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Editors

Transnational Commercial and Consumer Law

Current Trends in International Business Law

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Introduction

This collection of essays is about the relationship of law, innovation, and change in business law, especially the relative speeds of the responses of the law and its institutions to change. So it covers commercial and consumer law, public and private law, transnational and domestic law, and substantive and procedural law, including dispute resolution – all as they apply to commerce in today's global and dynamic environment.

The content of these essays was formerly presented as papers in July 2016 at the 18th Biennial Meeting of the International Academy of Commercial and Consumer Law (the International Academy) at Kyushu University, Japan, hosted by Professor Toshiyuki Kono. The purpose of the Academy is to draw together a self-regulating global and diverse community of scholars to discuss contemporary issues of Commercial and Consumer Law in an atmosphere of collegiality and fellowship. Between meetings, the discussion continues, as does collaboration on law reform and other projects, and opportunities present for our students to engage in this network. Publication is a vital part of the International Academy's work.

The scope of discussion reflects change over the 35 years of the life of the International Academy. The core as described by the inaugural President, Professor Donald King, of the University of St. Louis, was "whatever was within the grand tradition of commercial law which developed over the centuries".[1] It had two dominant characteristics: it was mostly domestic law, and it could be taught to students as doctrine. Neither of these is true today. In common law-based systems, it was for the most part contract law with some statutory regulation. In civil law systems, although core concepts were in commercial codes, they were supplemented by diverse special laws. Inherent in that traditional view is that commerce transcends national boundaries.

The description of "international", with its inference of state-state relationships, as a qualifier of "law" shifted to "transnational". The concept of "rules of law" that transcend state boundaries was expanded to include "soft law", law not based on

[1] Commercial and Consumer Law from an International Perspective, 25, (ed) Donald King, Fred Rothman, 1984.

formal treaties or even the customary sources of international law.[2] It moved beyond the definition of international law in the US Restatement of Foreign Relations Law, which is infused with criterion of state recognition.[3]b "Soft law" is described by Chris Brimmer, writing in the context of finance law, as the product of "international standards and rules [which]arise through largely informal arrangements grounded in non-binding bylaws, charters, and accords – which, as such are not recognised by international law. Although peer-based, they are hierarchical but lack the intrinsic equality of intergovernmental organisations, of egalitarianism, and of a separate legal personality".[4] The character of many intergovernmental conventions changes from mandatory to optional or facilitative instruments. These models help to mitigate the rigidity of treaty change. Growth of theories of regulation puts emphasis on compliance and process. The reach of regulation is extended by soft law as well as traditional multilateral instruments.

The creative effect of regulation is seen in the World Trade Organization (WTO) agreements of the mid-1990s.[5] The WTO is the central institution of the multilateral rules based legal order. New rules were created; old rules were recontextualised; and process becomes ordered and critical. By establishing a binding intergovernmental dispute settlement mechanism, the WTO has ensured that the new rules will be binding and enforceable. The analysis by Arie Reich of its operations in terms of effectiveness, timeliness, and compliance shows the need for and the problems of restructuring through its own procedures.[6] This is further complicated by the lack of resources and personnel and the decline in consensus as the basis for decisions as vital as appointment of new members to the Appellate Body. Replacing opinion, this analysis provides hard fact-based evidence of the need. It also shows the record of compliance and non-compliance of different member states.

Despite advances in technology in the field of financing, including blockchain, the letter of credit remains a central payment mechanism in international business. It has always been axiomatic that fraud undoes everything. But the scope of this exception from liability is itself highly controversial. Does it apply only when the fraud was committed by the beneficiary? Can a bank be expected to pay when it knows that one of the documents is fraudulent? Even where there is strict compliance, there are issues of principle and practice. Surprisingly, the Uniform Customs and Practices for Documentary Credits (UCP), the universally accepted rules regulating letter of credit promulgated by the International Chamber of Commerce, has until now refused to address the issue of fraud. These questions are critically examined by Časlav Pejović, arguing for an uncompromising approach towards

[2] The Statute of the International Court of Justice, Article 38 (1) (b).

[3] American Restatement (Third), Foreign Relations Law of the United States (1986), #102.

[4] Soft Law and the Global Financial System: Rule Making in the 21st Century, 61, Chris Brimmer, Cambridge University Press, 2012.

[5] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 1994.

[6] The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis, Chap. 1.

fraud. He also calls upon the UCP to address this central issue for the benefit of uniformity in international commerce.[7]

After 50 years of intermittent debate, the United Nations Commission on International Trade Law (UNCITRAL) appears to have reached a transnational consensus on the Secured Transactions Law. It has reached this goal by using the mechanism of a model law containing single uniform provisions. It has not omitted those issues where no consensus was reached but has offered a choice of alternative approaches. Given the far-ranging consequences of these provisions on property rights, including those of third parties and of state instrumentalities and norms, this is a significant victory for consensus as a legal mechanism. Catherine Walsh subjects this consensus to a critical analysis, in the context of explaining the problems that had to be surmounted. She concludes that UNCITRAL has been successful in reaching a consensus which is real, and not illusory, while still preserving some flexibility for states to adapt the model law to their specific needs and legal traditions.[8]

In an examination of the work of another multigovernmental institution, the International Institute for the Unification of Private Law (UNIDROIT), Giuditta Cordero-Moss assesses the extent to which the UNIDROIT Principles of International Commercial Contracts (UPICC) are a source of harmonised provisions in accord with commercial practice as the governing law of a transaction.[9] Particularly, her paper discusses how the explanatory comments published by UNIDROIT could help make the UPICC more attractive to commercial parties, namely, by using these comments as guidelines for the relationship between the contract terms, national contract laws, and the provisions of the UPICC. The UPICC may substitute for national law or complement it. They may flesh out the general provisions of the United Nations Convention on the International Sale of Goods (CISG). But the UPICC itself is couched often in general terms, in particular in view of its overarching principle of good faith, with the consequence that the required legal certainty is not obtained. The author therefore suggests that the accompanying explanatory comments could be more helpful if they clarified that the UPICC's interference with the contract terms is not intended to affect extensive and detailed contracts between commercial parties. She supports her arguments by using examples from Norwegian law.

In a similar vein, Hans-W Micklitz looks to German law as a pathway to guide through the development of consumer law in the digital economy, a law shaped by social justice considerations rather than the shape of any particular legal system or the linear progress of a transaction.[10] The Internet of things (IoT) is the arena where

[7] Documentary Fraud under the Uniform Customs and Practice (UCP): Revisiting an "Exception from Exception" Principle, Chap. 2.

[8] A Transnational Consensus on Secured Transactions Law? The 2016 UNCITRAL Model Law, Chap. 3.

[9] Detailed Contract Regulation and the UPICC: Parallels with National Law and Potential for Improvement – The Example of Norwegian Law, Chap. 4.

[10] Consumer Law in the Digital Economy, Chap. 5.

consumer law and data protection law meet. Deterritorialisation undermines the relevance and legacies of centuries of learning. German law has developed particular characteristics within domestic law to deal with unfair terms and commercial practices, the role of consumer associations in collective redress, and the evolution of specific consumer data protection law. EU law is omnipresent in terms of substantive content, regulation, and remedy. Viable solutions to incompatibility and to existing deficiencies are put forward.

Some of these issues within a broader context of innovative disruptive technologies are considered by Mark Fenwick, Wulf A. Kaal, and Erik P.M. Vermeulen, but they focus on the need for faster solutions.[11] The consequences of a system of regulation which is not dynamic and responsive to innovations may be either reckless and premature action or no response at all (regulatory paralysis). This stifles innovation and deprives consumers of the benefits that innovation can bring. The authors therefore call upon regulators to be proactive, dynamic, and responsive, and they formulate three guiding principles on how to ensure that tomorrow's regulation will meet these objectives.

The last theme of these essays is an examination of how common law systems can rethink established concepts of law, principally through the development of case law rather than legislation. A readiness to consider comparative solutions even if incompatible with established precedent seems to be the way forward. Many of these comparative solutions come from institutional law making, such as the work of UNCITRAL and UNIDROIT.

Mary Hiscock looks at the hesitation and reluctance to embrace concepts of good faith in negotiation of business contracts, despite the overwhelming consensus of acceptance in non-common law systems.[12] A further question is how far concepts of moral behaviour drawn from cutting edge practice influence the law. The law of Hong Kong and Singapore is contrasted with that of Australia.

Rick Bigwood considers how far an unknown and unsuspected change in facts embodied in a pre-contractual representation might involve liability for an otherwise innocent representor.[13] There is only an ambiguous decision in relation to English law from the Supreme Court and a clearer but lower level decision for Scottish law. The issues of principle and effects in practice are still unsettled. The author puts forward an analysis which can produce a harmless solution but only in relation to some of the statements. He calls upon courts who want to adopt a strict-liability continuing-representation approach to responsibility for accuracy in pre-contractual relations to acknowledge that it is premised on the implementation of a legal fiction, albeit one which may be justified by policy considerations. These examinations of the work of international legal institutions, the quest for solutions for fast emerging and changing problems, and the slowness of traditional legal

[11] Regulation Tomorrow: What Happens when Technology is Faster than the Law? Chap. 6.

[12] The Enforceability of Promises to Negotiate in Good Faith: Rethinking Traditional Common Law Attitudes, Chap. 7.

[13] Continuing Representations and Strict Responsibility for Accuracy After Cramaso: Fact or Legal Fiction, Chap. 8.

mechanisms for developing the law in a different direction all use the mechanism of comparative legal analysis at a sophisticated level. The formality and clarity of doctrine is blurred. The practitioner or student confronting these developments is working on a broad multidisciplinary canvas. These form an ideal arena for scholarly exchange.

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Mary Hiscock is an emeritus professor of Bond University, Queensland, Australia. She taught at Bond University and the University of Melbourne, with visiting appointments in Europe, Asia, and North America. She is a fellow of the Australian Academy of Law. Her expertise is in international trade and investment, with an emphasis on international contracts and comparative law. She graduated from the University of Melbourne and the University of Chicago. She is a legal practitioner of the High Court of Australia and the Supreme Courts of Victoria, New South Wales, and Queensland. Professor Hiscock has represented Australia at the United Nations Commission on International Trade Law (UNCITRAL) and has been an expert adviser to the European Bank for Reconstruction and Development and a consultant to the Asian Development Bank. She is a member of the editorial boards of the *Australian Journal of Asian Law* and the *Melbourne Journal of International*

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Arie Reich is the former dean and a current professor of the Faculty of Law at Bar Ilan University, Israel, and the Jean Monnet chair of EU Law and Institutions. He specializes in international economic law and EU law. He has authored more than 40 academic books and articles on topics ranging from international trade law, public procurement law, and European Union law to competition law and torts. Among them are his books *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (Kluwer, 1999) and *The World Trade Organization and Israel: Law, Economics and Politics* (Bar Ilan University Press, 2006). He is a member of the ICSID Panel of Conciliators and Arbitrators, has served as the president of the Israeli Association for the Study of European Integration, and is a member of the Executive of the International Academy of Commercial and Consumer Law and a national correspondent for Israel to the UNCITRAL. He has served as the chairman of Israel's Anti-Dumping and Countervailing Duty Tribunal and as a member of four different World Trade Organization dispute settlement panels in trade disputes between the USA, EU, and China. He has served as a visiting professor at UCLA, Georgetown University, the University of Toronto, the University of Pennsylvania, Columbia University, the University of Luxembourg, and Monash University and has been a Braudel Senior Fellow at the European University Institute.