

## A THEORY FOR INTERNATIONAL COMMERCIAL LAW?

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SUMMARY: I. *Lex Mercatoria: Globalisation and its Discontents*. II. *Rule of Law Theory*. III. *The Power of the Market: A Pro-Creditor/Pro-Debtor World*. IV. *Transplanting Financial Law*. V. *Conclusion*.

Over recent decades we can see the emergence of a new international commercial law driven by international institutions ranging from the Uncitral, the World Bank and the International Monetary Fund; through the Basel Committee on Banking Supervision and similar bodies like the International Organization of Securities Commissions (IOSCO); to industry bodies such as the International Chamber of Commerce (ICC), the International Accounting Standards Board (IASB) and the International Swaps and Derivatives Association (ISDA). The purpose here is not to describe these institutions or to analyse the substantive provisions of the new international commercial law. Although the area is a moving target, there are already some excellent attempts aimed at doing both. To take just one example from my own area of financial law: as well as providing a fine overview of the area, Professor Mario Giovanoli has argued that the new international financial law is mainly stand alone “soft law”, independent of any international framework of binding law rules, and sometimes lacking the degree of precision indispensable to a legally enforceable rule.<sup>1</sup> An up to

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<sup>1</sup> E.g., Giovanoli, M., “A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Settikng”, in Giovanoli, M. (ed.), *International Monetary Law* (2000), p. 40.

date compilation of much of this new international financial law is available from the Financial Stability Forum. That body brings together national authorities responsible for financial stability around the world, is serviced by a secretariat at the Bank for International Settlements in Basel and, most importantly, publishes a compendium of the international legal standards, codes and principles relevant to the transparency of policy making in the financial system, institutional and market infrastructure, and financial regulation drawn up by bodies such as those mentioned above.<sup>2</sup> In other areas of the new international commercial law there are comparable compilations and attempts at classification.<sup>3</sup>

My purpose is to explore whether it can be said that there are legal theory or theories which help explain the emergence of this new international commercial law and its adoption (or otherwise) in different jurisdictions. What this essay suggests is that there are several bodies of legal theory which may throw light on these issues. First is the new *lex mecatoria*, and whether its emergence at the international level can be explained in theoretical terms. There are also uniform principles, model laws and even international conventions drawn up under the auspices of bodies such as Uncitral, Unidroit and the ICC—making up an impressive corpus of international commercial law—. These principles have a resonance among international commercial lawyers and are sometimes drivers in structuring commercial transactions although they have tended not to have had much impact on national legal systems. A second strand of thinking has an important bearing on the economic content of commercial transactions because it shapes market perceptions and behaviour. This is the rule of law theory which is especially popular with the World Bank and IMF. Empirical studies suggest a link between strong rule of law institutions on the one hand and economic development on the other. Whether a country is in this category turns again on the adoption of these standards, codes and principles. Thirdly, is the method of categorisation which places the world along a spectrum of pro-creditor to pro-debtor countries. Where countries fall on the spectrum turns in part on whether they have adopted the standards,

<sup>2</sup> [www.fsforum.org](http://www.fsforum.org). But important standards, codes and principles of industry bodies are not included.

<sup>3</sup> E.g. Goode, R., *et al.*, *Transnational Commercial Law. International Instruments and Commentary* (Oxford, 2004); Bamodu, G., “Extra-national Legal Principles in the Global Village: A Conceptual Examination of Transnational Law” (2001) 7, in *Int. Arbitration LR* 6. And see the Uncitral and Unidroit websites.

codes and principles advanced as necessary for rule of law purposes. Whether a country is pro-creditor or pro-debtor feeds into market assessments and influences foreign investors. Finally there is legal transplant theory. This bears on whether these standards, codes and principles can be successfully implemented in national jurisdictions. It is only part of the explanation for successful transplants, however, for at the very outset there must be the political will to adopt them.

### I. LEX MERCATORIA: GLOBALISATION AND ITS DISCONTENTS

In recent decades there has been a burst of activity in international commercial law, part of which has been characterised as the new *lex mercatoria*. The latter has drawn inspiration from the medieval *lex mercatoria*, which evolved from the practices of the merchants as they traded at international trade fairs, held in the great medieval cities and ports of Europe. Berman provides an account of the development of what “came to be viewed as an integrated, developing system, a *body* of law”.<sup>4</sup> In his analysis it was a consequence of the enormous social and economic transformation which Europe underwent from the late eleventh and twelfth centuries. Its principles began initially with the merchants themselves, in the mercantile courts they founded. Later the principles spread as some were compiled into codes of mercantile practice, the mercantile courts themselves kept records of their decision which could be used in subsequent cases, and documents like bills of exchange and bills of lading designed for particular transactions circulated widely. Among the distinctive characteristics of the European mercantile law which Berman identifies are the distinctions between real and personal property and between ownership and possession; the creation of security interests in personal property; the recognition of the rights of the good-faith purchaser of goods and bills of exchange; the creation of documents such as negotiable instruments and bills of lading which embodied rights distinct from any underlying transaction; and the development of new business forms such as partnership and the *commenda* (which he describes as a kind of joint stock company, with the liability of each in-

<sup>4</sup> Berman, H., *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge, Mass., 1983, p. 333.

vestor limited).<sup>5</sup> Ultimately this medieval *lex mercatoria* was incorporated into domestic law, a happy process, in English conventional wisdom, because of the role of Lord Mansfield.<sup>6</sup>

The notion of a medieval *lex mercatoria* —objective, and based on a reciprocity of rights between the parties— does not bear close scrutiny. One form of criticism is that the *lex mercatoria* was never completely divorced from state power. In theoretical terms this was because whatever independent merchants might want in regulating the terms of trade, they needed the rule of law administered by a national legal system to protect the market from the local ruler's whim. So however desirable an independent mercantile law might be, merchants had to accept a second best solution where mercantile and state law were fused in national courts.<sup>7</sup> In historical terms a general *lex mercatoria* is hard to find.<sup>8</sup> There are examples of merchants winning some privileges from the exercise of state power. For example, in England there were separate procedures for mercantile disputes apart from the common law courts: thus shipping cases were handled by the separate Admiralty Court.<sup>9</sup> But until the great constitutional struggles of the seventeenth century, the *lex mercatoria* as used in England was apparently not a term describing a body of substantive law but stood for the separate system of judicial procedure for settling mercantile disputes.<sup>10</sup> The separate principles of mercantile law which existed for shipping and trade were far from universal —the various maritime laws of Europe provided different solutions to the same problems—. As Cordes argues, Lord Mansfield's "one and the same law" that existed in all countries and at all times in an identical form did not exist even in the field of the maritime law

<sup>5</sup> *Ibidem*, pp. 349 & 350.

<sup>6</sup> E.g. Scrutton, T. E., [one of England's great commercial judges], "A General Survey of the History of the Law Merchant", in *Select Essays in Anglo-American Legal History* (Boston, 1909), v. 3. cf. J. Baker, "The Law Merchant and the Common Law Before 1700" (1979) 38 *CLJ* 295; J. Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina, 2004).

<sup>7</sup> Unger, R., *Law in Modern Society* (New York, 1976), 73-6.

<sup>8</sup> Volkhart, O. & Mangels, A., "Are the Roots of the Modern *Lex Mercatoria* Really Medieval?" (1999) 65 *So.J.Econ.* 427, 435-446.

<sup>9</sup> E.g. H. Bourguignon, *Sir William Scott, Lord Stowell. Judge of the High Court of Admiralty 1798-1828* (Cambridge, 1987).

<sup>10</sup> Malynes, Gerard, *Lex Mercatoria or the Ancient Law Merchant* (1622), May be seen in the context of these struggles.

of freight, which was quintessentially an area where it should have. The body of international rules of law as postulated could be detected only by choosing to focus on overly general issues.<sup>11</sup>

These disputes about the medieval *lex mercatoria* are not simply of interest to legal historians. For some see a definite continuity with the modern law merchant or at least an inspiration for it.<sup>12</sup> One of the most effective of the English proponents of the new *lex mercatoria* was Professor Chris Schmitthoff. After arguing that international trade law developed in three stages—the medieval *lex mercatoria*, the period of incorporation into national legal systems, and the modern period—Schmitthoff saw the third phase as a conscious and deliberate return to the international spirit of the medieval *lex mercatoria*. He rejected the second, the national phase, of international trade law where the lawyer must ask first what is the law governing the contract through resort to national rules in the conflict of laws. It was an attempt at localising an international relationship in a national legal setting, an approach modern thinking rejected. In his view modern trade demanded an autonomous international trade law, founded on uniform rules accepted in all countries, making the localisation of a transaction in a national jurisdiction superfluous. This would be “a new *lex mercatoria*”.<sup>13</sup> While Schmitthoff’s views had been anticipated by others such as Berthold Goldman,<sup>14</sup> it was he who gave academic respectability to the idea in the English speaking world, beginning with the conference he organised in 1964 at King’s College, London.<sup>15</sup>

The cudgels for the new *lex mercatoria* have been taken up by a variety of scholars. International arbitration has been seen by some as the key ave-

<sup>11</sup> Cordes, A., “The Search for a Medieval *Lex Mercatoria*”, (2003) *Oxford U. Comparative L. For5um* 5 at ouclf.iuscomp.org, after n.47. See also E. Kadens, “Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law” (\*2004) 5 *Chi.J.Int’l. L.* 39.

<sup>12</sup> Trakman, L., *The Law Merchant. The Evolution of Commercial Law* (Littleton, Col. 1983), p. 39.

<sup>13</sup> Schmitthoff, C., *Commercial Law in a Changing Economic Climate*, 2nd. ed. (London, 1981), p. 20.

<sup>14</sup> E.g. Goldman, B., “Frontières du Droit et *Lex Mercatoria*”, *Archives de Philosophie du Droit*, 1964, p. 177. See also B. Goldman, “The Applicable Law: General Principles of Law—The *Lex Mercatoria*—”, in J. Lew (ed.), *Contemporary Problems in International Arbitration* (London, 19086); A. Goldstajn, “The New Law Merchant” [1961] *JBL* 12.

<sup>15</sup> Schmitthoff, C. (ed.), *The Sources of the Law of International Trade* (London, 1964).

nue for the enunciation of substantive rules of an international law merchant.<sup>16</sup> The work of the Iran-United States Claims Tribunal in applying general principles such as *force majeure* is said to have contributed considerably.<sup>17</sup> Perhaps the most active proponent today of a new *lex mercatoria* is Professor Dr. Peter Berger of the Center for Transnational Law (CENTRAL) at the University of Cologne. In his book *The Creeping Codification of the Lex Mercatoria* (1979), Berger argues that the concepts of transnational commercial law used in contract drafting and dispute resolution have been transformed into concrete principles as in the Unidroit Principles of International Commercial Contracts.<sup>18</sup> Berger argues that the process is gradual—the *lex mercatoria* is living law—and that the result comes not from above through formal codification but from below through the private work of academics and practitioners.<sup>19</sup> Based on Professor Berger's discussion in *Creeping Codification* CENTRAL now has a collection of *lex mercatoria* principles, rules and standards on its website. These are divided into fifteen chapters. Examples include good faith, reasonableness, the duty to negotiate, damages for breach of contract, set-off, unjust enrichment and the duty to compensation on expropriation. Each principle is supported by detailed references to scholarly writings, court decisions, arbitration awards, international conventions and statements and national laws.<sup>20</sup>

At this point a definitional issue arises: is the new mercantile law to be equated with the principles, rules and standards such as those developed by Berger? Or does it have a wider remit? So obvious difficulties arise in terms of agreement on the substance and identifying their source (al-

<sup>16</sup> E.g. Lando, O., "The *Lex Mercatoria* in International Commercial Arbitration#" 34 *ICLQ* 747; Carbonneau, T., "Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions" (1985) 23 *Colum.J.Transnat'l L.* 579; Carbonneau, T. (ed.), *Lex Mercatoria and Arbitration. A Discussion of the New Law Merchant*, revd. ed. (Dobbs Ferry, NY, 1998).

<sup>17</sup> Brunetti, M., "The *Lex Mercatoria* in Practice: The Experience of the Iran-United States Claims Tribunal", (2002) 18 *Arbitration International* 355.

<sup>18</sup> 2nd ed., 2004. See also Lando, O. & Beale, H. (eds.), *Principles of European Contract Law* (The Hague, 2000), v. 1 & 2. The UNILEX website lists only 23 cases where the Unidroit principles have been cited as of 1 March 2006.

<sup>19</sup> Berger, K., *The Creeping Codification of the Lex Mercatoria* (The Hague, 1998). See also Sharpe, J. "The Creeping Codification of Transnational Commercial Law. An Arbitrator's Perspective" (2004) 45 *Va.J.Int'l.L.* 199.

<sup>20</sup> [www.central-koeln.de](http://www.central-koeln.de).

though, as mentioned, Berger and his team have made impressive progress). Some would confine the term *lex mercatoria* to international trade practice which arises through usage. Thus Lord Mustill sees the *lex mercatoria* as not intentionally fashioned as an instrument of harmonisation but as a product of spontaneous generation.<sup>21</sup> However, the issue then becomes one of identifying usage or what practice is spontaneously generated. The doyen of academic commercial lawyers in England, Professor Sir Roy Goode, argues that the Berger type principles should not be the main focus of inquiry but rather the practices surrounding typical international commercial transactions.

Though it is common to treat the *lex mercatoria* as including general principles of law, and I myself used to follow this approach, it seems to me on further reflection that these principles—for example *pacta sunt servanda*, the *nemo dat* rule and the duty to mitigate loss suffered from a breach of contract—are not particular to international trade or even to commercial contracts, are qualified by numerous exceptions and tell us nothing about the process of spontaneous lawmaking which is said to be the hallmark of the *lex mercatoria*. If we look at the lists of rules of the *lex mercatoria* propounded by modern scholars and remove from it general principles of law, we find that almost nothing is left, while on the other hand there is a conspicuous absence of references to important modern usages in relation to documentary credits, demand guarantees, and clearing and settlement systems for the transfer of funds and investment securities.<sup>22</sup>

Although thin, the empirical evidence tends to support Goode's approach, since parties do not generally invoke the general principles of the *lex mercatoria* in their arbitration clauses and if so, do it to supplement rather than displace national law. Thus only 1 to 2 percent of clauses giving rise to ICC arbitration between 2000-3 provided for transnational or other non-national law as the governing law.<sup>23</sup>

<sup>21</sup> Mustill, M., "The New Lex Mercatoria: The First Twenty-Five Years", in M., Bos & I. Brownlie (eds.), *Liber Amicorum for Lord Wilberforce* (Oxford, 1987), 152-3. See also Benson, B., "The Spontaneous Evolution of Commercial Law" (1989) 55 *S.Econ.J.* 644.

<sup>22</sup> Goode, R., "Rule, Practice and Pragmatism in Transnational Commercial Law" (2005) 54 *ICLQ* 539, 548. See also Goode, R., "Usage and its Reception in Transnational Commercial Law" (1997) 46 *ICLQ* 1.

<sup>23</sup> Drahozal, C., "Contracting out of National Law: An Empirical Look at the New Law Merchant" (2005) 80 *Notre Dame LR* 523, 539. cf. K. Berger, "The CENTRE Enquiry on the Use of Transnational Law in International Contract Law and Arbitration", in Berger, K.



Either way —the Berger principles or the Mustill/Goode trade usage— the *lex mercatoria* is only one part of the new transnational commercial law. That now includes uniform principles, model laws and international conventions. The UNIDROIT Principles of International Commercial Contracts have already been mentioned.<sup>24</sup> A very long-standing set of principles, incorporated extensively in international contracts, are the Uniform Customs and Practice for Documentary Credits, first published by the ICC in 1933. Among the model laws of international commercial law are those of UNCITRAL Model Laws on International Commercial Arbitration, Cross-Border Insolvency and International Credit Transfers. International conventions include the United Nations Convention on Contracts for the International Sale of Goods (CISG) (1980), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York” Convention) (1958) and the United Nations Convention on the Assignment of Receivables in International Trade (2001). Uniform principles have force in as much as they are consciously invoked by parties engaged in international trade (primarily by incorporation by reference in their contracts) or by those settling disputes between such parties (primarily arbitrators). As the names suggest a model law is designed for adoption by national legislatures whereas a convention is a treaty, to which national states can choose to be a party. Model laws can obviously be modified in their adoption or adopted in part, whereas parties to a convention must be able to enter reservations if there are to be departures from a convention.

How is all this activity explained in theoretical terms? So far scholars have not given it much attention. Those engaged in the enterprise have rather common place explanations. As far as the *lex mercatoria* is concerned, its advocates have as a prime contention that it is autonomous. Not only is it free from the conflicting principles of national law but as a corollary it avoids the problems of choosing between those principles through the complexities of private international law. It has grown up in this way, argues Berger, because of a range of economic and geo-political factors. In broad terms there is the trend towards a “global civil society”;

(ed.), *The Practice of Transnational Law* (The Hague, 2001) (a survey of practitioners’ experience).

<sup>24</sup> See Bonell, M., “The Unidroit Principles and Transnational Law” (2000) 2 *Uniform Law Review* 199; J. Basedow, “Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts” (2000) 1 *Uniform Law Review* 129.



the erosion of national boundaries in markets; and the relative decline of state power to steer national or international economic factors. The upshot is the growth of party autonomy and the privatisation of international commercial law-making, notably through arbitration. So the modern *lex mercatoria*, in this view, is a spillover of the complex institutional processes connected with the phenomenon of globalisation.<sup>25</sup> The creeping codification of these customs as incorporated into uniform principles such as the Unidroit contract principles, can therefore be regarded as a reaction by scholars to the demand believed to exist amongst the business community.

Outsiders to the *lex mercatoria* process have had a more jaundiced view of its application and development. Dezalay and Garth see it in terms of the material interests of international arbitrators and their clients. In their analysis there was firstly a struggle between those offering arbitration services an older cadre of mainly continental academics, adherents of the *lex mercatoria*, on the one hand, and increasingly, mainly Anglo-American legal practitioners, adherents to the doctrines and techniques of the common law, on the other. Secondly there was a north-south tension: foreign investors did not want resort to local courts and law if disputes arose over construction and other projects but had to accommodate the objection of developing countries to the use of western law and courts. International arbitration using the *lex mercatoria* became the way through for both the European pioneers of international arbitration and for foreign investors.

The flexibility of the *lex mercatoria* not only permitted Western enterprises to win time when confronted with the escalation of demands of the third world, but allowed its inventors to gain time as well, preserving their position when confronted with the new law firm offensive in this market.

A principal merit of this doctrinal construction was that it furnished a double legitimacy —political and learned— that the European pioneers of arbitration needed, in a new field of practice at the crossroads of the worlds of merchants and learned jurists. The collective image of neutrality of the academy permitted these notables of law to intervene in a very delicate domain —that of postcolonial

<sup>25</sup> Berger, K., “The New Law Merchant and the Global Market: A 21st. Century View of Transnational Commercial Law” (2000) 3 *Int.Arbitration LR* 91, 100. See also G. Teubner, ““Global Bukovina”: Legal Pluralism in the World Society”, in G. Teubner (ed), *Global Law Without a State* (Aldershot, 1997), p. 40.

economic relations— by invoking great principles that could justify a middle way. They thus found a way to protect themselves from the most extreme demands of one side of the other.<sup>26</sup>

In this analysis the time of the *lex mercatoria* is coming to an end as the “European pioneers” are being replaced by the Anglo-American law firms.<sup>27</sup> While this analysis has a certain plausibility as far as arbitrators are concerned, it certainly does not seem to have much validity in terms of the position of foreign investors *vs.* developing countries. As mentioned already, contracts where the *lex mercatoria* has been used are fairly thin on the ground: developing countries seem to accept contracts where the governing law is either a national system of law or no system is specified.

Apart from the *lex mercatoria*, what explanation is there for the wider field of international commercial law promulgated under the auspices of the Uncitral, Unidroit or the ICC? Here harmonisation has been a typical goal, with the rules of different legal systems being replaced by a uniform law which can either be incorporated in international contracts or adopted in national legal systems (either through adoption of a model law or adherence to an international treaty). Nowadays, the aim is as much to improve rules in situations where the national legal rules are non-existent, underdeveloped or unsuitable to international transactions.<sup>28</sup> There is no doubt that there are different interest vying for particular outcomes in this process and some, such as developing countries, sometimes lack clout. The law-making process in international commercial law is sometimes without the transparency of national legislatures, especially with regard to the role of interest group participation. This seems unexplored, theoretically and empirically. So, too, another aspect—the adoption of international commercial law by commercial interests or national governments— although there is an interesting attempt to invoke Thomas Franck’s theory of the power of

<sup>26</sup> Dezalay, Y. & Garth, B., *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, 1996), 89 (notes omitted). See also 41.

<sup>27</sup> *Ibidem*, 86.

<sup>28</sup> Goode, R., *op. cit.*, note 22, 556; Davies, I., “The New Lex Mercatoria: International Interests in Mobile Equipment” (2003) 52 *ICLQ* 151, 153; Sono, K., “The Rise of Anatonal Contract Law in the Age of Globalisation” (2001) 75 *Tul.LR* 1185.

legitimacy in the way particular business communities have adhered to rules such as those in the UCP relating to documentary credits.<sup>29</sup>

## II. RULE OF LAW THEORY

In recent decades a conventional wisdom has evolved linking the rule of law with economic growth, sustainable development and poverty alleviation.<sup>30</sup> Multilateral financial institutions like the World Bank, regional development banks and some industry organisations advocate for countries principles of good governance, one aspect of which is a legal system of a type associated with states operating under the rule of law.<sup>31</sup> It is said that law can have an impact on development by facilitating economic activity through encouraging savings and assisting in the allocation of capital. It can do this by having predictably transparent and enforceable rules for the economy which ensure well-functioning and regulated markets, appropriate business forms with high standards of corporate governance, and efficient methods for dealing with default and insolvency in markets and businesses.<sup>32</sup> Government subject to law is part of the equation, to guarantee that insiders cannot use state power arbitrarily to trump property and contractual rights recognised by law.

In modern accounts, the rule of law has both formal and substantive aspects—a legal system with an independent, impartial and non-corrupt judiciary—laws that are clear, publicly available and in accordance with the constitution and human rights, and a court system which is accessible and efficient, protects contractual, property and human rights and provides for

<sup>29</sup> Winer, A., “The CISG Convention and Thomas Franck’s Theory of Legitimacy” (1998) 19 *NW J. Int’l. Bus.* 1, 56. See also Franck, T., *The Power of Legitimacy among Nations* (Cambridge, 2002).

<sup>30</sup> There is a growing literature about economic growth which is “pro-poor”: Ravallion, M., “Pro-Poor Growth: A Primer”, *World Bank Policy Research Working Paper*, 3242 (Washington DC, 2004).

<sup>31</sup> E.g. Shihata, I., “Democracy and Development” (1997) 46 *ICLQ* 635; Carothers, T., “The Rule of Law Revival” (1998), 77 *Foreign Affairs* 95; *Promoting the Rule of Law Abroad*, Carnegie Endowment, Democracy and Rule of Law Project num. 34, 2003.

<sup>32</sup> Posner, R., “Creating a Legal Framework for Economic Development”, *World Bank Research Observer*, v. 13, February 1998, 1.

judicial review of government action.<sup>33</sup> Some like Professor Amartya Sen would contend that rule of law reform along these lines must be valued in itself as part of the process of development, not just for the way it may aid economic or any other type of development.<sup>34</sup> Another line of argument is that rule of law reforms by themselves, are only part of the story. What is also needed is legal empowerment of the disadvantaged, which will benefit them in a broad array of development fields that may not have a strict legal dimension such as education, public health promotion and agriculture.<sup>35</sup> Both glosses on the basic argument have great force. Nonetheless, the concern here is with the policy prescription, that along with a transparent and democratic political system, efficient bureaucracies and developed public institutions, rule of law reforms in the financial sector will encourage investment, reduce corruption and cronyism, and generally contribute to social and economic development.<sup>36</sup> Does law, in other words, matter?

There is historical evidence of a link between the rule of law and economic development.<sup>37</sup> Over the last decade there have also been a number of large, cross-country studies which, by using proxies for rule of law measures such as the quality of legal institutions, lend support to the thesis.<sup>38</sup> Yet the relationship between rule of law reform and economic development is complex; as ever real world contingency must be taken into ac-

<sup>33</sup> E.g. Craig, P., "Formal, and Substantive Conceptions of the Rule of Law" [1997] *PL* 467; Allan, T., *Constitutional Justice* (Oxford, 2001); Whitford, W., "The Rule of Law" [2000] *Wisc LR* 723.

<sup>34</sup> A. Sen, *Development as Freedom* (New York, 1999), p. 37.

<sup>35</sup> *Legal Empowerment. Advancing Good Governance and Poverty Reduction*, Asian Development Bank (Manila, 2001), p. 27.

<sup>36</sup> On the earlier law and development movement see Trubek, D. & Galanter, M., "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development" [1974] *Wisc LR* 1062; Tamanaha, B., "The Lessons of Law and Development Studies" (1995) 89 *Amer.J.Int'l.L.* 470; Faundez, J., "Legal Technical Assistance", in Faundez, J. (ed.), *Good Government and Law* (London, 1997).

<sup>37</sup> E.g., Atiyah, P., *The Rise and Fall of Freedom of Contract* (Oxford, 1979); North, D., *Institutions, Institutional Change and Economic Performance* (Cambridge 1990); K. Pistor & Wellons, P., *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995* (Oxford, 1999).

<sup>38</sup> Porta, R. la *et al.*, "Legal Determinants of External Finance" (1997) 52 *Journal of Finance*, 131-1150; Porta, R. la *et al.*, "Law and Finance" (1998) 106 *Journal of Political Economy*, 1113.

count. It may be that in some respects it is economic development which facilitates a better functioning legal system, or that factors such as investment or political change move both economic development and legal reform in the same direction.<sup>39</sup> Another difficulty with causation in the thesis is identifying the relevant factors in the relationship. Is the key to economic growth the symbolic value of new law on the books, or is the effectiveness of legal institutions in practice more significant? Is governmental accountability, not least through the courts, a necessary element of the rule of law and, if so, how do we explain the East Asian model of economic development, best exemplified these days by China?<sup>40</sup> Further there is the puzzle of foreign investors, who are important in bridging the gap between investment and savings. While they say that they want a legal system which has a clear framework for contracting, which protects property, including intellectual property, rights, and which provides for the timely resolution of disputes, in practice the existence of business opportunities means that they may invest heavily in countries where these basic features of the rule of law are absent.<sup>41</sup>

Moreover, law's contribution to development in practice is a long-term and tortuous process. As a matter of public policy it demands a sensitivity to its inherent limits, the context in which it operates and the force of other social and economic factors.<sup>42</sup> There is always the potential for unintended consequences. A neat illustration pertinent to the issue of credit and security law is provided by the colonial courts in India, which were superimposed on a system where informal sanctions operated in rural areas to guarantee the repayment of credit, but which also encouraged money-lenders to carry debtors in difficult times. In one account new creditors, with access to the enforcement mechanisms of the colonial courts, entered the market,

<sup>39</sup> Messick, R., "Judicial Reform and Economic Development: A Survey of the Issues" (1999) 14, *World Bank Resource Observer* 117, p. 122.

<sup>40</sup> Upham, F., *Mythmaking in the Rule of Law Orthodoxy*, Carnegie Endowment for International Peace, Rule of Law Series, num. 30, 2002; Jones, C., "Capitalism, Globalization, Rule of Law" (1994) 3, *Soc. & Leg. Studies*, p. 195.

<sup>41</sup> Perry-Kessaris, A., "Finding and Facing Facts About Legal Systems and Foreign Direct Investment in South Asia" [2003] *LS* 649.

<sup>42</sup> McAuslan, P., "Path Dependency, Law and Development" (2001) 1 *J. Commonwealth L. & Leg. Ed.*, 51, p. 58.

forced down margins, which reduced the capacity of local money-lenders to accommodate debtors in difficulty.<sup>43</sup>

So how the law actually operates is at least as important as the law in the books. Using law for utilitarian ends means acknowledging, for example, the importance of non-state norms such as commercial custom, informal methods of social control and alternative mechanisms of dispute resolution. As well, it should not be forgotten that law's outcomes are not value-free and that law can be part of the struggle for power in society. Protecting contractual and property rights may simply shield what a powerful, and possibly corrupt, elite has seized under the cover of state power. Even more benign societies recognize the need for statutory control and well oiled regulatory agencies to curb the abuses associated with free contracting and markets. Apart from equity concerns, the state must police markets to curb corrupt and predatory practices which undermine their very integrity. Nor does creating a system which works for private economic interests mean overlooking values such as equality before the law, the wider public interest and the more vulnerable in society.

### III. THE POWER OF THE MARKET: A PRO-CREDITOR/PRO-DEBTOR WORLD

Attempts have been made to characterize legal systems along a spectrum from pro-creditor to pro-debtor. The same has been done for social systems.<sup>44</sup> Perhaps the best example in the legal literature has been advanced by Philip Wood, although he no longer uses the pro-creditor pro-debtor labels. Beginning in 1995,<sup>45</sup> Wood has developed a comprehensive and sophisticated analysis which divides the world in relation to financial law according to five key criteria: the availability of insolvency set-off; the marketability of contracts, receivables and claims; the availability and scope of security interests; the availability of the commercial trust; and whether tracing delinquent money is possible. Wood concedes that his mapping is not exact, is in some respects incomplete, and relies to

<sup>43</sup> Kranton, R. & Swamy, A., "The Hazards of Piecemeal Reform: British Civil Courts and the Credit Market in Colonial India" (1999) 58 *J. Develop. Econ.*, p. 1.

<sup>44</sup> Porta, R. la *et al.*, "Legal Determinants of External Finance" (1997) 52 *J. of Finance* 113; "Law and Finance" (1998) 106 *J. of Pol. Econ.*, p. 1113.

<sup>45</sup> Wood, P., *Principles of International Insolvency* (London, 1995), ch.1, pp. 10-12.

an extent on subjective judgment. Nonetheless, he says, “the differences between jurisdictions are striking”. The criteria are tested mainly on insolvency and go to the efficiency of the financial system, the extent to which risks are reduced and whether the legal system facilitates economic development. Wood concludes:

If one takes the five chosen issues, it can be said, as an extremely broad generalisation, that the traditional Napoleonic systems are negative on all of them, the Roman-Germanic systems are negative on just over half of them and positive on the other half, and the Anglo-American systems are positive on all five.

...

It would also be absurd to suggest that the three groups are fundamentally different throughout. The three main groups are substantially similar across large territories of law and their legal concepts —contract, corporate, law, property, sale, administrative law and the like— are extremely sophisticated, highly developed, and responsive to the needs of this arena.

Nevertheless, the triple polarisation on the five issues still remains as a significant contour of the legal landscape, despite many new erosions, inlets and weathered crags.<sup>46</sup>

Not surprisingly, given the huge task which would be involved, Wood’s taxonomy does not include the impact of the rules, their actual implementation or compliance with them in practice.<sup>47</sup> Yet in any society law works against a background of social factors. Unless this context is taken into account, the workings of the law will not be properly understood and efforts at reform will be misguided. One aspect is that a problem might not lie in inadequate laws or legal procedures but in the way law is enforced or operates in a society. Thus it is well known that in Japan litigation is relatively rare and parties seek to avoid court.<sup>48</sup> This could mean that it is more likely that when a borrower is having difficulty repaying, say, a Japanese bank may not invoke the very wide powers conferred on it by the loan agreement. Rather the borrower might receive visits from the bank and find its freedom of action curtailed as the bank prescribes a remedial course.

<sup>46</sup> *Ibidem*, 59.

<sup>47</sup> *Ibidem*, 13.

<sup>48</sup> E.g. Goodman, C., *The Rule of Law in Japan* (The Hague, 2003), 229 ff; Hasebe, Y., “Civil Justice Reform: Access, Cost and Expedition. The Japanese Perspective”, in Zuckerman, A. (ed.), *Civil Justice in Crisis* (Oxford, 1999), 248-50.



Whether this has also resulted in Japanese banks implicitly promising to rescue troubled but viable firms —the conventional wisdom now under fierce challenge— is beyond the scope of the present inquiry.<sup>49</sup>

From the point of view of law reform, what will be needed is a careful and painstaking identification of the problems in a particular jurisdiction and possible legal solutions. There will be no easy answers. Sensitivity to the context of the law is essential. A blanket introduction of “pro-creditor” laws without taking this into account will result in yet more ineffective laws. Indeed, it could well be counterproductive; schemes, both simple and sophisticated, will be devised to avoid their impact, and in extreme cases courts will simply refuse to apply what they see as draconian laws, further undermining the rule of law. And there are also social justice issues.

There can be little doubt that market perceptions of whether a country is pro-creditor or pro-debtor feed into some decisions by the international commercial community, especially foreign investors. That is reinforced by ROSC assessments of countries by the World Bank and IMF.<sup>50</sup> From the academic point of view, Wood’s mapping is a useful heuristic device in considering the issues which any system law must address. Recall that in practice it will be difficult to place a country accurately; recall also that the purpose of the exercise is not to make moral judgments, but to isolate problems and then maybe to suggest possible legal reforms; and recall, finally, that a legal system’s economic effectiveness may actually decline if it becomes too “pro-creditor”. Nonetheless, issues such as the free transfer of contracts and receivables are crucial if the law is to respond flexibly to new methods of financing and doing business. So, too, with the other criteria identified in the Wood mapping.

#### IV. TRANSPLANTING FINANCIAL LAW

What has been said already militates against a notion that economic development follows from a blind transplant of the standards, codes and principles of the new international financial law to developing and emerging

<sup>49</sup> Miwa, Y. & Ramseyer, J., “The Myth of the Main Bank: Japan and Comparative Corporate Governance” (2002), 27 *Law and Soc. Inquiry* 401.

<sup>50</sup> Details of the “Report on Observance of Standards and Codes” are published on the World Bank website: see [www.worldbank.org/ifa/rosc.html](http://www.worldbank.org/ifa/rosc.html).

economies. It cannot be assumed that their introduction will automatically occasion economic stability, sophisticated economic transactions, foster the establishment of complex enterprises or further the resolution of legal disputes. This is quite apart from the adverse reaction which could follow because transplanting these models might be interpreted as a form of neo-colonial domination. Ideally, what is wanted is an incremental approach, drawing on theory and international best practice, and over time melding this to local conditions in the light of accumulated experience.<sup>51</sup> In many cases copying foreign models is unavoidable because of pressure of time, the lack of expertise and the demands of outside interests for immediate action.<sup>52</sup> It might also be that a window of opportunity for fundamental reform presents itself; the ideal in these circumstances is a counsel of perfection and will miss the boat.

At the level of theory Montisquieu argued that it was unlikely that the laws of one nation would suit another, given the variety of environmental factors making up “the spirit of the law”.<sup>53</sup> In a more modern account, Professor Otto Kahn-Freund thought it possible to transplant law but emphasised the very great difficulties. Factors which in his account are especially important are political institutions, ideologies and the power structure.<sup>54</sup> Professor Alan Watson’s contrary thesis is that transplants can readily be made. Law has a strong autonomy from societal forces, law representing the culture of the legal elite.

[Law] is above all and primarily the culture of the lawyers and especially of the law-makers, that is, of those lawyers who, whether as legislators, jurists, or judges, have control of the accepted mechanisms of legal change... Law is largely autonomous and not shaped by societal needs; though legal institutions

<sup>51</sup> Seidman, A. & Seidman, R., “Using Reason and Experience to Draft Country-Specific Laws”, in Seidman, A. *et al.*, (eds), *Making Development Work* (London, 1999).

<sup>52</sup> Wälde, T. & Gunderson, J., “Legislative Reform in Transition Economies: Western Transplants: A Short-cut to Social Market Economy Status?” in note 51, 92-5.

<sup>53</sup> See Allison, J., *A Continental Distinction in the Common Law* (Oxford, 1996), pp. 12-13.

<sup>54</sup> Kahn-Freund, O., “On Uses and Misuses of Comparative Law” (1974) 37 *MLR* 1. See also A. Rosser, “The Political Economy of Institutional Reform in Indonesia”, in Jayasuriya, K. (ed.), *Law, Capitalism and Power in Asia. The Rule of Law and Legal Institutions* (London, 1999).

will not exist without corresponding social institutions, law evolves from the legal tradition.<sup>55</sup>

Lending support to Watson's view are his own speciality, Roman law, and other major episodes of legal transplantation: Napoleon carried his code to other parts of Europe; in the nineteenth and first part of the twentieth century, imperial powers like Britain took their laws to other parts of the world like India; and in recent decades international financial institutions have successfully marketed their models to developing and emerging economies.

So at a purely formal level law can be transplanted. The obvious issue is does a transplanted law become living law, and if so, how? There are no easy answers. Taxonomies in which certain families of law transplant efficiently and other ineffectively are not especially convincing.<sup>56</sup> Nor are some of the massive empirical studies which give them some support. What can be said is that a transplanted law is changed in use: it will be transformed through interpretation and application, and even be amended to take in local conditions. Secondly, whatever the law, transplanted or otherwise, commercial activity goes on. Thus in England and the United States informal norms, as with commercial customs, have always been part of the working of the law. In some situations transplanted law may have a greater chance in the commercial area, in particular the investment and financial sectors, because there is a need, especially among foreign investors.<sup>57</sup> But commercial laws which trench on rights in the wider community are likely to be resisted. The example of security (and insolvency) law falls into this category, if it threatens employees' continued employment in a jurisdiction which has comparatively little social security system. On the other hand, criminal and family laws have been successfully transplanted,

<sup>55</sup> Watson, A., *The Evolution of Law* (Baltimore, 1985), 119. See also his *Society and Legal Chance*, 2nd. ed. (Philadelphia, 2001), pp. 98-111.

<sup>56</sup> Berkowitz, D. *et al.*, "Economic Development, Legality and the Transplant Effect" (2003) *Eur.Econ.R.* 165; Mattei, U., "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics" (1994) 14, *Int'l Rl & Econ* 3; "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 *Am.J.Comp.L.* 5. See Smith, M., "Comparative Law and Legal Culture" [2003] 15, *Bond LR* 000.

<sup>57</sup> Shaver, F., "The Politics and Incentives of Legal Transplantation", CID [Harvard University] Working Paper num. 44, April 2000, pp. 9-11.

even laws which were forced, initially, onto a jurisdiction.<sup>58</sup> Such transplants have had a catalytic effect. It seems that the positive attitude of local elites, including legal elites, cannot be underestimated.<sup>59</sup> It is all a very mixed picture, but context cannot be underestimated.

## V. CONCLUSION

My argument is that there are legal theories which help explain some aspects of modern, international commercial law. They cannot explain the full picture by any means. Thus the efforts of bodies like Uncitral and Unidroit have at base a concern with solving practical problems in international commercial law, in particular where its cross-border nature throws up gaps in the ability of national legal systems to solve them. The work of the International Monetary Fund over the years in relation to central banking law, and more recently that of the Basel Committee on Banking Supervision with respect to the adequate supervision of international banks, the core principles for effective bank supervision and the rules for capital adequacy and sound risk management of banks can be seen as motivated, in broad terms, by a pragmatic concern with the stability of the international financial system.<sup>60</sup> Aspects of the work of other Basel bodies, such as the Committee on Payment and Clearing Systems, have at base considerations of risk reduction and efficiency. Different jurisdictions adopt similar measures to address common problems whether this is accommodating Islamic banking or addressing the liability of financial regulators when losses are incurred in the financial sector.

However, there are examples of standards suggested for adoption internationally in financial law derived from the rule of law and pro-creditor/pro-debtor models. The World Bank, the International Monetary Fund, regional development banks like the Asian Development Bank and other bodies like Uncitral have all been engaged in this work. Take as a case study the provision of credit, in particular the role of security (collateral) in

<sup>58</sup> Harding, A., "Global Doctrine and Local Knowledge: Law in South-East Asia" (2002) 51 *ICLQ* 35, 44-5.

<sup>59</sup> Cross, F., "Law and Economic Growth" (2002) 80 *Tex.LR* 1737, 1774.

<sup>60</sup> E.g. Norton, J., *Devising International Bank Supervisory Standards* (London 1995); G. Walker, *International Banking Regulation. Law, Policy and Practice*; Yokoc-Arai, M., *Financial Stability Issues: The Case of East Asia* (London, 2002).

facilitating this. In broad outline secured transactions law gives creditors and investors a priority claim against the debtor's property (the collateral) should it be unable or unwilling to pay in accordance with the credit or investment contract. The importance of an effective security law for an economy is advanced in World Bank Guidelines in this way:

A modern credit-based economy requires predictable, transparent and affordable enforcement of both unsecured and secured credit claims by efficient mechanisms outside of insolvency, as well as a sound insolvency system.

...

The legal framework should provide for the creation, recognition, and enforcement of security interests in movable and immovable (real) property, arising by agreement or operation of law. The law should provide for the following features:

Security interests in all types of assets, movable and immovable, tangible and intangible, including inventory, receivables, and proceeds; future or after-acquired property, and on a global basis; and based on both possessory and non-possessory interests;

...

Methods of notice that will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost;

Clear rules of priority governing competing claims or interests in the same assets...

...

Enforcement procedures should provide for prompt realization of the rights obtained in secured assets, ensuring the maximum possible recovery of asset values based on market values. Both nonjudicial and judicial enforcement methods should be considered.<sup>61</sup>

Similarly, a recent study of the Asian Development Bank underlines the importance of small and medium sized enterprises to sustainable economic growth. It argues that the key to their success is access to readily available, cheap and long-term credit that turns on a legal framework enabling small borrowers to give security over their movable property, since unlike larger

<sup>61</sup> World Bank, *Principles and Guidelines for Effective Insolvency and Credit Rights Regimes*, excerpt in [2003] *World Bank Leg R627*, Principles 1, 3, 5. See also UNCITRAL, *Security Interests. Draft Legislative Guide on Secured Transactions* (Vienna).

enterprises they are less likely to be able to offer land and buildings as security. That security must be readily enforceable on default.

All this has considerable intuitive appeal. That security rights under credit and investment agreements are readily enforceable, possibly without resort to the court, means that lenders and investors can more accurately manage and control the risk of default. It encourages discipline on the part of debtors. Disputes are more readily resolvable in the shadow of the law. By contrast, if enforcement of a credit or investment contract is doubtful, creditors and investors cannot price the risk of default accurately. A premium needs to be extracted to compensate for the uncertainty or for the risk of non-performance. In some cases the confidence of creditors and investors may be so eroded that credit is altogether unavailable.<sup>62</sup>

As the example of security law illustrates, however, there are reasons to consider very carefully international commercial law having its pedigree in a rule of law or pro-creditor/pro-debtor model. The major forces behind the provisions consequently spun off, and the motivating forces and actors, are one reason to pause. Another is the point already made that however splendid these laws may be “on the books”, if there is not the administrative machinery to give them force in practice they may simply be an illusion of progress. Perhaps most important are social justice issues such as the protection of consumers and employees. If these concerns are addressed however, it can be strongly argued that security law is as important for the poor as for others. In his *The Mystery of Capital*, Professor Hernando de Soto observes that in developing countries, although the poor may have capital such as growing crops or possibly land, it is “dead” economically it lacks adequate legal protection and, crucially, cannot be used as collateral for credit. Access to ready finance is the preserve of the elite.<sup>63</sup> Whether so benign a view of the new international commercial law can be taken depends in every case on the circumstances. Each measure must be tested not only in terms of its contribution to economic development but also to social justice.

<sup>62</sup> Adler, B., “Secured Credit Contracts”, *New Palgrave Dictionary of Economics and the Law* (London, 1998), v. 3, 405.

<sup>63</sup> Soto, H. de, *The Mystery of Capital* (New York, 2004).