

GLOBALIZATION AND THE TRANSNATIONALIZATION OF COMMERCIAL AND FINANCIAL LAW

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I. INTRODUCTION

Globalization of trade has been with us for a long time. After World War II, globalization's aim was government policy to avoid a repeat of the balkanization effect that occurred in the 1930s. States adopted the General Agreement on Tariff and Trade ("GATT"), and retained it, even after the United States Senate declined to accept the larger architecture of the International Trade Organization ("ITO") in 1948.¹ The European Economic Community ("EEC"),² now the European Union ("EU"), was an early effort to further promote and accelerate trade amongst the original six Member States, although there were many other objectives. Its creation of the internal market, now between twenty-eight Members, could be seen as a pre-cursor to full-fledged globalization before the term received mainstream acceptance. Throughout its evolution, this EU mini-globalization highlighted many problems and offered solutions that scholars and policymakers previously never considered. As such, it presents an important inventory of and guide to the complications that

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1. The GATT was based on the simple but effective principle of the Most Favored Nation Clause ("MFN"), which required lower tariffs given by Member States in respect of goods from one country to be extended to those from other Member States. The idea was that the unilateral lifting of restrictions was beneficial and would occur autonomously, but would be amplified through the MFN mechanism, only later followed by multilateral trade rounds, which provided an alternative mechanism based on mutual concessions, of which the Uruguay Round was the last one.

2. The ECC was created by the Treaty of Rome of 1957.

may be expected now that globalization has taken off on a much larger scale. In South America, the Member States of Mercosur operate with less effort, but still in the same direction. Projects that are more limited operate in free trade areas such as the North American Free Trade Agreement (“NAFTA”). As of 2013, more may be considered in the US/EU Transatlantic Trade and Investment Partnership. After years of experience with these projects, especially in trade, the most important realization must be that globalization is by no means a new phenomenon. Rather, it has a long history and is established policy which also shows as such important examples of its institutionalization.

In truth, as established policy, globalization was a government-guided ambition, initially perceived as a process for which national governments were setting the terms and conditions. Increasingly shackled by local interests, governments may have given up furthering this process. At least there no longer seems to be the consensus that once existed at the political level—hence also the problems in the WTO Doha Round. There is perhaps an underlying feeling that the process has gone quite far enough, even in trade and investment, irrational as it may seem. More importantly, governments may consider that they have lost the initiative while globalization has acquired a momentum of its own, and they are consequently disincentivized, even apprehensive. Although the completion of the Single Market and Monetary Union in the EU during the 1990s, along with the simultaneous creation of the World Trade Organization (“WTO”), was accelerated by this autonomous globalization process, arguably, it was a defensive move of governments to keep some institutional control.

Indeed, even if globalization is no longer uniquely a government-controlled process, but rather is market-driven, the public interest cannot be ignored. This is one of the key issues in this area. Globalization is not or should not be an unimpeded game of international market forces alone. The public interest remains a key element, even if only to keep these markets clean and competitive, as such also of the greatest interest to these markets themselves and their credibility. How the public interest is expressed, and who are its proper spokespersons at the transnational level then becomes a major institutional and practical issue.

To give some figures: the sum total of the cross border trade in goods was in 2012 put at about U.S. \$ (equivalent) 15 trillion; in services at about U.S. \$ (equivalent) 5 trillion. Compare this to the GDP of the U.S. at about U.S. \$16 trillion, of the EU a little more, total world GDP being in the region of U.S. \$ 60 trillion in 2012. It gives an idea of the scale of the international flows that are now larger than the GDP of any country or grouping of states. The rationale is simple: better products are, in this

manner, more cheaply obtained, better services become available, and economic activity is enhanced. It supports the old argument (Ricardo) that even unilateral opening of borders is beneficial because better and cheaper goods and services can come in. Consumers want to purchase the best car in the world, not what their own industry can produce, which especially in small countries may be very basic or very little or even in bigger countries, like the former Soviet Union, of low (but sturdy) quality. Thus, globalization makes us better off and capable of producing better products to exchange. Of course, local industries could obtain technology licenses and offer help from abroad to produce more locally—a common feature before globalization took off—but it may still not be the same and it may be more expensive for lack of scale. Rather, it may be better to concentrate on what we can do best and exploit that advantage internationally in a free exchange worldwide for the greater benefit of all.

Importantly, in this kind of world, finance or liquidity with the attendant services may also become accessible beyond what domestic markets might provide. The inflow of foreign capital may then also be considered a benefit. This idea largely drove the total reinvention of finance in the 1980s, which became substantially “transnationalized” and did away with local foreign exchange and other controls, beginning with the Eurobond markets (and its repos) and later more broadly through the swap markets. Investment securities can be traded anywhere in the form of security entitlements. Whatever the advantages and disadvantages in terms of financial stability and the deregulatory ethos, in banking it is especially clear in the aggressive lowering of capital adequacy standards through Basel I and Basel II (which became the international standards issued from the Bank of International Settlement (BIS) which functions here as the think tank for financial regulators), the international flows of finance, financial instruments, and related services were encouraged and borders were opened to it, even unilaterally. This became an autonomous process earlier than in trade³ and allowed the offshore Eurobond market (which has nothing to do with the EU currency) to become the largest capital market in the world. After recently celebrating its fiftieth anniversary, the total U.S. dollar equivalent issued in this market last year (2012) was \$4.5 trillion; the total outstanding amount is approximately \$26 trillion; and the repo market in Eurobonds was approximately \$7 trillion. Compare the second largest capital market: the (domestic) U.S. treasury market, the total outstanding amount being

3. See J.H. DALHUISEN, DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW VOL. 3 589–91 (5th ed. 2013) [hereinafter DALHUISEN, VOL. 3].

about \$16 trillion (U.S.). According to the BIS, the international swap market exceeded \$600 trillion (U.S.) (gross) in outstanding swaps by the end of 2012, a little lower than the year before.

These figures give some idea of the scale and importance of globalization, but also pose immediate questions for the law: what law applies to these immense international flows and the products and services connected with it? As will be argued later, it is not only the size but also the nature of these international flows as flows which affect the applicable law and its formation. In particular, can the applicable law still be adequately crafted solely in terms of national laws and, if so, are they adequate? The connected question is then whether the public interest can still be expressed adequately at the national level also. In international finance particularly, there is regulatory overlay, which is a hallmark in all of finance. While financial regulation remains, so far, a more fundamental domestic issue, this also sits uneasily with the international flows which might require a more transnational approach here as well.

The main purpose of this Article is to make the process of globalization more transparent in its legal impact. What are we talking about? What is the academic model that simplifies the argument and explains more? Is globalization an autonomous or still a state-driven event in law formation and operation? The autonomous liberalization of the Eurobond market is a clear and earlier case in point because it transformed bonds and all processes connected with them in terms of trading and services and brought them to the transnational level probably even in its bookentry securities entitlement system and repo/pledging facilities. Patently, the autonomy of the globalization process is here an important issue. The international swap market is another case in point. It is the world of the International Swap Dealers (ISDA) Master Agreements and their netting objectives as international risk management tools in finance.⁴ Globalization's autonomous force in these areas transnationalized the law applicable to these activities, even if a choice of local law—for instance, New York or England—is still common in these products but is likely to cede to international custom, especially in areas not at the free disposition of the parties, like issues of set-off and netting and the preferences they create. In truth, it may then well be asked what a choice of a domestic law by the parties still means

4. This facility idea is crucial to the *ISDA Master Agreement for Swaps* (and also the *TBMA/ISMA Master Agreement for Repos*). See J.H. DALHUISEN, DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW VOL. 2 296–300 (5th ed. 2013) [hereinafter DALHUISEN, VOL. 2].

in these internationalized instruments.⁵ In property, insolvency, and regulatory law, party choices mean even less; and international custom may mean a great deal more. In local bankruptcies, international custom may, it will be argued, even overcome a domestic public policy and public order test, more in particular if it is recognized and supported by an international arbitration award.⁶ But, the international flows are not only financial, although much of the impetus is. There are several others: besides money (capital and payments) from the EU internal market, we learn about people, goods, and services, coupled with the right of establishment. There are more: the free flow of investments which in the EU are mostly believed covered by other freedoms, and there is also the information flow and flow of technology (subject to the relevant intellectual property right protections). Increasingly, they also may need legal expression at the transnational level and, potentially, globalization has important consequences for the applicable law and the legal framework in all liberated flows.

Perhaps these flows and their force may together lay claim to constituting a new and different legal order, which will be considered later: the transnational commercial and financial legal order operating besides states. Although in that order, law formation may still be different for private and regulatory law (where the public interest comes in), it is not then statist any longer except to the extent that there is treaty law. Again, the EU, in particular, demonstrates the policy issues, even if one may quarrel with the solutions, and also elucidates the key question of the public interest and of public policy and order in the international marketplace.

II. OBJECTIVE METHODOLOGY AND MANNER OF TRANSNATIONAL PRIVATE LAW FORMATION IN THE BUSINESS SECTOR

First, does globalization of the underlying flows suggest a need for unification of private law at least in the business sector? If so, should this basically be an autonomous (bottom-up) or imposed (top-down) process?⁷

5. See J.H. Dalhuisen, *What Could the Selection by the Parties of English Law in a Civil Law Contract in Commerce and Finance Truly Mean?*, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW 619–34 (Mads Andenas & Duncan Fairgrieve eds., 2009).

6. For further examples of this issue, see *infra* note 32 and accompanying text.

7. For this discussion the author relies on the first Volume of his book, J.H. DALHUISEN, *DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW* (5th ed. 2013) [hereinafter DALHUISEN, VOL. 1]. The purpose of the conference for which this paper was prepared was to summarize the argument. It is not possible to reproduce it in a few pages and reference is made to this fuller text and its footnotes throughout.

As for the latter, treaty law springs to mind but is it good enough and is there still sufficient authority and power in states for treaty law to be effective? Even the Vienna Convention on the International Sale of Goods (“CISG”) is largely rejected by the commercial practice and, therefore, arguably superseded by superior custom even if not opted out of entirely by the parties. In Europe in particular, does the EU have sufficient institutional authority to unify private law short of any specific coverage in the EU founding treaties?⁸ As importantly, is there a consensus about methodology: is this to be in the common law or in the civil law codification tradition or something entirely different altogether? As will be argued shortly, the public international law model of law formation embodied in Article 38(1) of the Statute of the International Court of Justice (ICJ) may be extended to the private sphere, as was common before the 19th Century when states took over, while the details of the common law approach may now be largely preferred in business or simply be better known. In the meantime, unification of private law at the EU level is the subject of the Draft Common Frame of Reference (“DCFR” since 2008) as some academic model for an EU codification. Without discussion, it still relies on codification (German style) which only recognizes state legislation as legitimate in private law formation, never mind that it is also intended for England. The DCFR, so far, has no official status and remains mainly an intellectual exercise. However, the Common European Sales Law (“CESL”), as its sales law carve-out, is now an EU project since 2011, proposed in a draft EU Regulation, and is in the same codification mode.⁹ No questions were ever asked about this methodology; top-down codification thinking, civil law style, was assumed to find general acceptance pushing out all competing sources of law, but this is truly the basic question. Here, the attitude is that the EU is no different from an ordinary state and that its laws are formed in the same (civil law) manner.

But, at least in commerce and finance, the issue is whether at the transnational level, therefore in international business transactions, even in the activities conducted cross-border in the EU, these different autonomous sources of law can still be ignored, or return and operate

8. I would say probably not sufficiently under art. 114 TFEU. See also DALHUISEN, VOL. 1, *supra* note 7, at 187–91. Section 1.4.19 would then, in any event, be confined to cross-border transactions within the EU.

9. See *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011); The Proposal for a Regulation of Oct. 11, 2013; J.H. Dalhuisen, *Some Realism about a Common European Sales Law*, 24 *EBLR* 299 (2013). The Vienna Convention or CISG, which was much the model, also has a civil law codification tenor although it is confused (Art. 4, 7, and 9).

side-by-side, as common law still accepts for itself, even if it does not analyze the situation much along these lines. Or, does private law continue exclusively to issue from above, such law still claiming full coverage of the field? Essentially, these sources are fundamental principle; custom; treaty law; general principle; and party autonomy. They may be supplemented in appropriate cases by transnational considerations of justice, social peace, and efficiency when sufficiently pressing if not already subsumed in these sources of law, while in their application they are further subject to overriding transnational public policy and public order requirements including fundamental social values.

These sources of law are traditional, and we may continue to refer to them also in the context of transnationalization of private law as providing adequate clarity as to the potentially applicable laws. As already mentioned, they are still the gist of Article 38(1) of the Statute of the ICJ and remain fundamental for public international law, but they were substantially lost in private law in the 19th Century, when in civil law countries, the formation of this private law was codified by states in accordance with what they considered their particular cultural values. Private law formation was henceforth believed to be territorial and it was nationalized while governments put themselves in charge. Even in England, in the views of Bentham and Austin, all law—even private law—issued from the sovereign although not necessarily through statutes, could be born in the court system, which remained preferred. However, statutes have covered an increasing amount of private law, also in common law countries, in order to speed up the formulation and clarification of the law. Legislation of this nature also largely substitutes for the old equity jurisdiction of the courts of chancery.

Nevertheless, in England in particular, legislation is often still viewed as an aberration by typical common law lawyers, an intrusion into private law formation, and is at best considered of modest quality and, at worst, contributing to the confusion. Here, we also see suspicion that texts can never express ideas fully and cannot cope with practical evolution which always creates contradictions in established frameworks. In any event, it is obvious that there is no attempt at systematic clarification, and at least in England, these statutes often represent a ragbag of all kinds of provisions and measures that are barely coherent. The approach remains incidental and remedial. This reality is also clear from the application by the courts, which veer back to incidental application of legislation depending on the facts of each case. Systematic reasoning is in particular avoided. In England, the mistrust of all generalizations still plays an important role in the national psyche and affects law formation and interpretation. Perhaps it is somewhat

different in the United States, where there may be a more intellectual approach. The Uniform Commercial Code (“UCC”) and Bankruptcy Code are more comprehensive, but they are still based on the common law and its method. Even though the UCC is called a “Code,” it allows for the liberal interpretation of its language and leaves as much room as possible for other sources of law, especially common law, equity, law merchant, custom, and party autonomy (Section 1-103). This is very different from the civil law notion of codification where the state monopolizes the law’s formation. The UCC is not a code in a civil law sense at all.

We will come back to the different forms of private law formation in a globalizing world, especially in section VIII below in the context of the reinvigoration of the transnational law merchant or modern *lex mercatoria* largely through a more spontaneous bottom-up approach to law formation based on the various traditional sources of law. Shifting our viewpoint or paradigm in this area restores the unity between public and private law formation at the transnational level, much as it was before the 19th Century when states began to take over. Although this latter shift is now sometimes attributed to the democratic process, it should be recalled that it hardly existed when the “great codifications” were enacted in Europe. Rather, they supported the concept that the state knows best and is pure—the public good personified. Hence, all the state does is legitimate or must be assumed to be so. This presumption of infallibility helped justify its monopoly of private law formation. In codifications of this type, social values are also considered subject to the state’s expression in its statutes. There are no values beyond it.

This attitude is still evidenced by the DCFR, even after a substantial rewrite of the introduction in 2009 when its drafters suddenly discovered fundamental principle, but even then still limiting their analysis to demonstrating how much fundamental principle had been discounted in the text without recognizing its independent (higher) status—this was left to others to decide. The analysis could be different where the need for a liberal interpretation of private law texts remains recognized. In fact, it means that the old sources of law, evicted in principle in law formation, return through the back door of interpretation, although the DCFR also tries to still regulate this process in its Article I-1:102 even then suggesting that this is only allowed by government or statutory license. At the same time, this approach reduces law formation to a purely territorial phenomenon and local activity; now at the EU level, there are no more universal values, rules, or even concepts. They all depend on the state or a (for this purpose) statehood-assuming institution like the EU. Even though the horizontal effect of human rights in private relationships is advocated in this connection (Article I-1:102(2) DCFR), it is done again only by license. Although the invocation of human rights in

all situations where power is exerted is increasingly common, in private law it is perhaps no more (or less) than a recognition of the autonomous force of fundamental principle of which in contract the good faith concept may be another expression.

This 19th Century nationalization of all private law, in civil law countries at the level of the state, can easily be seen as a form of state absolutism, an aberration that needs correction, even locally. In any event, even now, in civil law countries, the private law texts and amendments are hardly the outcome of a public debate, which could better justify this process as an expression of democracy, but instead are normally rubberstamped in the political process of the day. Worse, when law formation becomes nationalized in this manner, it may easily fall into the hands of those who align their personal interests with the state's well being. In reality, there is little balance (*per se*) between nationalist private law formation and the public welfare. In many countries, the state-induced legal system fails to work because those in power do not want to be held accountable while lawyers benefit from the confusion. This is far more common than most observers seem to think. Especially in smaller countries, the democratic process is easily corrupted and reduced to a formalized facade, extolled only in a number of clichés that serve other interests.

There are other problems with codification of this nature, more in particular in Germany which remains here leading. It conforms to a model formulated by the state academics. This model is intellectual, assumes systematic coherence, extols it, and is then believed to be both comprehensive and capable of properly solving all legal problems: present, past, and future. This is "system thinking" that also controls the process of interpretation. It is rule-oriented: facts must conform or fall off the plate. It is followed by what the Germans call *Relationstheorie* under which a summary prima facie exposure of the facts leads to finding the proper rule which subsequently determines which facts need to be proven. All the rest is irrelevant. In this way, pre-contractual behavior was long ignored because the rules did not consider it, and many modern financial products are still not covered either. It follows in this approach that they are not authorized. All activity that does not fit an established category is then illegitimate; everything needs state approval. However, system thinking of this nature may cause serious intellectual prejudice and result in considerable narrow-mindedness. Such a system, based on past solutions aligned and systemized in a rational manner to dictate the future, is itself highly contentious and ultimately based on the idea that life is repetition. It suggests that there is consistency in human behavior

that can be found and be a reliable guide in future dispute resolution,¹⁰ that there is truth in precedent, and a superior role for the appellate jurisdiction in this regard. Ultimately, it goes into the whole concept of legal renewal and innovation, which is not then seen as a continuous and essential process.

The approach may still be different in the traditional common law, which is fact oriented, moves from case to case, and responds to practical needs. There is no generalization beyond the minimum, nearest cases will be cited, and the courts will choose which cases to restate to find a solution. Although precedent is emphasized, it may not be as important as it is often assumed to be, even though English academia still likes to line up cases. In any event, the rule of precedent does not operate at the level of the highest courts. In England, the skepticism about all generalization already mentioned also works against it. Again, this shows another attitude, very relevant, it is submitted, when it comes to transnationalization of private law and the legal approach to and support of international business dealings. While there is more “streamlining” in the United States, it never amounted to mere system thinking either. In its legal realism, the emphasis is on policies and the dialogue in society about their meanings and continued relevance. It is true that, in the UCC and Bankruptcy Code, this debate is more limited in respectively the American Law Institute (ALI) or in the various committees set up by Congress from time to time in the bankruptcy area. Social values are mostly not the prime issues (although when they are, they may lead to mandatory private law, for example the ranking of security interests) and the discussion is more technical, but it is a debate all the same. It follows that in this debate the totality of the law can never be fully known. Texts can only express it in limited ways. Black letter law becomes suspect.

What is going to be the model in a globalized world? It will likely follow the public international law approach in law formation, and in the method rely more on the common law. The reasons for the former were already mentioned. There are another two that support the latter: first, English is the “lingua franca” of the business world; and second, it is a less intellectual and more responsive method, at least in commerce also respecting customary law, making the applicable law more participatory and in that sense also more legitimate. Again, the DCFR never considered these methodological issues and the civil law codification

10. It might be recalled here that no one less than Lord Bingham believed consistency to be a vice in judges. See Lord Bingham of Cornhill, *DAILY TELEGRAPH* (Sept. 12, 2010), available at <http://www.telegraph.co.uk/news/obituaries/law-obituaries/7997574/Lord-Bingham-of-Cornhill.html>. It may be exaggerated, but it better expresses the common law attitude.

approach was automatically adopted. These are the primary reasons why it lacks credibility. At the very least, its intellectualized approach and the elimination of all other sources of law and values unless licensed by the state or similar authority, is no longer feasible in a modern diversified and globalizing society, and not truly purely local either. It is not a good model for transnationalization where, in any event (except in smaller conglomerations of states like the EU), there is no natural lawmaking authority in terms of a legislature either.

III. GLOBALIZATION AND REGULATORY LAW

Besides private law formation in which states may involve themselves, there is, at the national level, also legislation in which states more understandably intervene in the lawmaking process in order to further their political ideologies. In such situations, the state acts as a true defender of public interests as it perceives it from time to time. Government intervention of this nature may even give rise to new private causes of action and remedies, which are essentially damage claims or contract adjustment or termination facilities. This is evident in competition law. In this manner, weaker parties may, e.g., benefit from special consumer or labor law protections that provide (civil) causes of action against stronger employers or against manufacturers, who abuse their positions of power. The subsequent claims may be rooted in tort or contract law. In the investment market, new agency rules (or stricter fiduciary duties) provide investors with broader protection against advisors and brokers. If a fiduciary duty is breached, damages can range from monetary compensation to the termination of the investment contract.

However, it is also possible that state agencies become more directly involved and require brokers and advisors to obtain licenses, especially in finance. More likely is in such cases that concerns about stability and systemic risk (therefore the public interest) cause this intervention rather than the concern about private protection of depositors or investors (who may be more especially protected by depositor or investor compensation schemes in the case of a bankruptcy of their financial intermediaries). It suggests a measure of discretion in the authorities balanced by a possibility of judicial review under administrative law. Private people, even if the victims, have no standing here and cannot insist on license withdrawal; they can complain and write letters, but for

their protection they will have to rely on their private remedies to the extent existing.¹¹

Globalization may also have an effect on law of this regulatory nature and its application. It is likely to be quite different from the progression of private law and its unification at the transnational level through the modern *lex mercatoria* and its different sources. While it is likely that organizations like the EU take important initiative in their region, regulatory law of this nature remains a domestic affair longer regardless of globalization even in international finance, where, as we have seen, transnationalization of private law has become dominant in the Eurobond and interest rate swap markets. In the EU, at least in finance, the prime objective was rather to strike a balance between home and host regulators to avoid double regulation of transborder financial transactions, which is a potentially serious impediment to the free flow of financial services and products. Although there was some considerable unification of the underlying concepts in this approach in order to facilitate the mutual recognition of the home country rule, the EU has yet to establish an EU-wide system of financial regulation with a single

11. Still, it is possible that private parties may derive some implied protection against each other from this type of regulation, therefore depositors or investors against their banks or brokers, but if not clearly expressed, as for example, in the case of prospectus liability upon an authorization of the issuer to access public markets, it is unlikely. In the EU, another recent example is the liability of rating agencies towards those who rely on their findings. See EU Regulation (EU) No 1060/2009 of the European Parliament and of the Council of 16 September 2009, OJL 302/1 (2009) effective since December 2010 and amended by Regulation (EU) No 513/2011, OJL 145/30 (2011), Regulation (EU) No 462/2013 OJL 146/1 (2013) and Directive 2013/14 OJL 145/1 (2013).

It is even possible that regulators have to accept civil liability for failure to act, damaging depositors or investors, for example, while not winding up intermediaries in time, but this must also still be considered exceptional. The House of Lords seemed less concerned with depositors but accepted—absent bad faith—the prevailing statutory restrictions on liability for banking supervisors as an adequate defense, in the UK more extensively interpreted than elsewhere, like in France where administrative courts may now accept in this connection *faute simple* as sufficient ground for liability, therefore leaving more room for depositors' protection. *Three Rivers District Council v. Bank of England*, [2000] W.L.R. 1220 (appeal taken from Eng.); see also *Cour Administrative d'Appel de Paris [CA]* [regional court of appeal] Paris, 3e ch. Mar. 30, 1999 (Fr.).

In *Three Rivers*, reasonable policy objectives and considerations connected with systemic risk or the smooth operation of the financial system did not even seem to figure large. They were, in any event, not weighed against the statutory requirements of depositors' protection as laid down in Section 3 of the UK Banking Act of 1987. It was assumed that the EU First Banking Directive of 1977 (77/780/EEC), now largely superseded by the Credit Institution Directives of 2000 and 2006, even though clearly concerned with depositors, did not give depositors extra rights in this connection. No guidance from the European Court was sought. See also M. Andenas, "Liability for Supervision" [2000] *Eureedia* 379. Protection of regulators appeared here an objective in itself, although not everywhere as widely interpreted as in the UK.

regulator, except since 2013 in the Eurozone. For the EU as a whole, the approach remains that home regulation is recognized for EU-wide operations subject to some harmonization directives, especially in the area of capital adequacy and conduct of business, the latter especially in the investment area.

However, in environmental matters and perhaps, also, increasingly in matters of financial stability, there is emerging a stronger argument in favor of a more international regulatory regime, either under treaty law or indeed through organizations like the EU. The problem is that, beyond the EU, which only operates in a limited area, there is hardly a worldwide rule-setting and enforcement agency and mechanism, even then there may not be a consensus. This is so in the WTO, which largely still excludes financial regulation. Organizations like the International Labor Organization (ILO) also have difficulty agreeing on transnational protections, here through labor law, although it is conceivable, as we shall see, that mandatory minimum standards in terms of public policy or public order may develop more informally in the transnational legal order itself. The public interest must find a new expression in this new world order to balance the international markets. It was already said that the true question then becomes: who in this new order are the legitimate spokespersons for the public good or public interest? This concerns the informal institutional aspect of transnationalization of public policy, to be further discussed below.

There is here another aspect to consider. At least outside of the jurisdiction of organizations like the EU or similar institutions, the essential rule remains that states are sovereign in their own territories and can enforce their own rules or policies. In terms of globalization, this suggests that states can still redirect upon their territories all *conduct and effect* of an international transaction. They will do so primarily in the pursuit of what they see as their national public interest. So, to the extent that these transactions come onshore in their countries—and can be identified as doing so—states can still regulate them and impose conditions as they wish, or forbid them. While it may make these countries poorer, it is, nonetheless, the prerogative of these states. It would follow that globalization does not need to affect any domestic regime *per se*. Globalization does *not* then mean deregulation *per se*, either. Yet, modern states wanting the benefit of globalization are likely to adjust their regulatory regimes to transnational standards in order to create a more level playing field and thus may start to conform to what are more transnational norms. We need not go into the question of whether this is at all desirable. The essence is that many still believe that the issue, as well as the ultimate bottom line, remains as follows: if we assume that all transactions, never mind how transnational,

ultimately still take place in some territory, or at least, always have effect onshore, then states remain in ultimate control.

However, we live in an increasingly virtual world, in which assets and rights or obligations therein or thereto are ever more difficult to situate. This is clear in all international activity. Globalization has not only become an increasingly autonomous process, but international flows are also harder to spot. It was already said that it is not only the size but also the nature of these flows that lead to legal transnationalization both in the private and public policy aspects. Although modern legal literature describing the globalization process and its effect on the law seldom gives examples and the discussion remains extremely abstract, it is this autonomous process of globalization in respect of assets or activities that are, by their very nature, delocalized that may well figure as the greater worry when it comes to balancing international market forces against the public interest. But, even if there is still a physical presence of actors in a country, there may be more options for participants where they wish to come onshore, and it may not be to the country where it matters most. This further affects control over the process of transnational activity.

Moreover, while the *situs* of assets may demonstrably remain in a particular country, rights and obligations in respect of the assets may emerge elsewhere. Here, we enter the world of derivatives. The swap market, along with the investment security entitlements replacing the ordinary bonds and shares, is an example of this phenomenon.¹² Such products can operate anywhere, even if the underlying assets can be identified with reference to their *situs*. Risk can thus be moved and is, in

12. Through immobilization, the underlying investment securities can be traded in dematerialized book-entry form in any country where a book-entry system is organized. The same could conceivably be done for any other type of asset, pool of assets, or even asset flows. The applicable legal regime then becomes that of the book-entry system the parties prefer, even in proprietary aspects. Indeed, the 2004 Hague Convention on The Law Applicable to Certain Rights in Respect of Securities held with an Intermediary endorsed this principle [hereinafter "Place of Relevant Intermediary Approach" or "PRIMA"], but also allowed more directly for the parties to choose the applicable law, assuming there was an office of the intermediary in the country of the chosen law. There is, in fact, no reason at all why the applicable law should not then be transnationalized once its connection with the location of the underlying assets is cut. It becomes international market practice. After an initial flurry of enthusiasm, the Hague Convention has only been ratified by Switzerland and Mauritius. An explanation for its relative unpopularity may be that commercial practice mistrusts these initiatives and has more confidence in the existing practices and does not appear to cry out for help. This may also be the reason why uniform law in this area, now proposed in the UNIDROIT 2009 Geneva Convention on Intermediated Securities, has not appeared to take hold either. In fact, there seems no great practical need for these initiatives. The market can clearly survive without them and is happy to do so.

fact, now often considered commoditized and transferable to environments that allow it to be handled better or at least differently.

Again, the international financial markets may currently provide the best examples. In swaps, risk is diverted. The same goes for repurchase agreements, or repos, especially in investment securities. The people who sign these financial deals sit somewhere, but they may be in countries where there is less regulation or none at all. These transactions may be conducted through different countries for tax, regulatory, accounting, or other reasons, and both their negative and positive effects may therefore be felt in different jurisdictions. Because the localization of these transactions may increasingly result from the mere disposition of the participants, who may have much more choice than before, it has become increasingly fortuitous. Given that the detrimental or beneficial effects of these transactions may thus be ever more easily redirected by the parties, local regulators may no longer be able to control them, except to forbid local companies to pick up the pieces. This is not necessarily the best option when they have to manage many different types of risks, which may themselves originate elsewhere in a globalizing environment.

IV. THE NEED FOR TRANSNATIONAL MINIMUM STANDARDS

To repeat, the true concern in globalization is public policy and order, or the operation of any redistributing forces at the transnational level, and therefore, in the international marketplace itself. Again, the autonomous emergence of a mandatory international normativity in this area through transnational minimum standards (or values) is all the more relevant where the international flows become intangible, and conduct and effect in a particular territory become more difficult to spot or allocate. Local public interests are then less likely to prevail or may altogether not add up in an international transaction. But, even in labor relations, where there will always be substantial local contacts, an international normativity may still be relevant and serve an important protection when local interest groups behind the government have never managed to balance the conflicting interests in labor relations properly or have sided with employers. An international normativity based on transnational minimum standards could then help and be necessary also to prevent the movement of employment to more indulgent states.

Significantly, the autonomous development of international minimum standards shows that globalization is not merely an international market ploy. New transnationalized standards, which could also be human rights related, may be increasingly relevant in private relationships worldwide as a minimum that affects the international marketplace in terms of mandatory law. It is thus important, from the

point of view of the globalized order, that transnational minimum standards develop as public order requirements in those orders themselves, enforced for example by international arbitrators, even if this may be a longer drawn-out informal process than the development of the modern *lex mercatoria* in private law.¹³

The emergence of international minimum standards will be discussed further in section VI below and may already be happening in the area of competition law; it may also become clearer in labor law. It may be encouraged by international bodies: the ILO Global Labour Standards of 1999 could be mentioned. Companies' codes of best practices may demonstrate forms of self-regulation around developing international standards. Although often derided, self-regulation, as in labor law, where all kinds of industry standards (or codes) are developed, is not irrelevant. This is especially true since good labor relations are now often of the greatest importance to multinationals—a sea of change in attitude and culture over the last half century, not in the least when they are operating internationally. Standards thus emerge. In international finance, the Basel Committee has issued many standards, especially in the area of capital adequacy. Transnational public order or public policy concepts could also emerge in other areas: environmental protection for example. Many also see transnationalization in respect of the public policy bar to the international recognition and enforcement of arbitral awards under the New York Convention. Although this public policy bar was originally perceived as purely national, the concept is now being increasingly transnationalized in case law reducing its impact: the public policy bar in respect of arbitral award recognition is then likely to become less severe. This is work in progress.

While the normativity so emerging is often referred to as “soft law,” there is nothing “soft” about mandatory law that finds international recognition and expression as public order or public policy in the

13. This is to be distinguished from international arbitrators choosing the more relevant domestic regulatory system instead, or from striking some balance between the two systems. If international transactions come onshore in different countries, in the traditional view, this is a matter of determining the relevant domestic jurisdiction to prescribe. In international business transactions, courts or arbitrators must then decide any conflicts or balance the various governmental interests if they arise as relevant issues in private disputes. Public policy issues, and conflicts thereof, may arise here, especially in the areas of competition, environment, financial stability, employment, and consumer protections, but no less in matters of taxation, if the consequences or burdens affect the parties' behavior (and may be pleaded as defenses or excuses), or are to be divided between them. This is the area that the 2002 EU Regulation on the Law Applicable to Contractual Obligations (Rome I), meant to cover in Article IX (although it is only applicable in litigation in the ordinary courts, not in arbitrations). It is also covered in the U.S. in Sections 401 and 402 of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS.

transnational legal order, followed by international arbitral awards. In fact, the reference to soft law is mostly the positivists' or black letter specialists' "last throw," or recognition that there is law beyond (local) texts and cases, first as guidance but ultimately also as a legal norm.¹⁴ It is for adjudicators, especially international arbitrators, to make the appropriate determinations in the case of disputes. These adjudicators are likely to be increasingly responsive to transnational normativity of this nature when it is properly pleaded by the parties. This also applies to all kinds of codes of practice, especially when formulated by the participants themselves, because they are close to the action. But another life issue is here whether international arbitrators can raise public policy issues themselves, which will be dealt with towards the end of this contribution.

It should be noted that this transnational law is not necessarily higher than the mandatory domestic law or policy; rather, it is lower in respect of an international transaction's demonstrable conduct and effect on domestic public policy and public order requirements in the relevant national territory. Conversely, local public order and public policy considerations are likely to be inferior to transnational law outside local territories. But, as already mentioned, these transnational minimum standards may also overtake domestic considerations and become higher, especially when countries want to benefit from globalization.

V. THE IMPORTANCE OF THE DISCUSSION SO FAR AND THE STEREOTYPING OF THE ARGUMENT

The importance of the discussion so far is that globalization is not something new but something that has been with us for some considerable time. Notably, it was shown there are known models in private, regulatory, and administrative law to guide this process in law formation. Another area is foreign investment. Much of the experience is, so to say, "in house." We then see the development of the modern *lex mercatoria* in private law and of transnational minimum standards in

14. On the other hand, what is considered "hard" or doctrinal law becomes soft in interpretation. The distinction, in fact, has little meaning. On the one hand, all preexisting rules and cases are only guidance in different fact situations, while on the other hand, newer values and requirements enter the law all the time in the terms of better justice, greater social peace, or efficiency, whether at the domestic or transnational level. There are also overriding public policy and public order considerations. There is no clear distinction between rule and principle here either. The test ultimately lies in what competent authorities accept as the applicable law in relevant dispute resolution: no less, no more.

regulatory law. It was also said that the full realization of this development and its potential requires a paradigm shift.

One hears all kinds of uncritical stereotyping and clichés in connection with globalization: capitalist, conservative, or right-wing plots or the widening of the north/south and other divides, including the one between the rich and poor, and developed and underdeveloped countries; intrusion on the separation of powers, democracy, and accountability; and the phenomena of deregulation, privatization, and the unhinging of the modern state, then seen as the only true representative of the public interest. All that is perceived as “new” is then cast in “old” jargon using existing categories to describe what is happening and critiquing the newer developments. While this is the undisputed framework of many, it is that framework that itself may need questioning, as it may well be substantially out of date. Rather, we may simply have a newer version of the old battle between the marketplace and the state, the statist institutions, or the public interest. This relationship was never stable, even domestically, and easily led to excess where either the market or the state became dominant. Nonetheless, in the minds of many, it is the modern state that is the victim of globalization. This is then seen as a disaster and market conspiracy, the state being identified with the public good *per se*, that is seen as being under attack, but the recasting of the modern state itself, like the rebalancing of the marketplace, is a continuous process that is very necessary. It was already said that the modern state’s motives and objectives are often complicated and ambiguous. It can also be said that the modern state is mostly very poorly run.

Indeed, quite apart from the operation of local cabals behind many governments, it is arguably the modern state’s excesses, much more than globalization, that have unhinged it and led to its bankruptcy, or a serious threat thereof, especially in many democracies. It can also be argued that enduring poverty in many countries, even developed ones, mainly results from bad government exploited by local interest groups. In this view, the marketplace reinstates some much-needed discipline in the modern state, which, because of insiders’ self-interest on the one hand and the extreme demands made upon it by the multitude on the other, now often drifts from crisis to crisis and appears hardly capable of reforming itself. If this is true, it is this state of affairs, rather than globalization, which has reopened the road for the strongest to the detriment of the weak. However that may be, it is clear that in a globalized world the necessary checks will have to come increasingly from transnationalized public policy itself. Autonomous transnationalization, producing minimum standards of behavior for all, then presents a necessary countervailing power. It has already been identified as a key

challenge and may well be the most important element in the credibility of the whole legal transnationalization process. Again, transnationalization poses the question of who in the transnational legal order are the proper spokespersons for the public interest. It may still need strong support from treaty law, assuming governments can agree on a way, but treaty law will no longer be the only source in the international order; indeed, states may fail to agree on anything. The relevant questions then become: how do international minimum standards come about? And ultimately, are they strong enough to balance the system, and who enforces them?

VI. THE ROLE OF ACADEMIA

In the following Section, I shall propose an academic model which seeks to make the process of legal transnationalization more understandable and manageable. The purpose is to bring it into the next phase of operationability, not sometime in the future, but now. This model means to explain and simplify; it does not pretend to present any higher truth. It may even be considered banal, but it holds until a better one is found. This is what the author understands the purpose of law as an academic subject to be. It relies on a strong competition in views. This is academic discourse at its best. The better model is then the one that provides the better tools to make transparent and guide the process of fundamental change, here in the legal effects and management of globalization on the scale and in the way we now see it operating in commerce and finance. True academia seeks to make visible and to discover, explain, and, where necessary, correct the trends. In that way, it contributes to finding a better world. It means innovation or it means nothing.

It must be admitted that the legal science in Europe, to the extent still existing, has long been caught in the dilemma of either providing a practitioner's tool box or being a source of better understanding and renewal. It has basically surrendered to the former and presents, at best, refinement of existing texts and cases. Legal education is, at the high school level, largely conducted by people who are practitioners or pretend to be. It is scholastic in that the basic texts are not questioned but, instead, taught as truth. The consequence has been a steep decline in Europe, especially in private law, of which the DCFR is the demonstration. There are no deeper insights, and they are no longer much encouraged either; the resources are allocated elsewhere. It is the world of the plumber and electrician, who, in fact, do not need much education to do an excellent job repeating all the time what we have. In the meantime, the true science of the law emigrated to the top United

States law schools, where experimentation remains the order of the day. This being said, it is true that globalization and legal transnationalization have not received much scholarly attention in these schools either,¹⁵ even though such attention would support many of their theories and be their true test.

This is not to deprecate the work of the practitioners; it is important but it can hardly help us to progress. Legal globalization is unlikely to be understood and furthered by them. By its very nature, the practice of law has a tendency to lag behind. This has become abundantly clear in the area of transnationalization, which requires a different mindset or paradigm and education. To use the example of electricians: they often have modest education but are excellent at installing the best circuits. Yet, when it comes to alternatives, for example, a wireless system, it is most unlikely to come from them; it must first originate from science. The same goes for legal innovation. The traditional legal practitioner is unlikely to be able to develop new perspectives, but, instead, sees its task and virtue through repetition or, at most, in further elaboration of already existing perspectives. Innovation is here to find loopholes or ways around existing or new legal texts and case law, no more. This being said, international in-house law departments in particular while having to manage legal risk on a daily basis and keep the peace with the companies' clients may become more sensitive to and more aware of changing public perceptions and adjust sooner than, e.g., outside law firms in their deal-making aspirations.

It was already said that legal transnationalization, in order to catch on, requires a new paradigm (or return to an older one) and may even require a revisiting of the concept of law itself. It has always been difficult to define what law is, but it can be demonstrated what purpose it serves. Law's first objective is no doubt to create order in human relationships, which is always the key even if it is clear that this order is better when it is also just, promotes social peace and efficiency, or even promotes growth. At the least, law should not stand in the way of these

15. The notable exception is R.D. Cooter. See R.D. Cooter, *Structural Adjudication and the New Law Merchant: A Model for Decentralisation*, 14 INT'L REV. L. & ECON. 215, 215 (1994). In second-tier law schools, there is some more attention but it is a small haul, the reason being that the United States has a large internal market to which internationalization remains peripheral. Also, the United States is unlikely to admit to a surrender of sovereignty, which is the unavoidable result of making transnationalization function better. See Peer Zumbansen, *Transnational Law Evolving*, KING'S COLLEGE RESEARCH PAPER SERIES NO. 2014-29 (2011). For further examples, see ENCYCLOPEDIA OF COMPARATIVE LAW (2012) for a critique of the more philosophical contributions to the subject, many of which suffer from a lack of detailed understanding of the phenomenon and the way it affects the practice of the law, most notably in commerce and finance.

goals unless public order and policy clearly so require. That is no less so at the transnational level where in business now most of the action occurs.

A simple example may demonstrate the point. In a situation of chaos, traffic cannot move, but it will soon be discovered that by separating the flows that go either way, efficiency is enormously enhanced, as is social peace. It also shows that it is not necessarily a matter of justice at all: whether one drives on the left or right is simply a choice, nothing more. Much in the law is of this nature: who can say whether an assignment that requires notification to the debtor as a condition of its validity is a matter of justice? Like in the case of the traffic and its ordering, efficiency or practice may have more to do with it.

This process of rule formation can be entirely informal, bottom-up. The solution may be obvious, and immediately rewarding, like in the case of the most elementary traffic rules in the above example. It may be, and is likely that, sooner or later some busybodies emerge or perhaps some people are informally designated to be policemen and, in their function, may enforce and even formulate the emerging practices and, as a result, create further rules. When inspired by the public good, they may correct what already exists. Here, we see some top-down rule creation of a mandatory nature by persons who have acquired legitimacy and authority to do so within their group.

VII. THE TRANSNATIONAL COMMERCIAL AND FINANCIAL LEGAL ORDER

The above example presents a very basic (even though fictitious) picture of what is happening in the international marketplace in law formation. The process is obviously more complex and cannot here be briefly described.¹⁶ But, to make this work best, especially in public policy, it is important to get as many participants to speak and enter the discussion, which may ultimately go to minimum standards in terms of public policy formation. That includes NGOs, national governments and international bodies like the ILO, the informed press, and other commentators; no one is excluded nor necessarily in control, although governments in agreement may, through treaty law, seek to impose their order assuming it obtains a large enough number of ratifications (or leads to institutionalized mini-globalization like in the European Union). The law that so emerges, including any mandatory standards, is in truth the product of the global social discourse which is in constant flux. There is

16. For a more comprehensive discussion, see DALHUISEN, VOL. 1, *supra* note 7, at 144–48.

not necessarily a preset line of authority or a preconceived idea of who the legitimate spokespersons are in this order. Nor is there necessarily an implicit separation of power or formal notion of democracy operating. It is true that since the 19th Century, states, as if they were the only spokespersons, could and did use the law in the pursuit of their policies. Moreover, states attempted to stabilize the scene through legislation, and they pushed their policies forward first in private law, especially in civil law countries as we have seen, and then, later, increasingly for more specific public ends, most notably in regulation.

In this world, national courts were traditional interpreters and communicators, but other, more informal, spokespersons are also important for legal normativity to move forward so as to best work for all and to explain the operation of the law and its formation, now at the transnational level. In private law, one may think of the ICC in international business, but there are also the United Nations Commission on International Trade Law (“UNCITRAL”) and the International Institute for the Unification of Private Law (“UNIDROIT”) projects. For minimum standards, governments, NGOs, and the informed press will also speak out. The ILO and Basel committee were also already mentioned and there are many other international bodies that will further legal normativity. That is what true *participatory law formation* is all about, which is in essence a bottom-up process.

Here, international arbitrators are key persons, which then raises the question of their institutional power in that order, to which we shall return towards the end. But also, the legal practice of in-house law or compliance departments and outside law firms whilst structuring their deals perform an important function. Academia, if understanding its role properly, may also be of considerable relevance. It should be noted in this respect that the prime function of the law is *not* dispute resolution. Rather, good law is dispute avoidance; the dispute resolution function of the law is often its most primitive part and illustrates the law’s shortcomings and failures. Law foremost exists to make the daily lives of everyone easier and more meaningful, not to concentrate on the resolution of disputes.

It was already said in this connection that the traditional view, which still sees all law as statist, was in truth never more than 19th Century political philosophy (whilst people held exactly the opposite view only fifty years earlier). In international transactions, it requires them to be cut up in domestic pieces, assuming that in an increasingly virtual environment the proper connections can still be found. The hope is that somehow all these domestic legal subparts and scenarios, although mostly never contemplated for international transactions, will add up to a sensible legal regime governing the entire transaction. It will more

likely lead to law of a low quality (and certainty of that nature) that may destroy everything and impede all progress. Not only are the international flows impeded, but new ways of doing and new values cannot informally emerge. In this parochial environment, international minimum standards also fall by the wayside. This is a model that deserves to be discredited in a modern, forward-moving civil society. It is true that liberal interpretation of local laws could come to the rescue and discount the international elements. In international transactions, we could thus introduce the concept of “internationality” itself as a new interpretation tool. So we could use “professionalism” of the transaction,¹⁷ signifying the special requirements and perceptions of the business world, including public policy and public order constraints and their development in the international business order itself. Such an approach would demonstrate that the quest for clarity and certainty along national lines was always a chimera in international transactions but even then, each country would in this way develop its own set of norms for international transactions. Transactions would still be split-up and there would be no transnational law. Why?

In civil society, again as a model, it is better to place the law itself at the top and view it as sovereign. Under the rule of law, states are then subject to the law even if nationally they have the power of clarification and intervention—especially through regulation—and, in many countries in the codification of private law, but there will be superior values and stronger practices. In this view, law comes from all directions and basically forms itself as a social, economic, or cultural phenomenon. It is not necessarily territorial. As we have seen, even correcting forces in public order and policy may form themselves transnationally and that is very necessary. All of this is a work in progress and can never be fully discovered or complete. In fact we know this already from interpretation, which can lead anywhere. In that context, we notice it especially when we recognize the legal force of overriding principle, but we also see it when we recognize practices, customs, and even general principles. The force of party autonomy is also clear, particularly in business, now also increasingly operating at the transnational level, again subject to the public interest and also limited where it seeks to affect others, for example in new proprietary structures, as we shall also see. This together makes for the modern *lex mercatoria* supplemented by overriding notions

17. In terms of business dealings, the author includes in international commerce and finance and its legal order all professional transactions, also those that may play out purely domestically on occasion because their structure is likely to be increasingly transnationalized and should be covered by the same law. In other words, they are also situated in the transnational commercial and financial legal order.

of justice, social peace, and efficiency when they become sufficiently pressing in individual fact situations and are not already discounted in the *lex mercatoria itself*. Public order and public policy considerations encroach as well. This is so domestically, but no less so transnationally.

Given the size and nature of the transnational flows, legal transnationalization might now best be seen as concerning law formation in a *different legal order* than that of states, which are only one type of legal order, with the special feature that they are territorially confined. Especially to the extent that globalization is becoming an autonomous process, the emergence of a separate new legal order presents itself at least in business. That is, the *transnational commercial and financial legal order* and the modern *lex mercatoria* with its different legal sources then becomes the private law of that order. The transnational arbitral order, as the French call it,¹⁸ is its dispute resolution branch. Again, this is less novel than it may seem: the European Court of Justice (“ECJ”), from early on, recognized the separate and specific legal order of the European Union.¹⁹ One key element for such an order to exist is to acquire enough momentum to create its own basic infrastructure, which is plausibly happening in international commerce and finance. The lack of such momentum in areas such as criminal and human rights—where states still have more room to pursue their own policies—may explain the greater difficulty with transnationalization in those areas.

Indeed, in international business, we may now be able to identify a community that has sufficient momentum to create a minimum infrastructure with spokespersons that can articulate its laws. This community is then also likely to create its own dispute resolution facilities, such as international arbitration. For international business, this order is derived from the international marketplace and is promoted through globalization. Again, it has been propelled by the sheer volume of the international flows of goods, services, money, and information, which are now far larger than the GDP of any state, or even the EU, as already noted, and the nature of these flows. There is no longer anything that could rationally suggest that they can only be legally covered by domestic laws, which were seldom written for such purposes. They are simply

18. There is significant acceptance of a more transnational approach, particularly in France, where it is particularly demonstrated in the attitude towards international arbitration, perhaps recently best represented before the Hague Academy by Emanuel Gaillard, *Aspects Philosophiques du Droit de l'Arbitrage International*, 329 RECUEIL DES COURS 49 (2008); see also *Cour de Cass Civ 1*, 29 June 2007, in *Ste PT Putrabali Adyamulia v. Societe Rena Holding et Societe Mnugotia Est Epices*, Arrêts 1021, 207 *Revue de l'Arbitrage* 507.

19. For the minimum requirements necessary for a legal order to operate in this manner and thereby form its own law, see DALHUISEN, VOL. 1, *supra* note 7, at § 1.5.

inadequate when we talk about these flows as a reality. Law formation in the transnational commercial and financial legal order is immanent in principle but can be helped and stabilized through spokespersons who may formulate and produce texts (like the ICC in Incoterms and UCP), while international arbitrators produce awards. Again, states may intervene through treaty law assuming that it finds broad acceptance; it is likely to remain exceptional often also through lack of quality: the international community not recognizing its practices in it. It was already said that it can be cogently argued²⁰ that immanent law formation is here more legitimate than the formal democratic process is.

Like any other law, this transnational law (and the decisions properly reached under it) should be recognized and enforced by states as the sole law enforcers, unless public order or the public policy of such states dictates otherwise. A proper understanding of the rule of law in civil society in a globalizing world requires such enforcement, which for very good reasons remains monopolized at the level of states. But this does no longer apply to law formation itself.

VIII. THE MODERN *LEX MERCATORIA* AS A HIERARCHY OF NORMS FROM DIFFERENT LEGAL SOURCES

The *lex mercatoria* produced in the transnational commercial and financial legal order is only private law, and is best approached, it has been posited, as a hierarchy of the well-known traditional sources of law enumerated, in Article 38(1) of the ICJ: (a) fundamental principles; (b) mandatory customs and practices; (c) mandatory treaty laws; (d) mandatory general principle; (e) party autonomy; and (f) directory custom, directory treaty law, and directory general principle.

It is proposed that within this hierarchy of norms, *domestic* private law remains the residual rule in areas where the modern *lex mercatoria* has not yet developed. In these areas, traditional rules of private international law would apply but the resulting domestic law would still be transnationalized in order to make sense in the transnational order and be adjusted accordingly. It follows, then, that the modern *lex mercatoria* is not a single, systematically connected body of law, but rather a *hierarchy* of rules derived from the different sources mentioned.

20. PHILIP SELZNICK, *THE COMMUNITARIAN PERSUASION* 64 (2002). Some French legal scholarship insisted on the internal sovereignty of all social groupings much earlier. See GEORGE GURVITCH, *L'IDEE DU DROIT SOCIAL* 84 (1932); GEORGE GURVITCH, *SOCIOLOGY OF LAW* (1942). They were even within nations considered to create their own law, which limited that of states and was, in principle, superior to it.

This signifies a return to Grotius, when law was universal and not issued by the states. The *ius gentium*, now mostly translated as and limited to the law among nations, was once, like it was in the Justinian compilations, the law among all people and its sources were the same for both. It is argued that we should return to that simple model also for private law formation at the transnational level and is, it is posited, what legal transnationalization in the private sphere is all about. As previously mentioned, treaty law of a private law nature is included in the modern *lex mercatoria* even though it is territorial. But, it can only count when there is a sufficient number of ratifications so that the content is more likely to become general principle. If it is still rejected by the business community as the CISG is, it could be argued that it is superseded by higher custom, even if not opted out. When public policy or public order is at issue, treaty law becomes a matter of mandatory domestic law in the Contracting States (applicable only to the extent the international transaction comes demonstrably onshore). Unless it reinforces private causes of action, it is *not* part of the *lex mercatoria* but corrects it transnationally if it is supported by transnational minimum standards or broad treaty consensus.

IX. MAJOR CHALLENGES AND BOTTLENECKS IN THE
TRANSNATIONALIZATION OF PRIVATE LAW IN PROFESSIONAL
DEALINGS—MODERN CONTRACT LAW BETWEEN PROFESSIONALS

Ultimately, it may be useful to see some of the major, practical challenges and bottlenecks that face the development of the modern *lex mercatoria* and discuss how this law may react in practice. In doing so, we may use the DCFR as the competing response and limit ourselves to six key concerns that all modern, private business laws must address. These concerns can be articulated in the following questions: (a) is the duration contract intent- or promise-based, or is its validity a matter of signaling and, therefore, a matter of conduct and (detrimental) reliance throughout the contractual period (from pre-contract to post-contract phases), leading to a dynamic concept of contract law?; (b) in what way is intent still relevant where the contracting parties make choices and the contract becomes a road map and risk management tool and how are gaps filled in?; (c) what are the defenses and excuses in the case of default—are they intent or fault based?; (d) what is the role of party autonomy in the creation of proprietary rights, especially in asset-backed financing?; (e) how will international commercial flows be protected from the proprietary interests of others, both hidden and known, in terms of transactional and payment finality?; and (f) can we set aside

international commercial and related cash-flows, and offer them as security for working capital, and if so, how?

Treaty or similar law, to the extent that it addressed these issues in the Vienna Convention (which specifically does not cover proprietary issues), the Draft CESL of the EU (which does not cover them either), and the DCFR, is not responsive to any of these key issues and therefore lacks credibility.²¹ Aside from the absence of an investigation into the methodology, which has been discussed above, these more practical issues were not identified as crucial in the development of a modern, private law in the professional sphere. The sources of law but also these more practical concerns of the modern *lex mercatoria*, or professional law in the areas it covers, were simply eliminated by virtue of the typical European top-down codification model with its 19th Century perceptions of contract and movable property, considered to be the same for all. These perceptions are based largely on the German approach of those days, and therefore were made for a different society with very different needs. This approach to law formation no longer makes fundamental contributions and, therefore, must be approached with considerable skepticism.

In terms of contract law evolution, we must first consider the question of whether the professional (duration) contract is based on intent (consensus), or rather conduct and (detrimental) reliance, meaning a signaling mode raising reasonable expectations, subsequently backed by investment (or in the case of an exchange of promises by a beginning of performance), without which no claim can then be made under it. A connected issue is whether the modern contract is dynamic. The traditional view in civil law is that a contract is intent-based and depends on consensus. Rights and obligations are dated and crystallize at that moment, immediately upon offer and acceptance as a sort of “mating dance.” Contract interpretation is, in essence, determined by this moment of the meeting of the minds, and supplemented by good faith, custom, and systemic thinking. The common law contract, on the other hand, is based on exchange and bargain (consideration), supplemented in modern times by notions of conduct and detrimental reliance. In other words, the common law contract seeks party investment, upon which, the contract becomes a risk management tool. The parties’ intent is secondary in contract formation and only acquires importance where clear choices are made in terms of risk management. Even then texts are restrictively interpreted, especially if the contract is perceived as a road map. This may be explained by the common law of contract having first

21. The Cape Town Convention and the Collateral Directive in the EU may well be the exception.

emerged in commerce while the civil law concept remains typically anthropomorphic, geared towards individuals and their concerns. In modern times, this often implies a consumer law bias with strong public protection elements.

It represents two different cultures. It is true that offer, acceptance, and intent language wafted over from civil law into the common law, but in commerce the approach remains quite different. As a consequence, the common law concept of party autonomy is more objective and, at the same time, more fitting for the corporate situation. This "corporate situation" is one in which the person who signs the contract seldom knows what is in it except for the commercial objectives and relies only on his or her authority, while different departments, with little awareness of one another, have been involved in the negotiation in respect of different parts which may remain unconnected, and the ultimate text comes from outside, from non-party lawyers who are probably the only ones who understand the contract language. The difference between the common law and civil law approach is evidenced in the defenses such as mistake, misrepresentation, or fraud which do not depend upon what was intended (again the personal condition is ignored) but rather emerged in equity as incidental relief in the remedy of rescission, which depends entirely on the facts. Furthermore, as interpretation is literal and intent comes in only where parties have made clear choices, the parties must accept that the chips fall where they fall if they have made no such choices and there is therefore also limited room for gap filling unless there is a situation of dependency, for example, in information supply, which reminds us of fiduciary duties. As for excuses, the common law professional contract does not allow either for force majeure or change of circumstances as excuse in the major conditions of the contract unless written into the contract itself, or (sometimes) operating within it as an implied condition. Lack of blame in the case of breach is irrelevant. So, the defenses/excuses: "I did not mean it," "I cannot help it," and "it is not my fault," carry a great deal less weight in the common law than in the civil law of contract. Only the other party not performing is a clear cut defense.

This is also likely to be the approach transnationally, one reason being that the problems of one party should not normally be put on the other who is a complete bystander and certainly cannot help it either. Moreover, the party in distress under the contract may have thousands of them under many of which it may do very well. The counterparty may have only one contract on which it depends. Why should the first one be excused until perhaps the situation is thus that there results severe distress for this party overall?

It follows that, objective, good faith adjustments in common law contracts are also unlikely, especially if duration contracts are written as road maps. Intent is mainly important in terms of initiative, when the drafting of the roadmap is used as a risk management tool. Again, things may be different in situations of dependency, where the “relationship sensitive” feature of the common law of contract is illustrated. This is quite the reverse of civil law, which defines the contract types but is traditionally hardly sensitive to the type of relationships created. It explains why the common law needs good faith far less than civil law, in allowing for different types of parties and their strengths:²² it is part of its structure, supplemented by fiduciary duties and notions of reliance, and sometimes natural justice. On the other hand, in civil law, good faith protections for consumers constantly threaten to show up in business dealings in the same contract types.

The DCFR accepts, without question, the traditional anthropomorphic civil law approach of consensus and good faith interpretation following the earlier European Contract Principles (PECL). It is to be noted that the Vienna Convention or CISG also tends toward the civil law tradition in these matters. This is clear from its contract formation language. Although it does not go much into the interpretation of the contract, it maintains a subjective notion of fundamental breach in Article 25,²³ and also of force majeure in Article 79. Under Article 50, the buyer may unilaterally adjust the price under certain circumstances. It is mainly for these reasons that the international business community has rejected the Convention and usually excludes its application. Similar problems emerge in CESL, which follows the CISG in these matters (earlier largely copied in the DCFR) and is unlikely to find business acceptance for the same reasons, probably also because of the additional protection it offers to consumers.

22. The UCC, in Article II on the sale of goods, uses the good faith notion, U.C.C. §§ 1-304, 2-103(1)(b), but notably not in pre-contractual and post-contractual situations where the concept is only incidentally relevant. See U.C.C. §§ 2-603, 2-615. In the U.S., on the other hand, the non-binding RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) stated for the first time more generally that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. This was then followed in the 1990 revision of Section 3-103(a)(6) of the UCC for negotiable instruments, which, as far as the UCC is concerned, was first in accepting the idea that good faith could also mean the observance of reasonable commercial standards of fair dealing, but good faith remains a matter of performance and enforcement of the contract only.

23. See also Michael Bridge, *Avoidance for Fundamental Breach Under the UN Convention on Contracts for the International Sale of Goods*, 59 INT'L & COMP. L.Q. 911 (2010).

If all contract law is to be interpreted according to the canons of good faith, as is now mostly the attitude in civil law, this could, however, still mean that less rights exist in professional dealings; good faith itself would then require a more literal interpretation of the contract.²⁴ Indeed, good faith is not a source of law that mandates new values *per se*—for that, we (should) have fundamental principles—but it is more properly a liberal interpretative technique that may extend but also limit defenses and excuses and may facilitate, in business, strict compliance where the contract is expressed as a road map and risk management tool. Thus, mistake may have little meaning between professionals unless it was mutual, or where one party was misled. The same applies to the excuse of force majeure unless there is absolute impossibility. Even then, it must be decided who will pick up the pieces and bear liability for the adverse consequences of one party being excused—it would not necessarily be the non-breaching party. A change of circumstances will only impact if there is a hardship clause unless the situation becomes clearly untenable, taking into account the overall position of the breaching party as already mentioned.

Another issue is the dynamics of the contract itself. Both the common and civil law systems suffer from having a fixed moment at which contractual rights and duties emerge. However, a more dynamic concept has emerged in both systems. This dynamic concept allows for pre-contractual duties (especially in civil law) and, sometimes, post-contractual renegotiation duties (although more prevalent in consumer protection law and more relevant in labor law). Again, the common law looks for situations of dependency and reliance for these protections to operate in the pre- and post-contractual situations and does not recognize more general notions. But, the common law is also increasingly aware that duration contracts present a framework in which rights and obligations continuously emerge and may be extinguished. It is the acceptance of the risk of contracting itself and the different situations that may subsequently emerge. It was already said that short of risk management in the contract, the chips fall where they fall. Contracting, especially long term, is a risky business.²⁵ Much can simply not be foreseen but there will also be continuing signaling and reliance in the communications between both parties. Potentially that creates new rights and obligations all the time. The written contract may or may not

24. The Dutch Supreme Court has started to make distinctions on the basis of the professional contract. See HR 19 January 2007 (*PontMeyer*), NJ 575 (2007); 29 June 2007 (*Derksen/Homburg*), NJ 576 (2007); 9 April 2009 (*UPC/Land*), JOR 179 (2009). However, it is only a beginning. In civil law, the good faith concept has further to go.

25. For modern contract theory, see DALHUISEN, VOL. 2, *supra* note 4, at § 1.1.4.

have considered new events, might consider itself complete and may try to ignore new signals, but they cannot be avoided.

X. TRANSNATIONAL MOVABLE PROPERTY LAW

In terms of movable property law evolution, one central issue is whether property rights, with respect to movable assets, acquire their main features from the physicality of the underlying assets. Another issue is the extent to which we still have a closed system of proprietary rights and whether movable property rights and their emergence can be subjected to party autonomy becoming dynamic in a legal sense.

It has already been said that the law is concerned with rights and obligations and not with anything physical or unphysical *per se*. It is true, historically, that the English notion of bailment, or possession, has been a physical concept in chattels that is stronger than the right of ownership, and any owner who had voluntarily surrendered his assets was in a weak position. That was called *seisin*. In old Saxon law in Germany, this was the notion of *gewere*, but Roman law was different, and developed early on a notion of possession that was not physical *per se* (*corpus*), but rather denoted a state of mind with respect to the asset (*animus*) which the possessor meant to hold as if he were the owner, from which there followed a special and simpler kind of protection. Here, ownership and its defenses survived the surrender of the physical asset and could trump the right of the possessor, but in the 19th Century, there was a return in German law to the older notion of physicality. It was further demonstrated in the *Bestimmtheitsprinzip*, the need for any proprietary right to be in an identified, existing asset, set apart for the purpose. Another aspect was the delivery requirement for title transfer which also denoted (with exceptions) physicality. This is reflected in the German Civil Code (BGB and now the DCFR), but it upset the entire system.

Emphasis thus returned to possession and its defenses based on physicality and the identification and individualization of the underlying asset rather than the defense of the proprietary rights therein (the object of the proprietary rights being identified with it). In that system, assets could not be transferred in bulk or as a class subject merely to an adequate description, nor could future assets be included, for example, as security for debt. Floating charges could not then develop either, even if in German case law some party autonomy was assumed and there was

some early relaxation.²⁶ In this approach, intangible assets, like claims, were not assets at all; this affected the law of assignment and the proprietary defenses (although it could allow for more flexibility in terms of party autonomy). The DCFR not only accepts all of this, but is even regressive.²⁷

Another important aspect of the law of property is that it operates within a closed system of proprietary rights. This is true both in civil law and in common law, but only at law and not in equity. The reason for this restriction is that property rights can operate against third parties even when those third parties are not aware that those rights exist. So, we cannot have too many. Publicity has not much to do with it. In real estate, we have land registers that allow for discovery of these rights, but registers are unfeasible with respect to movable assets: one cannot possibly register all the things he or she may have in an apartment. These chattel items change all the time. So, at least in movable property, there is always a risk that we buy something in which other people have a prior interest, even if there are only a few such possible interests. These interests include common ownership, usufruct (or life interests), and security interests. The defense against such unknown interests is in bona fide transferee protection. This protection commonly goes to the purchaser who acquires physical possession of personal property assets,

26. The requirement of specificity remains an impediment, as it is still necessary to force bulk transfers into the established pattern of individual transfers, which is particularly problematic for future tangibles and receivables. The requirement of specificity is only (partly) overcome by the use of special constructions like the *Raumsicherungsvertrag* for tangible movable assets and the *Globalzession* for intangibles. For tangibles, it allows them to be described with reference to a certain place or room (*Raum*). Receivables may be sufficiently described with reference to certain debtors. For the transfer of future goods, the facility of the anticipated *constitutum possessorium* through a representative was created for physical assets. See RG, 11 June 1920, RGZ 99, 208 (1920). The *Verarbeitungsklausel* attempts to cover situations of conversion of the assets in manufactured goods and of resale where the concept of replacement goods appears as sufficient identification to retain the original ranking.

The assignment of future receivables was (perversely) much facilitated by not being considered assets capable of being the object of proprietary rights. Moreover, notification is not a constitutive requirement under German law for the transfer of claims, so they need not be individualized for that purpose. The claim itself need only be identifiable when it emerges, BGH, 25 October 1952, BGHZ 7, 365 (1952), whilst the relationship out of which it arises need not pre-exist (as Dutch law, for example, normally still requires). Indeed, the *Vorausabtretungsklausel* allows for a transfer of claims when emerging under a floating charge.

27. The law of chattels is followed in Article III-5:106 and claims must exist in order to be transferred under Article III-5:104. Party autonomy then becomes more restrained. See STUDY GROUP ON A EUROPEAN CIVIL CODE, PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) ART. III-5:104 (Christian von Bar et al., outline ed. 2009).

unaware of hidden proprietary rights or charges against those assets.²⁸ The rule is limited and applies only to tangible property and does not commonly apply to the acquisition of receivables or other intangible assets.

Problem areas in civil law are often found in the operation of conditional and temporary ownership rights and in the operation of segregation (constructive trusts in common law). The tension here is that these rights or concepts push against a closed system of proprietary rights. Although the DCFR accepts the notion of conditional ownership (Article VIII-2:203), it provides only a narrow construction—especially when operating as a modern financial product—and re-characterizes the traditional example of the reservation or retention of title rights as a separate property right (Article VIII-2:307). A finance lease is merely contractual, unless title is transferred at the end, then it becomes a retention of title (Article XI-1:103(2)(c)). Repos are secured transactions (Art. IX-1:102(4)(d)),²⁹ as are sales with leasebacks (Art. IX-1:102 (4)(c)).

28. In common law countries, such protection only derives from statute and is limited, in both England as well as the U.S., to only goods acquired by sale. In equity, as we shall see, the protection remains fundamental.

29. It is generally agreed upon in the U.S. that the characterization of repos as a secured transaction is disastrous. Such characterization leads to dispositions upon default and can even lead to filling needs at the time of creation in view of the fungible nature of investment securities revealing the tenuous nature of the possession by the financier. There would also be the danger of a stay and adjustment of the security in insolvency. See, e.g., Michael A. Spielman, *Whole Loan Repurchase Agreements: An Assessment of Investment Transaction Risks in Light of Continuing Legal Uncertainty*, 99 COM. L.J. 476 (1994); Jeanne L. Schroeder, *Repo Madness: The Characterization of Repurchase Agreements Under the Bankruptcy Code and the U.C.C.*, 46 SYRACUSE L. REV. 999 (1996). The U.S. does allow the repo price to be clearly expressed in terms of the original purchase price, plus an agreed interest rate, seemingly to re-characterize the repurchase as a secured loan. This is the better approach.

Case law is divided. See *In re Beville*, 67 B.R. 557 (D.N.J. 1986); *In re Beville*, 896 F.2d 54 (3d Cir. 1990). In these cases, *intention* was considered decisive as to whether there was a security agreement or a sale and repurchase. See also *In re Comark*, 145 B.R. 47, 53 (9th Cir. 1992). But, the fungibility of the underlying assets was believed to have an undermining effect on proprietary claims, although it seems that if the assets are with a depository who will provide replacement goods, the fungibility issue may be less urgent. All this translates into entitlements, which can be shared or conditional. For the new model of transferring and pledging of such securities and the priorities of owners and pledgees in them, see the 1994 revision of Article VIII of the U.C.C. However, case law may sometimes be construed to be generally more adverse to true repurchase agreements. See *In re Lombard-Wall, Inc.*, No. 82-B-11556 (EJR), 1982 Bankr. LEXIS 5453 (Bankr. S.D.N.Y. Sept. 16, 1982); cf. *In re Lombard-Wall, Inc.*, 23 B.R. 165 (Bankr. S.D.N.Y. 1982) (characterizing repos as secured loans and leading to the 1984 Bankruptcy Code amendments). See, more recently still, the U.S. Supreme Court decision in *Nebraska Dep't of Revenue v. Loewenstein*, 513 U.S. 123 (1994), which held the same, but expressly limited this finding to taxation matters. It did not mean to interpret “the Securities Exchange Act of 1934, the Bankruptcy

Floating charges are not favored either, and are mainly seen as a contractual extension of existing property rights under Article XI-2:307, and, as already mentioned, are probably more restricted than under present German law. The DCFR recognizes the formal trust as a separate proprietary right (Book X of the Code Civil), but not the constructive trust with its more informal segregation facility to avoid unjust enrichment. Again, this is all in the German tradition where modern financial products have always fallen off the plate of the BGB. But, it was also largely followed by the new Dutch civil code of 1992 and the new Brazilian code of 2002.³⁰ Civil law seems to not be able to deal seriously with these matters as it remains caught in 19th Century property notions. It means that its movable property law remains static. As in contract, civil law is not geared to proper risk management in movable property.

It should be realized that for common law countries in equity, the situation is quite different. Equity, notably, dispenses with the physicality notion, and assets become transferable in bulk, possibly including future assets. There is no closed system of proprietary rights: parties can freely create new ones. This results in a dynamic system of proprietary rights, not hemmed in by the *numerus clausus* bar to new ones. But, while there is party autonomy in the *creation* of these rights, they are cut off at the level of their *operation* in the sense that bona fide third parties, who are not aware of these interests, may ignore them. This is increasingly extended to all buyers in the ordinary course of business of commoditized products. There is no search duty, even if there is a register, except for insiders like banks or major suppliers. It means that the ordinary commercial flows are free of these interests. This protection is not limited to the physical possessor either, but benefits all who buy in the ordinary course of business, including the assignee of receivables who collects in good faith.

Indeed, like the modern contract, proprietary rights are then seen primarily as risk management tools. Here again, the international community is likely to subscribe to the common law practice. Equity gives the common law great flexibility, which has special relevance for

Code, or any other body of law." *Id.* at 134. It is often thought that the 1982, 1984, 1990, and 2005 amendments to the Bankruptcy Code—especially dealing with repos in government and other securities, 11 U.S.C. §§ 101(47), 101(49), 555, 559–62, 741(7), and exempting the netting of these transactions from the stay provisions—now indicate a different approach to repos whilst taking them outside Article IX of the U.C.C.

30. Only the French were able to enter piecemeal product-related reforms, now brought together in their *Code et Monétaire et Financier* of 2001, and in, as far as trusts and floating charges are concerned, Book IV of the Code Civil as amended.

the financial services industry in asset-backed financing. Common law countries have also traditionally had a more flexible regime in the equitable assignment of claims and in the equitable set-off. This being so, it is no wonder that the major financial centers are in common law countries: London, New York, Singapore, and Hong Kong.

This also touches on the issue of transactional and payment finality, which, as we see here, is the other side of a more dynamic property law. Much is said about certainty in the law—especially in connection with legal transnationalization. Whatever the popularity of the concept, it is hardly achievable in a fast-moving environment, even domestically. The true issue is, rather, transactional and payment finality. It is a proprietary issue. In this aspect, the law must be strict lest all would become unsettled. Title must be quieted. Above, the protection of the *bona fide* purchasers has already been mentioned in respect to unknown charges, a protection, now in more advanced legal systems extended to all transferees in the ordinary course of business of commoditized products (regardless of physical possession). They have no search duty even if registers were to exist. That is finality, and the DCFR accepts as much but still only with respect to physical movable assets in line with most codified civil law.

Finality not only guards against all kinds of unknown charges or other proprietary interests, however; it also guards against the undoing of contracts that have transferred property or money. Say I buy a bicycle and it is delivered. I am the owner. What would happen if the underlying contract were to be found invalid for lack of capacity, intent, consideration, or some other reason? This could seriously upset my title. This is the reason the Germans developed the concept of the abstract system of title transfer that disconnects the title transfer from the underlying contract (except in the case of fraud). This important additional prop of finality is the more common approach, although this concept has seldom been so analyzed in common law countries. Surprisingly, the DCFR, which otherwise follows the German model, takes this prop away in Article VIII-6:102. Even though certainty was one of its major concern (Article I-1:102 (3)(c))—never mind that it can hardly be guaranteed in a fast-moving environment—it shows that the much more attainable concept of transactional and payment finality was never central to the DCFR's thinking and appears to have been ignored.

This departure also affects the approach to payment systems and payments. Here again, the true supports for payment finality are the protection of the *bona fide* payee, the abstract system of title transfer coupled by notions of reliance, and an objective notion of intent and assumption of full capacity. Somehow, this escaped the DCFR also, even though it is crucial in the modern *lex mercatoria* and the markets it is

meant to support (and fully recognized in negotiable instruments and letters of credit). This lack of vision is caused by poor legal scholarship that is totally unaware of what is happening and of what is needed. At a minimum, these issues should have been spotted and discussed. If finality of this nature is not wanted, and it is hard to see how that could even be true, that decision should have been explicitly explained on the basis of demonstrable public policy and public order impediments.

XI. THE TRANSFER OF INTERNATIONAL COMMERCIAL AND RELATED CASH-FLOWS

In terms of the use and transfer of international flows, the essential issue is probably the applicability of irrational, and entirely out-of-date domestic law, and its monopolization of the scene. Consider a manufacturing plant, which produces cars it wants to sell in different countries, offering its entire stream of products and resulting receivables and payments to its bank for financing of its working capital. What would be more normal? Yet, even domestically, this may still create considerable problems in floating charges, particularly in civil law countries, as we have seen, where future assets cannot be transferred and any transfer in bulk is in any way invalid (all items being required to be individualized, identified, and transferred individually as existing assets). It is, again, the notion of physicality. If international transactions were to follow traditional notions, the inventory and related payments would have to be transferred per the country of their *situs*, assuming that the latter could still be determined and would provide the means under local law. It would leave all intangible claims, rights, and obligations literally in the air, as they have no natural *situs*. The result is that, in the traditional view, it is not possible to transfer an international commercial flow at all. As a minimum, the transfer must be cut up into its local parts, if they are at all determinable, which, as explained above, is increasingly doubtful. Again, it seems that the only reason for these problems stems from parochial biases: the perception that law is always national (and in proprietary matters always *situs*-related, therefore physical). Similar problems arise in the area of set-off. Consider how this would work in an international setting.

The modern *lex mercatoria* would be able to—and more than keen to—take the necessary steps of promoting the unity of commercial flows while arranging for and protecting their transferability under transnational law. This is a practical necessity in a globalized environment where assets are in constant transformation and have no natural *situs*, unless public policy and public order (of a transnational

nature) dictate otherwise. The test, as we shall see, is in bankruptcy which remains local.

XII. THE ROLE OF INTERNATIONAL ARBITRATORS

International arbitration has a special role to play, including the function of being a prime spokesperson for the new order, it was already mentioned, but it poses important questions about its nature, authority, and legitimacy, and then also about its power over domestic orders, especially in bankruptcy enforcement. Bankruptcy has traditionally remained local regardless of the adoption of the EU Bankruptcy Regulation and the UNCITRAL Model Law, which aim at a form of recognition and enforcement in other countries. An important consideration is in this regard the recognition and execution facilities of supporting arbitral awards under the New York Convention and its public policy bar which is often still considered domestic in recognizing states.

Another important issue in this context concerns the status of international arbitrators and regards the delocalization of international arbitration. This suggests the institutional foundation of the arbitration in the transnational legal order itself, establishing the powers and authority of international arbitrators. While this is a much larger subject than can be handled in a nutshell, the essence of that discussion is that international commercial and financial arbitration is now best seen as being founded in the transnational legal order itself. It is this order from which the arbitrators derive their power, not from the arbitration clause, which could hardly explain the arbitrators' authority to bind third parties in proprietary matters or in issues of set-off or in matters of public policy, over all of which parties do not have power, whatever their arbitration clause. That clause then merely activates the arbitration and is for its validity and meaning itself dependent on the transnational legal order.

The power of arbitrators, in that order, acquire an autonomous status and could in proprietary matters and issues of assignment and set-off be compared to the power of equity judges in common law countries.³¹ That power may, in appropriate cases, also affect third parties in the proprietary consequences and ranking, subject to their protections in terms of finality under the modern *lex mercatoria* as just discussed. A similar power is then obtained in respect of the set-off and netting

31. See J.H. Dalhuisen, *International Arbitrators as Equity Judges*, in PH BECKER, R DOLZER AND M WAIBEL (eds.), *MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS* 510 (2010).

facilities. The expectation must be that these findings also bind the domestic bankruptcy judges,³² which is the key in international finance, and makes the transnationalization of the private law and property law, at the global level, a true reality. This is the essence of international financial arbitration. This may be carried over into the formulation of transnational minimum standards in terms of public policy and public order. That would affect the public policy bar under the New York Convention.

Another issue is here the power of international arbitrators to deal with public issues at their own initiative and, therefore, their ability to raise them without dependence on the pleadings of parties. May or must they even raise these issues, for example, in the case of suspected market abuse in the terms of competition offenses, market manipulation such as insider dealing and money laundering, or corruption? It is increasingly believed that international arbitrators have these powers and may here even have duties. Again, these do not derive from the arbitration clause but concern public policy and arbitrability in the transnational commercial and financial legal order itself.³³ It raises the important question of who is to supervise these arbitrators in their much expanded role and who is to provide guidance. That would arguably require the operation of an International Commercial Court, not in terms of appeal, but in terms of supervision and perhaps preliminary opinions. Such a court could then also take ultimate jurisdiction in the recognition of the ensuing awards in other countries under the New York Convention, even in bankruptcy.³⁴

32. Note that the Australian (Victoria) decisions in *International Air Transport Ass'n v. Ansett Australia Holdings Ltd.*, [2005] VSC 113, [2006] VSCA 242, and [2008] HCA 38, in which the Australian High Court ultimately accepted that even without an arbitral award at least in a non-financial CCP, in respect of mutual airline claims resulting from passenger cancellations and ticket changes, this transnational form of clearing and settlement and set-off trumped the Australian bankruptcy laws. This was an important precedent. See also Christian Chamorro-Courtland, *The Legal Aspects of Non-Financial Market Central Counterparties (CCP): A Case Comment on Iata v. Ansett*, (2012) 27.4, BANKING & FIN. L. REV., and notable advances from *British Eagle International Airlines Ltd. v. Compagnie Nationale Air France* [1975] 2 All ER 390 (H.L.) (appeal taken from Eng.).

33. An important case in this regard was the one of the European Court of Justice (ECJ) in Case C-126/97 *Eco Swiss v. Benetton* [1998] ECR I-3055 upholding the arbitrators' right and even suggesting a duty to apply EU competition law.

34. J.H. Dalhuisen, *The Case for an International Commercial Court* 10–12 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433513.

XIII. CONCLUSION

In the view of this author, there is very little point to cast legal transnationalization in terms of receding government. Rather, it should be cast in terms of what works best, and what the minimum public policy and order limitations are at the transnational level, and therefore in the international marketplace. This may be supplemented by domestic public policy considerations when international transactions still come demonstrably onshore in a particular country.

The domestic or international role of government has never been static or a given, but has always been subject to an equilibrium of forces that change constantly. Even the efficiency of law formation by governments at the national level has probably always been exaggerated, whether at the level of private or public (regulatory) law. Private law codification only dates from the 19th Century, and is often left much unresolved, see for more modern times notably the legal characterization and treatment of finance in civil law countries. Most importantly, determining and monopolizing the value system between citizens at the government level, and the government making these choices, has always been a dubious proposition. In an open society, social and other values develop through the law in many ways. Even the ECJ recognized this in *Mangold* and *Audiolux*.³⁵ Government regulation or intervention, while necessary to bridle markets, is often no more than political expediency or mere wishful thinking even at the domestic level.

35. See Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-09981 (upholding as fundamental principle the concept of non-discrimination on the basis of age). This has become a check on private law legislation, although it may not yet be invoked directly between private parties. Non-discrimination according to nationality is no less fundamental, and also applies in private dealings under EU laws. See Case 115/08, *Land Oberösterreich v. ČEZ*, 2009 E.C.R. I-10265.

In Case C-101/08, *Audiolux SA and Others v. Groupe Bruxelles Lambert SA (GBL)*, 2009 E.C.R. I-09823, the ECJ made it clear that there are overarching fundamental principles that operate and are enforceable at the same level as the Founding Treaties and need *not* be written. The Advocate General called them “deeply rooted principles without which a civilised [sic] society would not exist.” They are generally effective and therefore also underlie private law.

This case law may also be seen in the light of the extension of the ECJ’s jurisprudence following Case C-33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989. In *Rewe-Zentralfinanz*, despite the lack of precise EU rules, the ECJ disallowed restrictive rules of national laws that affected the private law sphere, such as damage calculations, statute of limitations, interest charges, *res judicata*, and when those national laws obstructed the effectiveness of EU principles, particularly the freedom of movement of goods, services, capital, information, and persons.

Creating a better balance and new equilibrium in law formation through transnationalization is necessary simply because of the enormous expansion of the international commercial and financial flows in the last generation. Due to the extent and nature of these flows, the idea that local private or regulatory laws can still govern them and achieve the proper balance in terms of justice, social peace, efficiency, and ecology is a fiction. It requires the break-up of international transactions along territorial lines for no obvious reason, even if it was clear whether these lines can still be properly drawn.

Law better achieves order if it is the result of a constant dialogue within society to promote justice, social peace, and efficiency. In civil society, its formation is not an exclusive governmental prerogative. At least in commerce and finance, transnationally, we need a change of paradigm back to what it was before the 19th Century, when law developed autonomously and was considered universal, unless there were pressing reasons for it to be otherwise and public policy arguments for (governmental) intervention. The simple proposition is that this model that still obtains for public international law is again extended to private law formation in the international sphere. It may help in this connection if the emergence of a new transnational legal order in commerce and finance is properly understood. This law should be accompanied and corrected by public order considerations also at the transnational level in the form of transnational minimum standards. The formulation of these standards and the way they can be found, expressed, and enforced was identified as a major challenge. Details of the new law were elaborated for modern contract and movable property law as it was perceived to operate in the transnational sphere. That law appeared to be closer to the common law, especially in its equity variant.

There is here little to fear and nothing which suggests that the result will be any worse. Where this new law has developed most, in the Eurobond and financial swap areas, we hear few complaints. With imagination, this newer law can easily be better in as far as it affects international commerce and finance than what we now get through the application of an amalgam of local laws. For academia to be of use in this process, a firmer understanding of what is going on and what is truly needed is required. Without it, we shall have the quality of the DCFR in private professional law and the efficiency and utility of modern regulation (or lack of model and focus) in international finance.

The argument survives, however, that legal transnationalization, despite all its urgency and rationality, remains an opaque process. It is an easy jibe, and suggests that the current nationalistic paradigm is clear, works, and is therefore better, even if only by default, never mind that we cannot even transfer an international commercial/cash flow as

security for working capital. First, there is nothing opaque in the transnationalization of private law if one accepts that local law always remains the residual rule (even if in international transactions it will be adjusted for it to make sense in the international legal order), and there is thus still a full system for those who think that way, especially in private law. Second, both in private and public international law, the various sources of law are well known. Third, even in the nationalistic persuasion, interpretation was always an area where little could be said and all legal sources, however much they might have been preempted by domestic legal texts, revived.

Rather, it is the inclination to lean on the comfort of the established framework and the belief in its self-sufficiency that is the inhibiting factor which holds us back. Stated differently, it is the fear of legal experimentation and innovation. But most of what we have does not work very well—certainly not in international transactions—and needs in any event to be reviewed and critiqued on a continuous basis. For the law to remain living, our goal is always the law of the future, not the defense of the law of the past, which clearly has its limitations and was made for another world.

Perhaps we see the effort to renew clearest in international arbitration. In the exercise of their law and public policy-discovering function, international arbitrators who, as a tribunal, are unlikely to have any background in one particular legal system as *lex fori* (except in a transnationalized one), may on the one hand ask parties to demonstrate and prove the practices, customs, and general principles on which they rely in their private international dealings. On the other hand, they may invite international organizations, NGOs, and others to speak for public policy.

While international arbitration is thus important, true renewal may be better observed through a continuous process of discovery in the daily practice of the law, and is not limited to dispute resolution which is often uncertain. In any event, it is wrong to take the resulting decisions as sole yardsticks of our progress. Indeed, the real action is elsewhere. It is amongst the practitioners in their regular operations which should be conflict-avoiding and facilitating, ever more rational and sensible, thus better-equipped to making life easier and better for us all in a globalizing environment unless transnationalized public policy and public order forbid it.