Preface

This book addresses international harmonisation efforts in secured credit law and asks whether the most comprehensive international standard – the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions (2008) – is suitable for adoption at the national level. It explores the hypothesis that American law and lawyers have shaped the content of the Guide to the extent that it is not suitable for translation into other laws.

The clear objective of the Guide is to facilitate secured financing. The possibility of taking security rights over the assets of the debtor is thought to expand the availability as well as to reduce the cost of credit, thereby producing benefits for both creditor and debtor as well as for the overall economy. The Guide is very facilitating and enabling, and permits the creation of security in all sorts of situations. Security is seen as a good thing, through enhancing the availability of lower-cost credit. This perspective colours the approach adopted in the Guide on particular issues though, at the same time, it is recognised that beneficial economic results cannot be achieved by legislation alone – the legal and administrative infrastructure in a particular jurisdiction, including mechanisms for the enforcement of security, play a crucial role. In broad terms, the Guide follows the approach outlined in Article 9 of the American Uniform Commercial Code, and in the Personal Property Security Acts in Canada and New Zealand that have been modelled on Article 9. While the Guide is not an exact mirror image of Article 9, it is far closer in tone and spirit to Article 9 than the UNCITRAL Legislative Guide on Insolvency is to the comparable provisions of the US Bankruptcy Code. It is submitted that this closeness in approach is likely to militate against the prospects of the Secured Transactions Guide gaining widespread international acceptance.

The first chapter is introductory and looks at the nature and role of UNCITRAL as well as at recent controversy over UNCITRAL working methods. It considers the concepts of unification, harmonisation and modernisation and the legal instruments that are used to achieve these goals. It also addresses why the UNCITRAL agenda appears to have shifted from unification and harmonisation to modernisation, and considers the implications of this shift. The second chapter considers the case for

and against harmonisation and modernisation of international trade law and asks where these are realistically achievable goals. The chapter also explains the concept of path-dependency and how this may influence the harmonisation and modernisation agenda. Chapter 3 turns the spotlight more particularly on secured transactions, or secured credit law as it is variously called, and asks why harmonise and modernise in this area? UNCITRAL suggests that doing so will lower the cost and expand the availability of credit. Harmonisation and ‘modernisation’ are assumed to equal ‘liberal’ security regimes and the facilitation of secured credit. In this chapter, the modernisation equals liberalisation agenda is subjected to greater scrutiny.

Chapter 4 looks at the main features of Article 9, which is often seen as a beacon for law reformers worldwide. It also considers the influence of Article 9 on other common law jurisdictions and the English common law and, in general terms, the civil law approach towards security rights. Chapter 5 assesses previous harmonisation efforts in the sphere of secured transactions and sets them against the background of the UNCITRAL Guide. The focus is on two particular instruments – the European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transactions and the Organisation of American States (OAS) Model Law. Chapter 6 provides a critical evaluation of the main provisions of the Guide looking at the Guide in the context of other international and national secured transactions instruments including the EBRD Model Law and Article 9. The discussion addresses the overall philosophy of the Guide and how this is exemplified in particular provisions, including the scope of assets that may be collateralised, all-assets security, creation and third party effectiveness of security rights, quasi-securities and priorities.

Chapter 7 compares the UNCITRAL Secured Transactions Guide with its Guide on Insolvency. The main features of the Insolvency Guide are examined and analogies drawn with the key features of the US Bankruptcy Code. A central message is that the Insolvency Guide is not as closely aligned with US law as the Secured Transactions Guide. While the Insolvency Guide is arguably too legalistic on corporate restructurings, there appears to be greater recognition of diversity and the accommodation of different approaches than in the Secured Transactions Guide. The concluding chapter tries to explain why this may be the case and also the likely influence of the Secured Transactions Guide.

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