

The 21th Biennial Meeting of the International Academy of Commercial and Consumer Law

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ABSTRACTS OF THE PRESENTATIONS:

Global Value Chain from a Viewpoint of Conflict of Laws

Toshiyuki Kono, Kyushu University, Japan

In recent times, several national laws have been enacted to address value chains and the protection of human rights and the environment. Examples of these laws include the Dodd-Frank Act in the USA (2010) and the Modern Slavery Act in the UK (2015), which introduce reporting obligations on human rights issues. Similarly, the French "loi de vigilance" (2017) and the German "Lieferkettengesetz" (2021) impose due diligence requirements. The French law primarily focuses on civil liability, while the German law emphasizes regulatory control. These laws are intended to apply not only domestic companies but also to companies in third countries that meet specific criteria. In contrast, the Japanese Government issued Guidelines on Respecting Human Rights in Responsible Supply Chains in 2022 but has not yet developed a concrete plan for a binding law.

Currently, global value chains are subject to a combination of hard laws, soft laws, or no regulation at all. These hard laws vary in their scope, legal mechanisms, and effects. The European Union is working on a new directive for corporate sustainability due diligence, aiming to harmonize laws within the EU. However, the complexity of conflicts of laws on a global scale will likely persist for the foreseeable future. In my opinion, this complexity arises from two types of conflicts: (1) conflicts between public laws and (2) conflicts between private laws. My paper mainly focuses on the former issue, which was not much discussed so far, and examines the reasons and necessity for finding a solution to conflicts between public laws.

The Role of Uniform Private Law Instruments in Global Agricultural Value Chains

Ignacio Tirado & Anna Veneziano, UNIDROIT

Global value chains in general, and food value chains in particular, have suffered unprecedented disruptions and distress in the last few years, due to the effects of the pandemic, first, and war immediately thereafter. This has heightened the attention of legislators on the most suitable legal responses to

strengthen the effectiveness, fairness, sustainability, and resilience of global value chains, with particular regard to the needs of MSMEs and developing economies. The solution, however, cannot be limited to domestic legal reform, nor -we contend- should it be confined to national law-makers. In order to revive investment, bring credit to pre-Covid numbers, and ensure economic growth, two elements might prove key: a modern, state-of-the-art legal framework, and enhanced legal certainty. Both objectives can be achieved through the implementation of transnational law instruments, which not only represent best practice but have also the potential to substantially bolster trust and clarity in legal frameworks.

In order to substantiate this point, the paper's aim is to briefly present some of UNIDROIT's instruments best suited to modernise and underpin the law regulating the supply chain, with a particular view to the agricultural sector. To this end, we divide the paper in four parts: a first part looks at the transactional element of the supply chain (focusing on the Unidroit Principles for International Commercial Contracts (U PICC) and the contractual structures envisaged in the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming); a second part considers access to credit (focusing on how the MAC Protocol to the Cape Town Convention, or the newly approved UNIDROITs Model Law on Factoring and the future UNCITRAL/UNIDROIT Model Law on Warehouse Receipts offer harmonised legal guidance to legislators wishing to strengthen the opportunities for producers to access finance at limited cost); a third part addresses international investment in land for agricultural use, with a brief account of the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts; and, finally, a fourth part dwells upon UNIDROIT's current project on Legal Structure of Agricultural Enterprises, together with FAO and IFAD. The paper will finally present some considerations on the effectiveness of "soft law" guidance instruments developed internationally in shaping the governance of global value chains.

The Role of Defective Product Liability in Regulating Global Value Chains

Teresa Rodríguez de las Heras Ballell, University Carlos III of Madrid, Spain

The extraordinary growth of the digital economy has profoundly transformed Global Value Chains (hereinafter, GVCs). It has provided supply chains with new tools and models for organizing and structuring the 'activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company'.

On the one hand, digital technologies have enabled businesses to enlarge, expand, and optimize their distribution channels and commercialization practices, to strengthen the relationships with their customers, to monitor the upstream and downstream activities, and to highly personalize and effectively target the provision of products and services at a global scale.

On the other hand, beyond these visible and notable benefits for the effectiveness of traditional supply chains, the digital economy has had a more substantial and structural impact on GVCs with the irruption and pervasive presence of digital platforms. The transition from a digital economy to a genuine platform

economy driven and dominated by digital platforms has also prompted a radical transition in value-chain models. Platforms have not only emerged in the market as new players and significantly shortened supply chains removing intermediaries. First and foremost, platform-models have redesigned supply-chain schemes. In the platform economy, GVCs have evolved from the classical linear, sequential model ('pipeline model') to more diverse and sophisticated network-based models.

Thus, GVCs are not to be built as a mere chain of inter-firm contractual relationships, but they emerge as networks, ecosystems or increasingly complex organizational models. The classical idea of 'contractual cascading' describing the traditional governance model of supply chains needs to be recontextualized in GVCs that operate as platforms, multi-party agreements, networks or decentralized models (DLT-based models). Instead of a cascade of inter-firm contracts, these GVCs operate on the basis of multilateral agreements, consensus-based decentralized schemes (DLT) or a combination of agreements between the parties and the operator of the platforms and agreements between the parties within the platforms. Contracts are the essential building blocks of supply chain contracting, but also of the different governance models and practices. GVCs rely on contracts as governance devices. Contracting techniques in GVCs organize cooperation.

Under a diversity of governance models (networks, platforms, multi-party contracts, collaborative or associative schemes), one party may be entrusted with certain supervisory and governance powers. Governance models for GVCs have radically been reshaped to accommodate a variety of networked structures, decentralized schemes or platform-driven GVCs.

The Paper is aimed first **to acknowledge this structural transformation of GVCs** and to explore the models emerging from such a transition from linear supply chains to network-based GVCs and how governance models have evolved accordingly.

As the result of this transition, platforms have gained a paramount, multi-faceted role in GVCs. While the prominence of the role of platforms is undeniable, the legal characterization of their role is, nevertheless, still uncertain and debated. Whether platforms purportedly participate or simply unintendedly become importers, distributors or supplier throughout the value chain depend upon a number of factors from the platform design, to the contractual and algorithmic governance models. Courts have addressed these questions in a variety of platform cases and developed criteria (decisive influence, control, users' expectations) so as to assess the role of the platform operator in the deployment of supply activities.

The Paper **presents these criteria and explores the various position that platforms may hold within the value chain.**

Against such a backdrop, the Paper dives into the **possible (regulatory) role that rules on defective product liability may play in GVCs.** Product liability regime sets a cascade of liable economic operators that closely follows a classical supply chain. Such a waterfall approach for product liability establishes a natural regulatory framework throughout the supply chain and discipline due diligence actions, policies, and

practices along the GVCs. In ensuring that the efficacy and the effectiveness of the product liability rules are preserved in modern GVCs, the product liability regime has to accommodate to the above-described emerging models and structures. The product liability framework should be suited to the modern architecture of GVCs.

The Paper addresses these challenges and explores the needed adaptations. In particular, the Paper analyses in more detail the recent proposal of the European Union to revise the European Directive on liability for defective products that, among other substantial amendments and improvements, provides for the liability of platform operators (under very specific conditions) for the defective products placed on the market 'through the platform'. Even if, and when, the platform is not a distributor, importer or supplier in the traditional definitions of these operators, the proposal includes (in very specific circumstances though) platform operators in the classical cascade of liable operators in GVC, together with other new players in the traditional terrain for supply chains such as fulfilment services providers.

The perceived need for these amendments in the product liability rules is precisely the transformation of GVCs and, in particular, the entry of other market players in the global scene whose role, albeit uncertain, ambiguous or simply polyhedral from a legal viewpoint, is prominent and instrumental in modern GVCs.

The expected outcome of such amendments is that defective product liability rules reinforce and expand their function as a regulatory tool in GVCs disciplining inter-party relationships throughout and within the chain, and, more importantly, defining due diligence obligations and measures. Defective product liability rules devise an incentive-allocating scheme within the GVC. Thus, platforms would implement mechanism and adopt policies to control, trace and monitor, and prevent the defectiveness of products offered/commercialized/placed on the markets. The exposure of platforms, in particular, to potential liability for defective products needs to be put in context with the liability exemptions ('safe harbour') platform operators may benefit from and aligned with other due diligence obligations platforms are subjected to (traceability of traders, content moderation, complaint-handling mechanisms, transparency, compliance by design, risk assessment, etc).

Corporate Sustainability Due Diligence and Liability – Developments in the EU

Yesim Atamer, University of Zürich, Switzerland

The Sustainable Development Goals of the UN (2015) mandate countries to protect human and social rights, to prevent resource depletion and environmental degradation, to foster sustainable and inclusive growth, and to endorse transparency and long-termism in economic activities. Even though international trade has been the main driver of economic growth around the world, this often went hand in hand with severe negative externalities, especially adverse impacts on human rights and the environment. Therefore, the quest for the most effective regulatory techniques to eliminate such adverse impacts gained immense momentum. The aim of the presentation is to depict the development of two such techniques -corporate sustainability reporting and corporate sustainability due diligence- in the EU and some selected countries

in Europe. The trend towards introducing effective private enforcement mechanisms, like tort law based damages claims, is apparent.

The East-Mediterranean Gas Forum as a Platform for a Regional Energy Treaty

Igor Klotsman & Arie Reich, Bar Ilan University, Israel

This article explores the potential of transforming the Eastern Mediterranean Gas Forum (EMGF) into a robust and legally binding energy organization through the creation of a regional energy treaty. The Eastern Mediterranean region has experienced significant natural gas discoveries, which have created both opportunities and challenges, including energy security issues, geopolitical tensions, and disputes over maritime boundaries. The EMGF was established as a platform for dialogue among gas-producing countries but lacks legally binding obligations and dispute settlement mechanisms. To address these limitations, the article proposes a legal framework similar to existing energy and trade agreements, aiming to enhance the stability, economic growth, and sustainable development of the region. Key provisions of the treaty would focus on transit, trade, investment, and environmental protection, facilitating regional energy integration and minimizing the environmental impact. The inclusion of a dispute settlement mechanism would promote stability and efficient conflict resolution. Furthermore, the article suggests expanding the EMGF's scope to include renewable energy, contributing to energy security and global climate change mitigation efforts. By establishing a regional energy treaty, the EMGF can evolve into an effective organization that ensures uninterrupted and risk-free energy activities while promoting energy security and cooperation in the region.

Regulation of Global Value Chains: Canadian [in]Action?

Genevieve Saumier & Catherine Walsh, McGill University, Canada

States are facing ever-increasing domestic and international pressure to adopt a hard (or at least harder) law approach to the responsibility of their domestic private entities to detect, manage and remediate international human rights and environment harm violations committed by subsidiaries and partners in their supply chains. Our presentation reviews the evolving Canadian response to the ongoing demand for mandatory human rights due diligence (HRDD) laws.

Part I examines jurisprudential developments. Canadian courts have been increasingly open to retaining jurisdiction over litigation aimed at holding Canadian companies responsible for human rights violations committed abroad by their subsidiaries and supply chain partners. But developments to date have mainly resulted in the loosening of barriers – notably the *forum non conveniens* doctrine – at the jurisdictional level. At the applicable law level, the prospects are far more uncertain. Canadian choice of law rules direct application of the law of the tort – understood generally albeit with provincial variations and exceptions – to mean the law of the state where activity giving rise to the harm occurred. The Supreme Court of Canada has very cautiously opened the door to the possibility that enterprises might be liable under customary international law. And appellate decisions have accepted the possibility that enterprises might be held to a

civil duty of care with respect to their voluntary due diligence obligations. While case by case litigation is unlikely to yield systematic hard law solutions and certainly not in the near to medium term, the allegations of human rights abuses and environmental harms committed in Canadian corporate supply chains that have been exposed by the cases have added fuel to the persistent and growing demands by civil society and human rights organizations for mandatory HRDD norms.

Accordingly, Part II of our presentation turns to the current and pending state of play in Canada on the legislative and institutional fronts. We focus first on the very recently adopted *Fighting Against Forced Labour and Child Labour in Supply Chains Act* and the two Canadian non-judicial recourse mechanisms for complaints, the Canadian Ombudsperson for Responsible Enterprise launched in 2019 and the Canadian National Contact Point established under the *OECD Guidelines for Multinational Enterprises*. Despite deserved criticisms of these modest initiatives, we see reason for optimism going forward. Against the backdrop of these criticisms and the federal government's release in 2022 of a new and enhanced corporate social responsibility strategy (*Responsible Business Conduct Abroad: Canada's Strategy for the Future*), recent government announcements suggest that some version of several harder law bills currently languishing at first reading in the Canadian Parliament may be revived in the coming several years. In addition, the experience with Canada's 2015 *Extractive Sector Transparency Measures Act*, which is largely in line with European, UK and Norwegian legislation, suggests that adoption of the EU's *Corporate Sustainability Due Diligence Directive* (depending of course on its ultimate content), may do much to palliate the concern of Canadian businesses about the impact on competitiveness of Canada moving further along the mandatory due diligence legislative spectrum.

We conclude on a note of caution. Corporate due diligence standards, however robust, cannot by themselves ensure global human rights justice. And we must be mindful of the growing practical and legal difficulties faced by private sector companies seeking to conduct due diligence audits throughout far-flung supply chains.

Approaches to Modern Slavery in Supply Chains in Australia and the Pacific

Mary Hiscock and John Farrar, Bond University, Australia

In the area of our inquiry, the supply chain of foreign labour for agriculture, there is a widespread recognition of the risks of exploitation. The existing accepted legal concept of slavery has been enlarged to encompass a range of situations as modern slavery, such as forced labour and debt bondage. Australia has regulation as part of federal criminal law and has, to some extent, privatised its operation by placing on large Australian entities the responsibility for investigation and disclosure of modern slavery in their operations and supply chains. The use of criminal law reflects the absence of a general framework of enforceable human rights in Australian law and carries the intrinsic issues of enforcement and appropriate penalties.

The recent statutory review of the Modern Slavery Act has found that the legislation has achieved a measure of transparency, accountability, and cultural awareness, but has not been effective in reducing

instances of modern slavery. The field of agriculture and horticulture is perceived as “high risk”. The recommendations include the introduction of mandatory due diligence, but on a staggered scale to take account of entity resources. It is not yet clear which recommendations the Australian government will accept. The legacies of history are a critical part of the culture, and this varies from zone to zone in the Asia Pacific.

Global Trends in the Legal Recognition of Electronic Transferrable Records: Putting the Wind in the Blockchain B/L Sails

Caslav Pejovic, Kyushu University, Japan

In recent years, several countries, including Singapore, the UK, and Japan, have advocated for legislative measures to ensure the legal validity and enforceability of electronic trade documents, such as electronic bills of lading, in relationships extending beyond the contractual parties. Lawmakers paid particular attention to how possession should be applied to electronic trade documents. The intangible nature of electronic trade documents presents a fundamental challenge as they cannot be possessed and do not function in the same manner as their paper counterparts. One key terminological issue revolves around using the term “control,” which lacks a universally accepted legal definition and varies across jurisdictions. In the electronic environment, possession is substituted with the notion of “exclusive control,” as introduced by the Rotterdam Rules and incorporated by the UNCITRAL Model Law on Electronic Transferable Records (MLETR). Various jurisdictions employ distinct terminology, such as the UCC’s “control of electronic document of title”, the Singaporean SETA’s “exclusive control”, and the likely extended use of “possession” for electronic trade documents in the UK. Given these divergent approaches, an essential aspect to address is whether there is a necessity to harmonize the concept of control.

Functional equivalence in the UK: legislating for electronic trade documents

Luise Gullifer, University of Cambridge, United Kingdom

This presentation will discuss the UK’s approach to electronic trade documents. After a Law Commission report on the subject, a Bill is still currently going through Parliament, although it is likely to become law in the next few months. Unlike other countries, which have enacted the UNCITRAL Model Law on Transferable Electronic Records nearly verbatim, the UK took a different approach. The Bill is very short and focuses nearly entirely on creating functional equivalence, so that an electronic document which can be controlled, and which includes the information which would lead it to be a “trade document” if in paper form, can be possessed. This has the effect that the previous law, built up over centuries, relating to paper trade documents now applies to electronic trade documents as defined: the core of functional equivalence. This minimalistic approach is elegant, and has been effective in the UK in getting a Bill nearly through Parliament, when a longer and more complex bill would probably not have been sponsored and introduced to Parliament.

Who should Make International Commercial Law?

Susan Block-Lieb, Fordham Law School, and Jerome Sgard, USA

In the common narrative, the story of free trade started in earnest in the mid-nineteenth century, first, in 1846, with Parliamentary abolition of the Corn Laws, followed by the 1860 Anglo-French commercial treaty. Brought together, these two events ushered in a period marked, at least in Europe, by lower custom tariffs and growing cross-border trade. The usual perspective also assumes, somewhat summarily, that efforts to remove obstacles to international trade other than tariffs broadly belong to the post-1980s era, with two starting shots: the 1994 TRIPs accord on intellectual property rights and trade in services and the broader, more comprehensive, 1992 EU Single Market project.

But this common narrative misstates the historical narrative in that it misses early efforts to resolve 'non-tariff' obstacles to global trade. It does this because the consensus on free trade neglects, analytically and historically, what should be viewed as the primary form of non-tariff barriers to international trade: obstacles to trade that stem from judicial borders between states and, beyond, from differences in basic market rules, like contract law, incorporation, bankruptcy, debt, etc. Early-modern European trade rested on loosely unified trade law and practices, i.e., the law merchant or *Lex Mercatoria*, and on the typically city-based merchant courts, tied together by ad hoc or customary rules of coordination, that looked to this law merchant to resolve commercial disputes. But this early legal framework proved increasingly wanting as a consequence of the growing levels of exchange prompted by freer trade, and of diminishing uniformity given the emergence of modern Nation-States built around strong, hierarchic legal and judicial orders. Over the course of the nineteenth and twentieth centuries, national borders became more institutionalized, ever more policed, and harder for commercial actors to negotiate (or fudge). This conventional free trade story is, on one hand, perfectly consistent with the sovereignty-based, Westphalian order (and classic international law) history of 'modern' international law but, on the other, it ignores efforts from the moment of the repeal of the Corn Laws to resolve the non-tariff barriers to trade that tariff reforms revealed.

This apparent failure of policy is, we argue, better conceived of as a failure of historiography. This article discusses how the problem came to be perceived in the middle of the nineteenth century, in what we assume was its first modern expression, and how it was thereafter thought about and addressed. Specifically, we argue that, concurrent with repeal of the Corn Laws and broadening reduction in tariffs across Europe, a number of institutional and policy entrepreneurs identified legal and judicial coordination as the 'next issue' for resolution beyond tariff reduction if the promises of peace and prosperity were to be fulfilled. These entrepreneurs defended an emerging conception of 'international market governance' that was substantially more complex and forward-looking than what the usual references to free-trade and the most-favored-nation clause suggest about this era. Because these early efforts to resolve non-tariff obstacles to trade did not immediately succeed, the significance of these proposals was mostly suppressed in favor of the common narrative and its emphasis on the post-1980s.

Part One of this article discusses the contents and importance of the publication in both England and France, almost at the same time, of comparative studies involving large collections of foreign laws, both civil and commercial, by two remarkable institutional entrepreneurs: Anthoine de Saint-Joseph in Paris and Leone Levi in Edinburgh and London. Saint-Joseph was backed by the French Ministries of Commerce and Foreign Affairs. Levi, an émigré and institutional outsider, drew on Saint-Joseph for inspiration, but was also more ambitious than Saint-Joseph: on the back of Levi's editorial success in Britain, he launched a remarkable, in fact, an extraordinary, campaign to address the problem that these books revealed: the divergences between national legal systems was becoming a serious, unnecessary obstacle to trade.

Parts Two and Three detail this campaign and show that Levi was not merely a lonely prophet, shouting from the mountains, but that he, too, was supported by influential persons. Part Two describes that, in 1849-1853, Levi made several related proposals to coordinate commercial interests, modernize commercial laws and dispute resolution mechanisms, and enhance trade between nations. These proposals were vetted publicly by Levi through publications and pamphlets, as well as lectures hosted either by municipal leaders, religious leaders, or Chambers of Commerce. With the latter of these proposals, Levi sought permission from Prince Albert to convene an international diplomatic conference – specifically, he proposed that Chambers of Commerce from 'Christian, civilized countries' should be invited to meet at an international conference composed (at least in part) of merchants, industrialists, and bankers; that this conference would draft an international code of commercial law premised on the 53-jurisdiction comparative text Levi recently had published, and thereafter ask governments to endorse this draft code. Levi also suggested that the conference would take place contiguous with the Great Exhibition held in London in 1851, which Albert was charged with organizing.

Part Three describes Levi's influence outside Great Britain. Levi followed his proposal to Prince Albert with a nearly identical proposal to Napoleon III, then Emperor of France, although in this case the diplomatic conference would be held contiguous with the Universal Exhibition of Products and Industry to be held in Paris in 1855. Both proposals were turned down, but not until after prompting first the attention and review of Prince Albert and later of "le Petite" Emperor Napoleon and his Council of State – the *Conseil d'Etat*.

Part Four reflects on the significance of these efforts, both in terms of the Victorian and modern policy agents who considered the proposals. We conclude by noting that Levi was listened to by Prince Albert and Napoleon III because what he said about non-tariff obstacles to trade made sense to governing elites, even though they did not agree with the specifics of his policy conclusions. The rhetoric surrounding his proposals might also have gotten in the way. Levi's language of international codification drew strongly on the rhetoric of Jeremy Bentham and the Peace Congresses Bentham inspired, which may have contributed to the controversy surrounding the proposal. That Levi's proposal was framed as an effort to elicit an international code of commercial law similarly resonated with French legal culture and, at the same time, prompted the *Conseil d'Etat* to reject the proposal as both duplicative and dismissive of French civil law.

Leone Levi failed in both countries and was soon mostly forgotten. Still, Levi remains significant in the long arc of the history of 'global market governance' for at least two reasons. First, proposals to draft and adopt 'international codes' of private law have regularly emerged since Levi's suggestion, often with references to him, although inter-governmental efforts to unify private law did not solidify until the twentieth century. Second, even where unification through codification of substantive commercial law was not attempted -- for example, through networks of standardized contracts fitted with choice of law, choice of court, or arbitration clauses within their terms, or through international agreement on coordination of the procedures for dispute resolution -- initiatives short of international codification were viewed as second-best, pragmatic but imperfect means for obtaining the ideal of uniformity in governing law. As a result, three solutions to the problems of non-tariff obstacles to cross-border trade continue to coexist to this date: standard contracts, which can be seen small 'portable codes' (e.g., the standardized contracts promulgated by international associations centered on trade in corn, silk, multi-modal shipping, swaps and derivatives); unified laws promulgated by inter-governmental organizations (Hague Conference on Private International Law [HCCH], the International Institute for the Unification of Private Law [UNIDROIT], and the United Nations Commission on International Trade Law [UNCITRAL]); and international commercial arbitration (whether you see arbitration as a specific application of choice of law and choice of court arrangements or as the source of a new *Lex Mercatoria*).

The Paying Bank's Duty of Care

Sandra Boysen, National University of Singapore

A duty of care in the common law can arise in contract or in tort (delict). As a general rule, the courts are conservative about recognizing a duty of care for economic loss in tort, and are more comfortable doing so based on the terms of the parties' contract. As a general rule, service providers such as banks are expected to render their services to their customers with care (without negligence). Since most payments by a bank are made pursuant to a contract with the payer, it is quite settled that payments must be executed by the bank with care. Recent cases in the English courts have questioned the ambit of this duty of care. It generally has little relevance where the bank has paid without the customer's authority as the bank has a strict duty (irrespective of fault) to pay only with a customer's authority. Historically, the duty of care has found application where a customer's authorised agent abuses his/her authority and makes fraudulent payments out of the customer's account – so called internal fraud. If a reasonable bank should have suspected that the agent was acting fraudulently, the duty of care requires it to withhold payment and make enquiries. A recent English case has, however, recognized that the duty of care can also apply where a customer authorises the payment directly, but as a result of a third party's fraud – so-called external fraud. The decision has been appealed to the UK Supreme Court and their decision is pending. Because a paying bank has no contract with the recipient of the payment (the payee), the case law suggests that a duty of care is unlikely to be owed by the paying bank to the payee. Similarly, a senior Commonwealth court has recently recognized that a paying bank owes no duty of care to the beneficial owners of monies in an

account which are misappropriated. The presentation will examine the merits of these recent developments in the paying bank's duty of care in the light of the prevalence of fraud through bank accounts. It will also highlight new measures proposed in the UK to respond to the problem of external fraud and consider whether regulation is a better tool to respond to fraud than the common law duty of care.

The Emerging Landscape of Cryptocurrency Regulation

Adi Ayal, Bar Ilan University, Israel

Regulation of blockchain products: Regulation of blockchain-supported products is currently being implemented in multiple jurisdictions. Most commentators are understandably focused on the U.S. and the EU as international hubs of activity, but these are far from the only players in the field. Nation-states, professional organizations, and financial intermediaries are active as well, some forming their own rules and others implementing regulatory frameworks that will severely affect which DLT products will thrive, and which will be limited in application.

Academic and popular discussion of DLT regulation is multi-faceted and future-oriented, as potential blockchain applications are almost endless and encompass a wide variety of types and subject-matters. Still, most regulatory interventions currently considered and implemented, are focused on financial products. This is not surprising given that control of monetary instruments, payment systems, credit and financing, are among the most heavily regulated spheres of human activity. Currently, most regulation considered and applied has to do with cryptocurrencies, their status as monetary instruments or securities, their effect on financial stability, money laundering, taxation, and the like.

What should be taken into account, though, is how much of financial regulation takes the form of rules, rather than standards, and how much this affects the development of blockchain-supported products more generally. Rules are norms specified to the point where application is clear, allowing for predictability and delineation of responsibility. Standards are norms left purposefully vague, allowing for flexibility of application and adaptability to changing circumstances. Their downside is less predictability and more potential for misuse of authority.

Financial regulation, more than other types of regulation, is developed over time, as regulators implement "best practices" learnt from industry experience and routinely allow for participation and influence by major financial intermediaries. Indeed, industry participation exists in other forms of regulation as well, sometimes to an excess. Still, the financial realm is rife with long-standing economies of scale and scope, extreme levels of learning by doing incumbency advantages, together with regulatory respect for traditional methods and actors, which act together to increase industry concentration and influence.

To have these be the deciding factors for regulation of innovative technologies which could thoroughly affect broad swaths of human activity, is obviously problematic.

One might focus on the competition-limiting effects of traditional financial intermediaries being central players in the formative regulation of DLT. One might be even more worried that their ability to thwart competition goes well beyond regulatory involvement, to include their ability to limit financing and even access to traditional banking and payment systems.

The problem, though, is larger than that. Blockchain-supported products go well beyond financial instruments, and have the potential to dramatically change how we interact socially and professionally. The dominance of financial regulation in affecting the development of DLT has the potential to thwart growth and innovation in multiple sectors, not only when incumbents have a clear incentive limit competitive pressures, but when the structure of regulation is borrowed from finance while the effect of regulation is much broader in application.

In my discussion I hope to shed light on path-dependence in regulatory intervention which deals with urgent matters first, while determining regulation that will outlive these and influence multiple spheres of activity.

Stable Currencies: Concept, Risks and Regulation

Benjamin Geva, Osgoode Hall Law School, York University, Canada

In the continuing process of the digitization of money, stablecoins have emerged as a means of payment, particularly in international payments and transactions in digital assets, as well as investment objects. Eliminating the necessity of bank intermediation, payment by stablecoins reduces costs and may thus make inroads into retail payments. The presentation examines the legal features of stablecoins as well as legal issues arising in the course of their use. Thus, the presentation:

- sets out a uniform terminology addressing the differences among terms such as digital currency, cryptocurrency, and stablecoin.
- discusses the monetary features of a stablecoin as well as of its distribution and transfer mechanism as a payment system.
- analyzes practical and legal aspects of stablecoin holding and storing designs.
- presents stablecoin arrangement risks, focusing on security, issuer's insolvency, systemic risk, lack of interoperability, and the need to comply with securities laws and anti-money laundering and anti-terrorist financing laws.
- presents the central bank digital currency (CBDC) as a potential solution to most risks of stablecoins and as such a plausible route for the continuing process of the digitization of money.
- concludes by proposing areas for legislation and regulation.
- As post scriptum, summarizes a new Bill in the US addressing payment stablecoins.

Sustainable Finance and Ensuring Bank Compliance with ESG Requirements

Agasha Mugasha, Gulu University, Uganda.

Sustainable finance is a pillar of global economic policy because it is the avenue through which governments, investors and financial institutions provide funding to address the agenda for tackling the environmental, social and governance (ESG) challenges. The ESG discourse, which is currently dominated by climate change, is conceptually developing and its legal foundations are not firmly established. This article notes that an effective ESG regime requires clear policy, implementation standards, and an enforcement system. It then analyses the enforcement of the banks' implementation of the ESG agenda. Presently, the requirements to address climate change are legally enforceable through bank supervisory mandates. Furthermore, bank supervisors seem poised follow the model adopted for climate change as they pay increasing attention to the other ESG requirements, particularly the mitigation and adaptation of nature and biodiversity risks and the goal of a nature positive economy. The article observes that the development of the legal and regulatory standards has progressed in typical linear fashion by shifting from voluntary standards and soft law to mandatory standards, and from advisory action to legal provisions. It concludes that great progress has been made in enforcing the ESG requirements on banks even though conceptual and legal issues remain.

AI-based Consumer Credit Underwriting: Should We Fear Discrimination?

Ruth Plato-Shinar, Center for Banking Law and Financial Regulation, Netanya Academic College, Israel

In recent years, the use of artificial intelligence and advanced machine learning techniques by lenders has grown dramatically. In addition to relying on traditional processing of credit data to predict consumers' creditworthiness, lenders also consider various types of alternative, non-financial data to improve their accuracy and overall efficiency.

Notwithstanding the important potential of AI-based credit underwriting to improve lenders' predictability capabilities, it may introduce a serious risk of discrimination and harm disadvantageous communities. Empirical studies found that even if the raw information used to develop a model is completely neutral, nevertheless discrimination may occur.

This paper focuses on the situation in Israel, due to its unique credit data regime – the existence of a national credit database in the Bank of Israel. The goal of this database is to provide credit data in a supervised and regulated manner and to ensure that the credit bureaus provide non-discriminatory credit scoring. However, recently, more and more credit providers prefer to develop their own proprietary underwriting models based on artificial intelligence, so the same concerns of discrimination, which were expressed in other countries, might also be realized in Israel.

In light of the serious risk of discrimination, the paper calls for regulating the use of AI in consumer credit

underwriting. In jurisdictions where the current legal regime is ill- equipped to adequately address this risk, the task falls on the financial regulators, who should promulgate mandatory directives for lenders applying AI in credit underwriting.

In order to allow flexibility and encourage technological innovation, the regulation should be in the form of general principles, an approach that has already been adopted by financial regulators in some countries. Lenders will be required to develop and use their AI models while implementing four guiding principles: Respecting human rights – including the right to equality; transparency and explainability; human involvement (humans in the loop); and accountability.

While the paper focuses mainly on the Israeli situation, its analysis, and insights may be applicable to other jurisdictions as well.

Demand Guarantees and “Pay or Extend” or “Extend or Pay” Requests

Michelle Kelly-Louw, University of Cape Town, South Africa. President of the International Association of Consumer Law.

As a rule, “pay or extend” or “extend or pay” requests made by beneficiaries in terms of demand guarantees and standby letter of credit provide no real difficulties in practice. The International Chamber of Commerce (*ICC*) in their 1992 and 2010 versions of the Uniform Rules for Demand Guarantees (*URDG*) deal with “extend or pay” requests. The International Standby Practices (*ISP98*) similarly also deal with “extend or pay” clauses in standby letters of credit. Although the practice is very common, these requests are not often litigated on. Neither the South African nor English courts have dealt with cases where these requests have caused issues or resulted in litigation. In two fairly recent South Korean court cases heard by the Korean Supreme Court the “extend or pay” clauses in the respective instruments were quite contentious. In both cases, the “extend or pay” clauses were modified and therefore did not fall within the ambit of any of the ICC practice rules. Due to the international nature of these instruments and the limited case law dealing with “extend or pay” or “pay or extend” requests, it is of value to consider how other international courts, like the Korean Supreme Court, dealt with these matters when they came before them. Attention in the article is also given to how these requests are regulated in the *URDG* and *ISP98* respectively.

Keywords: validity; extend or pay; pay or extend; extension request; demand guarantee; standby letter of credit; complying demand; *URDG*; *ISP98*

Tort Principles for Internet Platforms: Vicarious Liability and the Importance of Control

Edward J. Janger and Aaron D. Twerski, Brooklyn Law School, USA

The modern law of product liability evolved in the middle of the last century and is now embodied in the Second and Third Restatements of Torts. Section 402A of the Second Restatement and Sections 1 and 2 of the Restatement of Product Liability take a functional approach to liability. A person who sells or otherwise

distributes a defective product is liable for personal injury caused by the product. The consumer can recover against anybody in the distribution chain, and it rests with the defendant to reallocate that liability if it can. While the word “seller” is used by the Restatements, that term is given a broad definition that focuses on substance rather than form.

Nonetheless, Plaintiffs who suffer personal injury resulting from a defective purchased on the Amazon.com on-line platform have faced insurmountable problems when the product was sold by a third-party vendor who turns out to be unavailable or insolvent. Most courts have absolved Amazon of liability on the theory that Amazon never took title to the goods and hence was not a seller as defined by the products liability restatements or by governing statutes.

This article decries this judicial escape to the formalism -- using title as the determinant of tort liability. Instead, it argues that courts should use established tort principles of vicarious liability to determine the appropriate scope of strict products liability. Under those principles control over the transaction determines liability – not who has title.

The article uses Amazon to illustrate why control not title is the correct criterion. Amazon controls of each and every sale: it determines the placement of the product for consumer viewing; it handles all communications between the consumer and the third-party seller; it often handles shipping and delivery, as well as returns. Its control is so pervasive that, even if it is not the formal owner of the product, it is the party truly responsible for accomplishing the sale. Courts to date have not, however, focused on control as the grounds for asserting liability. In our view, the courts have not been informed as to the marketing strategy of Amazon that makes the formality of title irrelevant.

The article shows why the marketing structure of Amazon calls into play fundamental tort duty rules and concludes by presenting a mode of analysis for determining the liability of other on-line sellers such as Lands-End, E-Bay, Etsy, and even Walmart.

The External Dimension of the EU Legal Framework on the Digital Economy

Hans-W. Micklitz, European University Institute, Italy

The paper analyses the role of technical standards in the EU digital policy legislation which aims at upgrading the existing AI international standards to ‘core European values’ – ‘human-centric, secure, ethical, trustworthy AI’ and ‘fundamental rights’. The EU relies on the successful strategy developed in 1985, the so-called New Approach/New Legislative Framework, of combining binding legal requirements with voluntary technical standards to ‘complete the Internal Market’ and pave the way for the European industry to defend European standards as an international benchmark (Brussels effect). The EU digital policy legislation is transferring the New Approach/New Legislative Framework from the industrial to the digital economy. The transfer is a presuppositional exercise built on the premise that the industrial and the digital economy are comparable, that the governance structure of political and technical co-operation together with stakeholders suffices to integrate fundamental rights into technical standardisation - and even

more important that the regulatory power of the EU suffices to put pressure on international standardisation bodies to give way to core European values.

Unjust Enrichment by Algorithm

Ayelet Gordon-Tapiero & Yotam Kaplan, Bar Ilan University, Israel

Social media platforms have become enormously powerful, accumulating wealth at an alarming rate, and influencing public opinion with unprecedented efficiency. Platforms use algorithms that promote discriminatory, divisive, extreme, and false content. In recent years, content promoted by social media platforms fueled a series of calamities: the spread of disinformation during the COVID pandemic, the January 6th insurrection, and the establishment of dangerous trends among adolescents and children. The platform crisis is here and is showing no signs of abating.

Platform algorithms recommend divisive, hateful and inflammatory content because such content encourages users to spend more time on the platform, allowing platforms to collect more user data, and present users with more advertisements, generating more revenue. Thus, the most socially harmful algorithms are the most profitable for platforms. This profitability is fueling the current crisis: as long as harmful algorithms remain the most profitable, new catastrophes are sure to come.

We argue that any effective legal response to the platform crisis must address the immense profitability of harmful algorithms. We further suggest that this type of legal response is possible through the doctrine of Unjust Enrichment. We explain the conditions under which platform profits should be considered unjust, and how the doctrine of unjust enrichment allows courts to strip platforms of such ill-gotten gains. Rather than prohibit a particular type of content or a specific optimization metric, this proposal targets platforms' financial incentives, forcing them to consider the broad societal impact of their choices. This is a promising legal venue, offering tools that are unavailable through other frameworks. We detail the advantages of our proposal, explain its origins in existing doctrine of the law of unjust enrichment, and provide a rich account of its implementation in practice.

European and U.S. Influence on the Israeli Judiciary in Corporate, Consumer and Labor Law

Arie Reich, Bar Ilan University & Guy Harpaz, Hebrew University, Israel

The Israeli legal system is a rich and mature legal order, rooted in both Common Law and Civil Law. As such, it is commonly considered to be a mixed jurisdiction. Due to its prestige and prominence, the Israeli judiciary, particularly the Israel Supreme Court, is entrusted with the task of gatekeeper, having to decide which Common Law and Civil Law doctrines, traditions and jurisprudence should enter the Israeli legal order and influence its evolution. The Israeli judiciary was founded on European models, including in particular that of Germany. Yet, Europe is losing ground on the judicial front, and like Israeli society at large, the Israeli judiciary increasingly resembles that of the United States. Consequently, and as demonstrated

by the recent work of Arie Reich, the impact of the Court of Justice of the EU on the Israeli judiciary remains modest.

Our research project attempts to advance a more nuanced and less binary argument. We postulate that the impact of Common Law on the Israeli legal order, mainly that of the U.S. legal order, is more evident in areas that are associated with economic efficiency (e.g. corporate law and securities law), whereas in other private law fields which are focused on the protection of social values (e.g., labour law and consumer protection), the impact of Civil Law remains more prominent. We attempt to substantiate this argument with a comprehensive analysis of the Israeli case-law of the last twenty years, drawing on both quantitative and qualitative analysis. Our findings reflect on the one hand, the ideological roots of the State of Israel, both in the Jewish biblical tradition of caring for the weak in society and in socialist values, *vis-à-vis* the capitalist free-market oriented attitudes and policies prevalent in the Israeli public opinion and politics of more recent times, on the other hand. They also show that reliance on foreign law is often based on ideological affinity between the jurisdictions in question.

An Historical Account of the Orderly Payment of Debts Act Reference: Limiting Provincial Efforts to Protect Insolvent Debtors

Thomas GW Telfer, University of Western Ontario & Virginia Torrie, University of Manitoba, Canada

This paper analyzes the history of the Alberta *Orderly Payment of Debts Act* and the Supreme Court of Canada decision which ruled that the legislation was *ultra vires*. Alberta has a long history of enacting legislation designed to assist insolvent debtors. Over several decades there had been persistent constitutional questions of whether provincial legislation designed to protect insolvent debtors interfered with the federal bankruptcy power. In the 1920s and 1930s Alberta passed debt adjustment legislation. The statutes gave a Debt Adjustment Board the power to bind creditors to debt settlements. When this provincial legislation was declared *ultra vires* by the Privy Council in 1943, Alberta enacted the *Debtors' Assistance Act*, which charged a Debtors' Assistance Board with the responsibility of working alongside debtors and creditors for the voluntary settlement of debts. The Board ran into administrative difficulties in the 1950s, and Alberta responded by enacting the *Orderly Payment of Debts Act* in 1959 which bound certain creditors to debt repayment schemes. The Supreme Court of Canada in *Reference re Validity of Orderly Payment of Debts Act, 1959 (Alberta)* ruled that the legislation was *ultra vires* on the basis that it interfered with the federal bankruptcy and insolvency power. The *Orderly Payment of Debts Act* reference is the capstone in a trilogy of cases in which provincial legislation was invalidated for encroaching upon the federal bankruptcy and insolvency power. The reference case represents a high-water mark for the expansion of the federal bankruptcy power and a curtailment of provincial authority to assist insolvent debtors. This article provides an historical account of what led to the enactment of the *OPDA* and analyzes the constitutional litigation that ensued. The paper argues that the *OPDA* reference is a landmark case in that it continued a trend of limiting provincial efforts to assist insolvent debtors by giving a broad reading of the federal bankruptcy and insolvency power.

The Effect of Corporate Rescue Proceedings on Existing Contracts in South Africa

Patrick C. Osode, Nelson R Mandela School of Law University of Fort Hare, South Africa

There is general consensus that South Africa's novel business rescue scheme is one of the most innovative features of the Companies Act 71 of 2008 (the Act). That scheme is clearly the tangible expression of s 7(k) of the Act which states that one of the Act's purposes is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of the relevant stakeholders". In order to maximise the prospects of every credible attempt at corporate rescue, the pertinent regulatory frameworks must make special provisions for (i) a moratorium on creditor claims against the debtor company; (ii) the special/superior positioning of new financing procured for the business during the restructuring/rehabilitation process; and (iii) the alteration or re-ordering of the company's obligations to perform in terms of contracts subsisting at the time of commencement of the business rescue process. With respect to the latter, s 136 of the Act empowers the debtor company's business rescue practitioner to unilaterally suspend, in whole or in part or conditionally, any contractual obligation falling due during the rescue proceedings; and, with the approval or consent of the court, to cancel any such contract-based obligation where s/he deems it either desirable or necessary. Not surprisingly, issues pertaining to the effect of business rescue proceedings on contracts subsisting at the time the proceedings commence are currently raising some of the most vexing questions of South African corporate insolvency law. This paper assesses the soundness of the pertinent statutory provisions through the prism of related emerging jurisprudence.

Justifying a Provincial Bankruptcy and Insolvency Power for Municipalities: An Analysis of *Ladore v Bennett* (1939) and its Divergence from Twentieth Century Federalism Jurisprudence in Canada

Virginia Torrie, University of Manitoba & Thomas GW Telfer, University of Western Ontario, Canada

Canadian provinces have a long history of enacting insolvency legislation designed to aid residents and entities facing acute financial situations. These provincial enactments often became the basis for a constitutional challenge before the courts. Twentieth century case law in this area brought forward various interpretations of the federal bankruptcy and insolvency power found in section 91(21) of the *British North America Act, 1867*. The dominant trend of the jurisprudence favoured a broad and robust federal bankruptcy and insolvency power. *Ladore v Bennett* represents a divergence from this trend, a rare instance where the Judicial Committee of the Privy Council validated provincial legislation dealing with the insolvency of municipal institutions. Many Canadian municipalities faced financial difficulties during the 1920s and 1930s, an issue that was further exacerbated by the poor economic conditions of the Great Depression. These conditions caused many municipalities to default on debt which often prompted government intervention. Ontario enacted *The City of Windsor (Amalgamation) Act, 1935*—the impugned statute in *Ladore*—for the purpose of combating the poor financial conditions facing the municipalities of Windsor, East Windsor,

Walkerville, and Sandwich. The legislation effectively amalgamated the four municipalities into one larger city called the “City of Windsor” and established a financial scheme for the debenture debt in the City. This paper offers a case study of these four insolvent municipalities during the Great Depression, the provincial legislative response and the constitutional controversy that followed.
