Approximation of Secured Credit Laws in Global Economies: Methodological Challenges

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Abstract:

The principal aim of this volume is to explore commercial contract law in scholarship and legal practice, to discuss new research agendas and provide a forum for debate of topical issues that might benefit from further attention by scholarship and legislatures. This chapter on methodological challenges within the approximation of personal property security law regimes raises what is a key contemporary problem as commercial legislations continue to grow out of national boundaries. It raises some of the most challenging issues in this area of commercial law due to its dependence on baseline concepts of insolvency and property laws and because of the vast differences within the laws of national legal systems in these areas. This chapter thus contributes to a topic of central importance to any project of law reform on an international level in commercial law. In particular, in the context of multiple projects for the approximation and modernisation of personal property security law, this chapter proposes to analyse some of the methodological challenges that have arisen as a result of these initiatives. It is argued that there are still outstanding challenges and obstacles to the comprehensive approximation and modernisation of personal property security law. The analysis sketches out and critically considers four methodological challenges connected to the justification of approximation of law projects, the appropriation of international endeavours and the issues of legitimacy and enforcement within the emergence of a transnational personal property security law framework.

Keywords Approximation of law – Harmonisation – Legal transplant- Personal Property Security Law

1 Introduction

In this era of transnationalisation of legal relations, law is being subject to significant mutations and challenges. This is especially true of the regulation of commercial transactions, and in particular personal property security law, which has been the focus of several attempts at modernisation and approximation in the recent years.[2] Having a similar and modern legal regime across national jurisdictions is in principle a desirable goal for commercial actors and

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[2] The European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transaction (1994), the International Institute for the Unification of Private Law (UNIDROIT) Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (2001), the United Nations Commissions on International Trade Law (UNCITRAL) legislative Guide on Secured Transactions (2007) and more recently the UNCITRAL Model law on Secured Transactions 2016 reflect some of the major attempts at the international level.

likely to promote economic prosperity. Harmonised and unified modern laws would increase confidence for traders and investors which should in turn constitute a positive factor for the growth of the economy.[3] It is argued that the adoption of a uniform legal regime should also encompass the principles of a modern and predictable law for secured transactions. Promoting access to credit has indeed been a priority for national and international law reformers seeking to promote economic activity and economic growth. Several international organisations such as the European Bank for Reconstruction and Development (EBRD), the United Nations Commission on International Trade Law (UNCITRAL) or the International Institute for the Unification of Private Law (UNIDROIT) have thus encouraged the approximation and modernisation of personal property security law regimes through the enactment of model laws and legislative guides. But as many projects for the approximation and modernisation of law continue to flourish and as the law continues to grow out of national boundaries, this chapter proposes to analyse some of the methodological challenges that have arisen from these initiatives. It is argued that there are still outstanding challenges and obstacles to the comprehensive approximation and modernisation of personal property security law. Firstly, this chapter reasserts that the case for the approximation of personal property security laws is not absolute[4] and that, despite a converging trend,[5] there are still unresolved obstacles to the recognition of a sound theoretical justification for the approximation of personal property security law regimes. The case within which the modernisation and approximation of law was built has also dramatically changed. The beginning of the millennium was marked by historic economic events such as the 2008 economic crisis, the transformation of planned economies to more liberal models in Eastern Europe, and more recently, the perceptible slowdown in global trade and noticeable emerging protectionism.[6] Further, the argument based on legal culture remains strong, especially in the field of personal property security law, baseline concepts of which are rooted *par excellence* in national property and insolvency laws. This argument is also reinforced by the fact that many international approximation of law projects in the field of secured credit law are modelled on the principles of Article 9 of the American Uniform Commercial Code (UCC) the rationale of which has yet to be proven from a legal perspective. The legal transplant of a foreign legal model thus appears to be the chosen methodology for the approximation and modernisation of the law rather than legal harmonisation.[7] There is no doubt that Article 9 UCC encompasses features of a modern and predictable legal regime for secured transactions but that should not in itself justify and prescribe the need to modernise and approximate the law along the same lines.[8] What works in one particular jurisdiction may not work in another.

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[3] See for example the UNCITRAL Report of the Secretary General on the draft legislative Guide on Secured Transactions in February 2002 available at http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html.

[4] See for instance Boodman (1991), p. 43; Legrand (1996), p. 52; Stephan (1999), p. 743 and Walt (1999) p. 671.

[5] On the convergence of commercial legislations, see for instance Mistelis (2001).

[6] See the note from the Secretary-General of the Organisation for Economic Co-operation and Development (OECD) entitled "Contribution of Trade and Investment to Increased Productivity, Growth, Jobs and Inclusiveness" available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC(2016)6/REV1doclanguage=en. The United States have recently pulled out of a major trade agreement namely the North American Free Trade Agreement (NAFTA) and the British government has indicated its willingness to leave the European Single Market.

[7] Legal harmonisation involves the action of coordinating different legal rules from different legal systems to eliminate and accommodate differences whereas legal transplant "[…] consists in the introduction, in national legal systems, of statutes and principles belonging to other systems, be they legal rules of other countries or customs whose acceptance is widespread". See Carbonara (2007), p. 2.

[8] See for example Mattei (2003), p. 385.

The American regime encompasses specific views on key policy issues that may not be reasonable to import within the cultural legal context of other jurisdictions. The literature demonstrates that the importation of foreign legal models within national laws and/or international law may raise significant difficulties due to the differences in socio-legal context and in legal culture, such as the differences underlying Common law and Civil law systems.[9] Secondly, this chapter discusses the ongoing issue of appropriation[10] and proposes to investigate the suitability of current forms of international instruments, namely international conventions and soft law instruments such as model laws or legislative guides, that might enable a successful approximation of law in the field of personal property security. Furthermore, the body of international law that is emerging from the international law making process raises further challenges for the approximation and modernisation of personal property security law. The analysis thus questions whether the nature of a transnational commercial law operating within a distinct legal order beyond the state would be better suited to regulate international personal property security law. It is argued that the recognition of such an autonomous transnational personal property security law together with the recognition of a commercial legal framework within which to operate remains uncertain because of further methodological challenges, primarily embodied in the lack of state sovereignty and lack of coercive powers to enforce property rights.

2 Prolegomena: the approximation and modernisation of personal property security law regimes

A security can be defined as a right over property to guarantee the repayment of a debt or to guarantee the performance of some other monetary obligation. As a general rule, secured claims get priority over unsecured claims. If the debtor defaults, the secured creditor is thus entitled to the asset representing the security in priority over other unsecured creditors. Without a regulated framework for secured credit and its priority system, the *pari passu* principle would apply, that is a principle of equal repayment amongst all creditors. Hence, a security creates an incentive for lenders as it gives secured creditors a priority for the repayment of money lent over other unsecured creditors. Finch explains:

> The normal rule in a corporate insolvency is that all creditors are treated on an equal footing - pari passu - and share in insolvency assets pro rata according to their pre-insolvency entitlements or the sums they are owed. Security avoids the effects of pari passu distribution by creating rights that have priority over the claims of unsecured creditors.[11]

The priority system enshrined in secured credit law regimes creates an exception to the principle of equality of repayment. This derogatory treatment may be considered unfair for unsecured creditors[12] and contrary to the principles of social justice but some argue that the rationale for the priority system can be grounded on the notions of property rights and freedom of contract.[13] It is further argued that the availability of security and its priority system may reduce risks for creditors, support economic activities and contribute to the growth of the economy.[14] If the institution of secured lending is desirable, it is contended that

[9] See example Montesquieu (1748); Kahn-Freund (1998), p. 7; Teubner (1998), p.11; Legrand (1997), p. 111.
[10] See for example Chinkin (1989), p. 850; Boyle (1999), p. 901; Shaffer (2008); Gopalan (2008), p. 327.
[11] Finch (1999), p. 634.
[12] On the debate over the rationale for secured lending, see for instance Jackson (1979), p. 1143; Schwartz (1981), p. 1; Schwartz (1984), p. 1051; Buckley (1986), p. 1393; Shupack (1989), p. 1067; Schwartz (1994), p. 2073; LoPucki (1994), p. 1887; Hudson (1995) p. 47; Carlson, (1998), p.1635.
[13] McCormack (2017), p. 112.
[14] See for example Gullifer and Raczynska (2016), p. 271 and Levine (2005), p. 865.

promoting access to credit through the modernisation of personal property security law regimes would constitute a significant factor in economic growth.[15] Economists and financial institutions further argue that an efficient and modern personal property security law regime should take a liberal approach by removing restrictions on the taking of a security.[16] In the international context, the yearly published Doing Business Reports of the World Bank also confirm this postulate.[17]As a result, it is contended that an efficient and modern personal property security law regime should give access to credit to a wide range of individuals and commercial actors at lower costs and should be framed within a secured and predictable set of rules.[18] Hence, it is not surprising that in this quest to become more competitive, many jurisdictions, including England and Wales, introduced law reform proposals aiming at the modernisation of personal property security law.[19]

An illustration of potential uncertainties within the law of secured credit and insolvency can be drawn from the English legal framework, particularly, within the distinction between the fixed and floating charge. A floating charge can be defined as a global security over a companies' fund of assets, including present and future assets. The security will thus float over a changing pool of assets until a triggering event does occur (crystallisation). The great advantage of the floating charge is that it allows a debtor to provide the secured creditor with a wide security and to continue to deal with the charged assets in the course of business without the lender's consent and until crystallisation which predominantly happens when a receiver or liquidator is appointed.[20] The floating charge is thus a great device for the borrower. It provides him with a great degree of freedom but may leave the creditor at greater risks of not getting repaid. Indeed, the holder of a floating charge will usually be paid out once other categories of creditors (fixed-charge holders, preferential creditors, expenses of the insolvent estates and unsecured creditors ring-fenced funds) have been paid. In contrast, the holder of a fixed charge is paid out of the proceeds of sale of the charged assets which may place him in a more advantageous position upon the debtor's insolvency. The uncertainty in the law stems from the characterisation of a charge as being floating or fixed. The characterisation of the floating charge has indeed been problematic and has been a recurring topic of debate in courts over the years. Particularly, the question emerged whether a security created over present and future book debts paid into a company's current account with a bank was a fixed or a floating charge. In *Westminster plc v. Spectrum Plus Limited & Ors*[21], the House of Lords decided that such a security had to be floating because the bank did

[15] Levine (2005), p. 865.

[16] See for example the studies on the legal origin thesis of the LLSV group (Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer and Robert Vishny) (1997) and (1998), p. 1113.

[17] See for example World Bank Doing Business Reports 2017 Getting Credit: Legal Rights **"**Two approaches to developing an integrated secured transactions regime" available at http://www.doingbusiness.org/reports/case-studies/2016/gc-legal-rights.

[18] Gullifer (2016).

[19] Some provinces of Canada reformed their personal property security laws modelled on the American Article 9 UCC. Ontario was the first Canadian province to adopt a PPSA modelled on Article 9 UCC. It was adopted in 1967 but the Act did not come into effect until 1973. New Zealand reformed its law in 1999 (Personal Property Security Act 1999). In England and Wales, the Law Commission considered the need for reform with respect to company charges, and issued a Consultation Paper in June 2002 (Registration of Company Security Interests: Company Charges and Property other than Land - Law Commission Consultation Paper No 164) which was followed by a Consultative Report published in August 2004 (Company Security Interests: A Consultative Report, Law Commission Consultative Report No176). A final Report was published in 2005 (Company Security Interests, Law Commission Report No 296, Cm 6654). France also reformed its secured credit Law in 2006 with the Ordinance No 2006-346 dated 23rd March 2006.

[20] Crystallisation can also occur upon 'ceasing to do business', 'enforcing the security' or upon the occurrence of a particular event agreed in a clause (automatic crystallisation).

[21] [2005] UKHL 41.

not have enough control over the account to completely block it which, if it did, would have enable the creation of a fixed charge. The case of *Gray and others v. G-T-P Group Limited*[22] is another illustration of the difficulties underlying the uncertain distinction between floating and fixed charge. In this case, the High Court had to determine whether the creation of a trust had to be characterised as a fixed or floating charge. Most significantly, the High Court had to determine whether such a security could fall within the ambits of the Financial Collateral Arrangements Regulations 2003 which exempts the financial collateral arrangement from the registration requirements under the Companies Act 2006. In the *Gray* Case, assets were placed in an account following a declaration of trust for the purpose of securing certain liabilities. The High Court clearly confirmed that such an arrangement was a charge and should be registered pursuing Section 860 of the Companies Act 2006. The Court then considered whether this security was floating or fixed. It was reaffirmed that:

> ... the essential element in determining the difference between a fixed and a floating charge is the chargor's ability without the chargee's consent to control and manage the charged assets. That ability is present in this case.[23]

Thus, it was concluded that the trust created for the purpose of security had to be characterised as being a floating charge, which was, under the circumstances of the case, void for lack of registration.

Looking at the wide range of modernisation endeavours in the field of personal security law, Article 9 of the UCC is often presented as a model of success in encompassing the characteristics of a modern secured credit law regime. Article 9 of the UCC adopts a functional approach to the regulation of a unitary security device, the security interest. It encompasses a wide range of coverage, including all categories of personal property, tangible and intangible, and all types of parties. One of the most interesting features of the Article 9 security interest lies in the fact that its scope is delimited according to the function served, so that the parties can freely apply the most suitable structure for their transactions. Article 9 of the UCC provides for a single functional system together with the recognition of a single set of rules, a notice filing system and a first to file priority rules, applicable to the security interest.

Many international organisations such as the EBRD, UNDROIT or UNCITRAL adopted international instruments modelled on the unitary and functional approach of the American secured credit law regime.[24] The need to become ever more competitive has also led national law reformers to opt for reforms encompassing some of the features of Article 9 UCC. Jurisdictions such as some provinces of Canada,[25] Australia,[26] and New Zealand[27] adopted an Article 9 UCC type regime but European jurisdictions such as France[28], Belgium,[29] Italy[30] and England and Wales[31] adopted a more nuanced approach. There is thus a noticeable

[22] [2010] EWHC 1772.
[23] See Para 31[2010] EWHC 1772.
[24] See for example the recent adoption of the UNCITRAL Model Law on Secured Transactions (2016).
[25] See for example the Personal Property act of Ontario 1990.
[26] Personal Property Security act 2009.
[27] Personal Property securities Act 1999.
[28] The Ordinance of 23rd March 2006 reforming French Secured Credit law added a new chapter to the French Civil code. On the French Law reform, see Simler (2006), p. 124.
[29] Law of 24th June and 11th July 2013 reforming personal property security law regime.
[30] Law 3rd May 2016, 'Decreto- Legge 3 maggio 2016, n. 59, Disposizioni urgenti in materia di procedure esecutive e concorsuali, nonche' a favore degli investitori in banche in liquidazione'.
[31] Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 clarifies which charges are registrable and improve registration procedures. On the development of the English secured credit law framework, see De Lacy (2012), pp 3-82.

convergence of the law towards the American model but a true assimilation of an Article 9 type regime through the approximation of law remains uncertain.

3 Justifications

The case for the approximation of law is not uncontested. On the one hand, advocates see it as likely to achieve substantial reductions in the cost of cross-border transactions and provide more certainty and clarity in the applicable law for the international business community. But on the other hand,[32] sceptical theorists see in the approximation of law process a form of disguised protectionism and national hegemony.[33] Further challenges to the argument for the approximation of secured credit laws are based on cultural and economic grounds.

3.1 The case for the harmonisation of secured credit law

Many arguments have been advanced in favour of an approximation of commercial laws, and emphasis will particularly be given on the reasons that have forged the consensus for the approximation of secured credit law regimes.[34] Arguments based on a cost-benefit rationale would seem to provide strong incentives in support of an approximation of secured credit law regimes. It is argued that the approximation of commercial laws is desirable because of negative externalities and jurisdictional interface.[35] Negative externalities would impose extra costs on contracting parties that could be avoided with an approximation of laws.[36]These costs within commercial activities include the costs of negotiations, drafting and enforcing commercial contracts, translation costs, search and information costs.[37] One crucial contractual aspect for traders is to find the best legal system that will provide them with security and certainty at cheaper cost. From that perspective, it is arguable that the implementation of modern and more uniform secured credit law regimes would reduce the costs of credit at domestic and international level.

It is further argued that within the jurisdictional interface, interaction and communication between commercial participants will be problematic in the absence of an approximation of laws.[38] An approximation of laws would enable the international commercial community to communicate and interact using the same legal language. Of course, conflict of law rules already help in providing more certainties for traders at the international level in the way they can now ascertain the applicable law but this is not always possible. The rule of the *lex situs*, for example, in the context of a security created in mobile equipment, is arguably not adequate. Further, the conflict of law rules does not eliminate all the costs. Creditors are not guaranteed that their security will be valid and enforceable within the national applicable law. Thus, contractual parties will generally spend substantial time and money in translation work and in searching and analysing the commercial law of a particular foreign jurisdiction if it appears to be the applicable law to the case. Thus, an approximation of secured credit law

[32] See for example Boodman (1991), p. 43; Legrand (1996), p. 52; Stephan (1999), p. 743 and Walt (1999), p. 671.
[33] Leebron (1996), p. 64.
[34] On this point see Schmitthoff (1968), p. 551; Goode (1991), p. 54; Fox (1991-1992), p. 593; Leebron (1996), p. 64; Kronke (2000), p. 13; Goode (2001), p. 751; Smits (2002-2003), p. 79; Kronke (2003), p. 11; Lando (2003), p. 123.
[35] Leebron (1996), p. 75.
[36] Ibid. p. 78.
[37] Schmidtchen (2004).
[38] Leebron (1996), p. 75.

regimes would seem to reduce these costs and would also provide more certainty with respect to the applicable law.

Approximation of laws is not only justifiable through a costs-benefits rationale; it has also been justified because of the values it would promote such as fairness and transparency within international transactions.[39] It is often contended that different legal rules can lead to unfair results for some participants.[40] In the field of secured credit law, this argument can be exemplified with the different registration requirements of a security created over movable property. For instance, a French or English lender does not need to register a property based security such as simple retention of title clause to be valid. Across the Atlantic, an American lender would need to file his purchase money security interest to perfect the security.[41] Registration may be presented as a burdensome requirement but some will argue that it provides more certainty and predictability for creditors by avoiding the issue of the debtor's false wealth. An approximation of laws would mitigate the production of unfair results by subjecting creditors and debtors to similar sets of rules. The question of the approximation of property-based security such as the English or French retention of title clauses in line with the American purchase money security interest has widely been discussed in a context of law reforms.[42] However, it is to be reasserted that reconciliation between the different national secured credit law regimes, particularly of retention of title, remains a true *casus belli* within the approximation of law endeavours.[43]

Although one could see substantial advantages in the approximation of secured credit law regimes, it has also been argued that uniformity of law is a mixed blessing.[44] There is always the risk, linked to the recognition of a single legal rule to be applied at the international level that uniformity might lead to the adoption of inefficient rules, which might ultimately increase the costs imposed on contracting parties.[45] In particular, the efficiency of the law as an international standard has been questioned. The risk being that an approximation of secured credit law regimes, modelled on a particular foreign legislation, may not produce similar efficient results in other recipient national legal systems. For example, the recognition of uniform rules could still lead to substantial divergences following their implementation and interpretation within national legal systems, thus leaving the establishment of uniform rules unproductive and fruitless. Finally, even if a nation was to implement the new uniform law, commercial participants, lacking information and familiarity with the new law, could be deterred from applying it which could, again lead to inefficiencies in the adoption of the uniform legal rule.[46]

3.2 Regulatory competition

In the absence of a sound and absolute theory on the approximation of secured credit law regimes, some authors have argued that the diversity in legal methods for structuring secured financing may enhance economic activities through regulatory competition. In this sense secured credit could be envisaged as a marketable product that would enable national jurisdictions to compete with one another.

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[39] Ibid. pp. 84- 89.
[40] Ibid. p. 84.
[41] Art. 9-324 UCC.
[42] See on this point Gullifer (2007).
[43] For example, the UNCITRAL Legislative Guide for Secured Transactions provides the option to include or exclude property based securities from the unitary regime.
[44] Walt (1999).
[45] Walt (1999), p. 672.
[46] Walt (1999), p. 673.

For example, in the context of the EU, and in light of the achievement of the Common Market, the question emerged whether the harmonisation of secured credit laws was desirable or whether the diversity of legal regimes which allows for more innovation in secured credit and which allows for a wider choice for structuring finance, should be preserved.[47] In other words, would competition between secured credit law regimes better support the development and growth of economic activities within the Common Market than legal harmonisation? Given the limited success at the harmonisation of EU secured credit laws,[48] and given the recent draft of the Common Frame of Reference[49] 'optional toolbox' for traders, competition of national legal systems would appear to be the current *statu quo.*[50] On the one hand, it is arguable that a competition of legal regimes could end up in distorted and unfair competition towards legal regimes with lower legal standards. The reason is that some jurisdictions might be deterred from investing in some Member States because their secured credit law regimes might offer lower standards. Jurisdictions with less efficient secured credit legislations may appear less attractive to investors than other jurisdictions offering more modern legal regimes.[51] On the other hand, it is arguable that diversity in national legal regimes would enable Member States to experiment and innovate in their quest to find an efficient and predictable secured credit law. It is arguable that the preservation of diversity in legal systems would also allow legal reformers to provide for more innovation within secured credit law regimes and would also avoid the risk of enacting an inefficient legal regime with the approximation of law. Ultimately, it is argued that a competition of legal systems will enable the best law to survive and may serve as basis for the law of the community.[52] Legal diversity would also be consistent with the preservation of legal culture.

3.3 Legal culture

The argument based on legal culture is significant in explaining the obstacles to successful comprehensive approximation of secured credit law regimes. In the field of secured credit, there are substantial differences among national legal cultures and policy choices regarding the extent to which a security should be recognised (if at all). In jurisdictions where the institution of security is recognised, the validity requirements for a security can also vary. These requirements will usually reflect different policy choices in different legal cultures. For example, Common law jurisdictions are generally described as sympathetic to the concept of party autonomy and self-help. These jurisdictions have thus developed a more liberal attitude towards security. As a result, a security can generally be taken subject to a minimum of formality over both present and future assets to secure existing and future obligations. A functional approach is also generally followed where the concept of a universal security usually prevails. By contrast, Civil law jurisdictions have been more cautious towards the recognition of a universal security and in their approach towards non-possessory security, such as the non-possessory pledge. These jurisdictions have been particularly concerned about the false wealth phenomenon where the debtor can remain in possession of an asset

[47] Sykes (2000), p. 257.
[48] See I.A.2. with respect to the Directive 2000/35/EC of the European Parliament and of the Council of 29th June 2000 on Combating Late Payment in Commercial Transactions, OJ L 200, 8.8.2000. See Article 4 on retention of title clauses.
[49] The Draft Common Frame of Reference (DCFR) prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law has been published in February 2009. The CFR will also include a Book IX on Proprietary Security Rights in movable assets. See Eidenmüller (2008), p. 665.
[50] On the CFR, see for instance Beale (2008). See also Reich (1992), p. 861.
[51] See Lando (2000), p. 61.
[52] See Schmitthoff (1968).

subject to a security. So in these jurisdictions, there are, in varying degrees, requirements of specificity and individualisation of assets, the requirement for a new post-acquisition act of transfer to give in proprietary effects to security taken on future assets, requirements of notice to the debtor as a condition of the validity (not merely priority) of an assignment of debts, and restrictions on self-help remedies such as possession and sale of the asset.[53]
The difficulty is that, despite diversity in national legal approaches and in underlying policies towards the regulation of secured credit, many approximation and modernisation of law endeavours opted for a model based on the principles of American Article 9 UCC. The reason is that Article 9 UCC is often described as a model of success in encompassing the features of a modern regime for secured credit and in promoting economic efficiency. Article 9 UCC enables wide access to credit within a certain and predictable legal framework for creditors and debtors. Such legal regime would in turn promote the growth of the economy. But given the legal and cultural divergences, the legal transplantation of a particular foreign legal model should be envisaged with caution within the context of the approximation and modernisation of law. The international legal reformer should avoid systematic standardisation through the process of legal transplantation of the law of the strongest or the richest. As explained above, regulatory competition would also enhance legal competitiveness and would also promote legal reforms. Legal diversity and legal culture are to be protected against hasty law reforms solely motivated by economic imperatives. Legrand argues that law is cultural, and that in a world of plurality of cultures, there cannot be a universal law.[54] In attempts at the approximation and modernisation of law, the international legislator cannot ignore the legal language or the historical and political context.

4 Appropriation and the choice of legal instruments

Goode identifies at least nine instruments by which unification of the law may be achieved:

> ... (1) a multilateral Convention without a Uniform Law as such; (2) a multilateral Convention embodying a Uniform Law; (3) a set of bilateral Treaties; (4) Community legislation – Typically , a Directive; (5) a Model Law; (6) a codification of custom and usage promulgated by an international non-governmental organization; (7) international trade terms promulgated by such an organization; (8) model contracts and general contractual conditions; (9) restatements by scholars and other experts.[55]

Although all these instruments aim at the harmonisation and unification of the law through the enactment of a supra national legal rule, they generally offer different degrees of flexibility to the interested states. International conventions have generally been the preferred method used to achieve unification of the law at the international level notwithstanding their restrictive nature, but model laws, restatements and other soft law instruments have recently become the panacea for successful international unification and harmonisation owing to their greater flexibility.
Considering the wide range of legal instruments for unification, one of the many challenges for international organisations is to determine whether a specific type of legal unification instrument can be identified which might constitute an adequate legal method to achieve a successful approximation and modernisation of secured credit law regimes.

[53] Goode (1998) Security in Cross-Border Transactions, p. 48.
[54] Legrand (1997).
[55] Goode (1998) Transcending the Boundaries of Earth and Space: The Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment, p. 54.

4.1 International conventions

International conventions have long been the preferred method to achieve unification of the law at the international level mainly because of their binding nature.[56] Abbott recognises that:

> [b]y using hard law to order their relations, international actors reduce transactions costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting.[57]

International conventions generally consist in the enactment of provisions aiming at the unification of conflict of law rules or in the enactment of provisions embodying a substantive law regime. For example, in the field of secured credit, the Cape Town Convention on International Interests in Mobile Equipment and associated protocols[58]opted for a uniform regime regulating the creation and recognition of an international interest in high value mobile equipment and did not opt for a regime aiming at unifying conflict of law rules.[59]
International conventions provide for a strong level of uniformity of the law with a unique supra national legal instrument that once ratified by states, is legally binding. Arguably, international conventions could provide a successful method for the modernisation and approximation of secured credit law regimes pursuing the achievement of a high ratio of ratifications. Evidently, such efforts would require a strong consensus among all participating states on the question of secured credit. The attempt to reach such consensus is however uncertain given the different legal and cultural approaches towards secured credit and given the various existing national secured credit law regimes. Even if a consensus was possible on the shape of a single legal regime for secured credit, it is arguable that uniformity would not be guaranteed if a consistent interpretation across participating states' courts was not followed.[60]
International conventions are not the product of national draftsmen but their adoption still requires a certain consensus among participating states. Given the diversity of national secured credit law regimes and the diversity among national baseline property and insolvency law principles, the success of an international convention to approximate and modernise the law would ineluctably require its drafters to accommodate the existing differences of national legal regimes to maximise state ratifications. International legislative efforts should thus attempt to establish the best available solution that would be acceptable for all, that would be consistent with the various national legal cultures and the diverse national legislations. In reality, powerful lobbies are commonly used by states' representatives within the international law making process, in an attempt to promote the exportation of their own laws to other jurisdictions which raises the obvious issue of legitimacy.[61] Such an approach towards the international law making process would also run the risk of a low level of ratification or the risk for international conventions to remain dead letters.

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[56] Shaffer (2008).
[57] Abbott (2000), p. 422.
[58] Convention on International Interests in Mobile Equipment (Cape Town, 2001); Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001) and the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 2007).
[59] On this point see Espinola, (1997), p. 9; Fleisig (1999), p. 253; Cuming (1998), p. 365; De La Peňa (1999), p. 347; Foëx (1999), p. 409 ; Cuming (1998) ; Davies (2002); Goode (2002), p. 4; Deschamps (2002), p. 17; Davies (2003), p. 151; Goode (2004), p. 757; Honnbier (2004), p. 3; Saunders (2006).
[60] On the assessment of international conventions as successful instruments of unification at the international level, see Kronke (2000), at p. 13.
[61] See section 5 below.

Simply concluding an international convention just constitutes an indication of the potential adhesion of states and will only become legally binding if officially ratified by states. As Goode has already highlighted:

> [t]he treaty collections are littered with conventions that have never come into force, for want of the number of required ratifications, or have been eschewed by the major trading States. There are several reasons for this: failure to establish from potential interest groups at the outset that there is a serious problem which the proposed convention will help to resolve; hostility from powerful pressure groups; lack of sufficient interest of, or pressure on, governments to induce them to burden still further an already over-crowded legislative timetable; mutual hold-backs, each State waiting to see what others will do, so that in the end none of them does anything.[62]

The UNIDROIT Convention on International Finance Leasing 1988 has only been ratified by ten countries[63] and the UNIDROIT Convention on International Factoring 1988 has only been ratified by seven countries.[64] The Cape Town Convention on International Interests in Mobile Equipment was much more successful and has been ratified by thirty-two countries. But, the Convention is restricted in its application to the regulation of an international security interest created in a particular class of assets, that is high value mobile equipment.

The possibility for states to derogate from the main text of the convention may also clearly undermine the goal of uniformity within unification of law efforts.[65] Considering the vast amount of divergences in national secured credit law regimes, the substantive unification of secured credit law regimes using an international convention would bear the risk of states introducing some opt-outs provisions or simply not proceeding to its ratification at all.[66] For example, Article 39 of the Cape Town Convention provides that each participating states can decide that certain rights and interests will have priority over international interests by introducing specific declarations. The loss of uniformity related to amendments explains the reason why international conventions usually have a limited scope and only cover a specific area of law. As a result, international conventions generally remain rather fragmentary in their nature and most of them only concern one specific area of commercial law such as one special type of contract or one specific legal regime. Even the very well-known United Nations Convention on Contracts for the International Sale of Goods contains legal gaps as for example on the validity of the international contract in question or about the repercussions of State control over the import and export of certain goods.[67]

The regime embodied in the Cape Town Convention is no exception as it enables creditors to create an international global security interest in high value mobile equipment together with the recognition of the notice filing[68] and a first to file priority rule. The international interest so created does not replace a security introduced under the law of a Member State as they can validly coexist. Nonetheless, if the international interest is validly registered, it will have priority over the national security.[69] Previous developments have identified some of the difficulties in attempting to reach a consensus on the question of secured credit, especially

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[62] Goode (1997), p. 232.
[63] The list of contracting states is available at http://www.unidroit.org/english/implement/i-88-l.pdf.
[64] The list of contracting states is available at http://www.unidroit.org/english/implement/i-88-f.pdf.
[65] Wool (1997), p. 49.
[66] See on this point Vogenauer (2009), p. 3.
[67] Bonell (1997), p. 11.
[68] The Cape Town Convention has introduced an international register (CTIR) in respect of security created in aircraft equipment. Information is available at https://www.internationalregistry.aero/irWeb/pageflows/work/UserDocumentation/DownloadUserDocumentationController.jpf?language=English.
[69] Goode (2004), p. 758.

considering the existing differences between legal systems.[70] Thus, on this occasion the choice to solely unify an aspect of secured financing[71] without requiring states to modify their national legislations proved to be a success. In this respect, the Cape Town Convention on International Interests in Mobile Equipment and Associated Protocols[72] constitutes a significant achievement for the unification of the law of secured credit in respect of these specific types of assets. Conversely, it is also arguable that the decision to opt for a series of separate conventions to regulate the creation of an international security interest relative to specific types of assets could reduce the economic benefits of the proposed new scheme to no more than a limited variety of assets.[73] Indeed, it is to be recognised that a successful modernisation based on the use of international convention would not be entirely satisfactory unless it could be extended to other categories of assets for secured credit.
Finally, international conventions could also fail in their endeavours to approximate the law if not interpreted uniformly. It is explained that:

> [t]he principal objective of an international convention is to achieve uniformity of legal rules within the various States party to it. However, even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.[74]

For example, it might be unnatural for a civil lawyer to understand and interpret a convention using the concept of 'security interest' when civil law jurisdictions do not recognise interests in property but only rights in property. In that respect, it is interesting to note that the UNCITRAL Model Law on Secured Transactions did not use the American Article 9 UCC terminology of 'security interest' but adopted the term of 'security right'.[75]

4.2 Model laws and restatements

Soft law international legal instruments[76] have recently become the panacea for the harmonisation and modernisation of private law. Soft law instruments can cover a wide range of legal instruments and include model laws, restatements, legislative guides, international trade terms such as those produced by the International Chamber of Commerce (ICC), or International Contracts Terms (ICT). As opposed to international conventions, states are not the sole actors in the making of soft law legal instruments. Private law scholars, academics, and organisations representing businesses and industries now also take part in the adoption of international legal standards which can raise questions as to the legitimacy of the rule making process.[77]
The use of soft law legal instruments has been the object of significant debates among academics. It has been argued that the increase in the use of soft law "... might destabilize the whole international normative system and turn into an instrument that can no longer serve its

[70] Goode (1998), p. 48.
[71] This aspect of secured credit law was for many jurisdictions left unregulated (for example in France) which facilitated the adoption and ratification of the Convention.
[72] The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape town 2001) and the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg 2007) but not yet in force.
[73] Stanford (1999), p. 248.
[74] Munday (1978), p. 450.
[75] For instance, terminologies issues have been extensively analysed in the *travaux préparatoires* of the UNCITRAL Legislative Guide on Secured Transactions. See for instance, Riffard (2006), p. 107.
[76] For a description of the features of soft law instruments see for example Shaffer (2008).
[77] See McCormack (2011).

purpose."[78] Others have argued that soft law is desirable as it would constitute a step towards the recognition of hard law.[79] Partisans of the use of soft legal instruments generally recognise that it would lower contracting costs by avoiding the lengthy negotiation process required with international conventions. The non-binding nature of soft law instruments would allow more flexibility in dealing with legal and cultural diversity. Further, these instruments would provide more flexibility in the amendment process which would ease and speed the adaptation to modern commercial and financial environment. By avoiding the ratification and cumbersome amendment process, soft law instruments might be quicker and simpler to draft. Finally, it is arguable that soft law instruments might be used as a step forward to the recognition of legally binding instruments.[80]

These instruments of unification have particularly been used in the United States of America. The American Law Institute has used restatements and model laws extensively as legal methods to clarify, modernise, and improve the law.[81] The success of restatements and model laws as a legal method to reform and approximate the law aroused significant interest from other international entities. The success of the American Uniform Commercial Code, and particularly of Article 9 in relation to secured transactions, in spreading uniformity and modern legislation across the American States[82] clearly inspired many international entities to create similar legal instruments to be used in other jurisdictions.[83] Indeed, recent international approximation and modernisation projects have essentially taken the form of soft law legal instruments such as restatements and model laws. For instance, UNCITRAL recently enacted a Model Law on Secured Transactions[84] which constitutes one of the major initiatives in the field of secured transactions. Previous initiatives conducted by UNCITRAL have already been successful in approximating and modernising the law by using soft law legal instruments. The successful UNCITRAL Model Law on International Commercial Arbitration (1985 as amended in 2006) has served as a model for legislative reforms in many jurisdictions such as Canada, Germany or Australia.[85] The UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) has also served as a model for legislation particularly in many new emerging economies such as jurisdictions from Africa and jurisdictions from the former Soviet Union.[86] Finally, the Model Law on Electronic Commerce has also successfully served as a model for legislative reforms in many jurisdictions such as China, India and the United States.[87] These examples clearly illustrate the success of soft law legal instruments such as model laws and restatements as legal methods for modernising and approximating the law in specific areas of commercial law.

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[78] Weil (1983), p. 423.
[79] Reinicke (2000), p. 75.
[80] Trubek (2005).
[81] See *e.g.,* the American Law Institute.
[82] Vogenauer (2009), p. 5.
[83] See fn. 2.
[84] The text of the UNCITRAL Model Law on Secured Transactions is available at http://www.uncitral.org/uncitral/en/uncitral_texts/payments/Guide_securedtrans.html.
[85] Legislation based on the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985 has been adopted in 74 jurisdictions.
[86] The UNCITRAL Model Law on Procurement of Goods, Construction and Services is available at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html. A
[87] The Model Law on Electronic Commerce is available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html. The Model Law has also been adopted in the Bailiwick of Guernsey (2000), the Bailiwick of Jersey (2000) and the Isle of Man (2000), all Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland; in Bermuda (1999), Cayman Islands (2000), and the Turks and Caicos Islands (2000), overseas territories of the United Kingdom of Great Britain and Northern Ireland; and in the Hong Kong Special Administrative Region of China (2000).

Soft law legal instruments are not binding and, thus, do not require any ratification, but states are offered the choice to adopt and modify some of their provisions or to disregard them completely.[88] Another purpose of restatements and models laws is that they can encourage party autonomy by offering the opportunity to parties to adopt the legal regime as the governing law for their contractual relationships. This is a substantial advantage in using these legal instruments as legal methods to modernise the law at the international level. Naturally, soft law instruments can also serve as model legislations for national legal reforms as it has just been demonstrated. Owing to more flexibility, the use of soft law instruments may offer the potential to successfully reform and modernise the law. On the other hand, it is arguable that the high degree of flexibility offered by model laws and restatements is obtained at the expense of the successful achievement of complete unification of the law. In effect, the nature of model laws and restatements does not impose any ratification amongst potential participating States of the dispositions to be adopted. States remain free to adopt, modify and reject altogether the dispositions of a model law.
By avoiding the difficulties underlying the adoption of international conventions and by providing more flexibility for states to adhere to their provisions and, more flexibility to adapt to modern commercial transactions,[89] model laws and restatements would seem to offer a better vehicle for the successful modernisation and approximation of secured credit law regimes.

5 The recognition of a transnational secured credit law: Legitimacy and enforcement challenges

5.1 Definitions

Originally, trade customs, embodied in the expressions of *lex mercatoria* or law merchant, were considered to constitute an autonomous source of law used to regulate commercial activities. During the nineteenth century the notion of sovereignty emerged and the idea that law could only emerge from the state. It was also during this time that codification spread as an expression of this national sovereignty. Illustrations of this movement of codification can be found with the enactment of civil codes in Europe such as the Napoleonic French Civil code in 1804, The Spanish Civil code (1888) or the German BGB (1900). With the transnationalisation of international commercial dealings, a new body of commercial law emerged at the international level which suggested a resurgence of the concept of *lex mercatoria* which is still the object of fervent debates.[90] The question of the emergence of a new *lex mercatoria* is part of a debate that is central for a number of scholars and academics.[91] In particular, underlying ambiguities remain over the definition, content, source and scope of the *lex mercatoria* which suggest the need for caution in the use of this terminology. The expression *lex mercatoria* is sometimes used interchangeably with the terminology of transnational commercial law which is defined as the "... law which is not

[88] Vogenauer (2009), p. 4.
[89] See Gopalan (2004), p. 310 where the author states that: **"**[t]his is a vehicle for harmonization that has assumed tremendous importance following the successful reception of the UNIDROIT Principles of International Commercial Contracts. Without a doubt, the tremendous flexibility offered by restatements has contributed to their recent allure. Parties can adopt them on a voluntary basis, and they serve many important functions. For example, the UNIDROIT Principles of International Commercial Contracts as viewed as "neutral" contract law principles in that they reflect a balance of interests and have not been formulated by any government."
[90] See for example Flanagan (2004), p. 297.
[91] On the debate on the *Lex Mercatoria* see for instance Berman (1988), p. 221; Highet (1989), p.613; Kahn (1992), p. 413; Drobnig (1995), p. 223; Berger (1997), p. 943; Bonell (1998); Dalhuisen (2006), p. 129.

particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems".[92] Yet the *lex mercatoria* and transnational commercial law must be distinguished. It is explained that:

> The phrase "transnational commercial law" is used to describe the totality of principles and rules, whether customary, conventional, contractual or derived from any other sources, which are common to a number of legal systems, while the phrase "*lex mercatoria*" is used to indicate that part of transnational commercial law which is unwritten and consists of customary commercial law, customary rules of evidence and procedures and general principles of commercial law, including international public policy.[93]

Thus the *lex mercatoria* is here taken to represent the corpus of unwritten law that is emerging at the international level through international usages and customs. Accordingly, the *lex mercatoria* only represents a small part of transnational commercial law which extends to international conventions, model laws and other international uniform principles.

5.2 The suitability of transnational commercial law to govern modern secured transactions

Would an autonomous transnational commercial law be more suited to enable the recognition of modern secured credit laws than domestic legislations? This question must be assessed in the light of the requirements of modern commerce and certainly does not aim to suggest that national legislations are inefficient. Naturally, domestic laws would still apply in purely domestic commercial transactions. Also, if transnational commercial law was not yet available in relation to specific aspects of international secured credit, domestic law would still be relevant following the application of traditional conflict of law rules.

As with legal unification, the recognition of international standards would clearly avoid conflict of law issues and thus avoid the complexities generated by the existence of different legal regimes. Further, by avoiding conflict of law issues, transaction costs and legal risks would also arguably be reduced. Traditional conflicts of law rules do not always provide the certainty that the creation of a security in one jurisdiction will be enforceable in a foreign jurisdiction. This is particularly true for securities created in movable assets which are likely to easily cross boundaries. In that respect, the Cape Town Convention now enables creditors to create and enforce their security in high value mobile equipment at the international level. Although the success of international conventions largely depends upon the degree of adherence and ratifications of states to be successful, this example demonstrates that the emergence and recognition of an autonomous transnational secured credit law regime would similarly avoid conflict of law issues.

In addition to avoiding conflict of law issues, the flexibility of transnational commercial law would ease the formulation of international legal standards to regulate areas of secured transactions where domestic legislations have left significant legal gaps. For instance, the Cape Town Convention filled in the legal gap in relation to the creation and enforcement of an international security in movable equipment such as aircraft or railway rolling stocks which did not exist under some domestic legislations.

The recognition of an autonomous *corpus* of law to regulate international secured transactions would arguably be better attuned to the requirements of modern international commercial transactions. This is because transnational commercial law generally adopts a functional approach to the formulation of international legal standards. The functionalist approach designs law according to the desired objective, overlooking, to a certain extent, cultural, social and political elements inherent to state values. At the outset, it is arguable that

[92] Goode (1997) Usage and its Reception in Transnational Commercial Law, p. 2.
[93] Ibid. p. 3.

transnational commercial law would be better suited to provide modern secured credit law regimes for international commercial participants than domestic legislations where legal culture is often said to constitute a significant obstacle to approximation and modernisation of law. Conversely, it is arguable that whatever the legal pattern in which secured credit law regimes emerge, a legal culture, representing specific policy choices and other specific interests will colour the legal norm. The draft of a secured credit law cannot be neutral and will always reflect fundamental policy choices. The question is thus to determine who is to make these choices. Should they solely remain with the state or could they also be considered within a distinct international legal framework by non-state entities and private actors? After all, there is always the risk that private actors decide to promote, through the recognition of transnational commercial law, specific policy decisions reflecting the position of powerful economic jurisdictions at the international level. In the field of secured credit, it is quite clear that most of the existing transnational legal instruments, such as the EBRD Model law on Secured Transactions or the UNCITRAL Model Law on Secured Transactions and other international principles already reflect the principles enshrined in Article 9 of the American UCC. There is the risk that the international law making process becomes the tool of legal political strategy.[94]

5.3 The challenges facing the recognition of a transnational secured credit law beyond the state

If transnational secured credit law could in theory be successful in providing a modern secured credit law, the next challenge is to determine how this autonomous body of law would operate in the international context. This section argues that the recognition of an autonomous transnational commercial law to regulate international secured transactions would create some difficulties related to the legitimacy and enforcement of these new sources of law.

The privatisation of the law-making process leads to significant concern as to the legitimacy of this new autonomous body of law, or transnational commercial law.[95] The recognition of the autonomy and legitimacy of transnational commercial law is still the topic of fervent debates amongst scholars and academics. It is questioned:

> Is there an anational lex mercatoria, a "global law without a state"? The debate seems infinite. Some argue that the rules, institutions, and procedures of international arbitration have now achieved a sufficient degree both of autonomy from the state and of legal character that they represent such an anational law. Others respond that whatever law merchant may exist is really state law – dependent on national norms and the freedom of contract they provide, and on the enforceability or arbitral awards by national courts. [96]

In the field of secured credit law, it is arguable that the case for the recognition of legitimate and autonomous sources of law is uncertain. In effect, the regulation of secured credit, which also involves the regulation of property law, remains a fundamental function of the state. The extent to which owners can exercise their property rights is restricted by state law. For example, the fundamental principle of the *numerus clausus* recognised in many Civil law jurisdictions restricts the creation of certain property rights. The regulation of property law remains a prerogative of the state, which arguably renders the recognition of an autonomous transnational secured credit law quite uncertain.

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[94] Cohen (2008), p. 770.

[95] On this point see *e.g.*, Franck (1988), p. 705; Zumbansen (2002), p. 400; Rodl (2008), p. 743; Basedow (2008), p. 703; Riles (2008), p. 605.

[96] Michaels (2007), p. 447. See also Mazzacano (2008).

If a distinct autonomous transnational commercial law could provide a transnational regime for secured transactions, a distinct international commercial legal framework would also need to be identified for this autonomous secured credit law to operate. The recognition of such a distinct legal order is admitted by many legal academics in relation to transnational commercial law.[97] Some authors recognise the existence of such a distinct legal order and talk about an 'international commercial and financial order'[98] that may have emerged following the phenomenon of internationalisation and globalisation of commercial transactions.

Legal orders have been defined as "... participatory social structures or communities that spontaneously produce their own laws".[99] The state can be cited as the most important legal order. Domestic legislations operate in their own national legal framework with their own enforcement mechanisms. If a relevant legal pattern can be identified, one would still need to determine whether the international secured transaction in question should be subjected to the law of this 'international commercial and financial order'. In other words, one would have to establish in which situations this autonomous secured credit law should supersede domestic legislations and how this autonomous secured credit law regime could be enforceable.

The recognition of this autonomous body of law to successfully operate in a distinct legal pattern, 'the international commercial and financial order' as proposed by Dalhuisen, would also need to be recognised as legally binding.[100] In this respect, the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards[101]is fundamental in providing guidance on enforcement mechanisms for transnational commercial law. Yet, it is arguable that the enforcement of an autonomous transnational secured credit law is to be doubted.

It is to be observed that in the field of international trade and international contract, party autonomy plays a major role in the legitimisation and enforcement of transnational commercial law. Commercial participants often choose transnational law as the governing law for their transactions. In England and France for example, the use of certain international usages to govern private dealings is open to traders as implied contractual terms.[102] General principles such as *pacta sunt servanda* and party autonomy are also recognised worldwide. The international commercial community often chooses transnational commercial law standards to govern international transactions through arbitration and reference to international usages. Could party autonomy also play a major role in the recognition of an autonomous secured credit law which would enable the creation and recognition of an international security in personal property?[103] Again, it is arguable that the recognition and enforcement of this international security in personal property would generate some difficulties in relation to the creation of proprietary rights and third parties. For instance, Civil law jurisdictions generally retain a restrictive approach to the recognition of proprietary rights through the *numerus clausus* principle. Secured transactions create proprietary rights which are enforceable *erga omnes*. Private parties cannot modify rules affecting transfer of property and freely create new proprietary rights. It is thus arguable that contractual choice of law may thus be ineffective in legitimising and enforcing transnational secured credit law.

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[97] On this point see Berger (1997), p. 91 and Cranston (2007), p. 600. See also Dalhuisen (2007), p. 211.
[98] Dalhuisen (2007), p.134.
[99] Ibid. p. 132.
[100]Ibid. p. 161.
[101] The Convention is widely recognised as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognise and enforce awards made in other States, subject to specific limited exceptions." The text of the Convention is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.
[102] Chuah (2007).
[103] Dalhuisen (2008), p. 354.

It is further proposed that an international court should be created to support the recognition of this autonomous transnational law and enable it to operate. The idea of an international commercial court to support transnational commercial law has already been suggested by some academics.[104] Could this international court be competent in enforcing international security interests? In the field of secured credit and property laws, it would seem difficult to see how the decisions of such a court would be recognised and enforceable in other legal orders, particularly national legal orders, unless this international court was internationally recognised by states under an international treaty.

The recognition of an autonomous transnational secured credit law operating within a distinct legal framework appears to be quite illusory. In particular, such recognition would create significant difficulties related to the legitimacy and enforcement mechanisms. Beyond the theoretical difficulties of recognising an autonomous secured credit law regime, it is fundamental to highlight the political impact on the recognition of autonomous sources of international commercial law. In effect, the formulation of secured credit law regime reflects fundamental political social and economic interests that are often overlooked by functional imperatives at the international level. Accordingly, the prospects for modernisation of secured credit law regimes through the recognition of an autonomous secured credit law regime appear to be limited. Secured credit law remains cultural, attached to the economic, social and political values of the state.

6 CONCLUSION

Following the multiplication of international initiatives in drafting international legal standards in the field of secured credit, the analysis has attempted to identify recurrent methodological challenges to the successful modernisation and approximation of personal property security laws. This chapter identified four methodological challenges that were recognised in the context of the approximation and modernisation of secured credit law regimes. In the absence of a sound theoretical justification for the approximation of law and given the strong legal cultural argument, it was concluded that the success of current and future approximation of law endeavours remains uncertain. Further, an analysis of current methods of appropriation such as the use of international conventions or soft law instruments demonstrated that a successful approximation and modernisation of the law is not always successful in the field. The analysis thus questions whether the nature of a transnational commercial law operating within a distinct legal order beyond the state would be better suited to regulate international secured credit law transactions. It is argued that the recognition of such an autonomous transnational secured credit law together with the recognition of a commercial legal framework within which to operate remains uncertain because of further methodological challenges, primarily embodied in the lack of state sovereignty and lack of coercive powers. The nature of transnational commercial law may be better suited to regulate international secured credit transactions in light of the requirements of modern commerce than under domestic legislations and private international law rules. Even where a particular national secured credit law regime can clearly be identified following the application of traditional conflict of law rules, substantial uncertainties may still arise for the commercial actors who may not be able to enforce their security in a foreign jurisdiction. The legal formalism and territorial nature of domestic legislations showed that it is often inadequate to fit with the requirements of modern legislations on secured transactions. The dynamic nature of transnational law would enable the recognition of more modern legislations that would adapt faster and more effectively to modern commercial practices. Assuming that a modern

[104] Ibid.

secured transactions law could arise from transnational commercial law, it was further questioned whether the recognition and enforcement of an autonomous corpus of law that would regulate international secured transactions could be possible. In this respect, the recognition of an autonomous body of law to regulate secured transactions outside the framework of a state may be limited. In particular, this situation evidently raises doubts about implied the question of the legitimacy of these new non-territorial sources of law to become legally binding without the intervention of the state.

The analysis explained that the regulation of secured credit largely affects baseline concepts of insolvency and property law. The regulation of property law remains a fundamental function of the state and it is difficult to see how an autonomous transnational secured credit law regime could be recognised and enforceable outside the national framework. The recognition of an autonomous transnational secured credit law regime would require the identification of a distinct legal order operating with appropriate enforcement mechanisms. In the field of proprietary rights, the emergence of enforcement mechanisms outside the framework of the state appears to be unlikely. Accordingly, the recognition of a distinct international commercial legal pattern that might enable the creation and enforcement of a security at the international level remains uncertain. Particularly, the enforcement of an international autonomous regime would create difficulties, especially in light of the creation of proprietary rights and third parties.

Beyond the theoretical difficulties underlying the recognition of an autonomous transnational secured credit law regime, mainly related to the lack of state sovereignty and coercive powers, it is fundamental to also highlight further obstacles to the recognition of legal reforms beyond the state, such as the reinforcement of legal pluralism and significant conflict of interests in the field of secured credit. Secured credit law is cultural, attached to certain economic, social and political values, even in the international context. The nature of secured credit makes it a complex area for law reform. Secured credit law is based on grounding concepts of insolvency and property and it also encompasses a certain legal culture, particular policy choices and fundamental interests which make it difficult to reform, particularly in the light of an approximation of law.

This is the grand challenge of law; to strike a balance between the requirements of modern commerce and the respect of legal culture, fundamental interests, and particular policy choices. In the field of secured credit, transnational commercial law instruments are essentially the products of private actors which often represent the political and economic values of powerful economic nations. Many secured credit law reform initiatives at the international level are based on the American Article 9 model. The modernisation of secured credit law regimes through legal reforms should not be the result of political economic strategy. There is always the risk that private actors, engaged in the making of the law, will produce projects more influenced by political economic power than legal expertise.

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