII-Doc. 40 (1998) 23-24 (including comments from the Director-General of the Chinese Ministry of Foreign

A memorandum prepared jointly by Airbus Industry and Boeing on behalf of the aviation working group revealingly states:

To be materially beneficial, the basic (non-exclusive) remedies under the proposed convention of possession/repossession/seizure, judicially supervised sale and judicial sale set forth in the summary report need to be available within an expedited time frame, and *notwithstanding any contrary provisions of national law*. We recommend, therefore, that the proposed convention provide a mandatory timetable in which courts having jurisdiction under the proposed convention would be required to determine issues brought before them relating to these basic remedies. In particular, we recommend that such courts be required to issue non-appealable, final decisions in respect of the availability of (a) the grounding of the aircraft (pending further litigation procedures) no later than five days, and (b) the right of the financier/lessor to repossession/seizure, or to a judicially supervised sale/judicial sale, of the aircraft no later than thirty days, in each case of the date on which the application is made to the court with *in rem* jurisdiction over the aircraft.<sup>157</sup>

The supplied rationale is that the right to gain prompt access to the asset is the *sine qua non* of asset-based finance, and without addressing timing considerations the proposed convention provides a theoretical right which lacks utility.<sup>158</sup> Airbus Industry and Boeing

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Trade & Economic Cooperation). Ms. Yuejiao Zhang pointed out that the aircraft market is a supplier's market in which buyers were rarely free to negotiate. *Id.* at 23. For this reason, Zhang called for the Convention's preamble to include financing cost reduction as an objective. *Id.* She also discussed how the additional expenses of "double or triple guarantees" that suppliers required from China and other countries were "passed on to consumers." *Id.* at 24. Zhang asserted that including the "principle of aircraft suppliers and financiers relying on the value of the asset rather than Government guarantees" was "crucial for the future Convention's acceptability to Governments," particularly in light of the Convention's several obligations. *Id.* at 24.

157. See UNIDROIT, Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Subcommittee for the Preparation of First Draft, Study LXXII-Doc. 16 (1995) 16-17 (suggesting changes and additions to the remedies section of the Convention). The Airbus Industry and Boeing Company continue that "for commercial reasons, these remedies must be non-exclusive" in that "additional remedies available under the selected law...or under the private international law rules of the forum...must also be available to the transaction parties." *Id.* at 16 n.36.

158. See *id.* at 17 (claiming that timely access to the asset is "the most fundamental commercially oriented right" of the secured financier/lessor).

state that the recommendations regarding timing of final court decisions are "designed to ensure that the proposed convention's important basic substantive remedies are not undercut by Byzantine implementation rules or intended or unintended delays resulting from national procedural rules."<sup>159</sup> They argue that national rules regarding deregistration of aircraft and their export are potential obstacles to the basic commercial rights of possession and sale.<sup>160</sup> The memorandum even more brazenly suggests that the Convention of 1993 for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft,<sup>161</sup> be expressly rejected by the proposed convention!<sup>162</sup>

The views of the aircraft industry took a different turn in its memorandum on December 16, 1996.<sup>163</sup> They recommended that the authors of the proposed legal instrument modify the document to

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159. *See id.* at 18 (asserting that "government intervention or cooperation" is essential in addressing timing considerations).

160. *See id.* (adding that the availability of deregistration and export are "essential components" of the rights of possession and sale).

161. *See* UNIDROIT, Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Subcommittee for the Preparation of First Draft, Study LXXII-Doc.16 (1995) (preventing the seizure of an aircraft where such seizure would seriously interrupt public, commercial or state transportation, and conflicts with the remedies that are desired). XXIV — RELATIONSHIP WITH THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE PRECAUTIONARY ATTACHMENT OF AIRCRAFT:

1. The Convention shall, for a Contracting State that is a Party to the *Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft*, signed at Rome on 29 May 1933, supersede that Convention as it relates to aircraft, as defined in this Protocol.

2. A Contracting State Party to the above Convention may declare, at the time of ratification, acceptance, approval of, or accession to this Protocol, that it will not apply this Article.

162. *See* UNIDROIT, Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Subcommittee for the Preparation of First Draft, Study LXXII-Doc. 16 (1995) 17 n.40 (explaining that the Precautionary Arrest of Aircraft prohibits the "seizure of aircraft where such seizure would seriously interrupt public, commercial or state transportation").

163. *See* UNIDRIOT, Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Revised Draft Articles of a Future UNIDROIT Convention on International Interests in Mobile Equipment, Study LXXII-Doc. 32 (1996) (including that the group's goal in making the recommendations was a "commercially acceptable Convention").

reflect the same compromises present in a base/umbrella agreement. For example, the document should set forth the basic legal framework applicable to all categories of equipment and be accompanied by equipment-specific protocols. Such protocols should be established from time to time, containing rules specifically applicable to that category of equipment.<sup>164</sup>

The rationale for this change is demonstrated by reviewing the concerns of the members of the second session of the 1996 Study Group Concern. The rationale was expressed by certain members of the Study Group, lest Article 13<sup>165</sup> of the draft aviation text be seen by states as unduly interfering in the exercise of their judicial

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164. *Id.* at 2.

165. Article X in the Aircraft Protocol as finally adopted: ARTICLE X — MODIFICATION OF PROVISIONS REGARDING RELIEF PENDING FINAL DETERMINATION:

1. This Article applies only where a Contracting State has made a declaration under Article XXX(2) and to the extent stated in such declaration.
2. For the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.
3. Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d): “(e) if at any time the debtor and the creditor specifically agree, sale and application of proceeds therefrom”, and Article 43(2) applies with the insertion after the words “Article 13(1)(d)” of the words “and (e).”
4. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.
5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.
6. With regard to the remedies in Article IX(1):
  - (a) they shall be made available by the registry authority and other administrative authorities, as applicable, in a Contracting State no later than five working days after the creditor notifies such authorities that the relief specified in Article IX(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and
  - (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.
7. Paragraphs 2 and 6 shall not affect any applicable aviation safety laws and regulations.

sovereignty, and Article 14<sup>166</sup> as unduly interfering with their national insolvency laws, in direct contrast with the philosophy

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166. Article XI in the Aircraft Protocol as adopted: ARTICLE XI — REMEDIES ON INSOLVENCY

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3).

*Alternative A*

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:

(a) the end of the waiting period; and

(b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

3. For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

4. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

7. The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8. With regard to the remedies in Article IX(1):

(a) they shall be made available by the registry authority and the administrative authorities in a Contracting State, as applicable, no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

underlying Article 19(6).<sup>167</sup> These concerns were justified by the comments submitted by the Government of Japan in 1999, wherein it stated that “imposing under [A]rticle X (1) a 30 day deadline (or any deadline) for obtaining judicial relief would be inconsistent with concepts of civil procedure in Japan and, therefore, unacceptable.”<sup>168</sup>

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11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

12. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.

13. The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article.

*Alternative B*

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXX(3) whether it will:

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of the aircraft object, in accordance with the applicable law.

3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

5. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the aircraft object but fails to do so, the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

6. The aircraft object shall not be sold pending a decision by a court regarding the claim and the international interest.

167. See UNIDROIT, *Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment*, Study LXXII – Doc. 27 (1996) 37 (on file with AUJLR) (noting that “nothing in the priorities rules of the future Convention was intended to interfere with any special rules of local insolvency law regarding the avoidance of transactions); see also Study LXII- Doc. 40.

168. UNIDROIT, *Committee of Governmental Experts for the Preparation of a Draft Convention on International Interests in Mobile Equipment and a Draft Protocol on Matters Specific to Aircraft Equipment*, Study LX11- Doc.49 / (1999) 3.

In particular, it was feared that courts might experience difficulty in seeking to comply with the very short time limits allowed for the completion of judicial proceedings under Article 13, a factor that would be predicated upon the conduct of litigation in a case. Consequently, support developed for creating a method by which the objectives could be formulated in a manner that would not offend state sensibilities.<sup>169</sup>

As the Aviation Working Group (“AWG”) notes, the most fundamental of asset-based financing principles is the principle that, in exchange for a reduced interest or rental rate, a secured party/lessor will have the ability upon default to promptly take possession of the equipment and convert it into proceeds for application against the obligations secured. In many instances, the international legal framework applicable to aircraft equipment financings is in tension with this principle.<sup>170</sup> To support what has been said by this author earlier,

[o]ur highest priority in participating in the proposed convention is to ensure that contracting states have the option of selecting rules which embody this fundamental principle, thereby permitting transaction parties in their countries to take greater advantage of international asset-based financing in connection with the acquisition of unprecedented amounts of required aircraft equipment . . . . This fundamental principle is but abstract rhetoric if the actual timing element is undefined and potentially open-ended. *In direct terms, if this timing element is not addressed, both inside and outside the insolvency contexts, the proposed convention will have a marginal impact on credit, leasing and lending decisions and will thus be of marginal benefit to the air transport industry.*<sup>171</sup>

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169. *See id.* (explaining that as for Article 13, the Study Group decided that the most appropriate solution in the circumstances was to empower the chargee, seller or lessor to apply to the court for interim relief or similar provisional measures). Even though there had been widespread agreement on the principle of the solution adopted by the Study Group, Mr. Wool, the representative of the aircraft lobby, had expressed reservations on the position of the Aviation Working Group. Therein perhaps lies the story of the Protocol recommendation. *Id.*

170. *See* UNIDROIT, *Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment*, Study LXII- Doc. 32, Add. 2, 2 (1996).

171. *Id.* at 2-3 (emphasis added).

The Study Group at its fourth session in July 1997 agreed to adopt an umbrella structure followed by equipment specific protocols.<sup>172</sup>

Finally, in November 2001, the Convention and Aircraft Protocol was adopted, close to the form that the aviation lobby wanted. The aviation lobby's clout is evidenced by the fact that twenty-four nations signed the Protocol less than a year after its adoption.<sup>173</sup>

## CONCLUSION

International commerce demands international law. As traditional notions of sovereignty cede ground to a dominant "global village" idea, international legal instruments will only burgeon in number. Industry has played a forceful role in the process of creating international law, as evidenced by the influence that the aircraft lobby had in the formulation of the CIIME.<sup>174</sup> Such a role could not have been imagined even a decade ago. Increasingly, even in traditional areas such as property law, industry is taking the lead. This is similar to industry's influence in the area of technology, where industry almost exclusively developed the rules. Only industry can inject speed into international law making by using their financial muscle to overcome any qualms that national lawmakers may have. This is just the beginning. Sovereignty in lawmaking is dying fast—and silently at that.

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172. See UNIDROIT, *Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment*, Study LXXII – Doc. 36 (1997).

173. See International Institute for the Unification of Private Law, *Status of UNIDROIT Conventions* (noting the states that have signed the protocol: Burundi, Chile, China, Congo, Cuba, Ethiopia, France, Ghana, Jamaica, Jordan, Kenya, Lesotho, Nigeria, South Africa, Sudan, Switzerland, Tonga, Turkey, United Kingdom, Tanzania, Italy, Senegal, Panama, and Germany), available at <http://www.unidroit.org/english/implement/i-main.htm> (last visited Apr. 5, 2003).

174. This presupposes that there is a demand for international law in that particular area, as industry being inherently bottom-line oriented is unlikely to invest money and time on fruitless ventures. There is another great advantage to be had in involving industry extensively in the crafting of international legal instruments – it acts as a powerful check against the creation of white elephants like the ULIS.