1. Introduction

The United Nations Commission on International Trade Law (UNCITRAL) has recently produced a Legislative Guide on Secured Transactions. 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 Legislative 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 enhancement of lower-cost credit availability. This perspective colours the approach adopted in the Legislative 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 Legislative 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 Legislative Guide is not an exact mirror image of Article 9, it is much 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.

This introductory chapter consists of five parts. The first part looks at the nature and role of UNCITRAL. The second at recent controversy over UNCITRAL’s working methods. The third part considers

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the substantive work of UNCITRAL and how it came to promulgate a Legislative Guide on Secured Transactions. The fourth part looks at the concepts of unification, harmonisation and modernisation. The fifth part considers the legal instruments used to achieve harmonisation and/or modernisation of the law across international frontiers. This is followed by a brief conclusion.

UNCITRAL – ITS ESTABLISHMENT AND MISSION

UNCITRAL was established by means of a resolution of the United Nations General Assembly in 1966 and has as its object ‘the promotion of the progressive harmonization and unification of the law of international trade’. It was established as a Commission of the United Nations General Assembly. In setting up UNCITRAL, the General Assembly reaffirmed its ‘conviction that divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade’. The resolution was grounded on a belief that ‘the extensive development of international trade could best be furthered by removing ‘divergences arising from the laws of different States’. Harmonisation and unification of trade law were seen as instruments to facilitate international trade rather than goals in themselves. International trade was said to advance ‘the interests of all peoples’ and ‘particularly those of developing countries’ because ‘international trade co-operation among States is an important factor in the promotion of friendly relations and, consequently, in the maintenance of peace and security’. Harmonisation and unification of international trade law was to be achieved through promoting the adoption of international Conventions and uniform laws as well as standard contract provisions, general conditions of sale, standard trade terms and other measures.

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3 Ibid.
4 Resolution 2205(XXI) included the following paragraphs:

‘Noting at the same time that progress in this area has not been commensurate with the importance and urgency of the problem, owing to a number of factors, in particular insufficient co-ordination and cooperation between the organizations concerned, their limited membership or authority and the small degree of participation in this field on the part of many developing countries,

Considering it desirable that the process of harmonization and unification of the law of international trade should be substantially co-ordinated, systematized and accelerated and that a broader participation should be secured in furthering progress in this area.’
As well as the harmonising function, UNCITRAL was also designed to play a coordinating role – acting as a sort of clearing house for other international organisations active in the field.\(^5\) The need for such a clearing house is illustrated by the fact that ‘the treaty collections are littered with Conventions that have never come into force, for want of the number of required ratifications, or have been eschewed by the major trading States’.\(^6\) In the immediate aftermath of the Second World War, Harold Gutteridge, a noted comparatist, commented about the

waste of effort and confusion that has, at times, been caused by the existence of competing agencies, engaged in the work of unification. The remedy for this state of affairs would seem to lie in the establishment of a rallying ground for unificatory activities . . . which would coordinate and supervise activities of this nature and also facilitate the collection of any information that might be required, either from governmental or other sources.\(^7\)

Before the creation of UNCITRAL, the UN General Assembly requested the Secretary-General to produce a comprehensive report on the need for such a body.\(^8\) The relevant resolution spoke of legal divergences and conflicts constituting an obstacle to the development of world trade. The resultant report by Clive Schmitthoff addressed the need for ‘the progressive harmonization and unification of the law of international trade’.\(^9\) Reference was made to harmonisation as a technique for ‘reducing conflicts and divergences in international trade law’ with unification described as ‘[t]he most effective method of conflict avoidance’. The report talked about harmonisation and unification as the ‘preventive method’ of private international law because it had the purpose of avoiding legal conflicts thus eliminating the need to rely on allegedly obscure choice of law rules.

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\(^6\) See R Goode ‘International Restatements of Contract and English Contract Law’ (1997) Uniform Law Review 231 at 232. Goode identifies several reasons for this: ‘failure to establish from potential interest groups at the outset that there is a serious problem, which the proposed Convention will help to resolve; hostility from powerful pressure groups; lack of sufficient interest of, or pressure on, Governments to induce them to burden still further an already over-crowded legislative timetable; mutual hold-backs, each State waiting to see what others will do, so that in the end none of them does anything’.

\(^7\) H Gutteridge Comparative Law (Cambridge, CUP, 2nd edn, 1949) at 146. According to Roy Goode ‘Harmonised Modernisation of the Law Governing Secured Transactions: General-Sectoral, Global-Regional’ (2003) 8 Uniform Law Review 341 at 345: ‘These words remain as true today as when they were penned some 54 years ago.’

\(^8\) UN Resolution 2102 (XX), available online at www.uncitral.org.

\(^9\) The ‘Schmitthoff Report’ (UN Doc A/6396) reprinted in (1966) 1 UNCITRAL Yearbook 2 and available online at www.uncitral.org and associated links.
Schmitthoff saw both harmonisation and unification as achievable goals in that the similarity of international trade law transcended the division of the world between free enterprise and centrally planned economies – the West/East divide – and between civil law and common law origin countries. The primary obstacles to harmonisation and unification were identified as being the existence of a plethora of international law reforming institutions whose work overlapped and whose membership represented developed and not developing nations – the North/South divide. Schmitthoff suggested a UN-related law reform body on the basis that it would provide more inclusive representation of the world’s legal and economic systems and accordingly better coordination among other international actors. A United Nations Commission on International Trade Law, established as a UN offshoot, would gain legitimacy and clout from the international representativeness of the UN and therefore function effectively as a coordinating entity.

Legitimacy could be described as ‘a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions’ and it has been argued that the legitimacy of international organisations such as UNCITRAL rests on the three foundations of representativeness, procedural fairness and effectiveness. The notion of representativeness is bound up with the idea that those responsible for the framing of the new global norms are in some way representative of the kinds of jurisdictions to which these norms are addressed. The notion of procedural fairness implies catholic participation and ‘voice’ – peripheral and core actors, the weak and the strong, are all allowed to take part in the norm-making process in ways that are seen to be fair. Effectiveness implies proposals translated into action or, to put it another way, that the accomplishments of an international organisation in the past are likely to be turned into probable future successes.

12 Other scholars have argued that UNCITRAL acts ‘incrementally’ and count this incrementalism as among its strengths – see J Pottow ‘Procedural Incrementalism: A Model for International Bankruptcy’ (2005) 45 Virginia Journal of International Law 935, who refers to the UNCITRAL Model Law on Cross Border Insolvency as fundamentally procedural in focus and sets out the merits of a process of incremental proceduralism.
Introduction

Essentially, UNCITRAL functions at four levels – the Secretariat, the Working Groups, the UNCITRAL Commission and finally at the top of the hierarchy, the UN General Assembly.13 The latter ratifies Commission decisions, often without additional deliberation, and this ratification, by virtue of the all-inclusive representative status of the General Assembly, gives a powerful symbolic imprimatur to UNCITRAL texts.

The UNCITRAL Commission has a membership of 60 States elected by the General Assembly for a term of six years. It is intended to be representative of the various geographic regions of the world; the principal legal and economic systems and developing as well as developed countries. The Commission sets out the work programme of UNCITRAL. Items may find their way into the work programme following representations from governments, or after consultation with non-governmental organisations (NGOs) or trade associations. For instance, following discussions at a 2010 international colloquium attended by representatives from governments, international organisations and the private sector, the UNCITRAL Commission decided to continue work on secured transactions, giving priority to the preparation of a text on registration of security rights.14

The Commission also finalises and adopts texts that have been sent to it by the Working Groups where the bulk of substantive work is done in the shape of ‘policy decisions’ and the drafting of relevant instruments. The Working Groups consist of official national delegates from UNCITRAL’s own membership, invited observers from other UN Member States, together with intergovernmental and NGOs that have an interest in the topics under discussion. No nation that wishes to participate in the Working Groups is excluded and it is the custom for observers to participate fully in the discussions. In practice both the Commission and Working Groups arrive at their decisions by consensus rather than by putting matters to a vote. This consensual mode of decision making has, however, recently come under challenge.

Finally, at the ground level is the UN Secretariat, which comes from the International Trade Law Division of the United Nations Office of Legal Affairs, based in Vienna. It consists of a small group of legally qualified

officials from a range of nationalities. The Secretariat plays a facilitative role in assisting the Working Groups and Commission in its work.

UNCITRAL WORKING METHODS

Recently there has been considerable controversy over UNCITRAL working methods though the controversy has not been on familiar fault lines as such, pitting the richer countries of the North and the West against those of the South and the East.\textsuperscript{15} Rather the main protagonists have been France and the US. France has called for revision of UNCITRAL’s de facto working methods\textsuperscript{16} whereas the US is basically content with the status quo.\textsuperscript{17} The controversy does not appear to have led to any pronounced substantive changes though there have been clarifications of practice that may have gone some way towards meeting French concerns.

Essentially, there were three bones of contention raised by France. The first concerned the consensual mode of decision making which the UNCITRAL secretariat suggested is conducive to achieving a larger cooperation among countries having different legal, economic and social systems and also ensuring that UNCITRAL instruments were generally acceptable.\textsuperscript{18} It stressed, however, that consensus was not the same as complete agreement and a decision could fairly be said to have been arrived at by consensus even though not all States were fully in accord with all aspects of a proposal. According to a note prepared by the Secretariat ‘[t]he basis of consensus is that efforts are made to address all of the concerns raised by participants so that the final text is acceptable to all’, but the doubts articulated by a single State were not sufficient to prevent a consensus being formed on the basis of what was otherwise


\textsuperscript{16} ‘France’s Observations on UNCITRAL’s Working Methods’ UN Doc A/CN 9/635 (2007). France believed that it was necessary to clarify UNICTRAL’s rules of procedure either by specifically referring to the UN rules applicable to all subsidiary organs, or by adopting rules unique to UNCITRAL. Reference was made to UNCITRAL’s drafting stages as its ‘legislative process’. See also ‘UNCITRAL Rules of Procedure and Methods of Work: Proposal by France’ A/CN 9/697 (2009).

\textsuperscript{17} ‘UNCITRAL Rules of Procedure and Methods of Work: Observations by the United States’ UN Doc A/CN 9/639 (2007).

the prevailing view of the meeting. France did not object to the consensus mode of decision making but sought clarification on the meaning of consensus, suggesting that consensus was deemed to have been arrived at too easily.\textsuperscript{19} It contended that ‘there cannot be a consensus without the consent of all delegates’.\textsuperscript{20} The UNCITRAL Secretariat has now propounded the following working definition of ‘consensus’:

Consensus is generally understood to mean adoption of a decision without formal objection and vote. Consensus may not necessarily reflect unanimity of opinion, namely, complete agreement as to substance and a consequent absence of reservations, and should therefore be distinguished from unanimity, i.e., the decision-taking by a vote wherein no negative votes are cast, albeit with abstentions. . . . Consensus in the Commission is based on the substantially prevailing view, a flexible notion that does not embody a pre-defined mode of calculation and is characterized by the absence of a formal objection resulting in a request for a vote.\textsuperscript{21}

There is some wriggle room in this definition but this is likely to be the case with all attempted definitions of ‘consensus’. Clearly the concept lacks the clarity of meaning of a decision by a simple majority vote. Nevertheless, the French view of the term does not seem to have been taken on board, or fully taken on board, in the Secretariat formulation.

While fuzzy and manipulable to a degree, the notion of consensus-based decision making has certain advantages. A unanimity requirement could stymie sensible decision making. It would constitute a particularly perverse form of minority rule, giving each and every State a veto power, no matter how insignificant the issue, but a simple majority requirement would go too far in the other direction, undermining the legitimacy of UNCITRAL and the possibility of its texts gaining general international acceptance. The UNCITRAL Secretariat itself has noted that it ‘would not be conducive to the harmonization of commercial laws if some provisions or instruments were approved by a small majority’.\textsuperscript{22}

France was perhaps on sounder ground in its second point when it queried the role of non-UNCITRAL members, particularly special interest groups, in the UNCITRAL decision-making process. It was argued that because of the technical and specialised work undertaken by UNCITRAL, experts from NGOs through the expertise they possessed

\textsuperscript{19} ‘France’s Observations on UNCITRAL’s Working Methods’ UN Doc A/CN 9/635 (2007) at para 5.11d.
\textsuperscript{20} Ibid.
\textsuperscript{21} ‘UNCITRAL Rules of Procedure and Methods of Work: Note by the Secretariat’ A/CN 9/676 (2009) at paras 11, 12.
\textsuperscript{22} Ibid at para 9.
influenced the entire process\textsuperscript{23} and participated on a ‘de facto equal basis with Member States in the sessions of the working group to produce the draft instrument’.\textsuperscript{24} The influence of experts and NGOs was also increased by the funding constraints faced by UNCITRAL, which was generally not able to fund participation in its activities by States. Financial factors therefore effectively shut certain poorer States out of the decision-making process whereas well-resourced private sector organisations with an interest in the subject-matter under discussion were free to attend and participate and had the financial wherewithal to do so.\textsuperscript{25}

The French complaint was also with the expansion in the number of NGOs that were allowed to participate. In the past only a small number of NGOs with a stated interest in the field of international trade were active within UNCITRAL, but more recently the field had opened up to a larger number of NGOs, ‘more obviously national in nature’\textsuperscript{26} and these groups have had a potentially decisive say on the outcome of UNCITRAL deliberations.\textsuperscript{27} To counter the influence of these interest groups, France put forward certain proposals including provision for ‘in camera’ meetings where requested by a Member State.\textsuperscript{28} It also proposed that the sphere of influence of experts should be confined to informal events such as colloquia and seminars, and only Member States should be permitted to draft and circulate documents.\textsuperscript{29}

Having identified the problem of interest group capture it is submitted that the detailed proposals advanced by France do not do much to address the problem, or at least raise issues of their own that may be as

\textsuperscript{23} ‘France’s Observations on UNCITRAL’s Working Methods’ UN Doc A/CN 9/635 (2007) at para 3.1. France was particularly concerned about the fact that when UNCITRAL undertook to draft an instrument, experts, or the groups represented by them, often initiated the process and provided most of the technical information that was considered by the respective working groups. These experts were not representatives or delegates of any Member State. Moreover, the working groups generally operated without any guidelines and the draft instruments that they submitted to the plenary session were only altered if a strong current of opinion favoured such changes.

\textsuperscript{24} Ibid at para 3.1.

\textsuperscript{25} Ibid.

\textsuperscript{26} Ibid at para 6.1.

\textsuperscript{27} NGOs participating in the Working Group on Insolvency Law included the American Bar Association and the American Bar Foundation – see UNCITRAL Report of Working Group V (Insolvency Law) and Working Group VI (Security Interests) on the work of their second joint session at para 7, UN Doc A/CN 9/550 (2004). The preface to the Legislative Guide on Insolvency Law also acknowledges that ‘[NGOs] participated actively in the preparatory work’.


\textsuperscript{29} Ibid at para 3.2 stating that NGOs should only be permitted to circulate information documents unless otherwise requested or authorised by Members.
troubling. For instance, provision for in-camera deliberation seems to run counter to the UN professed ethos of openness and transparency and raises the spectre of deals being stitched up behind closed doors. The US was able to knock this proposal quite easily, stating: ‘One of the hallmarks of the . . . successful work methods has been . . . [the] open and public process. Transparency and participation by knowledgeable and affected groups, including international and non-governmental organizations and private sector representatives, in working group meetings are key to UNCITRAL’s success.’

On the circulation of documents, again France does not appear to have had much joy. In the guidelines issued by the UNCITRAL Secretariat, it is stated that written proposals by the observer organizations may be circulated by the Secretariat to the commission and/or its relevant subsidiary organ unless decided otherwise by the Commission or the subsidiary organ concerned. The theoretical position has not changed but there may be alterations in practice.

At the very least, however, the French challenge to the UNCITRAL working practices has served to highlight the influence exerted by NGOs on the deliberative process. But the very nature of UNCITRAL as a specialist organ of the UN puts a premium on gaining specialist technical inputs from affected parties. As one commentator remarks, while ‘the participation of experts might give greater support to one State’s position over another’s, as long as the contributor is an expert and other experts are also permitted to participate, it would seem to serve . . . input legitimacy’. On the other hand, the participation of ‘experts’ may mean a greater imbalance of power and influence within UNCITRAL, especially if the supposed expert organisations are perceived to be generally national rather than international in character.

The UNCITRAL Secretariat has said that the notion of ‘international organizations’ has been interpreted broadly as ‘encompassing regional and subregional organizations, as well as other organizations with demonstrated international expertise’. This introduces considerable flexibility, but the Secretariat has opened the door even further by stating

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31 ‘UNCITRAL Rules of Procedure and Methods of Work: Note by the Secretariat’ A/ CN 9/676 (2009) at para 32. The 2010 document A/CN 9/697 is terse on the point merely stating (at para 11) that the ‘Secretariat shall decide on the appropriate form that the assistance of outside experts may take depending on the needs of the Secretariat’.
that while it generally considers the international focus and membership of the organisation, the main criteria to be taken into account include its ability to contribute meaningfully to the deliberations in view of its recognised competence, experience or interest in the subject-matter under consideration and its role in representing a particular sector or industry.\textsuperscript{34} Effectively, this means that interest groups whose orientation is primarily national may participate, and the US-focused Commercial Finance Association (CFA) has played a leading role in the Secured Transactions Guide, sponsoring receptions and symposia and providing experts for the UNCITRAL working group sessions.\textsuperscript{35} Those participating in the working group on Insolvency Law included both the American Bar Association and the American Bar Foundation. Such bodies provide subject specialist knowledge and technical input but their very knowledge and expertise is liable to overwhelm most, if not all, national delegates. Such bodies may also have financial resources and commitment to the issues under discussion far exceeding that of national delegates. Evening up the playing field is not an easy prospect however, except by means of the increase of financial resources available to UNCITRAL for subsequent disbursement to poorly resourced States and groups seeking to participate in UNCITRAL activities. This matter links up with wider issues about UN funding that go far beyond the realm of legal harmonisation.

Similarly broad issues were implicated in the third issue raised by France, which related to the use of English language as the de facto working language within UNCITRAL. France considered that as Working Group documents were circulated solely in English, the status of French as an official UN language, and other UN languages, was being ignored. UNCITRAL offered some concessions in this regard providing for the possibility of translation of drafts and other relevant documents but only where resources permitted.\textsuperscript{36} Given, however, the status of English as the international language of business, it is difficult to see its supremacy within UNCITRAL diminishing. This is not likely to change even if the global influence of the US recedes, for emergent powers such as India and China are more conversant with English than with French, whose position as the language of diplomacy and business belongs more to the past than the foreseeable future. The fact that UNCITRAL work

\textsuperscript{34} Ibid at para 28.
\textsuperscript{35} See generally the CFA website: www.cfa.com.
\textsuperscript{36} ‘UNCITRAL Rules of Procedure and Methods of Work: Note by the Secretariat’ A/CN 9/697 (2010) at para 14: ‘The UNCITRAL secretariat is committed to endeavour, resources permitting, to provide at such meetings translation and interpretation in as many official languages as appropriate.’
is expanding beyond international trade law, narrowly conceived into business law more generally, also seems likely to strengthen the dominant status of the English language within the organisation.

THE SUBSTANTIVE WORK OF UNCITRAL

The best-known instrument promulgated by UNCITRAL has probably been the Vienna Convention on Contracts for the International Sales of Goods,\(^{37}\) which has gained a wide measure of international acceptance and adoption. The US, though not the UK, is among the list of adopting countries.\(^{38}\) But apart from the Sale of Goods Convention, UNCITRAL has also produced international instruments on many areas of procedural and substantive law such as international arbitration,\(^{39}\) e-commerce,\(^{40}\) international payments,\(^{41}\) procurement and infrastructure development,\(^{42}\) international transport of goods,\(^{43}\) and insolvency\(^{44}\) as well as secured credit.\(^{45}\)

On secured credit, UNCITRAL in the 1970s commissioned Ulrich Drobnig to produce a comprehensive report detailing the legal treatment of security interests in many jurisdictions.\(^{46}\) In the light of previous international harmonisation efforts, Drobnig’s report was not optimistic about the likelihood of framing international rules governing security interests, or even Model Laws, and gaining general acceptance for the

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38 For a list of the nations that have adopted the CISG in one form or another see the UNCITRAL website.
45 See generally S Bazinas ‘UNCITRAL’s Work in the Field of Secured Transactions’ above, note 1.
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same. The report suggested that it was likely to be only a small minority of cases where moral persuasion or intellectual insight into the virtues of harmonised rules would persuade States to adopt them though insistence by international financial institutions might induce acceptance in a greater number of cases. In the wake of the Drobnig report, UNCITRAL concluded that worldwide unification of the law of security interests in goods was in all likelihood unattainable.47 This was because the laws of States differed fundamentally at the time on matters such as the degree of formality needed to create a security interest; the extent to which non-possessory security was recognised; the validation of all-assets or floating security; the availability of a single unitary security interest over all the assets of the debtor; the extent to which security interests needed to be publicised by registration; and the possibility of out-of-court enforcement of security interests upon the debtor’s default.

The possibility of harmonising secured transactions law was revived in 1992 with a specific suggestion for harmonisation in the area of receivables financing.48 This suggestion led to two reports and the commencement of work on harmonisation. In 1995, UNCITRAL decided to develop uniform rules and mandated a Working Group to embark on the exercise.49 The result was the United Nations Convention on the Assignment of Receivables in International Trade, completed in 2001.50 The Convention tries to create certainty on the cross-border assignment of receivables, partly through ensuring the validity of cross-border bulk assignments as well as the assignment of future receivables.

UNCITRAL in 2000 once again started work on security interests more generally, not least because of the perceived inadequacies of domestic laws to support modern financing practices.51 It was noted that, in many States, there were limits on the use of non-possessory security rights in credit transactions. These limits included restrictions based on the identity of the debtor, the potential creditor, or the nature of the asset to be encumbered.52 In addition, there was a lack of clarity on priority rules that ranked secured creditors compared with competing claimants and problems relating to the enforcement of security rights. In cross-border

51 UNCITRAL Report on the work of its thirty-third session (A/55/17).
52 Ibid at para 41.
transactions it was noted that divergent domestic conflicts of law rules increased the risks associated with credit transactions and, by extension, the cost of credit. After a further study conducted in 2001, UNCITRAL instructed one of its Working Groups to commence work on the development of ‘an efficient legal regime for security rights in goods involved in commercial activity, including inventory’ and this work has led to the Legislative Guide.

UNCITRAL is not the only international legal organisation working on the design of an ‘efficient’ legal regime for secured transactions. The European Bank for Reconstruction and Development (EBRD) in 1994, the Francophone countries of West Africa (OHADA) in 1997, and the Organisation of American States (OAS) in 2002 have all produced Model Laws or Uniform Acts and done follow-up work of greater or lesser intensity. The World Bank has formulated principles for Effective Insolvency and Creditors Rights Systems (revised in 2005). The World Bank and a World Bank sister organisation, the International Finance Corporation, since 2002 have produced a series of reports designed to evaluate the ease of doing business across the globe. As part of the evaluation process, the Doing Business reports have made use of a ten-point template measuring the degree to which secured credit and bankruptcy laws in particular jurisdictions ‘protect the rights of borrowers and lenders’ and thus facilitate secured lending. More recently the World Bank Group has collaborated in the production of a diagnostic toolkit on ‘Secured Transactions Systems and Collateral Registries’.

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58 The template is available as Annex 3 to Secured Transactions Systems and Collateral Registries (International Finance Corporation, Washington, 2010).
on Private International Law in respect of intermediated securities, and the International Institute for the Unification of Private Law (UNIDROIT) more generally, have also been active in the secured transactions sphere. UNIDROIT’s work has led to international Conventions on International Factoring, International Financial Leasing and more recently on international interests in mobile equipment (the Cape Town Convention).

So UNCITRAL is not alone in its efforts and, while there is the risk of duplication and overlap, UNCITRAL work gains added credibility and legitimacy from its perceived representatives and its institutional aura as a United Nations organ. Its work in the secured transactions sphere has not stopped with the Legislative Guide however, nor even with the elaboration of an intellectual property annex. At a 2010 colloquium several possible topics for further work were considered including preparation of texts on registration of security rights in movable assets; security rights in non-intermediated securities as well as a possible Model Law on secured transactions or a contractual guide on secured transactions. Subsequently it was decided to give priority to the registration project on the basis that there was an urgent need for guidance to States in connection with the establishment and operation of security rights registries. UNCITRAL cautioned that secured transactions law reform could not be implemented effectively in practice without an efficient publicly accessible security rights registry. It was also considered that the Legislative Guide was not sufficiently detailed on the various legal, administrative, infrastructural and operational questions that needed resolving before a registry could be implemented successfully.

The focus of these international efforts has increasingly been on the ‘modernisation’ rather than the ‘harmonisation’ of secured credit law, or particular aspects thereof. For instance, the Preamble to the UNCITRAL Legislative Guide refers to a modernised law of secured credit worldwide whereas the original mission of UNCITRAL spoke of ‘unification’ and ‘harmonisation’ of international trade law. The question arises whether

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61 See www.unidroit.org.
64 Ibid at para 265.
the goalposts have shifted or whether the concept of ‘modernisation’ is encompassed in the notions of ‘unification’ and ‘harmonisation’? This issue will now be addressed.

HARMONISATION, UNIFICATION AND MODERNISATION

There is considerable ambiguity and divergence of opinion on the precise meaning of harmonisation.65 Jacob Ziegel, e.g., has remarked that harmonisation in this field of law is a word with ‘considerable elasticity [and i]n its most complete sense it means absolute uniformity of legislation among the adopting jurisdictions’.66 According to Loukas Mistelis ‘harmonisation is a process which may result in unification of law subject to a number of (often utopian) conditions being fulfilled, such as, . . . wide or universal geographical acceptance of harmonising instruments, and with wide scope of harmonising instruments which effectively substitute all pre-existing law’.67 David Leebron defines harmonisation as ‘making the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar’.68

The official UN records on the establishment of UNCITRAL speak of the ‘progressive unification and harmonization’69 of international trade law to be accomplished by various instruments. According to the Schmitthoff report, harmonisation was a technique for ‘reducing conflicts and divergences in international trade law’ and unification was the ‘most effective method of conflict avoidance’.70 It is implicit in this analysis that harmonisation involves the convergence of legal rules toward a common standard and that, over the long run, harmonisation would move towards

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69 Resolution 2102 (XX), but Resolution 2205 (XXI) which actually establishes UNCITRAL speaks of ‘progressive harmonization and unification’.

70 The ‘Schmitthoff Report’ (UN Doc A/6396) reprinted in (1966) 1 UNCITRAL Yearbook 2 and available online at www.unictral.org.
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a unification of legal rules. In other words, all jurisdictions would have the same legal rules applying to a particular transaction.

One could argue that the same vision of harmonisation permeates the UN General Assembly resolution creating UNCITRAL.\(^{71}\) This resolution asserted that ‘the extensive development of international trade’ was best advanced by removing ‘divergences arising from the laws of different States’. This definition conceives of harmonisation in terms of the convergence of non-uniform national laws around an agreed-upon international standard. At the same time however, it is a pragmatic and progressive definition in that harmonisation is not sought for its own sake but because international trade is seen as favouring the interests of all peoples and particularly those of developing countries. International trade cooperation among States is considered to be an ‘important factor in the promotion of friendly relations and, consequently, in the maintenance of peace and security’.

The overriding goal is facilitation of international trade and friendly relations among States, with harmonisation and unification of laws serving as means towards this end. Such a characterisation leaves some room for flexibility as well as a degree of ambiguity about exactly what is comprised in the notions of harmonisation and unification. The UNCITRAL website\(^{72}\) offers certain definitions and suggests that ‘harmonisation’ can be thought of as the process through which domestic laws are modified to enhance predictability in cross-border commercial transactions whereas ‘unification’ is seen as the adoption by States of a common legal standard governing particular aspects of international business transactions. Harmonisation is also distinguished from unification in terms of the international instruments most likely to be employed. Model Laws or Legislative Guides are seen as examples of texts that are drafted to harmonise domestic law, whereas a Convention is seen as an international instrument that is adopted by States for ‘the unification of the law at an international level’. There is room for a more nuanced analysis however. A Convention may not be an effective instrument of unification in that few States actually implement it. A Model Law, on the other hand, despite its softer character, may actually bring about more unification in practice in that more States are prepared to enact its provisions, whether in whole or in part.

‘Modernisation of laws’ as an objective was not actually spelled out when UNCITRAL was created in 1966, but if the expression ‘progressive’

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\(^{71}\) Resolution 2205 (XXI).
\(^{72}\) Available at www.uncitral.org/uncitral/en/about/origin_faq.html.
in the relevant resolution is given substantive content one could argue that it implies ‘modernisation’. The resolution emphasised that the progressive harmonisation and unification of trade law followed from the United Nations’ broader agenda of economic development and the promotion of friendly relations among countries.\textsuperscript{73} Call it ‘mission creep’ or the express iteration of implicit principles, UNCITRAL now defines its mission as the ‘modernization and harmonization’ of trade law.\textsuperscript{74} ‘Modernization’ has been expressly incorporated within UNCITRAL’s core function. Since 2000, in its annual reports to the UN General Assembly, UNCITRAL has set out the view that the progressive modernisation and harmonisation of international trade law reduces, or removes, legal obstacles to the flow of international trade as well as contributing significantly to ‘universal economic cooperation among all States on a basis of equality, equity and common interest’.\textsuperscript{75}

There may be considerable difference, however, between harmonisation and unification of existing bodies of national law and modernisation of such laws. Harmonisation might only intrude minimally on the legislative sphere of national States through the identification of common approaches among existing domestic laws. The consensus in the late 1960s understood ‘progressive harmonization and unification’ of trade law to mean the reconciliation of divergent practices and the expression of emerging international norms. The focus now on ‘modernization and harmonization’ sees UNCITRAL in a more pro-active light actively striving for the reform of global commercial law.\textsuperscript{76}

Law reform efforts of this kind may involve so-called ‘in with the new’ modernisation. Existing legal instruments at the national level are seen as inadequate to keep pace with technologically-driven or market-led innovations and indeed, regulation or prescription at the national level may be insufficient to cope with the task at hand in view of its international dimensions. Given the fact that the challenges and problems are transnational in nature, the ideal solution may be at the transnational level bringing about an internationally compatible and harmonised result. Electronic commerce is a good example of this. UNCITRAL in the form of a Model Law

\textsuperscript{73} See Resolution 2205 (XXI).
\textsuperscript{74} See www.uncitral.org.
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has addressed national legislatures about the shape and content of new regulations that are required by changed exigencies.77

There are other notable examples of ‘in with the new’ modernisation in the case of work done by other international actors. Where assets by their very nature regularly move across national borders, there is a plausible argument that security interests over such assets should be governed by a single set of rules that apply irrespective of where the encumbered asset, the security giver and the security taker are located.78 In this context, governments negotiated and adopted, under the auspices of UNIDROIT, the 2001 Cape Town Convention on International Interests in Mobile Equipment and various equipment-specific protocols. The Convention sidesteps the diversity of national laws on secured transactions by creating an international interest that gives financiers priority in the debtor’s insolvency. This international interest is recognised in all contracting States upon registration in an accessible international register. But the Convention also highlights some of the dangers associated with the entire modernisation process. The background includes the privatisation of many national airlines with finance increasingly coming from private rather than state sources and a desire by these private actors for recognition and protection of their security interests in such high-value assets. In the process leading to the Convention, interest groups representing the aviation industry were particularly active and their involvement may have led to ‘bright line’ rules in the Aircraft Protocol protecting security interests. The danger is of interest group capture and a perception that the rules are designed to suit the preferences of richer nations that play host to powerful lending institutions.79

These dangers are perhaps even more acute in the case of ‘out with the old and in with the new’ modernisation. In this scenario, there is a framework of national law on a particular topic but this law is considered to be inadequate by UNCITRAL or other international actors. It is not

77 See UNCITRAL Model Law on Electronic Commerce (1996) which according to its Preamble is intended to assist ‘all States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists’.


merely the case of filling a gap in the old law but also the rejection of existing law, and the creation of new law. For example, in its 2000 Report on Possible Future Work on Insolvency Law, the UNCITRAL Secretariat noted that an important justification for authorising the Working Group on Insolvency Law to begin its work on a Legislative Guide ‘was to modernize insolvency practices and laws’. Unlike the electronic commerce work in largely virgin territory, the Insolvency Legislative Guide sought to ‘modernize insolvency practices and laws’ by recommending to national actors that they reject their existing domestic insolvency laws in favour of more modern ones.

This form of modernisation represents a fairly acute form of incursion into the sovereignty of nation States and national legislatures. The existing efforts of at least some States are viewed as inadequate in the face of some modernist ideal hailing from outside. It may be that so-called ‘modernisation’ is really a euphemism for ‘adaptation of a weaker country’s laws in the direction of a powerful sovereign state or international organization which has the cultural authority to define the meaning of modern’. It is also the case that modernisation might work against harmonisation or unification since ‘modernisation’ relates to a revision of the law to meet new exigencies; revisions that might not be consistent with existing national laws or global norms. Secured credit supplies a prime example of this. Most jurisdictions have laws that permit the taking of security in a variety of situations but these provisions are far from comprehensive and may impose onerous formality requirements. Hence advocates of secured credit see the need for ‘modernisation’ that would make security easier to take and to enforce. For instance, a 2000 UNCITRAL report authorised work on the Secured Transactions Legislative Guide on the basis that ‘modernization and optimization of secured credit law can lead to expanded economic development and, therefore, promote the general welfare’.

Chapter 2 considers in more detail the case for harmonisation and modernisation of the field of international commercial law and Chapter 3 turns the spotlight on secured credit law, but it is appropriate now to

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81 See S Block-Lieb and T Halliday above, note 76 at 477 fn 6, and see generally the discussion at 475–478. See also L LoPucki Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts (Ann Arbor, University of Michigan Press, 2006) at 231: ‘Harmonization is a euphemism for forcing commercially less important countries to adopt the remedies and priorities of the commercially more important countries.’
consider the instruments used to accomplish international harmonisation and modernisation.

**WHAT INSTRUMENTS SHOULD BE USED TO ACHIEVE HARMONISATION AND/OR MODERNISATION?**

The classic method of private law harmonisation is that of the Convention, and UNCITRAL’s first international instruments directed to national actors are Conventions – namely, the 1978 Convention on Carriage of Goods by Sea and the 1980 Convention on Contracts for the International Sale of Goods. A Convention takes the form of a multilateral treaty with countries acceding to a single standard. The chief advantage of the Convention is that national actors are offered a single set of options around which to converge. This unifying ideal suffers, however, from practical limitations. Conventions are not self-enforcing and they require States to sign, ratify and accede to the terms of the Convention. States face more or less the binary choice of acceding to the terms of the Convention in full, or failing to follow it at all. Ratification, in particular, is a difficult process since in many countries, including the UK, it requires the passage of national implementing legislation and countries may not alter any part of the Convention to suit domestic political or legal differences. Legislative timetables are often crowded, and implementing legislation often requires overcoming the opposition of a powerful pressure group. It may be politically expedient for a State to sign a Convention but then it is put on the back burner at the politically difficult stage of ratification. The willingness of delegates from States to sign up to a Convention does not guarantee that States will necessarily ratify that Convention.

Braithwaite and Drahos in their seminal text on *Global Business Regulation* comment that Conventions as tools of private law harmonisation have not been particularly successful, with low ratification rates. Many such instruments remain ‘little more than a dead letter’. Even

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87 See M Bonell ‘Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts’ (1992) 40 AJCL 617 at 617; R Goode in...
getting to the stage of agreeing a Convention can be a fraught process. The Convention is essentially an ‘all or nothing’ instrument and requires zero-sum bargaining in order to reach agreement.88 A Convention is also rather specific and fragmentary in character – in short, an island of uniformity in a sea of disharmony. The costs, in terms of time and inconvenience, of securing subsequent amendments of a Convention may also be prohibitive. Agreement has to be reached afresh among States on the terms of any modification of the Convention and then the process of ratification and implementation gone through again. In short, the process of formulation and implementation of a Convention is time consuming and the prospects of subsequent adaptation are prohibitive.

The Model Law, on the other hand, is a much more flexible instrument, being a legislative text that UNCITRAL recommends for enactment but States may be permitted to exclude, or modify, some provisions.89 The Model Law sets a global standard, but it should be easier to achieve agreement on the text of a Model Law since it does not impose the same ‘all or nothing’ standard as a Convention. The conditions of implementation are also not as onerous, and essentially a Model Law acts as a spur to a reform-minded national legislature. Domestic law makers may take some or all of the provisions of the Model Law to update national legislation. As Roy Goode remarks:90

A model law proposes, in more or less detailed provisions, a way of regulating a certain type of transaction (for example leasing) or a certain area of law (such as international commercial arbitration). National legislatures are then free to either not make use of the proposal at all, to take the model law as it is and transplant it into their domestic law, or, finally, to adopt in part and provide for amendments and variations required by or considered to be desirable in light of a specific domestic situation.

‘International Restatements of Contract and English Contract Law’ (1997) Uniform Law Review 231 at 232 comments that while ‘many States participate in the work leading to a convention, for fear of losing the opportunity to influence its terms, most of them are likely to drag their feet for many years before ratifying the convention, if indeed, they ever get around to ratifying it at all’.

88 S Block-Lieb and T Halliday above, note 76 at 480.
89 See ‘Possible Future Work on Insolvency Law’ above, note 80 at p 42. See also the following comment by the Working Group at p 42: ‘A model law is an appropriate vehicle for modernization and unification of national laws when it is expected that States will wish or need to make adjustments to the uniform text to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary. . . . A model law would also be appropriate when the purpose of the uniform text is, on the one hand, to establish a standard of a modern law in an area where national systems are widely disparate, undeveloped or outdated and, on the other hand, to provide an incentive for a movement towards unification.’
90 R Goode et al. above, note 13 at 197.
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While a Model Law may appear to be a less harmonising instrument than a Convention, the appearance does not necessarily square up to the reality. Its form may encourage both agreement on a wider set of provisions than can realistically be achieved through the mechanism of a Convention and also a higher take-up rate than could be accomplished with a Convention. Indeed, the Model Law technique has been described as ‘breathtakingly successful in some instances’. The usefulness of a Model Law is enhanced where it is coupled with a guide to enactment that explains its terms to national policy makers and advocates the enactment of implementing legislation. In general, guides to enactment set out background information including information on the different policy decisions; they explain decisions that have been reached in framing the relevant provisions and generally assist legislatures in arriving at coherent choices. Model Laws do not necessarily contain a ‘one size fits all’ approach and UNCITRAL has increasingly recognised that domestic legislatures should be presented with a wider canvas of choices rather than only acceptance, or rejection, of the Model Law provisions in their entirety. A variety of legislative responses should be possible, and the emphasis placed on guides to enactment ties in with this recognition.

UNCITRAL has also distinguished between two types of Model Laws, with the Model Law on International Commercial Arbitration and the Model Law on Electronic Commerce being singled out as illustrating the flexibility of the form. The Model Law on Commercial Arbitration has been described as a procedural instrument, providing a discrete set of interdependent articles, and it was suggested that, in adopting the Model Law, very few amendments or changes were required. ‘Deviations from the Model Law text have, as a rule, very rarely been made by countries adopting enacting legislation, suggesting that it has been widely accepted as a coherent model text.’ By contrast, the Model Law on Electronic Commerce has been described as more conceptual, establishing a set of model principles. These are drafted in the form of legislative provisions to facilitate consideration by legislatures and assist in the development

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91 Ibid at 198.
92 See ‘Possible Future Work on Insolvency Law’ UNCITRAL Working Group on Insolvency Law, 22nd Session (6-17 December 1999), A/CN 9 WG V/WP 50, which adds at p 42: ‘The guide might include, for example, information that would assist States in considering what, if any, provision of the model law might have to be varied to take into account particular national circumstances, as well as information relating to discussions in the Working Group on policy options and considerations. In addition, matters not addressed in the text of the model law may be included in the guide by way of further explanation and guidance to States enacting the model law.’
93 Ibid at 42.
of laws. It was suggested that legislation adopting the Model Law should largely reflect the principles of the text, but could depart from it in terms not only of drafting, but also in the combination of provisions proposed for adoption.\(^94\)

The more 'conceptual' form of Model Law has the advantage that if a UNCITRAL Working Group cannot achieve consensus on some provisions, the complete project need not be abandoned in favour of a more limited set of prescriptions that do not cover the same field. Alternative provisions may be included in the Model Law with the choice left open to domestic legislatures, or the latter may be permitted to exclude certain provisions in deference to local social or cultural norms that may be at variance with the international norms of the Model Law.\(^95\) In this scenario, guides to enactment can explain how the alternatives might work in practice as well as elaborate upon the competing policies and principles that are contained in the choices being offered. The existence of alternatives in the Model Law, as well as the possibility of exclusions, promotes a softer notion of harmonisation that is consistent with the reduction of differences over time.

The focus on 'modernisation' rather than 'harmonisation' has also encouraged a move away from rigid Conventions. There is a need for supple instruments that offer flexibility in reforming a broad range of laws, especially with the benefit of time and incremental progress. The rigidity and inflexibility of Conventions leads to the exclusion of issues where delegates cannot reach consensus or, worse still, agreement among delegates on a form of words but no agreement as to the meaning of those words. Such reliance on compromise language either leaves an issue unresolved or muddier than before. The changing context, and the development of the modernisation mission, has encouraged UNCITRAL to make use of new forms of modernising instruments that vindicate that mission. Uniformity may be unnecessary to the goal of modernisation and indeed may hinder it on occasion. Therefore, it is inappropriate for law reform projects with the modernisation mission in mind to rely on Conventions that are intended to produce a single, uniform legal standard.\(^96\)

But even a Model Law may be insufficiently flexible to respond to the modernisation agenda. For instance, in 1981 the UNCITRAL Secretariat reported success on its initial 'four fields of interest: the law of international sales of goods, carriage of goods by sea, international

\(^95\) S Block-Lieb and T Halliday above, note 76 at 495–496.
\(^96\) Ibid at 478.
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In each of these fields, ‘comprehensive texts’ had been adopted but the Secretariat added that ‘[t]he subject matter of the Commission’s new programme of work does not always require a comprehensive solution. . . .The difference in magnitude of the problems considered may have an impact on the final form which the Commission’s work might take.’ It was suggested that, if it was not feasible for UNCITRAL to suggest a text in a form that was suitable for adoption, then it might instead adopt a ‘guidelines approach’ on the basis that ‘the development of guidelines or recommendations may be an appropriate first objective, leaving until later a decision as to whether further actions are desirable’.

A standalone Legislative Guide seems particularly appropriate when law reform seeks to reject law that is supposedly outmoded in favour of new, and more modern, principles. Other international instruments are less well suited to this task. With Model Laws there is somewhat greater latitude in that domestic legislation may be enacted that adopts some, but not all, provisions of the Model Laws. One is stretching the concept of a Model Law very far however, if States are regarded as given a fairly free hand to choose among the provisions of a Model Law. For this reason, it is not altogether surprising that both the Insolvency and Secured Transactions Working Groups opted to work on Legislative Guides, rather than a Model Law or Convention. The UNCITRAL Secretariat, in ‘selling’ to the Commission the task of taking on work in the insolvency and secured transactions fields, commended the flexibility of Legislative Guides as a form, particularly in light of the lack of global consensus on these issues. A propos insolvency, the Secretariat said: It is not always possible to draft specific uniform provisions in a suitable form, such as a convention or a model law, for incorporation into national legal systems. One reason may be, for example, that national legal systems use widely disparate legislative techniques and approaches for solving a given issue, or that

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98 See R Goode et al. above, note 13 at 200: ‘Guides are truly educational exercises, the authors being the teachers and the government officials and parliamentarians being the pupils: a guide discusses in depth the structure of legal problems (for example, the taking of security in movables, the issues to be dealt with in the contract between franchisor and franchisee), including their economic, technical and other factual background, outlines possible solutions and explains the underlying legal concepts, and ideally concludes by making recommendations.’
99 See the discussion in S Block-Lieb and T Halliday above, note 76 at 491–493.
States are not yet ready to agree on a common approach or a common rule. A further reason may be that not all States perceive a sufficiently urgent need to find a uniform solution to a particular issue. . . . It may be appropriate not to attempt to elaborate a text in the form of a model statute, but to limit the action to a set of principles or legislative recommendations.

Similar sentiments were articulated within the Secured Transactions Working Group. Before beginning the drafting exercise, the Working Group considered the merits of a ‘convention unifying substantive rules governing security interests’, a ‘convention establishing uniform conflict rules’, a ‘convention or model law creating an international security interest’, a ‘statement of principles accompanied by a model law’ or a ‘statement of principles accompanied by a legal guide’. The Convention option was ruled out because national legal systems were considered to be too divergent and because a Convention would not be sufficiently flexible to take into account the diversity of circumstances across the world. There was more support for the idea of a Model Law and it was suggested that a comprehensive Model Law had the potential to bring about the greatest possible benefit. On the other hand, the UNCITRAL Secretariat hedged its bets, stating that ‘to the extent that such a model law would need to reflect certain fundamental guiding principles that would not be common ground to all legal systems, it would represent a significant change from current law in many countries’. Therefore, it was cautious about the prospects of such a Model Law gaining general acceptance. While it ventured the view that a Model Law would be more desirable from the point of view of completeness and uniformity, it also observed that a set of key objectives and core principles along with a legislative guide ‘would still be sufficiently useful to justify future work’.

Legislative Guides are a malleable mechanism but the recommendations therein contained may be couched in a harder or softer form and they may reflect different orientations, whether pluralistic, or tending to mirror the norms of a hegemonic State. At the risk of over-simplification, the Insolvency Legislative Guide is more the former and the Secured Transactions Guide more the latter. The Insolvency Guide was a pragmatic response to address the diversity of insolvency laws among nation States and it was widely believed that policy differences were too deeply

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102 Ibid at para 46.
103 Ibid at para 50.
104 Ibid at para 62.
embedded in States to permit agreement on either a Convention or Model Law. Thus, the flexible alternative of a set of principles embodying legislative recommendations was seized upon. It was envisaged that these principles and recommendations would be of assistance in reviewing the adequacy of national laws and similar legislative texts in the insolvency field. They would set out a list of possible legislative solutions on certain issues, but not necessarily a single set of model prescriptions for the issues addressed.

The Insolvency Guide combined principles with recommendations, choices with justifications and options with explanations. The Insolvency Guide has been praised for employing a sophisticated repertoire of rules, organised in a hierarchy of specificity or generality that depends on the type of consensus that could be reached on a particular issue. It is suggested that this array of rule-types contains ample flexibility to deal with cross-national variability on issues. For instance, where it did not seem possible to obtain consensus on the content of a particular rule, consensus could be achieved on the need for some sort of rule (‘architectural’ recommendations) coupled with acceptance of the principle that the rule should be clearly and expressly stated in the insolvency law. The Legislative Guide on Secured Transactions follows the same basic approach but is much more prescriptive in tone, leaving less leeway to national legislatures. Less use is made of so-called architectural recommendations and the Secured Transactions Guide also keeps very closely to the contours of American law, leaving less room for competing principles in other national legal systems to come into play.

CONCLUSION

UNCITRAL was established as a specialist organisation within the United Nations family to facilitate international trade. Its original mission was spoken of in terms of the progressive unification and harmonisation of the law of international trade. UNCITRAL has interpreted its mission flexibly by placing greater emphasis on modernisation rather than harmonisation. ‘Modernisation’ is interpreted as being within its remit on the basis that international trade is best facilitated by a modernised law. The international Convention is the classic vehicle by which international trade law is harmonised but UNCITRAL has made increasing use of Model Laws and Legislative Guides to keep pace with the modernising agenda.

105 S Block-Lieb and T Halliday above, note 76.
The Legislative Guide is a particularly flexible tool in that it contains policy prescriptions, recommendations and explanations for action rather than just a ‘take it or leave it’ diagnosis. Legislative Guides, however, come in different shapes and sizes and may be more or less imperative and prescriptive. They may also come with different biases and orientations. This chapter has outlined a difference in approach between the Insolvency Legislative Guide and the Secured Transactions Legislative Guide. This difference will be further considered and elaborated upon in subsequent chapters, but first it is necessary to address the case for modernising and harmonising international commercial law as the Secured Transactions Legislative Guide purports to do.