
ARTICLES

UNIFORM LAW AND FUNCTIONAL EQUIVALENCE: DIVERTING PATHS OR STOPS ALONG THE SAME ROAD? THOUGHTS ON A NEW INTERNATIONAL REGIME FOR TRANSPORT DOCUMENTS

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INTRODUCTION

International efforts to unify and harmonise private law date back to the 19th century.¹ Despite the inherent difficulty and delay of the process, for a very long time there seemed to be broad support for the idea of legal unification. A century ago, few would have disagreed in substance with Lord Justice Kennedy's enthusiastic statement at the 1909 Annual Meeting of the Liverpool Board of Legal Studies that "[t]he certainty of enormous gain to civilised mankind from the unification of law needs no exposition."²

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¹ The Hague Conference on Private International Law first convened in 1893. See Peter H. Pfund & George Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671, 675 (1986); Marc Ancel, *From the Unification of Law to its Harmonization*, 51 TUL. L. REV. 108, 108–09 (1976). For general information on the Hague Conference, see its website at <http://www.hcch.net>.

² "Conceive the security and the peace of mind of the shipowner, the banker, or the merchant' continued His Lordship, 'who knows that in regard to his transactions in a foreign country the law of contract, of movable property, and of civil wrongs is practically identical with that of his own country." Lord Justice Kennedy, *The Unification of Law*, 10 J. SOC'Y COMP. LEGIS. 212, 214 (1909).

The creation of international organizations especially for the purpose of unifying rules of private law and private international law was warmly acclaimed by an academic world in which the impact of the monumental work of the 19th century codifications in continental Europe was still fresh. The Hague Conference on Private International Law (the Hague Conference)³ or the International Institute for the Unification of Private Law (UNIDROIT)⁴ are examples of such approval. International “unification” of law seemed to be the next obvious step towards an illuminated state of legal order, coherence, and clarity. Particularly among continental lawyers, this vision was often motivated by the nostalgic attachment to the “Paradise Lost” of Roman Law.⁵ Work in those early years of institutionalised legal harmonisation was dominated by academics, and “developed in an unconstrained, truly academic discourse among experts[.]”⁶

Europe was historically the driver of the legal unification movement.⁷ This is not surprising when one considers the remarkable diver-

³ The Hague Conference, which currently has sixty-nine Member States, had been active since 1893, and received a statute in 1955. It has worked on a wide range of issues, including abolition of legalization requirements, service of process, taking of evidence abroad, access to justice, international child abduction, intercountry adoption, conflicts of laws relating to the form of testamentary dispositions, maintenance obligations, and recognition of divorce. See More About HCCH, http://www.hcch.net/index_en.php?act=text.display&tid=4 (last visited Aug. 27, 2010).

⁴ UNIDROIT, which currently has sixty-three Member States, was established under the auspices of the League of Nations in 1926 and re-established in 1940 following the demise of the League. UNIDROIT has worked in various areas, such as agency and sales law, security interest in mobile equipment, international leasing and factoring contracts, international wills, stolen or illegally exported cultural objects, and principles of international commercial contracts. See UNIDROIT: An Overview, <http://www.unidroit.org/dynasite.cfm?dsmid=84219> (last visited Aug. 27, 2010).

⁵ See Ancel, *supra* note 1, at 108.

⁶ Herbert Kronke, *Methodical Freedom and Organisational Constraints in the Development of Transnational Law*, 51 *LOY. L. REV.* 287, 288 (2005).

⁷ “European legal systems have a common history and common roots, which reach back into Roman Law and into the Law Merchant developed in the Middle Ages. Concepts of natural law developed in the eighteenth century also constitute a common foundation of all modern European law. The development of the modern national state and the period of national codification have resulted in a departure by the individual countries of this shared background. It must be the task of legal science, especially of the science of comparative law, to revive the consciousness of a common European law. If law teachers, scholars, judges and attorneys become accustomed, as they were in former centuries to think in terms of European law in spite of all the specific national differences, unification of European law will be near at hand.” Ernst von Caemmerer, *The Problem of the Unification of Private Law in Europe*, 36 *U. COLO. L. REV.* 307, 320 (1964).

sity of cultures and legal traditions of the continent. Despite their universal vocation and aspirations, the activities of the Hague Conference or UNIDROIT were confined to Europe for a long time.⁸ What followed was a period of rising “universalism.”⁹ New organisations were established, including the United Nations Commission on International Trade Law (UNCITRAL)¹⁰ in 1966, several specialized UN bodies, and other global or regional organizations. As more countries outside of Europe joined the Hague Conference and UNIDROIT, the number of ratifications of, or accessions to, pre-existing treaties and conventions greatly increased, and new instruments were developed and gained worldwide acceptance.¹¹

The combined production of those and other intergovernmental organizations, and also of non-governmental organizations, such as the International Chamber of Commerce (ICC), include various highly successful international instruments such as the Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the “Hague Rules”);¹² the Warsaw Convention on the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention);¹³ the New York Convention on the Recognition

⁸ See Jürgen Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration—General Report*, 8 UNIF. L. REV. 31, 32 (2003).

⁹ *Id.* at 33.

¹⁰ UNCITRAL is a subsidiary body of the U.N. General with the general mandate to further the progressive harmonization and unification of the law of international trade. There are sixty full members of UNCITRAL elected for six-year terms, but its proceedings are open to all 192 Member States of the United Nations. UNCITRAL has worked on many areas of commercial law, including sales law, international payments, assignment of receivables, arbitration, and conciliation, international carriage of goods, electronic commerce, insolvency, and public procurement. For more about UNCITRAL, see http://www.uncitral.org/uncitral/en/about_us.html (follow “Origin, Mandate, and Composition,” “Methods of Work,” and “FAQ” hyperlinks) (last visited Aug. 27, 2010).

¹¹ Of the seventy Member States of the Hague Conference (including the European Union), twenty-eight are outside of Europe. See HCCH Members, http://www.hcch.net/index_en.php?act=states.listing (last visited Aug. 27, 2010). Of the sixty-three Member States of UNIDROIT, thirty are outside of Europe. See UNIDROIT Membership, <http://www.unidroit.org/english/members/main.htm> (last visited Aug. 27, 2010).

¹² International Convention for the Unification of Certain Rules Relating to Bills of Lading for Carriage of Goods by Sea, Aug. 25, 1924, 51 Stat. 233, 120 L.T.N.S. 155 [hereinafter Hague Rules], implemented by the U.S. by the Carriage of Goods at Sea Act, Apr. 16, 1936, 49 Stat. 1207, 46 U.S.C. §§ 1300–1315 (1940).

¹³ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

and Enforcement of Foreign Arbitral Awards;¹⁴ the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;¹⁵ the United Nations Convention on the International Sale of Goods (CISG);¹⁶ the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects;¹⁷ the Convention on International Interests in Mobile Equipment;¹⁸ the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters;¹⁹ the International Chamber of Commerce's International Rules for the Interpretation of Trade Terms (Incoterms);²⁰ and Uniform Customs and Practice for Documentary Credits (UCP).²¹

The intensification of international unification efforts and the ever-growing number of initiatives led more prominent representatives of the unification movement to see wide-reaching legal unification as inevitable and its achievement as a simple question of finding the appropriate means.²² Yet, by that time, dissenting voices were starting to

¹⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

¹⁵ Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

¹⁶ United Nations Convention on Contracts for the International Sale of Goods [CISG], 1489 U.N.T.S. 3 (Apr. 11, 1980).

¹⁷ International Institute for the Unification of Private Law [UNIDROIT] Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322. <http://www.kentlaw.edu/faculty/sharding/classes/HardingPropandCultureF2009/CourseDocs/UNIDROITConvention.pdf>.

¹⁸ UNIDROIT Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

¹⁹ Inter-American Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 26, 1968, 23 U.S.T. 2555, 847 U.N.T.S. 231.

²⁰ International Rules for the Interpretation of Trade Terms, 1990, International Chamber of Commerce [I.C.C.] Publ. No. 460.

²¹ Uniform Customs and Practice for Documentary Credits, Jan. 1, 1994, I.C.C. Publ. No. 500.

²² René David, the famous French comparative lawyer, for instance, was positive: "From our point of view, the illusion is not the international unification of the law. On the contrary, it is the refusal to contemplate unification and the desire to preserve law as strictly an instrument of state power and thus as divided among states Let jurists continue in their routine opposition to international unification of law; nevertheless, that unification will occur without and despite them, just as the *ius gentium* [law of nations] developed in Rome without the pontiffs, and as equity developed in England without the common-law lawyers. Today the problem is not *whether* international unification of law will be achieved; it is *how* it can be achieved." René David, *Methods of Unification*, 16 AM. J. COMP. L. 13, 14 (1968) (emphasis in original).

question “the assumption that uniform law is good in itself and that the process of unification is one to be encouraged.”²³

Indeed, the term “unification of law” became synonymic with a simplistic, top-to-bottom approach to rule-making. It was eventually abandoned in favour of the term “legal harmonisation,” thought by many to reflect more accurately both the flexibility now universally understood as necessary, and the holistic approach to a task that was not to be accomplished with the mere enactment of uniform rules.²⁴ The international harmonisation process became more complex, however, with a growing number of different instruments being used²⁵ or different levels of coherence being sought.²⁶

In what may appear as a paradox, criticism of international harmonisation efforts did not result in fewer harmonisation projects. On the contrary, the deepening of the European integration process and the growing economic ties across the globe led to a steady expansion of the number of international harmonisation initiatives. By the mid-1980s, some even began to fear that the multiplicity of international projects might have reached a saturation point.²⁷

Initially, criticism was directed at the primary vehicle for the international unification of domestic private law: the multilateral treaty

²³ R. H. Graveson, *The International Unification of Law*, 16 AM. J. COMP. L. 4, 5–6 (1968).

²⁴ See Ancel, *supra* note 1, at 112-17 (discussing the reasons behind the trend towards the use of “legal harmonization” in place of “unification of law”).

²⁵ The inventory of instruments used by various international organizations now includes, in addition to multilateral treaties, or “conventions,” any of the following: “model laws,” “regulations,” “directives,” “recommendations,” “guides,” “guidelines,” “policy advice,” “model clauses,” “model provisions,” and “principles.” ROY GOODE ET AL., *TRANSNATIONAL COMMERCIAL LAW—INTERNATIONAL INSTRUMENTS AND COMMENTARY* 191–214 (Oxford University Press 2007) (discussing instruments, methods and forums for legal harmonisation).

²⁶ The word “unification,” is an inventory of instruments used by various international organizations and now includes, in addition to multi-lateral treaties, or “conventions,” any of the following: “model laws,” “regulations,” “directives,” “recommendations,” “guides,” “guidelines,” “policy advice,” “model clauses,” “model provisions,” “principles.” *Id.* at 197-99.

²⁷ “In fact, one should worry at the prospect that the countless current projects of legal unification and harmonisation could come to fruition as complete texts and that the stream of such texts might flow down to the already overburdened mills of national legislative organs. Above all, one must ask whether the ever more intricate patchwork of uniform law might not at the end overwhelm the capacity of practice to process new norms.” Heinz Kötz, “*Rechtsvereinheitlichung—Nutzen, Kosten, Methoden, Ziele*,” 50 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 2, 5 (1986).

(usually referred to as a “convention”). The treaty-making process was increasingly criticized as being cumbersome and time-consuming, and the resulting product difficult to amend in instances requiring accommodation of economic changes or evolution of practice or technology.²⁸ Even where amendments were practicable, there was a risk that amending protocols might not be ratified by all the original signatory States. This unease sometimes resulted in a complex patchwork of contracting parties. The rigidity of the treaty-making process and the little flexibility—if any—left for adaptations to the domestic reality, it was said, was discouraging States from adhering to international conventions.²⁹

Beyond the multilateral treaty, criticism has also been directed against the international negotiation process itself.³⁰ The search for consensus between different legal traditions may entail mitigating or abandoning the preferred rule in a given legal system, especially when it is unlikely that it will obtain the support of other legal systems. Instead, it sometimes requires an effort to formulate rules at a level of generality and flexibility so as not to displace traditional legal concepts and doctrines. Neither product appeals to domestic readers persuaded of the superiority of national law.³¹

The emergence of the law and economics movement inevitably added a new dimension to the debate between advocates and opponents of legal harmonisation. Arguments no longer focus primarily on the suitability of a particular topic or methodology, but would now go at the heart of the question of the need for legal harmonisation. In

²⁸ “As time changes and the law does not, codifications become the enemy of substantive reform. In today’s world, any code that does not build a process for prompt and sustained reconsideration into its structure becomes part of the problem, not part of the solution.” Arthur Rosett, *Unification, Harmonisation, Restatement, Codification and Reform in International Commercial Law*, 40 AM. J. COMP. L. 683, 688 (1992).

²⁹ “At the international level, it is harder to persuade States to accede to a convention if ‘the price’ is so high at the outset. And, if this initial hurdle is overcome and a reasonable number of States do accede, amendment of that original convention then requires agreement from a much larger group of States if uniformity is to be maintained.” Alan D. Rose, *The Challenges for Uniform Law in the Twenty-First Century*, 1 UNIF. L. REV. 9, 13 (1996).

³⁰ See Rosett, *supra* note 28, at 688.

³¹ “These conventions are inevitably and confessedly drafted as multi-cultural compromises between different schemes of law. Consequently they will normally have less merit than most of the individual legal systems from which they have been derived.” J.S. Hobhouse, *International Conventions and Commercial Law: the Pursuit of Uniformity*, 106 L. Q. REV. 530, 533 (1990).

addition to the positive political, social, or cultural values traditionally attached to legal harmonisation, a great deal of attention has recently been given to demonstrating the practical utility of legal harmonisation, which is justified by the expected positive impact in the reduction of transaction costs.³²

That assumption, however, is also not taken for granted. In particular, some argue that the benefit of lower transaction costs and lower legal risk expected to result from legal harmonisation must be balanced against the transition costs incurred by parties that must adapt to the operation of the harmonised rule.³³ Some even see in the harmonisation process a direct source of higher transaction costs because it would typically lead to the adoption of “sub-optimal,” vaguely drafted rules for the purpose of achieving political compromise.³⁴ The comparative law foundation of the harmonisation process, too, has been questioned as incapable of differentiating between types of rules, or providing “any guidance as to the normative value of the rules so produced,” and leading to the formulation of “text-based solutions and compromises” that are “inconsistent with the overriding commercial objective of achieving materially greater levels of certainty and predictability.”³⁵

Some suggest that it would be better to simply allow companies to “elect in and out of national commercial law systems” so that States “could compete for legal business on the basis of the attractiveness of their rules and dispute resolution procedures, rather than coerce their subjects to follow any one system of commercial law.”³⁶ Others propose a combination of uniform rules with a choice of policy-type options that contracting States would be free to make on a number of points related to the objectives of the harmonisation project that

³² See John Linarelli, *The Economic of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387, 1401 (2002).

³³ See Michale P. Van Alstine, *Treaty Law and Legal Transition Costs*, 77 CHI.-KENT L. REV. 1303, 1303–24 (2001).

³⁴ Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 694–96 (1999).

³⁵ Jeffrey Wool, *Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: Proposal for a Policy-based Unification Model for Drafting International Commercial Law*, 52 UNIF. L. REV. 47, 48–49 (1997).

³⁶ Paul B. Stephan, *The Futility of Unification and Harmonisation in International Commercial Law*, 39 VA. J. INT'L L. 743, 789, 795 (1999).

would permit them to enhance the benefits expected to be derived from the international instrument.³⁷

Doubts about the harmonisation process are not new, and not every criticism is justified or reasonable. The debate in the last two decades has, however, produced a fertile theoretical and practical ground for assessing the need of and scope for international legal harmonisation, the value it adds in a particular context, and the possible advantage of a uniform rule, as opposed to a purely domestic solution.³⁸ Therefore, the recognition that legal harmonisation does not necessarily mean progress, is itself significant progress.³⁹

In fact, this apparent paradox has prompted international organizations involved in legal harmonisation to consider more critically the limitations of the instruments they produce and the possible shortcomings of their methods. The result has been, for example, greater flexibility in choosing instruments and in conceiving ways in which “hard” and “soft” law may best supplement one another.⁴⁰ There is now a clear tendency to reserve the multilateral treaty form (“conventions”) for special cases that require uniformity and to make greater use of instruments capable of being more easily adapted to a domestic context, such as model laws or guidelines.⁴¹ Even within the ambit of the European Union (EU), where the high level of uniformity offered by regulations or directives issued by the EU is supplemented by the availability of judicial mechanisms to interpret and enforce uniform law (thus overcoming one of the main shortcomings of traditional international harmonisation), there is growing interest for alternative solutions, such as optional instruments available for parties to choose as

³⁷ The main consideration for Contracting States in choosing whether or not to implement the options would be whether “the policy benefits of significantly furthering the objectives of the convention within its territory outweigh the policy values embedded in the provisions of its national law which such [optional] convention provisions would displace.” Wool, *supra* note 35, at 51.

³⁸ See, e.g., David Leebron, *Claims for Harmonization: A Theoretical Framework*, 27 CANADIAN BUS. L.J. 63 (1996).

³⁹ See Herbert Kronke, *Der ‘Commercial Approach’ in der Rechtsangleichung und das Internationale Privat—und Verfahrensrecht*, in Festschrift für Dieter Henrich 385, 390 (2000).

⁴⁰ Instruments such as the UNIDROIT Principles on International Commercial Contracts are a prime example of the growing importance of soft law.

⁴¹ See José Angelo Estrella Faria, *Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?*, 14 UNIF. L. REV. 5, 11 (2009).

the applicable law would allot the parties to avoid divergent mandatory provisions of the different member states.⁴²

There is also greater flexibility in the approach to formulation of rules and to the value attached to the uniformity norm, as well as to the extent of freedom given to contracting States to adapt the scope of international conventions and to shape their application.⁴³ There is also growing awareness of the challenges of overcoming the barriers posed by deeply ingrained legal concepts and categories, and of the need for shifting attention from conceptual categories to their practical operation in the relevant legal systems.⁴⁴ While normative and conceptual uniformity were nearly inseparable attributes of early harmonisation efforts, recent instruments often include entire sets of provisions, the object of which is limited to ensuring that a certain uniform policy objective is achieved through a minimum catalogue of functions that may be performed by existing legal categories available under domestic laws without attempting to reduce them to a common single concept. This has become known as the “functional approach” to legal harmonisation.

There is a clear logical relation between “functional approach,” as used here, and the “functional method,” as known in the theory of comparative law.⁴⁵ However, the two terms do not mean exactly the

⁴² See Jürgen Basedow, *Transjurisdictional Codification*, 83 TUL. L. REV. 973, 995 (2009).

⁴³ “Where the diversity of the factual situations and the law prior to the unification effort are such as to suggest that the only (and more likely) alternative to full-scale unification is no unification at all, but where unification in core areas appears nonetheless desirable and achievable at the price of leaving certain other policy-sensitive areas untouched, a Convention may well respond to those differing policies by providing some flexibility through a system of declarations.” Herbert Kronke, *Transnational Commercial Law: General Doctrines, Thirty Years On*, in Festschrift für Jan Kropholler 39, 43 (2008).

⁴⁴ “Practice requires conceptual categories. But these categories are different in various countries and lawyers in these countries do nothing to free themselves from these differences. The contrasts we have before us exist in taxonomy qualifications, languages, descriptions, explanation and concepts. They do not exist however in the operating rules.” Rodolfo Sacco, *Diversity and Uniformity in the Law*, 49 AM. J. COMP. L. 171, 188 (2010).

⁴⁵ The “functional method” of comparative law, which was originally advocated by Ernst Rabel, is still today largely seen as the most meaningful method of comparative law. Some go as far as calling it “comparative law’s principal gift to 20th century legal science.” MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 1, 11 (2d ed. 1994). There is, however, extensive debate among comparative lawyers as to the place and value of the functional method, as compared to other methods advocated for comparative law, as well as its logical and

same thing. In the context of the formulation of uniform law, “functional approach” refers to the task of identifying a certain number of functions that a legal concept must achieve in order for it to develop a certain number of effects under a uniform law instrument or to benefit from a certain status or legal protection provided for by that instrument.⁴⁶ While the choice of legal concepts to be encompassed by the same rule will inevitably entail a comparison of the functions performed by those concepts under the domestic systems covered by, or used as a paradigm in, the relevant harmonisation process, neither the identity of functions nor a thorough comparability of concepts are necessary preconditions for the use of a “functional approach” in legal harmonisation. Indeed, the functional approach is sometimes used in a prospective way in the absence of an existing category, especially in instances of “preventive harmonisation.”⁴⁷ In some other cases, the

theoretical foundations. See Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339-82 (Mathias Reimann & Reinhard Zimmermann eds. 2006) (analyses of the various concepts of functionalism).

⁴⁶ The recent UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva, October 9, 2009) is a good example. It applies to holdings of securities under various systems, independently of the way in which each system characterises the interests of investors in the securities held by intermediaries (whether direct ownership or joint ownership rights in the underlying securities or some other proprietary interests or contractual rights in respect of the securities (as long as they are being credited to a securities account and are being acquired and disposed of by book entries)). This choice was explained in the following terms: “In each jurisdiction, the law governing securities holding and transfer is embedded in national legislation and integrated within several different legal areas: commercial law, corporate law, tax law, insolvency law, etc., as well as through measures carried out by the regulatory authorities. Generally, provisions in an international instrument can be either intrusive with respect to domestic legislation, or seek solutions that are compatible with the law of all contracting countries, or at least with their legal tradition The preliminary draft Convention settles on an intermediate approach: it is not designed along the lines of domestic laws (and is therefore ‘intrusive’), but aims at avoiding too much intrusion by formulating rules only by reference to facts. The means by which the required result is to be achieved in a concrete legal system is not decisive and remains within the national legislator’s discretion, provided it is compatible with the other rules of the preliminary draft Convention.” Explanatory Notes to the Preliminary Draft Convention, UNIDROIT Study LXVIII Doc. 19 (Dec. 2004), <http://www.unidroit.org/english/conventions/2009intermediatedsecurities/study78-archive-e.htm> (last visited Mar. 20, 2010).

⁴⁷ “Preventive” harmonisation means the effort to formulate uniform rules to address new phenomena before the development of domestic practices and usage could generate disparate laws and regulations. The UNCITRAL Model Law on Electronic Commerce is a well-known example of this approach. See generally *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment*, U.N. Doc. A/51/162, U.N. Sales No. E.99.V4 (1996), available at <http://www.uncitral.org/pdf/english/texts/electcom/05->

“functional approach” has a clearly normative rule in legal harmonisation, in that it serves to promote “best solutions” rather than simply to build on common approaches, which is the modern trend in legal harmonisation.⁴⁸

This article examines a recent example of the application of the “functional approach” in one particular area of law: the international carriage of goods.

I. CONTEXT AND PURPOSE OF THE ROTTERDAM RULES

On December 11, 2008, the U.N. General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”).⁴⁹ This was the culmination of several years of work of the UNCITRAL Working Group III (Transport Law) originally started in cooperation with the Comité Maritime International (CMI).

The Rotterdam Rules deal with a wide range of issues, some of which are directly covered by earlier conventions, but most of which are novel terrain for a uniform transport law instrument. In many areas, the Rotterdam Rules follow the traditional approach used in previous conventions and establish uniform substantive rules built upon uniform concepts. Examples include the provisions dealing with the liability of the carrier and the evidentiary value of qualifications in transport documents, which are primarily intended to codify and consolidate over eighty years of jurisprudence.⁵⁰

In other areas, however, the Rotterdam Rules use a different technique, avoiding existing concepts, and using, instead, neutral language to describe their functions. This is particularly the case in the provisions dealing with transport documents and their role in the performance of the contract of carriage. The “functional approach” used in the Rotterdam Rules reveals itself at two different levels: first, with regard to the various types of transport documents and their respective

89450_Ebook.pdf. “Preventive harmonisation” has been successful in pre-empting legislative disharmony. See José Angelo Estrella Faria, *Online Contracting: Legal Certainty For Global Business*, 39 UCC L.J. 25, 40 (2006).

⁴⁸ GOODE ET AL., *supra* note 25, at 169.

⁴⁹ See United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, U.N. Doc. A/Res/63/122 (Feb. 2, 2009) [hereinafter Rotterdam Rules].

⁵⁰ See *id.* art. 17, 41.

functions; second, with regard to the conditions for the use of electronic equivalents to transport documents.

Before exploring the use of the functional approach in the Rotterdam Rules, it may be useful to describe the context in which the rules were developed and the purposes they intend to achieve.

A. *Current Status of Uniform Law*

Efforts to achieve uniformity in the law governing carriage of goods by sea date back to the 19th century. The most widely adopted set of rules is contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading signed at Brussels on August 25, 1924 (the “Hague Rules”).⁵¹ The Hague Rules, which have been adopted in more than seventy jurisdictions around the world, are essentially concerned with the liability of the carrier and the contents of the bill of lading. Attempts to modernize the Hague Rules and address some of the many issues not addressed by them have not been extraordinarily successful. The text introduced by the Protocol signed on February 23, 1968, to amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading signed at Brussels on August 25, 1924, (the “Visby Protocol”)⁵² could not attract the requisite number of ratifications until 1977 and still today only has thirty Contracting States, all of which were Contracting Parties to the 1924 Hague Rules.⁵³ A later protocol on the unit of account for calculation of the liability limits obtained only twenty-five ratifications.⁵⁴

⁵¹ See International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter Hague Rules].

⁵² See Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Signed at Brussels on August 25, 1924. Concluded at Brussels on February 23, 1968, 1412 U.N.T.S. 127 (1985), [hereinafter Visby Protocol], available at <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ea4ab>.

⁵³ However, the countries that have not joined the Visby Protocol include some of the world’s largest economies (such as China, Germany, India, Japan, and the United States), and represent about half of world’s trade in goods, both in value and weight. The application of the Visby Protocol is further limited, however, by the fact that bills of lading incorporating its terms typically do so only to the extent that the protocol is made compulsorily applicable by national law. Otherwise, the original 1924 Hague Rules continue to be routinely chosen by carriers. *Id.*

⁵⁴ Comité Maritime International [CMI], *Limitation of the Liability of Owners of Seagoing Ships* (1957), CMI Y.B. 407, available at http://comitemaritime.org/year/2007_8/pdffiles/YBK_07_08/contents/brussels.pdf.

The alternative regime negotiated under the auspices of UNCITRAL,⁵⁵ and the United Nations Convention on the Carriage of Goods by Sea, concluded in Hamburg on March 31, 1978, (the “Hamburg Rules”) failed to live up to the hopes of ever replacing the out-dated Hague Rules. More than thirty years after its adoption, it has attracted only thirty-four States, none of which is a major seafaring nation.⁵⁶

As if the fragmentation of the law governing sea carriage was not enough, international transportation is further complicated by the co-existence, side-by-side with the maritime conventions, of various conventions dealing with carriage by air,⁵⁷ rail,⁵⁸ and road.⁵⁹ The multiplicity of instruments, each governing a particular mode of carriage, created a highly unsatisfactory legal puzzle. This occurred at a time when the growing use of the container, which made it possible to move cargo in successive hauls by land, ocean, and air without rehandling, required integration, rather than fragmentation of international transport. Alas, the dream of streamlining and rationalizing the legal landscape through the formulation of a global regime to govern multimodal carriage was not to come true. After several years of negotiations, the United Nations Convention on International Multimodal Transport of Goods, adopted in Geneva on May 24, 1980,⁶⁰ never obtained the minimum number of ratifications required for its entry into force.

⁵⁵ UNCITRAL was established by the U.N. General Assembly in 1966 and received the general mandate to further the progressive harmonization and unification of the law of international trade. See G.A. Res. 2205/XXI (1966), *reprinted in* [1971] 1 U.N. Comm’n on Int’l Trade L. Y.B. 65.

⁵⁶ See UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA at I-21, U.N. Sales No. E.95.V.14 (1994)d [hereinafter Hamburg Rules].

⁵⁷ See Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

⁵⁸ The French title for the Convention, from which it derives the initials “CIM,” is “*Convention Internationale Concernant le Transport des Marchandises par Chemins de Fer*” which occurred in Berne on October 14, 1890. The current version can be found at: The Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM—Appendix B to the Convention) (1999) [hereinafter CIM-COTIF], *available at* <http://www.jus.uio.no/lm/cim.rail.carriage.contract.uniform.rules.19xx>.

⁵⁹ See Convention on the Contract for the International Carriage of Goods by Road, 1208 U.N.T.S. 1208 (1978) [hereinafter CMR].

⁶⁰ See U.N. Convention on International Multimodal Transport of Goods, Geneva, Switz., May 24, 1980, U.N. Doc. TD/MT/CONF/16. [hereinafter Multimodal Convention].

B. *Reasons for Negotiating a New Regime*

By the mid-1990s, it had become obvious that neither the Hamburg Rules nor the Multimodal Convention would achieve their goals. It was equally obvious that separate attempts to update the various unimodal conventions were unlikely to produce greater coherence. The shipping industry and related legal circles seemed to have come to terms with the situation, and the uniformity movement showed signs of fatigue. Two developments would revive the interest for an overall reform of the law governing the international carriage of goods. The pressing need for modernization of the United States's enactment of the Hague Rules, the Carriage of Goods by Sea Act (COGSA),⁶¹ led to fears of further fragmentation of law.⁶² At the same time, the extraordinary development of information and communication technologies in the last twenty years exposed further the obsolescence of a legal regime entirely premised on the issuance and transfer of paper documents. As the need for new rules to enable the use of modern technologies became evident, new hope emerged about the feasibility of revisiting the existing carriage conventions and addressing a number of important aspects of maritime transportation they left unregulated.⁶³

UNCITRAL and the Comité Maritime International (CMI) carried out preparatory work and held consultations with a broad base of stakeholders⁶⁴ between 1996 and 2002. In light of the consultations and preliminary work, UNCITRAL decided in 2001 to entrust the project to its Working Group on Transport Law. The Working Group held thirteen sessions between April 15, 2002, and January 25, 2008,

⁶¹ See 46 U.S.C. §§ 30701–30716 (2006) (original version at 46 U.S.C. §§ 1300–15 (1936)).

⁶² See William Tetley, *The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law*, 30 J. MAR. L. & COM. 595, 595–625 (1999).

⁶³ Alexander von Ziegler, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, THE INTERNATIONAL LAW OF MARITIME TRANSPORT 1999, at 75, 118–19 (Hague Acad. Ctr. for Studies & Research in Int'l L., Book Series No. 13, 2001).

⁶⁴ They included, in addition to governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), and the International Association of Ports and Harbors. See Stuart Beare, *Liability Regimes: Where we are, how we got there, and where we are going*, 2002 LLOYD'S COM. & MAR. L. Q. 306 (2002).

when it approved the “draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.”⁶⁵ The draft Convention was finalized by UNCITRAL at its 41st session (New York, June 16–July 3, 2008) and adopted by the U.N. General Assembly during its 63rd annual session, on December 11, 2008, and given the informal title “Rotterdam Rules.”

II. TRANSPORT DOCUMENTS UNDER THE ROTTERDAM RULES

The preceding section shows that law governing the international carriage of goods is an area of the law that is characterized by a double degree of fragmentation: first, international attempts to unify the law have generated a patchwork of conventions, each with a different group of participating States; and second, international unification has been sketchy, leaving many important issues to be settled by domestic law. With time, a considerable body of jurisprudence developed, bringing countries further apart in their understanding of basic concepts and legal theories that govern the use of transport.

Comprehensive unification of the law of carriage of goods in the late 20th century would have meant extensive harmonisation of legal concepts and doctrines, hardly a promising enterprise in an area with deep-rooted traditions. The drafters of the Rotterdam Rules chose instead a balance between harmonisation of results and preservation of existing theories.

A. *Transport Documents and Their Traditional Functions*

International conventions on the carriage of goods use various names to refer to the document that evidences the contract of carriage or represents the goods received for carriage. CMR⁶⁶ and CIM-COTIF,⁶⁷ as well as the original Warsaw Convention,⁶⁸ refer to “consignment note;” the Hague Protocol to the Warsaw Convention,⁶⁹ introduced the term “air waybill,” which was kept in the 1999 Montreal

⁶⁵ See U.N. Comm’n on Int’l Trade Law, *Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008)* U.N. Doc. A/CN.9/645/Annex (Jan. 30, 2008).

⁶⁶ CMR, *supra* note 59, art. IX para. I.

⁶⁷ CIM-COTIF, *supra* note 58, art. XI.

⁶⁸ Warsaw Convention, *supra* note 57, art. VIII.

⁶⁹ See Protocol Amending the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, art. 6, Aug. 1, 1963, 478 U.N.T.S. 371.

Convention.⁷⁰ The original Hague Rules apply to contracts of carriage covered by “a bill of lading or any similar documents of title,”⁷¹ whereas the Hamburg Rules, although being primarily concerned with “bills of lading,” also allows the carrier to issue “a document other than a bill of lading to evidence the receipt of the goods to be carried.”⁷²

The Rotterdam Rules follow the more neutral terminology used by the 1980 Multimodal Convention⁷³ and refer instead to “transport documents,”⁷⁴ which, as in the case of the Multimodal Convention, can be “negotiable” or “non-negotiable.”⁷⁵ This was an obvious choice for an instrument that governs contracts for carriage of goods that may be carried “by other modes of transport in addition to the sea carriage.”⁷⁶ The real novelty, however, consists in the functional treatment given to negotiability, a particular attribute of the ocean bill of lading.⁷⁷ No uniform text ever attempted to harmonise the functions of bills of lading in respect of the title to the goods. In fact, the law of carriage, while governing the contents of bills of lading and the carrier’s duties in respect of the goods, leaves the question of passage of title to the goods to be governed by the sales contract and the underlying applicable law. The absence of a sound link between sales law and the law of carriage has led to the development of various theories on the role and value of the bill of lading as a means for evidencing and establishing ownership of the goods and hence exercising the right to give instructions to the carrier in respect of the goods.

The function of the bill of lading, in respect of the goods, is crucial for the protection of the rights of the various parties involved in the sales contract. For example, a seller that has not yet been paid may wish to retain title to the goods, whereas the buyer may wish to be able to trade them while they are still in transit. The bank issuing the docu-

⁷⁰ See Convention for the Unification of Certain Rules for International Carriage by Air, art. V, May 28, 1999, S. Treaty Doc. No. 106-45, at 30 (2000).

⁷¹ Hague Rules, *supra* note 51, art. I.

⁷² Hamburg Rules, *supra* note 56, art. XVIII.

⁷³ See Multimodal Convention, *supra* note 60, art. V.

⁷⁴ Rotterdam Rules, *supra* note 49, art. 1(14).

⁷⁵ *Id.* at arts. 1(15), 1(16).

⁷⁶ *Id.* at art. 1(1).

⁷⁷ The function as a document of title is a particularity of the bill of lading, which is not shared with transport documents used in other modes of transport, which have primarily an evidentiary function. Non-negotiable documents used in ocean carriage, such as the sea waybills, which are largely used in trades to and from North America and the Far East, as well as in intra-European routes, function only as receipt of the goods and evidence of the contract of carriage.

mentary credit will insist on a pledge of the goods as a condition for issuing the letter of credit. The protection of each of these interests will typically require some legal mechanism for placing the goods under that person's control for purposes of the law. Since the goods themselves are under the physical control of the carrier, "legal control" is exercised by the possession of the document that represents the goods of title. This requires, however, not only that the document in question confer such control—which, as we will see, may vary—but also that the rights "represented" or "embodied" by the document be capable of being transferred or pledged.

In few other business activities would the contract performance be as likely to involve various foreign parties and jurisdictions as in international shipping. For the same reason, there are not many areas of the law in greater need of uniformity and predictability.⁷⁸ Yet, from the nature of the transport documents to the rules on delivery of goods under transport documents, the international disparity of legal doctrines and actual rules is striking.

Under the common law, for example, the bill of lading is regarded as a symbol of the goods, allowing the parties, if they so wish, to transfer title in the goods just as the title would pass by an actual delivery of the goods.⁷⁹ This function of the bill of lading has been recog-

⁷⁸ "The ever-decreasing profit margins of world trade necessitate the smooth and efficient execution of not only the logistical, but also the legal processes. Any uncertainty and any loss of smooth coordination affects profit adversely and, therefore, undermines the mechanisms of world trade." ALEXANDER VON ZIEGLER, *Particularities of the Harmonisation and Unification of International Law of Trade and Commerce*, in *PRIVATE LAW IN THE INTERNATIONAL ARENA* 875, 880 (Jürgen Basedow et al. eds., TMC Asser Press 2000).

⁷⁹ "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. It is the key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be." *Sanders Bros. v. Maclean & Co.*, (1883) 11 Q.B.D. 327, 341. Charles Debattista notes, however, that the term "document of title" is used to refer to a number of different things, fulfils a variety of functions, and that the above opinion of Lord Justice Bowen exemplifies "the dangers of attempting to encapsulate diverse legal concepts under one convenient label." CHARLES DEBATTISTA, *SALE OF GOODS CARRIED BY SEA* 24 (Butterworths 2d ed. 1998).

nized in the common law at least some two hundred years.⁸⁰ Whether or not the bill of lading indeed performs that particular function in any given case will depend on the parties' intention.⁸¹

Civil law jurisdictions generally recognize that a bill of lading plays an important role in the performance of both the sales contract and the contract of carriage. They are not unanimous, however, as to the function of bills of lading as a means of conveying title to goods. In some jurisdictions, the bill of lading, as representation of the goods, establishes a presumption of ownership, but is not itself a means for transferring title to them.⁸² Other jurisdictions, however, go further and accept that title to property—at least in the form of “ostensible title”⁸³—may pass from seller to buyer through the surrender of a bill of lading.⁸⁴

⁸⁰ Although there seems to be some evidence of earlier recognition of title to goods by bona fide acquisition of a bill of lading, see Frederick K. Beutel, *Development of Negotiable Instruments in Early English Law*, 51 HARV. L. REV. 813, 836 (1937–1938), the common law generally traces the origins of legal recognition of bills of lading as documents of title back to *Lickbarrow v. Mason*, a late 18th century case where the court recognized a custom of merchants that a bill of lading in which goods were stated to have been “shipped by any person or persons to be delivered to order or assigns” enabled the holder to transfer the property in the goods to the transferee. *Lickbarrow v. Mason*, (1794) 5 T.R. 683, 685 (101 E.R. 380, 382).

⁸¹ See THOMAS SCRUTTON ET AL., CHARTERPARTIES AND BILLS OF LADING 186-87 (Sweet & Maxwell 19th ed. 1984) (1886).

⁸² This is typically the case in countries such as France and Italy, where property to moveable goods passes from the transferor to the transferee by virtue of the agreement to transfer (e.g., sales contract), without the need for a further act of perfection. See Odile Plégat-Kertault, *France*, in TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE 155, 161–66 (Alexander von Ziegler et al. eds., 1999); Stefano Zunarelli, *Italy*, in TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE 155, 209 (Alexander von Ziegler et al. eds., 1999).

⁸³ See Hugo Tiberg, *Legal Qualities of Transport Documents*, 23 TUL. MAR. L.J. 1, 11 (1998) (referring to Scandinavian countries).

⁸⁴ This is particularly the case in those legal systems, such as in Germany, that distinguish between the agreement that gives rise to the obligation to transfer property (e.g., the sales contract) and the act of performance that makes the transfer effective. This theory, which is known as “principle of separation” (“*Trennungsprinzip*”), is reflected in § 929 of the German Civil Code, which requires, for acquisition of ownership to a moveable asset “that the parties agree to such transfer and that the asset be surrendered to the acquirer.” Bürgerliches Gesetzbuch (BGB) (Civil Code) August 18, 1896, Bundesgesetzblatt (BGBl.) § 929(t). Such act of transfer may be affected by the transfer of a document of title (“*Traditionspapier*”), which “replaces the delivery of the goods.” HANS JOSEF WIELANG, SACHENRECHT 114 (Springer-Verlag Berlin Heidelberg, 2007). Section 650 of the German Commercial Code (Handelsgesetzbuch, or HGB) specifically provides that transfer of the bill of lading (“*Konnossement*”), once the goods have been placed under the control of the captain or other representative of the carrier, to

Another point of divergence concerns the transferability of the bill of lading. The prevailing common law rule seems to be that a bill of lading must contain an order clause for it to be transferable.⁸⁵ This is also the rule in some civil law codifications,⁸⁶ but in others, the bill of lading is presumed to be transferable unless otherwise stated.⁸⁷ A document that by its own terms precludes transfer to any person other than the named one, is not, strictly speaking, a “document of title,” since it does allow for anyone other than the named person to obtain constructive possession of the goods and claim their delivery from the carrier. The distinction is not innocuous. The transferability of the bill of lading—or, depending on the relevant legal underpinning, the transferability of the rights represented by the bill of lading—will in many legal systems determine the extent of the protection enjoyed by its holder.

For example, under traditional common law rules, a person acquiring a document of title in good faith is protected against competing claims of third parties in respect of the same goods in a manner similar to the protection given to the holder of a negotiable instrument, such as a bill of exchange or a promissory note.⁸⁸ The traditional common law view rejects that assimilation, insisting that bills of lading, as documents that “embody” rights to goods, are only “negotiable” in the sense that they are “transferable,” but that the endorsee will not have better contractual rights than the endorser.⁸⁹ The United States, in turn, adopts a “mercantile view,” which, by analogizing the bill of lading to the bill of exchange or promissory note, “goes beyond the embodiment concept and invests the bill of lading with broad ne-

the person entitled to claim their delivery has the same legal effect as the transfer of the goods themselves. See *Handelsgesetzbuch (HGB) (Commercial Code) May 10, 1897, Bundesgesetzblatt Teil II (BGBl. II) § 650.*

⁸⁵ See DEBATTISTA, *supra* note 79, at 54. U.S. law adds a nuance by clarifying that a bill of lading is nonnegotiable if the bill states that the goods are to be delivered to a consignee, 49 U.S.C. § 80103(b)(1), but the simple mention of a named person to be notified of the arrival of the goods is not sufficient to preclude negotiability of a bill of lading. See 49 U.S.C. § 7-80103(a)(2); U.C.C. § 7-501 (6).

⁸⁶ See *Handelsgesetzbuch [HGB] [Commercial Code] Oct. 5, 1897, Bundesgesetzblatt (Germany).*

⁸⁷ This seems to be the rule, for example, in Scandinavian countries. See Tibergh, *supra* note 83, at 13.

⁸⁸ Generally, the transferee holding a negotiable instrument is regarded as having acquired a better title than that possessed by the transferor, since it takes the instrument free of claims and defences that could be invoked against the transferor.

⁸⁹ See SCRUTTON ET AL., *supra* note 81, at 185.

gotiability.”⁹⁰ The endorsee of a bill of lading under the U.S. Federal Bills of Lading Act⁹¹ is protected against defences and third party claims to a greater extent than the endorser.⁹² This protection is nearly identical with the protection generally afforded to the holders of negotiable instruments under Article 7 of the U.S. Uniform Commercial Code (U.C.C.).⁹³

All of the above attributes of the bill of lading (“negotiability” or “transferability,” document of title or document representing the goods) and the degree of protection enjoyed by the holder are crucial for determining the remedies available to the parties if something goes wrong. Typically, a documentary credit is the vehicle of choice for financing an international export/import transaction. The credit agreement between the buyer and the bank issuing the letter of credit will typically specify the type of documents required to be presented or surrendered by the seller to the correspondent bank against payment under the letter of credit.⁹⁴ Those documents will then be passed to

⁹⁰ Note, *Ocean Bills of Lading and Some Problems of Conflict of Laws*, 58 COLUM. L. REV. 21, 225–26 (1958).

⁹¹ See Federal Bills of Lading Act, 49 U.S.C. §§ 80101–80116 (2006).

⁹² Under the Act, “[w]hen a negotiable bill of lading is negotiated, the person to whom it is negotiated acquires the title to the goods that (A) the person negotiating the bill had the ability to convey to a purchaser in good faith for value and that (B) the consignor and consignee had the ability to convey to such a purchaser.” At the same time, “[t]he common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person.” Lastly, “[w]hen a negotiable bill of lading is negotiated to a person for value in good faith, that person’s right to the goods for which the bill was issued is superior to a seller’s lien or to a right to stop the transportation of the goods . . . whether the negotiation is made before or after the common carrier issuing the bill receives notice of the seller’s claim.” 49 U.S.C. § 80105.

⁹³ U.C.C. § 7-504(2) (2006); 2C U.L.A. 403 (2000) (“[T]itle and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentations fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.”).

⁹⁴ Letters of credit issued to secure payment are often subject to the Uniform Customs and Practice for Documentary Credits (UCP), which governs the operation of letters of credit and is prepared by the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC). The UCP provides guidance to banks in assessing the conformity of documentation to the terms of letters of credit. Their current edition is known as “UCP 600.” See generally, International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits*, U.C.P. 600, July 1, 2007 [hereinafter Int’l Chamber of Commerce].

the issuing bank, which would retain them as security until the buyer liquidates the credit. Among the various documents that may be required (e.g., commercial invoice, insurance certificate, certificate of inspection, packing list), the most important document is the bill of lading, through which the goods are pledged to the bank. In principle, for most banks, a transport document only has value as security if it permits to place the goods under the legal control of the bank.⁹⁵ Since it is doubtful that a straight bill could effectively transfer title to the goods, many documentary credits call for negotiable bills of lading.⁹⁶

The greater speed of modern ships, however, often results in goods arriving at destination before the bills of lading are physically transferred to the final consignee, remaining somewhere along a chain of buyers and banks. Unavailability of bills of lading at the time a vessel is ready to discharge the cargo at destination could cause costly delays.⁹⁷ In an effort to minimize the problems associated with delayed arrival of bills of lading, commercial parties have been encouraged to use sea waybills rather than bills of lading in all cases where sale of goods in transit was not envisaged.⁹⁸ Sea waybills are not, however, “documents of title” and do not allow for negotiation by mere transfer or endorsement. Therefore, in order to have a security in goods when a sea waybill is used, banks would require to be named as the con-

⁹⁵ See PAUL TODD, *BILLS OF LADING AND BANKERS' DOCUMENTARY CREDITS* 155 (Informa, 4th ed. 2007).

⁹⁶ Besides other transport documents, the UCP treats the “bill of lading” separately from the “non-negotiable sea waybill,” but makes no reference to its nature as “negotiable” or “straight.” See Int'l Chamber of Commerce, *supra* note 94, arts. 20–21.

⁹⁷ See Susan Beecher, *Can the Electronic Bill of Lading Go Paperless?*, 40 INT'L LAW. 627, 633–34 (2006) (“The most prominent shortcoming of the traditional bill of lading is that it is a piece of paper, and unlike an electronic impulse, must be physically transported. If the shipper is lucky, the bill of lading is ready for pickup from the carrier the day after the vessel sails, but the average delay before the paper document is ready is three days, and it is sometimes not available for up to seven days. The documents must then be pouched overseas, generally directly to the consignee's customs broker, adding roughly four days. The customs broker must then surrender the document to the carrier, which takes at least one business day and possibly two, as a large percentage of steamship lines have now nationally centralized their customer service function in one location, often not actually near any port city If a bank is involved, as for a letter of credit, the delays become acute. Two more parties, the seller's bank and the buyer's bank, must each have an opportunity to examine the document, and must then transmit it by courier to the next party downstream.”).

⁹⁸ See U.N. Centre for Trade Facilitation & Electronic Bus. [UN/CEFACT], *Measures to Facilitate Maritime Transport Documents Procedures*, Recommendation 12, 2d ed., U.N. Doc. ECE/TRADE/240 (Oct. 2001).

signee in the transport document. A bank would release the goods to buyer upon payment or against the presentation of an acceptable guarantee.⁹⁹

Whether the goods are carried under a bill of lading or another document, both the bank and the consignee will need assurance that the carrier will not deliver the goods to an unauthorized party. In other words, they will need assurance that the goods will be delivered only to the rightful holder of the (negotiable) bill of lading or to the named consignee (in a non-negotiable bill of lading). To the extent, however, that some jurisdictions link the carrier's delivery obligations to the qualification of the document, such assurance may not be available in all jurisdictions to the same extent.

Where the goods are carried under a bill of lading, the carrier is, in principle, obliged to deliver the goods only on presentation of the bill of lading by the holder. There seems to be no doubt as to the applicability of this rule with respect to negotiable bills of lading.¹⁰⁰ There is also general agreement that no such requirement exists for transport documents that do not constitute documents of title. Thus, for example, the consignee under a sea waybill, unlike in the holder of a negotiable bill of lading, is able to take delivery of the goods merely

⁹⁹ For example: where the bank releases the bill of lading in exchange for a trust receipt or a similar document constituting the buyer trustee for the bank of the documents of title and the goods until sold, and of the proceeds of sale once sold. See TODD, *supra* note 95, at 159. In such a case, the buyer would normally arrange, at its own risk and expense, the discharge, customs clearance, transportation, insurance, and bank approved warehousing of the goods and obtain a warehouse receipt made out to the order of the bank. Although this may expose the bank to some risk (e.g., insolvency of the buyer), these arrangements may be the only way for a buyer to obtain funds with which to satisfy the bank. See DEBATTISTA, *supra* note 79, at 50.

¹⁰⁰ The carrier is in breach of contract by delivering the goods without the production of the original order bill of lading, even if the goods were delivered to a person believed to be entitled to the possession of the goods. As stated by Justice Clarke in "*The Sormovskiy*": "It makes commercial sense to have a simple rule that in the absence of an express term of the contract the master must only deliver the cargo to the holder of the bill of lading who presents it to him. In that way both the shipowners and the persons in truth entitled to possession of the cargo are protected by the terms of the contract. Where the master or shipowner delivers the cargo in breach of contract otherwise than in return for an original bill of lading the person entitled to possession will of course only be entitled to recover substantial damages if he proves that he has suffered loss and damage as a result. So, for example, if the cargo is delivered to the person entitled to possession he will not ordinarily be able to show that he has suffered a loss." *Sucre Export SA v. Northern River Shipping Ltd. (The Sormovskiy 3068)* (1994) 2 Lloyd's Rep. 266, 272 (Q.B).

by establishing its identity, without the need to produce the original sea waybill.

The situation is less clear in respect of non-negotiable bills of lading, often called “straight” or “recta” bills of lading, which are typically issued in those trades where a negotiable bill of lading is not required, particularly where it is envisaged that the bill of lading will not need to pass down a chain of buyers.¹⁰¹ The traditional view under English law was that, under a straight bill of lading, a carrier was entitled and bound to deliver goods to the named consignee regardless of the whereabouts of the original bill.¹⁰² Although precedents were not numerous, in the report that lead to the adoption of the Carriage of Goods by Sea Act of 1992, which essentially treated straight bills of lading as sea waybills, the Law Commission had no difficulty in affirming that a straight bill of lading “is not a document of title at common law.”¹⁰³ The matter was not entirely clear throughout the commonwealth, as some jurisdictions, such as Hong Kong,¹⁰⁴ were inclined to follow the English interpretation, while others, such as Singapore,¹⁰⁵ insisted that the presentation rule did apply to straight bills of lading. The law changed significantly with a much-debated House of Lords decision in 2005, which recognized a straight bill of lading as a document of title, at least for the purpose of triggering the application

¹⁰¹ “Examples include: (1) the sale of goods to a consignee who does not wish to resell the goods; (2) in-house transfers within large multinational companies; (3) the issue of house bills by non-vessel-operating common carriers (“NVOCCs”) or freight forwarders; and (4) regular sales between companies well known to each other.” See Stephen Girvin, *Bills of Lading and Straight Bills of Lading: Principles and Practice*, J. Bus. L. 86, 98 (Jan. 2006).

¹⁰² “[T]he shipper cannot oblige the carrier to deliver the goods to a different consignee from the one named merely by indorsing and delivering the bill to that other person; for under a straight bill the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill, so that, when he deliver the goods, he may have no means of knowing of the purported transfer of the bill. This difficulty cannot arise in the case of an order bill, under which the goods are deliverable only on production of the bill.” BENJAMIN’S SALE OF GOODS 900 (A.G. Guest et al. eds., 5th ed. 1997).

¹⁰³ THE LAW COMMISSION & THE SCOTTISH LAW COMMISSION, LAW COMMISSION NO. 196, SCOTTISH LAW COMMISSION NO. 130, RIGHTS OF SUIT IN RESPECT OF CARRIAGE OF GOODS BY SEA, ¶ 2.50, at 25-26 (1991).

¹⁰⁴ See *e.g.* *The Owners of Cargo Lately Laden on Board the Ship or Vessel ‘Brij’ v. The Owners and/or Demise Charterers of the Ship or Vessel ‘Brij,’* [2000] 1 Lloyd’s Rep. 431 (C.F.I.). Hong Kong courts eventually reversed that understanding in light of “*The Rafaela S*” decision of the House of Lords (*infra* note 106).

¹⁰⁵ See *e.g.* *Voss v. APL Co. Pte. Ltd.*, 2 Lloyd’s Rep. 707 (SGCA, Oct. 3, 2002).

of the Hague Rules or Visby Protocol.¹⁰⁶ Further, the decision clarified that a clause requiring one original to be “surrendered duly endorsed in exchange for the goods or delivery order” obliged the carrier to deliver the cargo only on presentation of the original bill of lading.¹⁰⁷

The rule now prevailing in the United Kingdom coincides in effect with the understanding currently prevailing in most civil law jurisdictions on delivery of goods shipped under a recta bill of lading, although under different justification. In some jurisdictions, this has long been settled law.¹⁰⁸ In other jurisdictions, this issue has been highly debated, resulting in conflicting interpretations, which sometimes affirmed, and sometimes denied, carrier liability for delivery of cargo without production of a straight bill of lading.¹⁰⁹ Quite the opposite, however, is the situation in the United States, where a carrier that has issued a non-negotiable bill of lading “normally discharges its duty by delivering the goods to a named consignee; the consignee need not produce the bill or even be in possession of it; the piece of paper on which the contract of carriage is written is not of importance in itself.”¹¹⁰ One exception to this rule is made in cases where the

¹⁰⁶ J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co., SA (*The Rafaela S*) [2005] 1 C.L.C 172, [2005] UKHL 11 (appeal taken from EWCA) (U.K.). The House of Lords essentially concluded that, as a document of title needed to be presented to obtain delivery, a document that had to be presented to obtain delivery was a document of title, a link that was heavily criticized. See G.H. Treitel, *The Legal Status of Straight Bills of Lading*, 119 L.Q.R. 608, 612 (2003). Commentators also noted “that the parties may specify that the bills of lading must be presented,” but it remained “still unclear in many jurisdictions whether the general rule will apply where the straight bill of lading is silent.” See Girvin, *supra* note 101, at 113.

¹⁰⁷ See *The Rafaela S*, *supra* note 106, at 112; Treitel, *supra* note 106, at 613.

¹⁰⁸ In France, for instance, there seems to be no doubt that “the carrier may not deliver the goods, and should not worry about ownership thereof, to anyone other than the holder of the bill of lading that presents its original. No one else has the right to claim delivery.” PIERRE BONASSIES & CHRISTIAN SCAPEL, *DROIT MARITIME* 987 (Librairie générale de droit et de jurisprudence 2006). In Germany, the function of the bill of lading as a document of title is not made strictly dependant on its transferability, so that also in the case of a recta bill of lading, the rights of the consignee are understood as rights deriving from the document, which must therefore be surrendered to the carrier to obtain delivery. On property aspects of straight bills of lading, see EBERHARD STEN-GEL, *DIE TRADITIONSFUNKTION DES ORDERKONNESSEMENTS* 156–57 (Carl Heymanns, 1975). For the Scandinavian countries, see Tiberg, *supra* note 83, at 11.

¹⁰⁹ For mainland China, see Felix W.H. Chan, *Plea for Certainty: Legal and Practical Problems in the Presentation of Non-Negotiable Bills of Lading*, 29 H.K.L.J. 44 (1999); see also Caslav Pejovic, *Legal Issues Arising from Delivery of Goods Without a Bill of Lading: Case Study of Some Asian Jurisdictions*, 45 COMP. MAR. L. 1 (2006).

¹¹⁰ Felix W.H. Chan, *Plea for Certainty: Legal and Practical Problems in the Presentation of Non-Negotiable Bills of Lading*, H.K.L.J. 44, 51 (1999).

straight bill of lading contains a clause that expressly requires that the bill be surrendered as a condition to obtaining cargo.¹¹¹

Another situation that highlights the sometimes complex interplay between sales law and the law of carriage concerns the ability of the seller to prevent delivery of the goods, for instance, after learning of the insolvency of the buyer. According to rules of sales law recognized in many countries, in particular in those that have ratified the United Nations Convention on the International Sale of Goods (CISG),¹¹² an unpaid seller, or a seller that has reasonable grounds to fear that the buyer will not pay the sales price, has the right to prevent the delivery of the goods.¹¹³ In some legal systems, this right, which is known as “stoppage in transit,” continues to apply even after title to the goods has passed (e.g., by the transfer of a negotiable bill of lading).¹¹⁴ In other legal systems, however, the seller’s remedies are limited to those generally available under sales law (e.g., a court injunction) and do not include the power to prevent the carrier from delivering to the holder of the bill of lading according to the rules of ostensible title.¹¹⁵

A possible tension between sales law and the law of carriage arises, here, from the fact that “sales law provides a default rule of a delivery-against-payment or documents-against-payment,” whereas “trade practices allow transport documents to reside with the buyer well before payment of the purchase price,” giving the buyer “control over the goods during transit and a “key” for their delivery at the destination.”¹¹⁶ It is true that the seller may retain (partial) control over the goods only

¹¹¹ D. Thomas McCune, *Delivery of Cargo Carried under Straight Bills of Lading: The Ocean Carrier’s Rights and Obligations*, 17 UCC L.J. 4, 344, 350–51 (1985).

¹¹² According to Article 71 of the CISG, “(1): A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) A serious deficiency in his ability to perform or in his creditworthiness; or (b) His conduct in preparing to perform or in performing the contract.” 1489 UNTS 72 (1988). Article 71(2) provides further that “[i]f the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them.” *Id.*

¹¹³ For a discussion of the relationship between CISG Article 71 and the law of carriage, see Alexander von Ziegler, *The Right of Suspension and Stoppage in Transit (And Notification Thereof)*, 25 J.L. & COM. 353 (2005). See also Caslav Pejovic, *Stoppage in Transit and Right of Control: ‘Conflict of Rules?’*, 20 PACE INT’L L. REV. 129 (2008).

¹¹⁴ See TODD, *supra* note 95, at 156–57.

¹¹⁵ See Tiberg, *supra* note 83, at 11.

¹¹⁶ von Ziegler, *supra* note 113, at 366.

by keeping one original document. But, this may merely allow the seller to prevent delivery of the goods to the buyer, and does not entail the right to give instructions to the carrier.

B. *Finding a Functional Equivalent to the Possession of Bills of Lading*

The above discussion shows that the varying qualification given to the bill of lading in different legal systems affects not only the extent of protection given to the holder, but also the duties of the carrier in respect to delivery. These variations are the result of centuries of legal evolution and, in many instances, are deep-rooted in the legal thinking of their respective jurisdictions. The result is an alarming degree of uncertainty, conflicting practice, and inefficiency.

The drafters of the Rotterdam Rules had, basically, three options.

The first option would have been to align the law of carriage of goods with sales law and formulate uniform rules on how and at what time title to goods in transit will pass from one person to the other. This would have entailed not only the unification of terminology and trade practices concerning the various types of transport documents currently used, but also the unification of the legal effect of the issuance and transfer, as appropriate, of each of those documents with regard to the ownership of the goods. The fact that even the drafters of the CISG had refrained from trying to unify the property aspects of the sales contracts was a clear indication that this was not a realistic option to pursue within the narrower scope of the law of carriage.

The second option would have been to avoid the matter altogether. This would have meant that the existing uncertainty concerning the requirements for proper delivery of the goods under the various transport documents would be allowed to persist, leading to further proliferation of unsatisfactory solutions, such as the practice of delivering goods without proper production of a bill of lading against presentation of a letter of indemnity.¹¹⁷

The option eventually retained by the drafters of the Rotterdam Rules was to develop a set of rules aimed at clarifying the position of the various parties involved without attempting to unify the various le-

¹¹⁷ Even those who disagree with the “strict and puritanical” condemnation of letters of indemnity by the Protection and Indemnity (P&I) Clubs, recognize that letters of indemnity “abound to such a degree as to suggest an addiction.” D. Rhidian Thomas, Editorial, *Letters of Indemnity—LOIs*, 12 J. INT’L MARITIME L. 5, 5-6 (2006).

gal doctrines that explain and justify the rights of those parties. This entailed an effort to analyze the interest of the various parties (i.e., seller, buyer, secured creditor) in respect of the goods shipped and identify the most relevant function that, at any given time, they could perform in respect of the goods.

This function found its expression in the notion of “right of control,” which is defined as the prerogative of the “controlling party” to exercise any of the following rights: (a) the right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage; (b) the right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and (c) the right to replace the consignee by any other person including the controlling party.¹¹⁸ The right of control exists during the entire period of responsibility of the carrier and ceases when that period expires.¹¹⁹ As was already the case with the CMI Uniform Rules on Sea Waybills, a right of control exists independently from the negotiability of the transport document.¹²⁰

Generally, the shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party. The controlling party is entitled to transfer the right of control to another person, which becomes effective upon notification to the carrier by the transferor.¹²¹ If a non-negotiable transport document was issued that indicates that it must be surrendered in order to obtain delivery of the goods, the consignee to whom the shipper transfers the right of control by transferring the document without endorsement must produce all originals of the document and properly identify itself in order to exercise its right of control.¹²² Lastly, if a negotiable transport document was issued, the holder or, if more than one original of the negoti-

¹¹⁸ Rotterdam Rules, *supra* note 49, arts. 1(12), 50(1).

¹¹⁹ *See id.* at art. 50(2).

¹²⁰ The CMI Uniform Rules for Sea Waybills, which were designed for incorporation into commercial contracts, set out a mechanism for the transfer of the right of control from shipper to consignee. Rule 6(ii) provides: “The shipper shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee. The exercise of this option must be noted on the sea waybill or similar document, if any. Where the option has been exercised the consignee shall have [the right to give instructions to the carrier in relation to the contract of carriage] and the shipper shall cease to have such rights.” CMI Uniform Rules for Sea Waybills, *available at* <http://www.comitemaritime.org/cmidsocs/rulesaway.html>.

¹²¹ Rotterdam Rules, *supra* note 49, art. 51(1)(a)–(c).

¹²² *See id.* at art. 51(2)(a)–(b).

able transport document is issued, the holder of all originals is the controlling party and may transfer the right of control by transferring the negotiable transport document to another person duly endorsed or in blank, if the document is an order document, or without endorsement, if the document is either a bearer document or a blank endorsed or if the new controlling party is the same person named in the document.¹²³ Similar rules apply in respect of negotiable electronic transport records.

The attribution of the original right of control to the shipper is an obvious solution, since the shipper is the person that enters into a contract of carriage with a carrier. Apart from that, however, the Rotterdam Rules are neutral with regard to the legal basis for the transfer of the right of control. This may be done to affect a pledge, an assignment, or an outright conveyance of property, as determined, for instance, by the law governing the sales contract or the documentary credit.

The Rotterdam Rules still recognize this existing legal practice.¹²⁴ However, they provide that possessing the right of control and holding the bill of lading are no longer necessarily linked. “The provisions on the right of control also apply when no document is issued for the carriage involved.”¹²⁵ “In other words, possession of a negotiable document and possession of certain rights in the goods have been decoupled.”¹²⁶

The Rotterdam Rules do not deal with sales law, property law, or bankruptcy law per se. Therefore, it is other law, not the Rules, that provide for ownership of the goods, grounds for a right of stoppage in transit, or any other right in the goods. However, the Rotterdam Rules do “provide the legal tools under maritime transport law for the holder of any of these rights to exercise its right with respect to goods that are subject to a maritime carriage.”¹²⁷

¹²³ See *id.* at arts. 51(3)(a)–(b), 57.

¹²⁴ For an overview of the treatment of right of control in the Rotterdam Rules, see Gertjan van der Ziel, *Chapter 10 of The Rotterdam Rules: Control of Goods In Transit*, 44 *TEX. INT'L L.J.* 375, 384 (2009) (discussing how right of control may create constructive possession).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

III. ELECTRONIC EQUIVALENTS OF TRANSPORT DOCUMENTS

The practical significance of requiring transfer of actual or constructive possession of tangible goods, or of the physical surrender of a document that represents goods or embodies other rights, is to prevent conflicts between parties claiming entitlement to the same goods or rights. As no two persons can possess certain goods or hold a given transport document at the same time, the requirement of possession ensures the regularity of the chain of negotiation. Ultimately, the law aims at ensuring that only one person can effectively exercise control over the goods, the document that represents them, or the negotiable instrument.

Many attempts have been made by a number of international organizations, whether intergovernmental or non-governmental, and by various groups of users of electronic communication techniques, to reproduce the functions of a traditional paper-based bill of lading in an electronic environment.¹²⁸ Besides various technical and commercial challenges, those projects faced one nearly insurmountable obstacle: namely, that both international and domestic rules on shipping had been conceived against the background of paper documents and would either require directly the issue of a bill of lading in paper form or assume its existence for various functions, in particular transfer or pledge of rights over goods in transit. The approach taken by the drafters of the Rotterdam Rules is an attempt to overcome those difficulties without creating entirely new legal categories.

A. Legal Obstacles to the Use of Electronic Records as Transport Documents

Replicating the evidentiary function of the bill of lading in an electronic environment is a relatively simple task, and in many trades, sea waybills have already been effectively replaced with electronic communications.¹²⁹ It is the negotiability function of the bill of lading that gives rise to most difficulties, mainly because it is impossible to physically “hold,” “endorse,” or “deliver” an electronic record. These functions must therefore be fulfilled by other means capable of

¹²⁸ For an overview of various developments, see Marek Dubovec, *The Problems and Possibilities for Using Electronic Bills of Lading as Collateral*, 23 ARIZ. J. INT'L & COMP. LAW 437 (2006). Information on earlier initiatives, such as the Sea Docs experiment and the CMI Rules for Electronic Bills of Lading, can be found in earlier studies done by UNCITRAL. See Working Group on Electronic Data Interchange, U.N. Doc. A/CN.9/WG.IV/WP.69 (Jan. 31, 1996).

¹²⁹ See Dubovec, *supra* note 128, at 454.

establishing, at any time, who is the rightful “holder” of the electronic equivalent of the negotiable transport document.

Early analysis of the legal basis for the negotiability of documents of title had indicated that “[t]here is generally no statutory means in place by which commercial parties, through the exchange of electronic messages, can validly transfer legal rights in the same manner possible with paper documents.”¹³⁰ “In the present state of most laws, negotiability cannot be divorced from the physical possession of the original paper document.”¹³¹ The main obstacle to accommodating electronically transmitted documents of title was, therefore, to devise procedures that assure the holder that “there is a document of title in existence, that it has no defects upon its face, that the signature, or some substitute therefore is genuine, that it is negotiable, and that there is a means to take control of the electronic document equivalent in law to physical possession.”¹³²

Where the law requires physical delivery of goods, or of a document that represents the goods, for the purpose of transferring property or perfecting security interests in such goods, a mere exchange of electronic messages between the parties would not be sufficient for that purpose, however evident the parties’ intention might have been. Therefore, even in jurisdictions where the law generally recognizes the legal value and effectiveness of electronic communication or records, no such communication or record could alone effectively transfer property or perfect a security interest in a manner that would be enforceable vis-à-vis third parties without an amendment of the law governing transfer of property or perfection of security interests.

Recognizing that electronic communications lack the tangibility that characterizes traditional negotiable instruments and documents of title, electronic negotiability models based on registry systems attempt to replace both paper documents and their physical transfer with electronic records. Typically, there will be one or more electronic records that contain essentially the same information that would otherwise be

¹³⁰ Jeffrey B. Ritter & Judith Y. Gliniecki, *International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms*, 6 HARV. J.L. & TECH. 263, 279 (1993) (discussing the transfer of legal rights).

¹³¹ Kris Bernauw, *Current Developments Concerning the Form of Bills of Lading—Belgium*, in OCEAN BILLS OF LADING: TRADITIONAL FORMS, SUBSTITUTES AND EDI SYSTEMS 87, 115 (A.N. Yannopoulos ed., 1995).

¹³² Donald B. Pedersen, *Electronic Data Interchange as Documents of Title for Fungible Agricultural Commodities*, 31 IDAHO L. REV. 719, 726 (1995).

contained in the paper document. Furthermore, there would be a series of electronic communications recording transactions in the goods, rights, or receivables represented by the electronic record. Only the person recognized by the registry as the rightful “holder” would be entitled to claim delivery of the goods or to exercise other related rights. At least in theory, the same result could also be achieved if computer technology were able to create a “unique” electronic record that could be exclusively held by a holder and transferred to another without replication at some point down the negotiating chain.¹³³

To a large extent, practical solutions may be crafted by contractual arrangements binding upon the users of any such systems. However, voluntary rules give way when they conflict with a State’s laws and may not be enforceable against or binding upon third parties.¹³⁴ Indeed, courts may be inclined to accept electronic book entries as the functional equivalent of endorsement and physical transfer of a document of title as between persons and entities that participate in a closed negotiation system where all parties agree in advance to be bound by the rules of that system. The result may differ, however, in situations where the courts are asked to enforce rules of an electronic system against a third party that did not expressly agree to be bound by those rules in the absence of statutory provisions recognizing their enforceability and supporting their operation.¹³⁵

¹³³ For a theoretical discussion, see Robert E. Kahn & Patrice A. Lyons, *Representing Value as Digital Objects: A Discussion of Transferability and Anonymity*, 5 J. ON TELECOMM. & HIGH TECH. L. 189 (2006).

¹³⁴ The limited success of some registry systems developed thus far can be explained by a reluctance of the industry, particularly the banking industry, to accept electronic equivalents of paper bills of lading as adequate collateral under a letter of credit. Developers of technological solutions take the view that “the acceptance of electronic documents is not a matter of changing transportation law to enable electronic documentation, but is predominantly a matter of gaining the trust and security of the customers who use shipping documents in their trade relations.” Dubovec, *supra* note 128, at 465. This may be partly true, but the trust and security of those customers would be strengthened “by clear legal rules enacted by state legislators, and not with the confusing legal structure created by the Bolero system.” *Id.* It has been said that one of the reasons why the use of electronic commerce is not developing in line with technological capability is that “there is little law governing its use.” *Id.* The exchange of data electronically does not itself pose a problem. However, “when the data represents negotiable documents that cover valuable assets, an established legal structure is needed.” *Id.*

¹³⁵ For example, the administrator in insolvency proceedings of a company that sold goods in transit to another participant in an electronic system shortly before becoming insolvent would be expected to try to obtain delivery of the goods to the benefit of the insolvency estate. When faced with a concurring claim by a buyer admitted to the electronic system, the insolvency administrator would very likely refuse being bound by

B. *Conditions for Functional Equivalence under the Rotterdam Rules*

The introduction of a general statutory recognition of contractually agreed systems and procedures for the transfer of the right of control over goods in transit, as contemplated by the Rotterdam Rules, intends to ease some of the legal concerns that currently exist. The drafters of the Rotterdam Rules were aware of the various technological options and business models being developed and did not wish to interfere with them. At the same time, they were aware of the rapid pace of technological evolution, including the possibility that technology developments may enable business models based on solutions other than registries managed by trusted third parties or closed networks. One conceivable model, for instance, might rely on a technical device that would assure the uniqueness of an electronic record to allow the record itself to be “passed” down a negotiation chain.¹³⁶

The policy choice eventually made by UNCITRAL was to formulate rules at a level of generality that could accommodate closed networks and registry systems, as well as any other solutions following a different pattern. The Rotterdam Rules do that by introducing the general notion of “exclusive control” over the negotiable electronic transport record, to which both the definitions of “issuance” and “transfer” of electronic transport documents refer.¹³⁷

The Rotterdam Rules aim at establishing the conditions under which electronic systems can replicate the negotiability function of traditional bills of lading. They do so by linking the electronic negotiability to the existence of procedures that ensure that only one person at any given point in time should be capable of exercising “exclusive control” over the negotiable electronic transport record. The Rotterdam Rules require that a negotiable electronic transport record must follow procedures that “ensure that the record is subject to exclusive

rules that he or she has not accepted and that are not statutorily enforceable against him or her. The insolvency administrator would likely insist that the court should apply the laws of the place where the goods are located to determine whether a transfer of property had validly occurred. In such a case, unless the applicable law recognizes the validity of the negotiability rules of the electronic system, the court would likely hold that only the actual endorsement of a bill of lading, a nearly universally accepted means of transferring the right to claim delivery of the goods, could have granted that right to the alleged holder.

¹³⁶ So far, however, computer technology has not yet been able to create such a “unique” electronic record, which means that electronic negotiability systems continue to rely essentially on electronic registries.

¹³⁷ See Rotterdam Rules, *supra* note 49, arts. 1(21), 1(22), 8(b).

control from its creation until it ceases to have any effect or validity.”¹³⁸ In other words, only electronic records that are not susceptible of being “held” by more than one person at a time will meet this requirement.

The notion of “exclusive control” over an electronic record can be found in the Uniform Electronic Transactions Act (UETA).¹³⁹ Section 16 of UETA, “Transferable Records”, establishes the criteria for the legal equivalence of electronic records to notes or records under Articles 3 and 7, respectively, of the UCC. The essential criterion for the legal equivalence of electronic records to negotiable instruments under UETA Section 16 is that the electronic record needs to be of such nature that a person may exercise “control” over the record. Acquisition of “control” over an electronic record serves as a substitute for “possession” of an analogous paper negotiable instrument. More precisely, “control” under Section 16 serves as the substitute for delivery, endorsement, and possession of a negotiable promissory note or negotiable document of title. Section 16(b) allows control to be found so long as “a system employed for evidencing the transfer of interests in the transferable record reliably establishes [the person claiming control] as the person to whom the transferable record was issued or transferred.” The key point, as indicated in the official commentary, is that “a system, whether involving third party registry or technological safeguards, must be shown to reliably establish the identity of *the* person entitled to payment.”¹⁴⁰

A person is considered to have control of a transferable record under UETA if a system employed for evidencing the transfer of interests in the transferable record “reliably establishes that person as the person to which the transferable record was issued or transferred.”¹⁴¹

¹³⁸ *Id.* at art. 1(21).

¹³⁹ See NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, UNIF. ELEC. TRANSACTIONS ACT [UETA] § 16 (1999), available at <http://www.law.upenn.edu/bll/archives/ulc/uecicta/eta1299.pdf>. Updated information on the enactment of the UETA may be found at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Sept. 12, 2010).

¹⁴⁰ *Id.* § 16, cmt. 3 (emphasis added).

¹⁴¹ *Id.* § 16(b). A system satisfies this requirement, and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that: “(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable; (2) the authoritative copy identifies the person asserting control as the person to which the transferable record was issued; or the authoritative copy indicates that the transferable record has been transferred, the per-

A person having control of a transferable record acquires the status of holder of the record, for the purposes of Section 1-201(20) of the UCC, and has the same rights and defences as a holder of an equivalent record or writing under the UCC, including the rights and defences of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

The official commentary to UETA suggests that control requirements may be satisfied using a trusted third party registry system, but “a technological system which met such exacting standards would also be permitted under Section 16.”¹⁴² Further, the commentary to Section 16 “provides legal support for the creation, transferability, and enforceability of electronic note and document equivalents, as against the issuer/obligor.”¹⁴³

The Rotterdam Rules adopt a similar approach. An electronic negotiable transport record is the legal equivalent of a paper transport document whenever its use is subject to procedures that, among others, provide for: (a) a method to effect the exclusive transfer of that record to an intended holder; (b) an assurance that the negotiable electronic transport record retains its integrity; and (c) the manner in which the holder is able to demonstrate that it is the holder.¹⁴⁴

The “holder” of a negotiable electronic transport record under the Rotterdam Rules is as “[t]he person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.”¹⁴⁵ The combined effect of these provisions is to require the negotiability system to have procedures in place whereby the person claiming to be the holder can demonstrate that it has *the exclusive control over the electronic*

son to which the transferable record was most recently transferred; (3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian; (4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control; (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and (6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.” *Id.* § 16(c)(1)–(6).

¹⁴² *Id.* § 16, cmt. 3.

¹⁴³ *Id.* § 16, cmt. 4.

¹⁴⁴ Rotterdam Rules, *supra* note 49, arts. 9(1)(a)–(c).

¹⁴⁵ *Id.* art. 1(10)(b).

record, either because the document was originally issued to that person or because it has been subsequently transferred to that person.

How this can be done is a matter that depends largely on the technology used to ensure the uniqueness of the electronic records. If a token system is used, for example, the holder would typically be the person to whom the token has been “passed” through a regular chain of negotiation. If a registry system is used, the holder would typically be the person recognized by the registry as the person having exclusive control over the electronic transport record. Depending on how access to the registry is structured, this may involve various forms of electronic “authentication,” “signature,” or proof of identity, or any combination thereof.¹⁴⁶

The central function of a transport document is accomplished when the goods are delivered to the rightful holder at the end of the journey. At that time, the transport document is said to be “accomplished” or “exhausted,” so that it “will not operate at all to transfer the goods to any person who has either advanced money or has purchased the bill of lading.”¹⁴⁷

It is logical, therefore, that any system to replicate the functions of the negotiable bill of lading in an electronic environment must also

¹⁴⁶ A number of different electronic authentication and signature techniques have been developed over the years. Each technique aims at satisfying different needs and providing different levels of security, and entails different technical requirements. Electronic authentication and signature methods may be classified in three categories: those based on the knowledge of the user or the recipient (e.g., passwords, personal identification numbers (PINs)), those based on the physical features of the user (e.g., biometrics) and those based on the possession of an object by the user (e.g., codes or other information stored on a magnetic card). A fourth category might include various types of authentication and signature methods that, without falling under any of the above categories, might also be used to indicate the originator of an electronic communication (such as a facsimile of a handwritten signature, or a name typed at the bottom of an electronic message). Technologies currently in use include digital signatures within a PKI, biometric devices, PINs, user-defined or assigned passwords, scanned handwritten signatures, and signature by means of a digital pen. Hybrid solutions based on the combination of different technologies are becoming increasingly popular, such as, for instance, in the case of the combined use of passwords and TLS/SSL (transport layer security/secure sockets layer), which is a technology using a mix of public and symmetric key encryptions. See U.N. Comm’n on Int’l Trade Law [UNCITRAL], *Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods* ¶ 16, at 13, U.N. Doc. A/CN.9/630 Add.1-5, U.N. Sales No. E.09.V.4 (2009).

¹⁴⁷ *Enichem Anic SpA v. Ampelos Shipping Co. Ltd. (The Delfini)* [1990], 1 Lloyd’s Rep. 252, 269 (quoting *Barber v. Meyerstein* (1870) L.R.E. & I. App. 317, 335 (H.L.)).

replicate, in particular, the act of surrendering the paper bill of lading. To that end, the electronic system used by the parties must offer reliable mechanisms to record the time when the goods were delivered, signifying the moment when the electronic transport document loses its function as the electronic equivalent of a document of title. Where the parties use a registry system, this may be achieved, for example, by making corresponding entries in the registry, including an indication that the electronic transport document has ceased to be valid. Where an electronic device, such as a token system, is used, the token itself will need to be transmitted to the carrier, much the same way that a paper bill of lading would need to be physically surrendered.

The Rotterdam Rules accommodate both third-party-based and carrier-operated registry systems for negotiability, as well as a “technical” solution in the form of a unique token.¹⁴⁸ While the last alternative is not yet a reality, the certainty created by rules of this nature should provide, or in the case of UETA, should offer “the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents.”¹⁴⁹

CONCLUSION

The law governing the international carriage of goods offers a prime example of the widely varying legal doctrines that explain the function of a single instrument (here, the transport document) in different legal systems. This area of the law also shows how far apart the positions of the holders of those instruments may be, depending on the applicable law. Theoretically, the ideal solution for an industry as international as the shipping industry could have been to eliminate legal diversity and replace it with a strictly uniform set of legal concepts and categories. Doing this in an area filled with legal theories that find their roots in legal principles as basic as those that govern the passage

¹⁴⁸ See Rotterdam Rules, *supra* note 49, *passim*.

¹⁴⁹ UETA, *supra* note 138, § 16, cmt. 1, ¶ 2. Commentators note, however, that meeting the standards of UETA section 16 “will be no easy task, and will require a carefully designed and supervised set of systems and practices. The key element will be data integrity. Courts evaluating the control of a transferable record may be expected to focus on the systemic protections—e.g., division of labour, complexity of backup systems, activity logs, and security of copies stored offsite to verify content—which make it difficult to tamper with the record without detection.” R. David Whitaker, *Rules under the Uniform Electronic Transactions Act for an Electronic Equivalent to a Negotiable Promissory Note*, 55 BUS. LAW 437, 449 (1999).

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of property to tangible goods, however, would have been a nearly impossible task. The decision of the drafters of the Rotterdam Rules to attempt, instead, at drawing a catalogue of functions performed by the possession of transport documents, and to bundle these functions in a legal equivalent, is an ingenuous solution to achieve uniformity in economic function with minimal interference with the operation of legal doctrines.

The above considerations highlight the complexities of international legal harmonisation and the methodological challenges of law reform. The functional approach to legal harmonisation may prove to be useful to help advance legal harmonisation efforts in other areas of the law where the practical commercial need for uniformity collides with the overwhelming force of traditional legal thinking.

